From human rights to essential rights
From human rights to essential rights

Edited by Magdalena Sitek & Laura Tafaro & Michele Indellicato

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Introduction

The traditional concept of human rights recognized them as a category of claims of the individual to the community and its structures, including the state. Frequently the issue of the responsibility of the individual toward community and its rights regarding the individual is overlooked. In the face of globalization rights of the community play more and more important role. The reason of this fact is that community is the natural environment of human beings and allows them to satisfy their basic needs.

The editors of this paper, on a base of the concepts and the presentations during the 15th International Conference on Human Rights held on 1-2 June 2015 in Józefów, subarea of Warsaw, decided to systematize the collected materials so that publication shows both the human needs and rights while respecting the responsibilities of individual towards the community at the same time.

The structure of this monograph is based not only on the concept of human rights, but also human needs. The issues of rights and human needs in the community together with the issue of human duties towards the community were places in the first part of this joint publication. Subsequently they are discussed rights of nations, especially right to self-determination and the right to good administration, which became the main measure of the rule of law. Next are discussed human rights to the clean environment and human obligations towards the environment. An important group of issues is the contribution of religion to the concept of human rights. In the end, human rights are considered in the context of civil law solutions.

Editors
CHAPTER I

Fundamental Rights and Law
Abstract
The subject of the study is to show the conflict of values. The global world is built on the basis of various value systems, among which, the human rights system is the dominant one. The system of these rights, however, is dynamic and the contents of individual human rights are gradually being transformed. This leads to the conflicts between individual values, which are reflected on the level of global values in the collision with local values. The research also discusses the conflict between two global values, it is – the progress and the protection of the natural environment. The work uses the legal-dogmatic analysis method, description and functional method.

Keywords: human rights, natural environment, global values, local values, resolving value conflicts.

1. Attempt to define the terms “value” and “conflict of values”

In various types of scientific discussions, ranging from philosophy, religion and ethics, through the media and political discussions, the term “value” or the plural “values” is used as a specific “spell”. It is often instrumentalized to achieve temporary benefits, such as the integration of a specific social group or the elimination, or at least the stigmatization of those who profess different values.

Moreover, it is often, that the certain values are a priori assigned to certain ideologies or philosophical trends, in order to create conflicts between various social groups. Without any reflections, in the public discussion, the opposite adjectives such as: progressive and backward, liberal and conservative, or the
Middle Ages and the 21st century are used such. However, the most important issue is omitted, namely – what is the nominal meaning of these terms, and what is their significance in the public discourse. Understanding of individual values is usually intuitive and the interlocutor is unable to define the concepts used by him or her.

Hence, it is necessary to look for answers to the question – what is the meaning of the term values? How to define and organize them? And finally, the question arises – what exactly is the conflict of values and does it actually occur? It can be fictitiously created for the immediate, public or economic needs of specific groups.

The answers to these issues have been formulated by various thinkers since the 1960s. To a large extent, they were collected and presented by K.A. Zupa in a Ph. D dissertation titled: *Values, Conflicts & Value Conflict Resolution: An Investigation of the Experiences of Educational Administrators*, defended in 2012 at the University of Toronto¹.

According to the author of this dissertation, there is no one comprehensive definition of the term “value” nor there is not any closed set of values. The number of them is uncountable. It should be assumed that the values are a projection of desires of specific social groups or their ideas about how it should be. Many values are a reflection of the order of nature – it has already been noticed by the ancient Romans² and what is the foundation of Christian values³. Values are also a symbol of belonging to a specific social, political, cultural or religious group.

K. A. Zupa also presents quite numerous definitions of the term “conflict of values” that function in the doctrine. The common denominator of these definitions is the element of contrast between the behaviour of individual human

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¹ This PHD thesis paper can be found at: https://tspace.library.utoronto.ca/bitstream/1807/32858/1/Zupan_Krista_A_201206_EdD_thesis.pdf [access: 21.02.2018].
³ Recourse to the law of nature is already in the Old Testament. Numerous references are also found in the New Testament. The concept of divine law (*ius divinum*) and natural law (*ius naturale*) in Christian doctrine was developed by Saint. Thomas Aquinas. Human law should be a reflection of divine and natural law. See: J. Salij, *Prawo naturalne i prawa stanowione w ujęciu św. Tomasza z Akwinu*, Łódzkie Studia Teologiczne 26/2/2017, pp. 103-110.
groups. The effect of conflicts of value can be: the isolationism, the sense of injustice, the impossibility of cooperation, the discrimination, the reporting and the lack of social communication. However, some definitions of this concept also indicate its positive side, namely – the conflict of values can also be an impulse to take action aimed at solving it and working out the principles of social coexistence of the people with different value systems.

The subject of this study is to show the conflict of values in the relation to human rights in the area of the relationship of global and local values and in the area of progress in relation to the natural environment. The analysis of these issues will allow showing inside-civilization conflict and various ways to solve it. A possible proposal must be far from populist or even political neo-traditional speeches, typical for extremely liberal and extremely conservative circles. Such a study is extremely important, because of the current polarization of views in Europe that may become the fuel of one or another war, and certainly the cause of the breakup of the European Union.

2. Global values and identity

The first and probably the most important area of the conflict today is the divergence of global and local values. At the very beginning, it is necessary to clarify the meaning of both concepts. It should be noted that the global values are not synonymous with the universal values of the ancient world, based mainly on Roman law or the universal values of the medieval world, based essentially on Christian values.

A characteristic feature of global reality is the widely understood tolerance for the diversity of different views. You can even talk about a kind of Tower of Babel. Globalization is a consequence of technical progress (ease of movement – migration on an unprecedented scale), computerization, which creates, among others, through social media, new communities, greater integration or closer cooperation between states, which results in the abolition of borders, or at least

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in the liberalization of border traffic, the ease and universality of foreign language learning, which eliminates natural communication barriers between people.\(^7\)

The material effects of globalization are visible almost everywhere in the world. It is enough to point to its effects, such as: the unification of fashion (in fact there are several global fashion creation centres in the world), the unification of nutrition – almost anywhere in the world you can meet McDonald, KFC or several types of pizzerias, which are basically produced by global corporations. The same can be said about the drink production, especially for beer, which is also produced only by several large brewing concerns, such as AB InBev, SABMiller or Heineken.

Advertising is one of the basic instruments of globalization. It is used not only to inform about the sale of products or services, but is used for various types of political activities, such as the discrediting of political opponents or promoting election programs, and it is also used to run social campaigns – for example: for the disabled or groups which feel being discriminate. The global advertising is handled by highly specialized advertising or PR agencies. They affect not only individual recipients. Advertising also creates, or better, it is used to build so-called political correctness. This practice is reflected in the studies programmes at schools and universities as well as in the media reports or the statements of politicians.

This global reality is based on the international human rights system. The declarations and international conventions, starting with the United Nations Universal Declaration of Human Rights from 1948 to the EU Charter of Fundamental Rights from 2000 are their materialized form. More detailed analysis of the content of particular regulations shows their evolution, sometimes detaching from their original version set in the Declaration of 1948. It is enough to point to the right to life, the legal status of the nasciturus, or the concept of marriage.\(^8\)


\(^8\) Until the end of the last century, marriage, as a relationship between man and woman, was generally not questioned. A new dimension in this discussion was initiated with the adoption in 2000 of the Charter of Fundamental Rights in Lisbon, where the article 9 refers to the right to marry without defining it. Thus, a legal basis was created in international law for the acceptance of same-sex relationships as a marriage. This, however, should be decided by national legislation.
Such globalization has different consequences, especially in contact with local cultures, which cultivate their own customs in the area of clothing, the way of nutrition, upbringing of children, beliefs, lifestyle, and organization of social or political life. By the nature of things, a conflict must arise at the junction of the globalization and the localisms, which can take different forms.

In the sphere of Western culture, the globalization has relatively easy entered into the lifestyle of individuals. This is visible, for example in: a fairly homogeneous way of dressing up, eating, and lifestyle. In this respect, no major disturbances, disputes or conflicts in this sphere can be seen. However, this conflict is different in other cultures, especially in Islam. The liberation of Afghanistan from the hands of Taliban and almost the defeat of the so-called Islamic State (ISSI) did not have a visible impact on the change in the style of the inhabitants of countries from that cultural circle. What is more important, those societies vote for their radical (radical from the western point of view) leaders who are advocated for preserving the cultural status quo. The recent elections in Iraq may be use as a good example here – the election was won by the rather radical cleric Muktada as-Sadr, who is perceived as the guardian of Islamic culture.

A much larger conflict is evident in the sphere of economics. For a long time, the several economic centres have been created in the world. In addition to the United States, undoubtedly, China is the second economic power, followed by Russia and India. Some of the Arab countries, especially Saudi Arabia, have the same aspirations. In this area, the local economic centres submit to the dominance of the biggest market players and they can cooperate with them so that they can survive. Even, if local conflicts of economic interests can be noticed, the reasoning rises reasonably fast.

An opportunity for local, smaller economies is the fragmentation of production, which consists in the division of manufacturing processes into smaller parts and their location in the different parts of the world. It this way they create a specific type of chain. As a consequence, the trade in subassemblies and intermediate goods increases, creating a global value added chain. The specialization further deepens, which is an opportunity for countries with low economic development⁹. However, one cannot forget that in the area of the chain, the lead company has the greatest bargaining power. Such a role may be performed by a production or

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commercial company. In chains coordinated by a production company (producer-driven), the producer of the final product always has the leading role.\(^{10}\)

The biggest conflict, however, is currently being drawn between globalization, and not so much the localism but between the globalization and the Christian religion, especially Catholicism, which is a global symbol of traditionalism, and sometimes backwardness or even retrograde.

Those views must arouse great fears at the very beginning, because the Church itself is always universal. The Catholic Church’s teaching is addressed to all people, regardless of skin colour, age or gender. The pope John Paul II pointed out that the Catholic Church perceives the phenomenon of globalization. He talked about the so-called globalization of solidarity.\(^{11}\) Therefore, in the light of the Gospel, nobody can speak about the national church. It would be a denial of the teaching of Christ and the essence of the Church. Only, we can talk said about the devotion or in liturgy in particular countries or regions.

Christian values are universal. Referring only to quantitative evidence, Christianity is the religion with the largest number of believers in the world. Christian values have religious and moral character. They are connected with the human person and the church community. These are personal and community-forming values. In particular, it should be pointed to such values as: the respect for earthly life but also for eternal life, the modesty but also enlargement of material goods which should serve man, the forgiveness, the mercy and the love of beauty. In essence, these are universal values.

More and more often, the human rights are opposed to these values. The tendency is very clear, according to which the human rights are a global system of opposite values, and even contrary to Christianity. This conflict manifests itself most in the content of the right to live, which is limited to the period after birth. We can also see this conflict in the area of the right to marry, especially the concept of marriage. The Christian concept of marriage, derived from Roman culture, understood as a relationship between man and woman, is replaced in many European countries by the concept of marriage as a union of persons, regardless of gender.\(^{12}\)

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\(^{11}\) No 55 of the Post-Synodal Apostolic Exhortation Ecclesia in America of John Paul II from January 22, 1999.

The promotion of human rights as a system of values typical for the atheist worldview is a mistake. This leads to the polarization of entire societies and to the antagonism of social moods. This is visible in the social discussions, in the political programs, and even in the scientific doctrine, which should be free from such ailments. In fact, the very concept of human rights is neither atheistic nor Christian. It is a reflection of the nature of human being, independent of any ideology. Assigning the specific content to particular human rights often serves goals far away from the protection of human being and his or her dignity. One cannot hide the fact that, for example, the contraception is first and foremost a business. People and their rights remain here on the sidelines. The attempt to marginalize church teaching is therefore aimed primarily at protecting the interests of large corporations. Becoming aware of this mechanism will help to overcome conflicts, and perhaps to eliminate them.

3. The progress and the environment

There is no doubt that the two values that are important for today’s global world are: the progress and the natural environment. The most vivid proof of the conflict between the progress and the natural environment is the pollution of environment with the products of progress. Media report about the ocean pollution by plastics. In the Pacific Ocean, there is an island of plastic garbage which is five times bigger than Poland\(^{13}\). The environment is polluted by electro-technical waste sent from rich countries to the poor, especially to India. A single person still does not have pro-ecological behaviour. We do not have the instinct to save water, segregate waste or choose organic products. It all happens despite the ecological education and despite the increase of awareness of the importance of the natural environment for humans\(^{14}\).

The technical and technological progress determines the level of civilization development. Thanks to it, human being overcomes the deadly diseases, extends the human life, allows for quick communication on a global scale and for mass movement of people, or for satisfying the needs of a higher order\(^{15}\). Still another


kind of progress is the development of various forms of services, especially in the field of tourism. The progress is connected with the phenomenon of innovation, which has become the driving force of scientific or technological progress, and consequently, it is the measure of the quality of work of a scientist, entrepreneur and even the measure of the position of the state in the world.

In turn, the natural environment is the centre of human existence and a *sine qua non* condition for the survival of the human species. The right to the environment is linked to the right to life and human health. Thus, the environment itself is a value of great importance. In the hierarchy of the importance of contemporary values, the natural environment takes a very high place. The concept of exploitation of the environment has been replaced by the concept of sustainable development; it means the development which takes into account the needs not only of the current generation, but also the need for future generations, including the need for a clean and healthy environment.

This part of the paper will discuss two examples of the impact of progress on natural environments and, consequently, on human being and his or her rights. The first one is genetic modification and the second is the impact of electromagnetic waves.

However, one cannot hide the fact that technical or technological progress is often made with the use of the natural environment, or even at its expense. Thus, the conflict between progress and the natural environment is becoming more and more visible. You can point to numerous examples of such a conflict. One of them is the research and as a consequence, the genetic modification. It is in this area where the greatest progress can be noticed, which includes the interference in the structure of the natural environment\(^\text{16}\). The genetic research sometimes transforms into manipulation of genetic codes, which has also been banned in numerous acts of international law, including in the *Convention of 5\(^{th}\) June 1992 on Biodiversity*\(^\text{17}\). The international legislator, in this act, also expressed a deep concern for the preservation of biodiversity, which, unfortunately, is gradually being liquidated through the mass and global food production, based on standardization. You

\(^{16}\) See: P. Krajewski, *Ochrona prawna człowieka i jego środowiska wobec ekspansji organizmów genetycznie zmodyfikowanych w prawie wspólnotowym i międzynarodowym*, UWM, Olsztyn 2010, p. 283.

\(^{17}\) This convention was adopted in the form of an intergovernmental agreement at the Earth Summit in Rio de Janeiro. In Poland, the Convention entered into force on 19\(^{th}\) December 1996 (Journal of Laws 2002, No. 184, item 1533).
can even talk about the global agribusiness sector\footnote{See: J. Kraciuk, \textit{Bezpieczeństwo żywnościowe w procesie globalizacji sektora rolnego}, Journal of Modern Science 1/1/28/2016, pp. 251-262.}. The standardization is about introducing a global product to the global market. However, such standardization takes into account essentially two aspects which are directly related to each other: the economic result and the needs of the broadly understood consumer\footnote{See: R. Oczkowska, \textit{Strategia produktu na rynkach zagranicznych i determinanty ich wyboru}, Zeszyty Naukowe Akademii Ekonomicznej w Krakowie nr 729/2006, p. 38.}. There is no de-facto environmental protection. In this context, one should speak about the need to discuss about the bio-safety or about the ecological security\footnote{See: P. Krajewski, \textit{Biotechnologie i biobezpieczeństwo w prawie międzynarodowym}, UWM, Olsztyn 2014, p. 42.}. Another example of the threat posed by new technologies is the impact of electromagnetic field on the human environment. The electromagnetic energy can primarily have natural sources. It comes from Earth, but also from space and nature itself. In the Earth’s atmosphere there is static electricity in the form of ions that carry negative or positive charges. But a source of electromagnetic energy or radiation can be a person and its devices, such as the transmission lines (50 Hz), the radio waves (from 0.1 MHz to 300 GHz), the microwaves (from 300 MHz 300 GHz), the infrared and the ultraviolet. Today, almost every human being has at least one mobile phone that produces microwaves. It is difficult to find a place where there would be no transmission networks or the installations producing energy. The creation of these waves can undoubtedly be helpful to humans, such as using them for joint treatment processes or for eliminating tendon calcification in the legs. However, you cannot miss the negative effects of waves on man and the natural environment. The scientific literature points to such effects as: insomnia, weakness, lack of appetite, weakening of the pattern, but also changes in the protein synthesis, changes in the structure of nucleic acids or the immune activation of cells. These effects are caused not only in the human body but also in all cells of the living matter, and thus also in the vegetation\footnote{See: A. Roman, M. Drabik, \textit{Oddziaływanie pól elektromagentycznych na środowisko człowieka}, Prace Naukowe Akademii im. Jana Długosza w Częstochowie. Seria: Edukacja Techniczna i Informatyczna, 2012, from VIII, pp. 39-41.}.

\textbf{4. Conclusions}

The modern era is characterized by a multitude of value systems. A characteristic feature, however, is their instrumentalization in order to achieve certain political, economic or social benefits. This instrumentalization is so easy that, unfortunately,
the concept of “value” is most often understood intuitively. The social or political interlocutors as well as their listeners are not able to define the very concept of “value” or understand the content and meaning of this concept. In this way, the content of individual values can be easily changed and even manipulation here is possible.

The Tower of Babel, which was created by the contemporary value systems, often leads to the conflicts which are most evident on the line of global values and local values. Undoubtedly, this conflict is generated by the global economy, for which it is extremely important to standardize products or services, at the expense of eliminating local products and services. In the background, however, there is the pressure to unification of the values of social behaviour, including the relationship to changing the concept of marriage, the approach to nasciturus, or other attitudes created by local cultures or universal culture that is Christianity.

This conflict of value is most evident in the sphere of environmental protection. The symbol of global value in this case is the progress that most often uses natural resources. And although, the international law has been developed the global environment protection policy, which often takes into account local conditions, the uncontrolled progress contributes to the destruction of the natural environment of human being. An example is the island of plastic waste in the Pacific, which is five times larger than the territory of Poland or Italy.

The final conclusion of my study is the thesis that the conflict of values is inevitable. However, there are no clear mechanisms in the international law which would allow amicable resolution. The most important thing, however, is the departure from the concept of political correctness, built on the basis of one system of values, in favour of tolerance of various value systems. Such a solution is possible, as exemplified by the ancient Rome, where various, religious, economic, social and political value systems function side by side.

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No 55 of the Post-Synodal Apostolic Exhortation Ecclesia in America of John Paul II from January 22, 1999.


Aldo Moro and Humanitarian Law

Abstract
Aldo Moro certainly undergoes, in his training as a Catholic intellectual, the influence of Mounier and Maritain’s personalism and is part of the personalist philosophy with a remarkable stature and authority, precisely because of the depth and richness of his thought with the which he has been able to philosophically establish the concept of person in respect of which he has developed a conception of ethical and humanitarian law.

For Moro the law is justice and has the task of ordering and humanizing the life of relationships on democratic bases, not leaving aside the ethics that is the essential prerequisite and also aiming to direct life itself to seek the truth that always illuminates and makes brave.

With this essay we want to highlight how the conception of law in Aldo Moro connotes itself as a humanitarian right that humanizes relations between men orienting them to the search for truth. Humanitarian law retains its identity even when the juridical ideal translates as force, never identifying itself with brute power, but always remaining a real ideal.

Keywords: person, law, ethics, justice, democracy.

1. Law and ethics law

All the Christian thought of the last two centuries – from Kierkegaard to Rosmini to Newman, from Marcel to Maritain to Mounier – is built around the category of person, which is opposed both to the closed individual, and to the “class” understood as a collective in which the individual disperses and in some way cancels himself.
The question of consistency proper to human rights is always found at a crossroads, at the same time methodological and foundational. Far from showing itself to be subject to the wear and tear of various theories and orientations, it always re-emerges with profound vigor as Waldstein warns (Waldstein, 2014).

The reflection on the balance of life and thought of Aldo Moro, forty years after his death, can offer valuable insights for the development of a new ethical and juridical humanism open to the social and for the application of a humanitarian right characterized by the respect for human rights.

Certainly the apulian statesman in his training as a Catholic intellectual has felt the influence of Mounier’s community personalism and in particular of the thought of Jacques Maritain and of his work Integral Humanism. In fact, in an interview on television (22 May 1973), following the death of the French philosopher (28 April 1973), Aldo Moro expressed himself thus: «Maritain’s influence on the Italian Catholic world has been manifested in previous years World War II and then, more and more intensely, from the moment of the resumption of democratic life in Italy (...). Maritain’s influence on Italian Catholics manifests itself through some dominant ideas elaborated with intellectual rigor and presented with singular emotional force. First of all there is the call to autonomy and, so to speak, to the value proper to temporal reality. One can not look with indifference to society, to the risks of division and injustice, to the reasons for unity, to political destiny. The purpose that the Christian proposed, Maritain believed, is not to make the world the kingdom of God, but of it, according to the historical ideal of different ages, a place of fully human life, whose social structures have the measure of justice and the dignity of the person» (Moro, 1978, p. 3 ss.).

In this personal thread Moro fits with a remarkable stature and authority, precisely because of the depth and richness of his thought with which he has been able to philosophically establish the concept of person in respect of which he has elaborated a conception of ethical right and therefore humanitarian. He understood the ‘relational nature of the person’, in both a horizontal and vertical perspective, reflecting also on the human condition and on the concrete political and social-historical situation, aiming at the same time to gain a new vision of man and to understand the truth of existence and meaning of life which the human spirit must take on as an essential task. «The human spirit, writes Moro, is faced with the task of understanding the meaning of life. This is the problem of philosophy, which represents the effort of the human spirit, which turns into
itself in a careful reflection, to understand the nature of man, its value, its task, the particular forms through which the human life takes place and reality is. It is well understood that the problem, the apulian statesman continues, is not only of those who practice philosophy, but of every man as a rational being, who has the possibility, on the one hand, and the profound experience of to realize the value of his life and the directive to be given to it, so that this value is concretely realized» (Moro, 2006, p. 28).

For Moro law is justice and has the task of ordering and humanizing the life of relationships on democratic bases, not leaving aside the ethics that are the essential prerequisite. It is now clear that «law is resolved precisely in the universal ethical law which dominates the world of action of which it represents value and which guides the process as a truth immanent to it» (Moro, 2006, p. 40). Moro is convinced that «law is the ethical law itself as the truth and therefore the determinant of a complete process of implementation of the total ethical life of the community» (Moro, 2006, p. 45). The Pugliese statesman underlines the meaning of law as a value which, while requiring the realization of the fact, nevertheless remains as a criterion for evaluating the fact and therefore can not in itself be a criterion of juridical and justice in the becoming of human life. This is why Moro affirms «the ideal superiority of the right in the face of force, which, in itself, does not create law and that is not legitimate at the level of the universal ideal for its sole expression as power and therefore as life ( ...). It is certainly true that the juridical ideal in the meantime lives because in reality it translates as force, but if the right is necessarily in the form of power, it is never identified with brute power, but it is always a real ideal» ( Moro, 2006, p. 45). Therefore the living experience of juridical life is realized in a recognition of the subjects as values, since in each one the universal is present; recognition that leads to the respect of one's own and the other's spiritual dignity. And it is precisely recognizing oneself and recognizing others in one's own human dignity that represents the affirmation of the total value of truth and therefore of society itself as a universal value. None of us is of course an isolated individual, as saying person, as Mounier teaches us, means to say community, while affirming that the community is not everything but an isolated individual is nothing. While it is true that in the act in which each of us «engages his singularity in universal expansion, he is a realizer, as far as he is concerned, of the universal value expressed in everyone, and therefore collaborates with all to establish truth in life» (Moro, 2006, p. 45).
2. Democracy and moral life

The thought, the life and the action of Aldo Moro, open to dialogue with the secular culture, even if characterized by a clear political vision of Christian witness and moral responsibility, never lose sight of the socio-economic and cultural context within which he operated both nationally and internationally.

Already in June 1945 Aldo Moro, in an article entitled Democracy and moral life published in the periodical “La Rassegna”, wrote that at that particular moment of the life of the country for the democratic reconstruction it was necessary to appeal to the solid spiritual bonds, to the serious one human education, to affectivity and comprehensive collaboration, «which all of them implement, if not the form, certainly the substance of democracy» (Moro, 2011, p.104). And noting the reason for the failure precisely in the lack of these resources, in the disorder of conscience, he admonished to commit himself concretely so that the failure had nothing definitive not being able to fail «the clear truth, Christian and human, of democracy as a reality of ‘trust’, of spontaneous agreement, of collaboration, of concrete extension of the attributes of human dignity. We have many faults, therefore, but together many possibilities. Let us begin by recognizing, continues Moro, the eternal truth of democracy, to see it, not in its proper form, which is ancillary, but in substance as a perennial longing for humanity which is identified with the anxious and continuous expectation of a higher revelation of life, of a better life (...). Let us agree to declare the failure of democracy, only when we are ready to declare our moral life in a defeat. That is never. And we nourish our arid and weary interest in the common good, for the things of our brothers, in the same love and trust that sustain us in the arduous effort of our moral perfection» (Moro, 2011, 104).

Moro, as a statesman and a witness to active Christianity, insists on establishing a substantial and non-formal democracy for the reconstruction of a free and peaceful national community, aimed at regenerating spiritual, moral and intellectual resources, and thus starting the process of social and economic development of the whole country.

We can not forget Moro as a politician with excellent mediation skills who have worked so hard to build a peace that goes beyond national borders, a statesman with a far-sighted look at Europe, the Mediterranean, the world and who knew how to place problems of the country in the broader and decisive continental and international dimension so as to affirm that nobody is called to choose between being in Europe and in the Mediterranean, because the whole of Europe is in the Mediterranean.
Moro has taught us that peace can not have value if it is not built on spiritual foundations, if we do not suppress hatreds and enmities by means of reconciliation based on mutual charity, so that the journey of civilization can be resumed in harmony. So he wrote in May 1945: “We feel that peace to be lasting must be founded above all in the spirits: the organization that must serve to preside over it must stand on this basis if it really wants to last in the future” (Moro, 2011, p. )

In February 1944, already a young professor at the University of Bari, Moro wrote: “We do not ask much, but only what is compatible with the justice of international relations and the equal liberty of all. We are ready, equally, to give everything that can honorably be asked of us, as a member state of an international community and of a truly solidarity-based Europe. For this we call upon the resources of the Spirit in all free and responsible men, because the fruitful labor of a moral conquest prepares the way for the able diplomatic work and places the public opinion of all countries to accept the sacrifices of particular aspirations imposed. from the just peace, which the whole world awaits as compensation for the immense effort of this war of liberation “(Moro, 2011, p. 23).

The prophecy of morotea spirituality, therefore, is combined with the dimension of shâlom, of hope, of the possibility of a future of freedom, peace and justice. It should not be forgotten, in fact, that the Pugliese statesman gave an indispensable contribution to the project of a European Community in which the values of pluralism, intercultural dialogue, solidarity and respect for human rights were at the center, so that Europe would be the protagonist of the international politics. In this regard, the decision to elect by direct universal suffrage of the European Parliament under the Moro Presidency in 1975 and which subsequently led to the first election of the European Parliament by universal suffrage in 1979 remained fundamental.

On the occasion of an international conference on the thought of Moro held in Bari in 1979, the honorable Pierre Harmel highlighted the high thickness of the work and the excellent qualities of the Pugliese statesman for the construction of a united and pacified Europe: «Générosité, force de la penseé, respect, patience, tells sont à mes peux, je l’ai dit, les marques, du grand caractère du Président Moro. Je les retrouve dans son action pour la construction européen» (Harmel, 2016, p. 43). Also Raphael Caldera speaks of Moro statesman as a prophetic figure at the political level and affirms that «the generous blood of the great Italian statesman has fertilized the vivification of the fundamental values that nourish the life of his homeland and has provoked a supportive and similar movement
in countries so bound to Italy as those of the European Community and those of Latin America «(Caldera, 2016, pp. 37-38).

3. Spirituality and ethics of law

The intellectual and ethical-political commitment of the statesman Moro, brilliant thinker who wrote and worked in one of the most difficult and interesting seasons of Italian culture, undoubtedly assumes considerable value in terms of testimony, a value undoubtedly destined to stand trial weather. All his multiple activities as a statesman, philosopher of law, jurist, politician, educator, promoter of culture is animated by the awareness of having to pursue the truth and to witness with his own existence, even before the writings, the fecundity of a thought that feels the urgency of being incarnated in life.

Moro certainly underwent the influence of the philosophers Maritain and Capograssi on the concept of the intrinsic connection of law with economy and morality, indeed with the integrity of the person. The whole problem of law for the apulian statesman is contained in the concept of a person. Moro expressly states that the purpose of law is ethical, since law is the same ethical law and society is “ethical cooperation and therefore the implementation of law is the total implementation of truth, which is realized in the form of collaboration” (Moro, 2006, p. 47).

Moro recognizes the spiritual and ethical character of society and law and affirms that subjective law as “expression of unity and truth of social life is realized through multiplicity and precisely through the combined situations of subjective and obligation law, in which that objective reality takes place in the ethical developments of the individual subjects “(Moro, 2006, p. 48).

Law has the task not only to regulate the life of relationships, but also to humanize it and to direct it to seek the truth in order to avoid evil and illicit activity. In fact, when the subject, invested with the necessity of realizing the law for the person entitled to the right, does not fulfill his task and denies, in his concrete process of life, the truth that he is called to realize, configures a position that for ethics it is evil and for law it is illicit.

Spiritual and ethical is also the strength, according to Moro, that to the subject incurred in the illicit can appear a harsh expression of power that opposes his physical freedom, while it is “in fact spiritual process in all, which constitute the only social and that in this case they want the truth for the whole society, including the one who betrayed the truth “(Moro, 2006, p. 49).
Trying and affirming truth and justice also through humanitarian law was the goal of Moro’s life because the truth, as he affirmed, determines the goal of human life and for this must be conquered with a patient, humble and trusting search. A truth that must be restored to things, to events, to institutions, to ideals and which must be communicated so that it may make itself felt in the consciousness of those who live and work in this world, its tendency towards a supernatural goal, that is, towards God.

Justice, which must be fulfilled through the law, is ultimately “the highest expression of love, the most generous gift that men can make to man” (Moro, 2006, p. 50), and also when he has to react against the man who has committed the illicit act must refuse to let it degrade into a mere object and must work to see that subjectivity and spirituality re-emerge and thus reaffirm the truth of the law in all its universal extension.

It is necessary to follow every path that leads to moral restoration in society because if this does not happen, one can well say that “the right has failed in the implementation of its true task, even if its immediate and temporary aim to re-establish itself is realized. the objective order of justice “(Moro, 2006, p. 51).

If then this possibility is not realized in all its entirety and therefore life itself lacks in some way to realize all its truth, we will have that irreducible residue of evil, which attributes so much of its pain to life. “We must think, however, Moro continues, that such a restoration of moral values in the story of history, which the law directs tracing the ways of truth, is more extensive and deeper than it appears outwardly and that the mysterious energies of the spirit, operating in all who constitute society and in particular in some of whom the voice of the supreme truth speaks the highest, they redeem the evil that is accomplished in social life and this interiorly restores it in its own value “(Moro, 2006, p. 51).

Meditation on Moro’s thought and life as well as on the conception of law appears today, after forty years from his death, vital and fruitful as it aims at identifying an ethical and juridical humanism in defense of freedom and dignity of the human person. Moro in all his writings starts from the centrality of the person, clarifies his inviolable rights, personal and social, in terms of freedom, he grasps the applications in the full freedom of initiative and freedom of relationships between people from whom “the civil society “in its articulations.

“Civil society” derived as a relationship between people, is a priority for any subsequent political and legal-state organization.
The sublime thinker, as the apulian statesman, found in his interiority the inexhaustible source of his intellectual, temporal and spiritual works, in the conviction that only by practicing the truth is it possible to stem the damages of “bad thinking and the worst of love”, as Rosmini taught, proposing at the same time a way of future and renewed civilization of the spirit as a basis for the construction of a civilization of love in which authentic values together with the centrality of the person play an important role.

All of Moro’s writings urge us today to reflect on the prophetic and illuminating ideas of his thought that must certainly be considered as a very useful guide to rereading the aberrations of political ideologies collapsed in the last century and which had led to threaten the dignity of the person and his inviolable rights.

Furthermore, it cannot be denied that Moro was a consistent witness to the Christian faith, an uncomfortable witness to all those who seek to overshadow the revolutionary significance of the Gospel. His militancy as a Catholic intellectual who believes in the primacy of the Spirit, but is alien to any disembodied spiritualism, contrasts with the belief of all those who profess a Christianity reduced to moralism unable to deal with the increasing complexity of social life. Moro is the believer who realistically faces the tragedy of events, with the yeast of the spirituality of the Easter event, as in the fifty-five days of his cruel and unjust imprisonment; a human story characterized by an experience so tragic, but also soaked in the illumination of the dawn of the Resurrection, as can also be seen from the famous letters written during that period. The apulian statesman has adopted the maritainian model of “Christian politics”, elaborated starting from a perspective image of the historical ideal of the “new Christianity” embodying the intellectually most rigorous and highest expression of the personalistic season of Christian thought (Maritain, 1968).

Moro has never stopped in front of the difficulties, convinced as he was that the homo viator, to put it with Marcel, is always accompanied by the Deus viator (Marcel, 1967). Renewing and proposing new solutions was a feature of his visionary personality, always proactive before any crisis, new challenges and unprecedented problems, because he believed in the dawn of a new start in peace and harmony to fertilize the life and thought of those values that only give meaning to the truth of human existence and to the civilization of love in which he believed and for which he spent his entire life.

This is what Moro writes: “Life in the stupendous variety of its determinations must always be lived in the spirit of truth, which certainly does not deny that
variety, nor does it detract from any experience its own meaning of joy and sorrow, but it all enlightens them. of its light, bringing it to the most truly and highly human level” (Moro, 2006, p.28). The reflection of the Pugliese statesman is carried out in the living of the human condition and of the political and historical-social situation, and aims to gain a new consideration of man, to rediscover the concrete reality of the person, to understand the truth of existence and meaning of life which the human spirit must take on as an essential task.

From the studies of a philosopher of law, a jurist and those more properly referring to political theory, it emerges that, for Moro, belonging to a community, to a world of shared values constitutes an aspect intrinsically connected with human nature; it gives meaning to the various human activities, from those that are more specifically intellectual (from science to literature, from the right to art to religion), to those that are more properly social and political. It is man’s own to make the original individual aspirations to freedom, justice, democracy with obligations towards others coexist in this community structure, which are obligations towards a reality that transcends it, towards values, towards a culture, towards a tradition that has received but which is called to interpret and to renew through its personal moral responsibility. It is precisely the person, in his ontological and cultural roots, in his responsibility towards what he founds and transcends it, to characterize the projects and paths of life in a horizon of truth. It is with these hints, interesting and original, that Moro has interpreted the conception of an ethical right that has the primary task of ordering and humanizing the life of relationship in local, national and international communities for a future of freedom, peace and justice that has as a noble purpose respect for the dignity of the person and human rights.

References


Restrictions on the freedom and rights of the individual for reasons of protection of state security and public order during the period of emergency states

Abstract
The purpose of the article is to present issues related to the limitation of the freedom and rights of the individual in the situation of the introduction of an emergency. The analysis will be based on the current provisions contained in the current constitution and statutes.

Keywords: extraordinary states, human rights, constitution, state security, public order.

The provisions of the Constitution of the Republic of Poland define the situations in which it is possible to limit the rights and freedoms of man and citizen. They mainly concern situations in which one of the emergency states may be introduced. According to the provision of article 228 (1) of the Constitution of the Republic of Poland in a situation of particular danger, if ordinary constitutional measures are insufficient, an appropriate extraordinary state may be introduced, i.e. martial law, state of emergency or a state of natural disaster. The extent to which the freedoms and rights of man and citizen can be limited during particular emergency states is specified in the Act (Article 228 (3) of the Constitution of the Republic of Poland). In addition, it should be borne in mind

1 (Dz. U. 1997 No 78 item 483 as amended).
that measures taken as a result of an emergency, or restrictions on the exercise of human and civil liberties, must correspond to the degree of threat and should aim at restoring the normal functioning of the state as soon as possible (Article 228 (5) Constitution of the Republic of Poland). The indicated provision establishes the principle of proportionality which requires that actions, also in the field of human and civil rights and freedoms, are proportional to real needs. The extent to which the freedoms and rights of man and citizen can be limited during particular emergency states is specified in the Act (Article 228 (3) of the Constitution of the Republic of Poland). In addition, it should be borne in mind that measures taken as a result of an emergency, or restrictions on the exercise of human and civil liberties, must correspond to the degree of threat and should aim at restoring the normal functioning of the state as soon as possible (Article 228 (5) Constitution of the Republic of Poland). The indicated provision establishes the principle of proportionality which requires that actions, also in the field of human and civil rights and freedoms, are proportional to real needs. This means that it is unacceptable to restrict and interfere with the rights and freedoms of man and citizen over the necessary level.

The provisions of the Constitution of the Republic of Poland provide for the possibility of introducing one of the three extraordinary states: martial law, state of emergency and state of natural disaster. Martial law may be introduced in the event of an external threat to the state, armed attack on the territory of the Republic of Poland or when the international agreement implies an obligation to jointly defend against aggression (Article 229 of the Constitution of the Republic of Poland). In turn, a state of emergency can be introduced in the event of a threat to the constitutional state system, security of citizens or public order (Article 230 (1) of the Constitution of the Republic of Poland). On the other hand, the state of natural disaster can be introduced in order to prevent the consequences of natural disasters or technical failures that bear the marks of a natural disaster and to remove them (Article 232 of the Constitution of the Republic of Poland). Each of the identified states of emergency may be introduced after the other grounds. Nevertheless, each of them is associated with the occurrence of a special threat situation.

According to the provision of art. 228 (1) of the Constitution of the Republic of Poland, martial law, state of emergency, or a state of natural disaster may be introduced. The extraordinary state can be introduced only on the basis of the Act, by way of a regulation, which is subject to additional public disclosure (Article 228 (2) of the Constitution of the Republic of Poland). As mentioned earlier, states of emergency may be introduced in situations of particular danger. It must therefore be assumed that such situations will be associated with a particular approach to, among others, the rights and freedoms of man and citizen. This means it can be reduced, under certain strict conditions, rights and freedoms of man and citizen. In addition, during the extraordinary circumstances, the possibility is suspended Constitution, electoral regulations for the Government, Senate and local self-government bodies, the Act on the election of the President of the Republic, and the Act on Extraordinary Conditions (Article 228 (6) of the Constitution of the Republic of Poland). So we can say that while the ability to change these laws during states of emergency in general has been disabled, it is within the rights and freedoms of man and citizen it is possible to reduce them.

Comparing each of the above solutions, it can be concluded that the prohibition of change specific legal acts are aimed at protecting the political system of the Republic of Poland and the principles of selecting its organs. This is to prevent the situation when, in connection with the introduction of one of the extraordinary states, attempts are made to influence the shape of the political system and system of the Republic of Poland. The adoption of such a solution should be considered as justified. Its guaranty nature allows for the stabilization of the political system and protects it against violent and misguided changes that could be carried out in a situation of a particular threat to the state. A similar character has the regulation contained in the provision of art. 228 (7) of the Constitution of the Republic of Poland. According to its content, during the emergency and during the 90 days following its conclusion, the term of office of the Government, a nationwide referendum, the elections to the Government, the Senate, local self-government bodies and the election of the President of the Republic cannot be shortened. In addition, the terms of office of these bodies shall be extended accordingly. Moreover, elections to local self-government bodies are possible only where the state of emergency has not been introduced. This solution is a reference and continuation of the ban on changes.

to some legal acts discussed earlier. The ban on shortening the term of office of legislative bodies as well as the ban on elections and the nationwide referendum is aimed at preventing situations in which, due to the state of emergency or its ongoing effects, the result of the election will be distorted. In turn, the extension of the term of office of the authorities is aimed at ensuring stable functioning of the state. The above-mentioned regulations contain prohibitions in terms of changing the law, as well as the conduct of elections and the national referendum aimed at protecting the country by the adverse changes that could be made in the situation of a specific threat to the state. The effects of such changes could turn out to be very negative for the functioning of the Republic of Poland. Therefore, it should be considered justified to introduce a ban on them at the time and immediately after the period of operation of a particular emergency state.

The provisions of the Constitution of the Republic of Poland specify what may be the scope of restrictions on freedom and human and civil rights in connection with the introduction of one of the emergency states\(^5\). In the first place, it should be emphasized again that such restrictions must be specified by statute. The authors of the Basic Law applied the negative and positive method in the scope of defining statutory restrictions on freedom and human and civil rights. According to the provision of art. 233 (1) of the Constitution of the Republic of Poland during martial law and special law cannot be restricted: human dignity (Article 30 of the Constitution of the Republic of Poland), citizenship (Articles 34 and 36 of the Constitution of the Republic of Poland), protection of life (Article 38 of the Constitution of the Republic of Poland), humanitarian treatment (Article 39, 40, 41 (4) of the Constitution of the Republic of Poland), criminal liability (Article 42 of the Constitution of the Republic of Poland), access to court (Article 45 of the Constitution of the Republic of Poland), personal rights (Article 47 of the Constitution of the Republic of Poland), conscience and religion (art. 53 of the Constitution of the Republic of Poland, petitions (Article 63 of the Constitution of the Republic of Poland) and family and child (Articles 48 and 72 of the Constitution of the Republic of Poland) It is clear from the content of this regulation that other freedoms and rights may be subject to restrictions. they are not subject to restrictions allowed to specify that the remaining ones can be

limited. In addition, according to the provision of art. 233 (2) of the Constitution of the Republic of Poland, it is unacceptable to limit the freedom and rights of a person and a citizen solely on the basis of race, sex, language, religion or its absence, social origin, birth and property⁶. This regulation excludes the possibility of restricting freedoms and human and civil rights, which are based only on certain personal characteristics. While analyzing the content of the discussed provisions, it should be emphasized that the negative definition of the catalog of freedoms and rights that are not subject to limitation concerns martial law and the state of emergency.

This allows to put a thesis that the creators of the Constitution recognize that during these extraordinary circumstances it may be necessary and permissible to limit the freedom and rights more extensively including a broader catalog. In terms of the state of natural disaster, the founders of the Constitution have made a positive indication of freedom and human and civil rights, which may be limited. This means that due to the introduction of a state of natural disaster, other freedoms and rights cannot be restricted. Based on the provision of art. 233 (3) of the Constitution of the Republic of Poland may be limited: freedom of economic activity (Article 22 of the Constitution of the Republic of Poland), personal freedom (Article 41, paragraphs 1, 3 and 5 of the Constitution of the Republic of Poland), inviolability of housing (Article 50 of the Constitution of the Republic of Poland), freedom of movement and residence on the territory of the Republic of Poland (Article 52 (1) of the Constitution of the Republic of Poland), the right to strike (Article 59 (3) of the Constitution of the Republic of Poland), property rights (Article 64 of the Constitution of the Republic of Poland), freedom of work (Article 65 (1) of the Constitution of the Republic of Poland), the right to safe and healthy working conditions (Article 66 (1) of the Constitution of the Republic of Poland) and the right to rest (Article 66 (2) of the Constitution of the Republic of Poland). The catalog of freedoms and rights listed above, which may be limited, is of a closed nature. The way of editing the provision of art. 233 (3) of the Constitution of the Republic of Poland indicates that it is impossible to limit other freedoms and rights in connection with the introduction of a state of natural disaster⁷.

Turning to the assessment of the regulations regarding the possibility of limiting freedoms and rights under the current Constitution of the Republic of Poland, it must be stated that it is possible to limit the freedom and rights in connection with the introduction of martial law and the state of emergency. On the other hand, smaller possibilities in this respect occur in connection with the introduction of a state of natural disaster. Undoubtedly, this is due to the fact that in the case of the first two extraordinary situations, the level of special threats is higher. It can also be said that the source of these threats is more serious. Therefore, it is justified to be able to restrict freedom and rights more during their lifetime. In connection with the above, the negative method of determining freedoms and rights, which can not be subject to limitation, was applied. Other rights may, however, be limited due to the continuance of the emergency. In terms of the state of the disaster, it should be assumed that, as a rule, it is associated with a lower level of special threat than martial law or state of emergency. This is also due to the nature and sources of specific threats. Therefore, the creators of the Constitution of the Republic of Poland positively indicated freedoms and rights that may be limited in connection with the introduction of a state of natural disaster. This results in the inability to restrict other rights and freedoms.

Bearing in mind the above analysis, it can be stated that in the realities of the functioning of the legal system of the Republic of Poland, it is possible to limit a relatively broad catalog of freedoms and human and civil rights. Based on the provision of art. 234 (1) of the Constitution of the Republic of Poland in a situation when the Government can not meet for a meeting, the President of the Republic, at the request of the Council of Ministers, issues a regulation with the force of law within the scope and within the limits specified in art. 228 (3-5). The regulation is of the nature of the generally applicable law.

Based on the provision of art. 3 (2) of the Act of 29 August 2002 on Martial Law and on the competences of the Supreme Commander of the Armed Forces and the principles of its subordination to the organs of the Republic of Poland\(^8\) (hereinafter: the Act on Martial Law), the regulation specifies, to the extent permissible by law, types of restrictions on freedoms and rights man and citizen. The types of restrictions on freedom and human and civil rights set out in the Regulation should correspond to the nature and intensity of threats constituting the reasons for imposing martial law, and ensure effective restoration of normal state

\(^8\) (Dz. U. 2002 r. No 156, item 1301 as amended).
functioning. Based on the provision of art. 19 of the Martial Law Act during its lifetime the right to employee strikes and other forms of protest may be suspended in relation to specific categories of employees or in specific areas; strikes and non-strikes forms of farmers’ protest actions; protest actions of students organized by student self-governments, associations or organizations. Moreover, during martial law, in the case of persons whose activities threaten the security or defense of the state, it is possible to search these people or search their flat, as well as to take up objects used to conduct this activity. This regulation is also applicable to the search of other rooms, vehicles, aircraft and vessels.

In addition to the above regulations, martial law may be introduced: preventive censorship of the media including press materials; control of the content of parcels, letters, parcels and remittances handed over as part of universal postal services or courier services; control of the content of telecommunications correspondence and telephone conversations or signals transmitted in telecommunications networks; the emission of signals that prevent the transmission or reception of radio, television or telecommunications transmissions and networks, the content of which may increase the threat to the security or defense of the state. At the same time, the authorities of censorship and control are entitled to retain in whole or in part publications, postal and courier items and telecommunications correspondence, as well as to terminate telephone conversations and transmission of signals sent in telecommunications networks, if their content or content may increase the security or defense threat of the state.

Nonetheless, preventive censorship does not include the means of social communication belonging to churches and other religious organizations that provide information on religion and serve to fulfill religious functions. Under the provision of Article 22 (1) of the Martial Law Act during martial law may be suspended rights to: organize and conduct all kinds of meetings; organizing and conducting mass events as well as cultural and entertainment events not being mass events conducted as part of cultural activities; association by ordering temporary abandonment of registered associations, political parties, trade unions, socio-professional organizations of farmers, employers’ organizations, civic movements and other voluntary associations and foundations whose activities may hinder the

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9 Article 18 (2) of the Martial Law Act.
10 Article 20 (1) of the Martial Law Act.
11 Article 21 (1) of the Martial Law Act.
implementation of defense tasks. The above regulation does not apply to assemblies organized by churches and other religious associations and religious organizations operating within temples, church buildings, other rooms serving for organizing and public worship, as well as assemblies organized by state organs or local self-government bodies. In the area of martial law, a person under 18 years of age who is staying in a public place may be required to carry an ID card or other identity document and a school ID (for a learner under 18 years of age)\textsuperscript{12}. In addition, during martial law may be introduced orders or prohibitions: staying or leaving at a fixed time marked places, objects and areas; obtaining permission from public administration authorities to change their place of permanent and temporary residence; to notify the authorities of the population or police records of arrival to a specific place within a specified period; preservation of the appearance or other characteristics of specific places, facilities or areas using technical means. During martial law there may also be restrictions on freedom and human and civil rights in the scope of: access to consumer goods, through total or partial rationing of the supply of people; the freedom of contractual agreement between parties to the contract, by prohibiting periodically raising prices for goods or services of a certain type or ordering the use of prices set on goods or services of fundamental importance to the costs of consumer maintenance; freedom of economic activity, by ordering temporary discontinuation of a particular type of business or establishing an obligation to obtain a permit to start a particular type of business; educational activities, through the periodic suspension of classes in schools, including universities, except for schools of clergy and clerical seminaries; trading in domestic means of payment, foreign exchange transactions and bureau de change; operation of communication systems and telecommunications and postal activities, by ordering the exclusion of communication devices or suspension of service provision for a definite period, and also by ordering immediate deposit of radio and television transmitting and transmitting-receiving devices to the deposit of the competent governmental administration or establishing another way of securing them before being used in a manner threatening the security or defense of the state; the right to possess firearms, ammunition and explosives, and other types of weapons or specific objects, by ordering immediate deposit of the competent government administration body or prohibiting the wearing;

\textsuperscript{12} Article 23 (1) of the Martial Law Act.
access to public information\textsuperscript{13}. The restrictions on freedom and human and civil rights set out above by the President of the Republic of Poland in the Regulation are introduced and applied by means of ordinances issued by the Council of Ministers, a proper minister or voivode.

The ordinances specify a detailed procedure and methods as well as the area, subjective and objective scope of introducing and applying restrictions on freedom and human and civil rights, taking into account to the extent possible the minimization of individual and social nuisances resulting from the application of these restrictions. At the same time, based on the provision of article 25 (1) of the Martial Law Act, you can: impose on the entrepreneurs additional tasks, the implementation of which is necessary for the security or defense of the state and provide for the supply of people; introduce a receivership board for entrepreneurs, including foreign capital, if the object of their activity is production of goods or provision of services of particular importance for the security or defense of the state; impose an obligation on natural persons and juridical persons running agricultural holdings to perform services consisting in deliveries to specific entities of agri-food products and on the cultivation of specific plant species and animal husbandry; introduce the lease of premises and buildings on the basis of the administrative decision on the allocation to all premises and buildings, and in justified cases also to hold people to a dwelling or a building; enter the occupation of property necessary for the Armed Forces or defense.

The above mentioned restrictions on freedom and human and civil rights established by the President of the Republic of Poland in the Regulation are introduced and applied by way of ordinances of the Council of Ministers or decisions of government administration bodies. These ordinances specify the detailed procedure and methods as well as the area, subjective and objective scope of introducing and applying restrictions on freedoms and human and civil rights, taking into account to the extent possible the minimization of individual and social nuisances resulting from the application of these restrictions. During martial law it may also be introduced: total or partial ban or limitation of transport of persons and goods in road, rail, air, sea and inland waterway transport; total or partial ban on flights of Polish and foreign aircraft over land territory and territorial sea of the Republic of Poland; total or partial prohibition or restriction of the movement of Polish and foreign vessels in internal sea waters, in the territorial sea and on inland

\textsuperscript{13} Article 24 (1) of the Martial Law Act.
waterways; total or partial prohibition or restriction of all vehicles on public roads; the obligation for carriers to carry transport for the purposes of national defense and security.\textsuperscript{14}

The regulations referred to detailed procedures and methods and the territorial, subjective and objective scope of the introduction and application of restrictions on freedom and human and civil rights, taking into account to the extent possible to minimize individual and social burden resulting from the application of these limitations. In turn based on the provision of art. 27 (1) of the Martial Law Act during martial law, means of road, rail and air transport as well as sea and inland waterway vessels can be taken or requisitioned for the state defense needs. You can also: close or restrict personal and freight traffic through border crossings; introduce specific rules for issuing documents entitling Polish citizens to cross the state border; introduce specific rules for issuing documents entitling foreigners to cross the state border and stay on the territory of the Republic of Poland.\textsuperscript{15}

The above mentioned restrictions on freedom and human and civil rights established by the President of the Republic of Poland in the ordinance introduce and apply, by way of regulation, the minister competent for internal affairs, in agreement with the minister competent for foreign affairs and the Minister of National Defense, taking into account, to the extent possible, the minimization of individual and social nuisance resulting from the application of these restrictions.

Additionally, pursuant to the provision of art. 29 (1) of the Act on Martial Law during martial law may be introduced a general obligation to perform work by persons who have completed 16 years of age, and have not exceeded 65 years of age and are capable of performing work due to their state of health and personal and family conditions.

This restriction is introduced by the Council of Ministers, by way of a regulation, defining the categories of persons not subject to a general obligation to perform work, and the mode and conditions for transferring people to work in other localities, including minimizing the nuisance caused by these restrictions.

It should also be noted that on the basis of the provision of article 30 of the Martial Law Act during martial law, editors of the head of daily newspapers and broadcasters of radio and television programs are obliged, at the request of public

\textsuperscript{14} Article 26 (1) of the Martial Law Act.

\textsuperscript{15} Article 28 (1) of the Act on Martial Law.
administration authorities, to publish, publish or post messages, decisions and decisions of these authorities related to state defense and citizens’ safety. The regulations described above indicate restrictions on the use of constitutional freedoms and rights that may be established during martial law. It can therefore be concluded that in connection with the imposition of martial law, the use of both personal freedoms and rights, freedoms and political rights as well as economic, social and cultural freedoms and rights may be limited. Their scope may also be the widest possible due to the fact that martial law entails the greatest special threats to the state. During the martial law period it is possible to limit the freedom of the media (Article 14 of the Constitution of the Republic of Poland). The protection of property (Article 21 of the Constitution of the Republic of Poland) can also have significant limitations. Economic freedom (Article 22 of the Constitution of the Republic of Poland) may also be limited during martial law. There may also be a situation where the secrecy of communication is restricted (Article 49 of the Constitution of the Republic of Poland) and the inviolability of an apartment (Article 50 of the Constitution of the Republic of Poland). Detriment may also experience freedom of movement, freedom of choice of place of residence and residence (Article 52 of the Constitution of the Republic of Poland). The freedom to obtain and disseminate information (Article 54 of the Constitution of the Republic of Poland) may also be limited. Within the scope of freedom and political rights, the following may be limited: freedom of assembly (Article 57 of the Constitution of the Republic of Poland), freedom of association (Article 58 of the Constitution of the Republic of Poland), right to information (Article 61 of the Constitution of the Republic of Poland), property and property rights (Article 64 Constitution of the Republic of Poland), freedom to choose and practice a profession (Article 65 of the Constitution of the Republic of Poland) and the right to safe and healthy working conditions (Article 66 (1) of the Constitution of the Republic of Poland).

Based on the provision of art. 3 (2) of the Act of 21 June 2002 on the state of emergency\(^\text{16}\), the regulation on the introduction of the state of emergency specifies the reasons for the introduction, duration and the area in which the state of emergency is introduced, and, to the extent permitted by this Act, types of restrictions on freedom and human and civil rights. The types of restrictions on freedom and human and civil rights should correspond to the nature and

\(^{16}\) (Dz. U. 2002 No 113, item 985 as amended).
intensity of the threats constituting the reasons for the introduction of the state of emergency, as well as to ensure effective restoration of the normal functioning of the state. During the state of emergency may be suspended the right to: organize and conduct all kinds of gatherings; organizing and conducting mass events and artistic and entertainment events conducted as part of cultural activities, not being mass events; workers’ strikes and other forms of protest in relation to specific categories of employees or in specific areas; strikes and non-strikes forms of farmers’ protest actions; protest actions of students organized by student self-governments, associations or organizations; association.

As regards the restriction of the right of association, a ban may be imposed on the creation and registration of new associations, political parties, trade unions, farmers ‘socio-professional organizations, employers’ organizations, civic movements and other voluntary associations and foundations; order the temporary abandonment of registered associations, political parties, trade unions, socio-professional organizations of farmers, employers’ organizations, civic movements and other voluntary associations and foundations whose activities may increase the threat to the constitutional state, security of citizens or public order.

Nevertheless, the above regulations do not apply to assemblies organized by churches and other religious associations and religious organizations operating within temples, church buildings, other rooms used for organizing and public worship, as well as assemblies organized by state organs or local self-government bodies. Based on the provision of art. 17 (1) of the state of emergency at the time of the state of emergency may be an isolated person over 18 who has reasonable suspicion that while remaining at liberty will conduct activities threatening the constitutional state system, citizens’ security or public order or when isolation is necessary to prevent committing a punishable offense or preventing an escape after committing it. A person who is over 17 years old may also be isolated if the previous warning conversation was unsuccessful. Isolation takes place on the basis of the decision of the voivode competent for the place of permanent or temporary residence of an isolated person and is performed by the competent provincial police officer, by way of detaining the person and compulsory bringing to the detention center subordinate to the Minister of Justice. The provisions of the Executive Penal Code regarding the rights and obligations of pre-trial detainees, execution of temporary detention and penitentiary supervision shall apply accordingly to the stay of detached persons in detention centers. In addition, in the area of the state
of emergency, a person who is 18 years of age or in a public place may be required to have an identity card or other identity document, and a school ID for a learner who is under 18 years of age\textsuperscript{17}.

Due to the provisions of the said Act, prohibitions or prohibitions may also be imposed: staying or leaving marked places, objects and areas within a set time; obtaining permission from public administration authorities to change their place of permanent and temporary residence; to notify the authorities of the population or police records of arrival to a specific place within a specified period; preservation of the appearance or other characteristics of specific places, facilities or areas using technical means. During the state of emergency, at the request of the prosecution, police, Internal Security Agency, Border Guard, Military Police or Military Counter-intelligence Service, a person aged 17 or older is obliged to take part in a warning conversation\textsuperscript{18}. If the person called for a warning call does not voluntarily report to the indicated place and the fact of receiving the summons is not in doubt, it may be forcibly brought by the requesting authority\textsuperscript{19}. According to the provision of article 20 (1) of the Act on the state of emergency during this extraordinary state may be introduced: preventive censorship of social media including press materials within the meaning of the Act of 26 January 1984 – Press Law; control of the content of parcels, letters, parcels and remittances handed over as part of universal postal services or courier services; control of the content of telecommunications correspondence and telephone conversations or signals transmitted in telecommunications networks; broadcasting signals that prevent the transmission or reception of radio, television or telecommunications transmissions or networks, the content of which may increase the threat to the constitutional state, security of citizens or public order.

The function of the authorities of censorship and control is exercised by the competent voivodes, who can order public administration authorities operating in the area of the voivodship to perform technical activities necessary to conduct censorship or control. In addition, the censorship and control bodies indicated are entitled to retain in whole or in part publications, postal and courier mail and telecommunications correspondence, as well as to terminate telephone conversations and transmission of signals sent in telecommunications networks, if

\textsuperscript{17} Article 18 (1) of the Emergency Act.

\textsuperscript{18} Article 19 (1) of the Emergency Act.

\textsuperscript{19} Article 19 (3) of the Emergency Act.
their content or content may increase the threat of the constitutional state system, security of citizens or public order. Preventive censorship does not cover media of public communication belonging to churches and other religious organizations, which are sources of information about religion and serve to fulfill religious functions. Next, it should be pointed out that during the state of emergency restrictions on freedom and human and civil rights may be introduced in the scope of: access to consumer goods, by total or partial rationing of supply to the population; the freedom of contractual agreement between parties to the contract, by prohibiting periodically raising prices for goods or services of a certain type or ordering the use of prices set on goods or services of fundamental importance to the costs of consumer maintenance; freedom of economic activity, by ordering temporary discontinuation of a particular type of business or establishing an obligation to obtain a permit to start a particular type of business; educational activity, through periodic suspension of classes in schools, including universities, except for schools of clergy and clerical seminaries; trading in domestic means of payment, foreign exchange transactions and bureau de change; road, rail and air transport as well as in the movement of vessels in internal sea waters and in the territorial sea as well as on inland waterways; operation of communication systems and telecommunications and postal activities, by ordering the exclusion of communication devices or suspension of service provision for a definite period, and also by ordering immediate deposit of radio and television transmitting and transmitting-receiving devices to the deposit of the competent governmental administration or establishing another way of securing them before being used in a manner threatening the constitutional state system, the security of citizens or public order; the right to possess firearms, ammunition and explosives, and other types of weapons or specific objects, by ordering immediate deposit of the competent government administration body or prohibiting the wearing; access to public information. The ordinances specify the detailed procedure and methods as well as the area, subjective and objective scope of introducing and applying restrictions on freedoms and human and civil rights, taking into account to the extent possible the minimization of individual and social nuisances resulting from the application of these restrictions. As in the case of martial law, the introduction of the state of emergency involves a special threat to the state, which authorizes the introduction of restrictions on the use of constitutional freedoms and rights.

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20 Article 20 (7) of the Emergency Act.
Therefore, it can be pointed out that due to the introduction of the state of emergency, the use of personal freedoms, personal rights, freedoms and political rights as well as economic, social and cultural freedoms and rights may be limited. A similar situation occurs during martial law. Their scope may also be relatively wide and comparable to that which may take place during martial law. During the state of emergency, it is possible to limit: media freedom (Article 14 of the Constitution of the Republic of Poland); protection of property (Article 21 of the Constitution of the Republic of Poland), economic freedom (Article 22 of the Constitution of the Republic of Poland), protection of the secrets of communication (Article 49 of the Constitution of the Republic of Poland), inviolability and personal liberty (Article 41 of the Constitution of the Republic of Poland), inviolability of an apartment (Article 50 of the Constitution RP), freedom of movement, freedom of choice of place of residence and residence (Article 52 of the Constitution of the Republic of Poland), freedom to obtain and disseminate information (Article 54 of the Constitution of the Republic of Poland), freedom of assembly (Article 57 of the Constitution of the Republic of Poland), freedom of association (art. 58 of the Polish Constitution), the right to information (Article 61 of the Constitution of the Republic of Poland), property and property rights (Article 64 of the Constitution of the Republic of Poland), freedom of choice and profession (Article 65 of the Constitution of the Republic of Poland) and the right to safe and healthy working conditions (Article 66 (1) of the Constitution of the Republic of Poland). Based on the provision of article 21 (1) of the Act of 18 April 2002 on the state of natural disasters restricting freedoms and human and civil rights during the state of natural disaster may consist in: suspension of the activities of certain entrepreneurs; order or prohibition to conduct a specific type of business; ordering the employer to delegate employees to the disposal of the governing body for activities aimed at preventing or removing the consequences of a natural disaster; total or partial rationing of the supply of certain types of articles; a ban on periodic price increases for specific types of goods or services; an order to use fixed prices for goods or services of fundamental importance to the costs of consumer maintenance; the obligation to undergo medical examination, treatment, protective vaccinations and other preventive measures and treatments necessary to fight infectious diseases and the effects of chemical and radioactive contamination; the obligation to quarantine; the obligation to use plant protection products or

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21 (Dz. U. 2002 No 62, item 558 as amended).
other preventive measures necessary for the control of organisms that are harmful
to humans, animals or plants; the obligation to use specific measures to ensure
environmental protection; the obligation to use the means or treatments necessary
to control animal infectious diseases; obligation to empty or secure dwellings or
other premises; making forced demolition and demolition of buildings or other
construction objects or parts thereof; an evacuation order within a set time from
specific places, areas and objects; order or prohibit staying in certain places and
facilities and in specific areas; prohibition of organizing or conducting mass events;
order or prohibition of a particular way of moving; using, without the consent
of the owner or other authorized person, real estate and movables; prohibition
to conduct a strike in relation to certain categories of employees or in specific
fields; limiting or departing from certain health and safety at work rules, however
not directly endangering the employee’s life or health; performing personal and
material benefits. The limitations referred to above in relation to persons employed
by the employer against whom an order to conduct a specific type of business
was issued may consist in: changing the system, dimension and working time
distribution, including extending the reference period to twelve months, on the
terms specified in the Labor Code; obligation to work on Sundays, holidays and
non-working days resulting from the distribution of working time in a five-day
working week, including extending the reference period to twelve months, on the
terms set out in the Labor Code; entrusting the employee with performing a job
other than that resulting from the employment relationship established; in this
case, the employee retains the right to the previous remuneration, calculated in
accordance with the rules applicable to the calculation of remuneration for the
period of annual leave. Based on the provision of article 22 (1) of the Act on the
State of Natural Disaster, it is possible to introduce the obligation of personal and
material benefits consisting of: providing first aid to persons who have suffered
from accidents; participation in the rescue operation or other tasks assigned by
the person heading the rescue operation; performing specific works; putting into
use of owned real estate or movable property; making rooms available to evacuees;
using the property in a certain manner or within a specified scope; acceptance for
storing and guarding the property of injured or evacuated persons; the protection
of endangered animals, and in particular the supply of feed and shelter; protection
of endangered plants or seeds; performing worth; securing own sources of drinking
water and foodstuffs against their contamination, contamination or infection, as
well as making them available to the needs of evacuees or victims, in the manner
indicated by the authority imposing the benefit; securing endangered cultural goods. In addition, pursuant to the provision of article 24 (1) of the Act on the state of natural disaster, in order to improve the movement of transport means necessary for carrying out rescue operations, restrictions may be imposed in road, rail and air transport as well as in the movement of vessels on inland waterways, internal sea waters and the territorial sea. In order to provide communication for the needs of rescue operations, limitations may be introduced in the performance of postal universal services or courier services, as well as restrictions on the operation of radio transmitting or transmitting and receiving devices and in the provision of telecommunications services are set out in separate regulations. Editor-in-chief of daily newspapers and broadcasters of radio and television programs are obliged, at the request of the minister, voivods, starosts, mayors (mayors, city presidents) or proxies, to publish or post messages of these organs free of charge related to actions to prevent the effects of a natural disaster or their removal (Article 26 of the Act on the State of Natural Disaster).

In the situation of introducing a state of natural disaster, it is possible, as in the case of martial law or state of emergency, to limit the use of constitutional freedoms and rights. Compared with the first two emergency states, their range is significantly limited. The provisions of the Constitution of the Republic of Poland indicate a closed catalog of these freedoms and rights. And so on the basis of the provision of article 233 (3) of the Constitution of the Republic of Poland during the state of natural disaster may be limited: freedom of economic activity (Article 22 of the Constitution of the Republic of Poland), personal freedom (Article 41 (1, 3, 5) of the Constitution of the Republic of Poland), inviolability of the flat (Article 50 of the Constitution of the Republic of Poland), freedom of movement and stay in the territory of the Republic of Poland (Article 52 (1) of the Constitution of the Republic of Poland), the right to strike (Article 59 (3) of the Constitution of the Republic of Poland), property rights (Article 65 (1) of the Constitution of the Republic of Poland), the right to secure and hygienic working conditions (Article 66 (1) of the Constitution of the Republic of Poland) and the right to rest (Article 66 (2) of the Constitution of the Republic of Poland).

As follows from the presented analysis regarding the possibility of restricting the use of constitutional freedoms and rights, their scope depends on the situation in which the emergency situation will arise. The greatest possibilities in this

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22 Article 25 (1-2) Act on the state of natural disaster.
respect exist in the case of the introduction of martial law and state of emergency. In such cases, the provisions of the Basic Law indicate what basic freedoms and rights cannot be limited. All others can be limited. However, in the situation of introducing the state of a disaster, the provisions of the Constitution indicate which freedoms and rights can be limited, which means that others can not be subject to such restrictions. The introduction of a negative (with reference to martial law and state of emergency) and positive (with reference to the state of natural disaster) to the content of the Constitution of the Republic of Poland defining the freedoms and rights, the use of which may be limited should be assessed positively. Also the catalog of indicated freedoms and rights deserves approval. In addition, it should be recognized that the manner of regulating issues related to limiting the opportunities to enjoy freedom and human and civil rights in the legal system of the Republic of Poland is consistent with both international standards in this area, as well as the principle of a democratic state ruled by law.

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Abstract
One of the fundamental questions related to legal universalism is the proclamation and protection of the right to life. In relation to the therein proclaimed right to life, there is another heavily contested right today and namely “the right to being born”, i.e. the right to life of the human embryo. It is a clear manifestation of universal regulation of this basic human right on the one hand and of its framework in terms of a particular problem which, however, bears significant social, moral and legal consequences – for the protection of pregnant women and the children in their wombs, the recognition of paternity and parental rights, respectively the right to child support for the unborn, the right to abortion, assisted reproduction, surrogacy, cloning, etc. The fundamental theoretical legal question is what comes to the fore about the moment when the legal person starts its existence, respectively from the moment when law recognizes the presence of life, i.e. of a living creature, and to what extent this reflects upon the status of the mother, etc. The article presents the main texts of the Roman law, which relate to such problems as the basis of modern legislation and its improvement.

Keywords: right to life, right to being born, human embryo, Roman law, nasciturus.

1. The right to life- the right to being born
The studies in recent years are dedicated to the universal nature of law. It can be studied in a legal-dogmatic and legal-historical perspective drawing comparisons on a broader or narrower scale. Legal universalism is conceptualized as a common intellectual framework within which an emphasis is laid on the spiritual unity of
humankind perceived as an integral spiritual community. This topic is particularly significant nowadays when different political or academic projects struggle to define the basic principles and rules for the purposes of legal systems approximation, at least to some extent, which on its part shall facilitate not only social contacts but also economic activity and international communication on a community, regional and world level.

One of the areas where legal universalism is most prominent is that of the protection of the fundamental human rights. The current 2018 is the year celebrating the 70th anniversary since the adoption of the Universal Declaration on Human Rights by the United Nation’s General Assembly on 10th December 1948. It is the first significant achievement of the world organization of nations in this field in the time after the Second World War and the first act of world record of rights whose holders are all human beings. Its basic provisions are further developed by subsequent international treaties, regional instruments for the protection of human rights, national constitutions and laws (Steiner, Alston, 2000; Tanchev, 2002, p. 9 ss.). Along with the Universal Declaration on 7th November 1950 the European Council member-states governments adopt the European Convention on the protection of human rights and fundamental freedoms which comes into force in 1953 and creates inalienable rights and freedoms for everyone binding the States Parties of the Convention to guarantee these rights to every person within their jurisdiction.

The Universal Declaration embodies moral principles and core values whose origin dates back to legislative acts and political manifestos of ancient times (Novkirishka-Stoyanova, 2016, p/100ss.). As early as the Preamble of the Code of Hammurabi, the king of Babylone, from the 18th century BC, in laws from Egypt, Mesopotamia, and the ancient East a tradition can be traced which later had been integrated into Greek philosophy and in the Roman legal concept of *ius naturale* for the protection of the human being and the basic values in his or her life. The basic human rights formulated during the Enlightenment and underpinning the national and international legislative acts of the contemporary world are built upon the genetic foundation of the ancient concept of a human being.

This is a ubiquitous research topic fraught with challenges that has much too often been a subject of discussions spanning over centuries especially if one seeks to find the historical origins and the philosophic argumentation for the protection of human rights in Antiquity. The definition and the special terminology of “human rights” in the Greek-Roman Antiquity, anachronistic though it may seem, have been
discussed in many different ways which are not entirely unknown to us. If we take a deeper look into the ancient laws we will observe a fairly detailed legal framework of people's rights depending on their citizenship, sex, age, religion, ethnical affiliation, etc. (Amunátegui Perelló, 2014, pp. 15-26; Burnyeat, 1994, pp. 1 – 11).

One of the fundamental questions related to legal universalism is the proclamation and protection of the right to life. This right is invariably connected both with human existence and with various philosophical concepts as well as with a considerable legal framework in general and in specific terms (Fernández de Buján, 2017, pp. 1-14). It is defined in a different way historically too and enjoys an interesting evolution. Thus, on the one hand, regardless of how real it is or is not, but the ancient rulers or the national assemblies in their legislative activity determine human life as a core value in society which needs to be protected. This is the reason why murder or deadly bodily harm is prohibited and respectively most severely punished.

Precisely in this respect the Preamble of the US Declaration of Independence of 1776 states: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” It was adopted in 1948 and under art.3 of Universal Declaration of Human Rights “Everyone has the right to life, liberty and security of person “.

The prohibition of homicidium (Berger, 1953, p. 487), however, does not refer to causing death in war time, crushing civil mutinies and insurrections, legal self-defence or capital punishment execution.

This is explicitly laid down in 1950 with the adoption of the European Convention on Human Rights by the European Council where article 2 provides that:

„Right to life

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.
The right is enshrined in Article 6.1 of the International Covenant on Civil and Political Rights: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

One very specific aspect of the protection of human life concerning children is stated under article 6 of The United Nation Convention on the Rights of the Child of 1989: “1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.” This Convention is a human rights treaty which sets out the civil, political, economic, social, health and cultural rights of children. The Convention defines a child as any human being under the age of eighteen, unless the age of majority is attained earlier under national legislation.

In relation to the therein proclaimed right to life, there is another heavily contested right today and namely “the right to being born”, i.e. the right to life of the human embryo. It is a clear manifestation of universal regulation of this basic human right on the one hand and of its framework in terms of a particular problem which, however, bears significant social, moral and legal consequences – for the protection of pregnant women and the children in their wombs, the recognition of paternity and parental rights, respectively the right to child support for the unborn, the right to abortion, assisted reproduction, surrogacy, cloning, etc. The fundamental theoretical legal question is what comes to the fore about the moment when the legal person starts its existence, respectively from the moment when law recognizes the presence of life, i.e. of a living creature, and to what extent this reflects upon the status of the mother, etc. Modern-day research even mentions “pre-life” or pre vita.

2. Nasciturus in the Roman law

Many of these topics are unknown for the world of Antiquity, but one thing is undisputable – in their theory and practice Roman jurists create a universal rule for the protection of human life from the moment of its creation which in a lot of respects is more humane and more pragmatic bearing in mind the entire protection of the mother and the child by a number of rules in contemporary codifications. And because this is one equally ancient and modern topic, it is worth looking at the Roman jurisprudence which in this case too amazes us with its modernity.

Philosophically speaking, the question comes down to this if the soul appears from the moment of conception (i.e. the fusion of the gametes and the formation
of a zygote) or from the moment when the formation of the main organs of the embryo is complete and mostly that of the heart (i.e. after the 9th week of gestation when organogenesis comes to an end, despite the fact that further development and settlement of the organs in their functional slots is still to follow) (Ovcharov, Takeva, 2015, p. 167 ss.).

First, I would like to remind you that in Greek philosophy, life is directly linked with the existence of a soul. According to the followers of Pythagoreanism, the soul is placed into the body at the moment of conception as it is of divine origin and is immortal, whereas the concrete body just temporarily shelters it. Aristotle argues that every living creature is endowed with a soul determining its essence and this applies equally to plants, animals and humans. The idea of the vegetative state of the soul within the embryo is developed by Neoplatonists. Stoicism in turn accepts that the soul is inspired into the body at the point of birth when the air taken in by the newborn is actually the vital spirit that animates the body. By this time the embryo is part of the mother’s body and its existence is vegetative, regardless of the sensual perceptions which she has for it. There are also authors (e.g. Diogenes) who entirely reject the existence of a foetus as a living creature as far as it does not breathe independently (Bernard, Deleury, Dion, Gaudette, 1989, pp. 180-182).

In the Christian religion the human being and life are considered to be the most amazing creations of God (“God saw all that he had made, and it was very good.” (Genesis 1:31). As far as conception is concerned the so-called “duality” of the person is revealed, i.e. as made up of body and soul (“Then the LORD God formed a man from the dust of the ground and breathed into his nostrils the breath of life, and the man became a living being.” (Genesis 2:7). Psalms describe life in the womb as created and known by God whereas in many places in the Biblical texts a differentiation exists between the visible and the spiritual world (Psalm 138:13-16; Ecclesiastes 12:7, Zechariah 12:1).)

There is a very significant difference in the ancient and modern perception of human life and the right to life established in the respective legal system and influenced by religious beliefs as well. In modern legislatures, generally, birth is a juridical fact related to the occurrence of a human personality, respectively this is the beginning of a physical person’s legal capacity, of their recognition as a legal subject and their right to legal protection. In addition, there is a number of rules regulating the embryo’s status and lending significance to its existence related to: abortion, assisted reproduction, surrogate motherhood, embryo donation,
paternity acknowledgement, newborn abandonment and murder, and others. The Christian religion, assuming the embryo is also God's making, condemns abortions and the murders of pregnant women which are interpreted as an act of killing two human beings and this is reflected in modern legislatures.

In Antiquity, however, there are not any such abstract categories as “a right to life” and status of a person who is not visible and really perceptible in the shape of a human. Birth results in legal consequences only in so far as the child’s existence is acknowledged by the father or by society. Therefore, abortion, murder or abandonment of the newborn are sanctioned as crimes only if they are contrary to the father's will who is entitled with “the right to life and death” (ius vitae necisique in Rome).

Romans look at the right to life of the human embryo from a different perspective. From an entirely pragmatic standpoint jurists discuss the rights of the conceived but unborn child, especially when, if at the time of his or her birth, the child would have had the status of an inheritor. Romans considered the issue of right to succession over family property, the cult of the family and the deference towards ancestors as the basis for a large part of the legal framework related to the status of persons, i.e. both personal and property status. In this respect, a system of rules is developed which protects the life of the foetus as an independent being albeit not separated from the mother's body as well as that of the mother as a bearer and keeper of this being. The social significance of this issue is not to be underestimated either in so far as the demographic problems concerning the stability of the Roman people, the continuation of the Roman tradition and the entire material and spiritual world created by the Romans are of foremost concern for the state and its authorities, institutions and law.

In a terminological aspect Roman jurists do not use the term “a legal subject” but an equivalent one – “persona”. It denotes a human face, but also a religious or theatrical mask, whereas in the legal compositions – a physical person (Catalano, 1990, p. 216 ss.; Lubrano, 2002, p. 3 ss.). From this point of view, the unborn child for whom there is not a visible perception neither his face is known, could not have possibly been considered a persona. Despite this fact, however, the Roman iurisprudentes admit that there is a great number of cases where the rights of the conceived but unborn child have to be taken into account as well as those of the newborn or the child born after the death of his or her father. Thus, the special terms “nasciturus” and “postumus” are created. And if in the second instance we already have a born child both live and viable and despite his or her
early age, he or she can acquire rights and obligations on an equal par with other children as a legal subject with an equal standing, in the first instance with the yet unborn child, referred to as nasciturus, what we are talking about is an “invisible” legal subject, rather using the sensual perceptions of the pregnant woman than the outward manifestations of the life existing within her womb.

Most authors emphasize the creation in Roman law of a fiction about nasciturus by virtue of which the foetus is thought of as being born (pro nato habetur), not that it is a real persona. This, however, is a much more complex problem which on the one hand is related to the reason for accepting such a resolution concerning the conceived but unborn child, and on the other hand, poses the question to what extent and how in practice his or her rights are protected.

First it should be noted that in the Roman jurists’ texts on the topic there is a reference to natural law and correspondingly to the natural legal position of nasciturus (Fontana, 1994; Baccari, 2006). One of the fundamental texts where Ulpian defines natural law, mentions that it refers to family relations such as marriage and the creation, upbringing and education of children. (D. 1.1.1.3.) Related to this concept is the development of the views about the pregnant woman and her expected child considered as an entirely natural being and therefore “nurtured” by law (D.1.5.26).

Obviously Romans withhold from recognising the unborn as a child due to the rule that the liber status occurs at the moment of birth and the status of the mother and the father determines what freedom, citizenship and family dependence the person will enjoy. Nevertheless, Julian argues that irrespective of the “invisible” existence of the one “that is in the mother’s womb”, they are entirely subject to the rules of the Roman Civil Law, and i.e. they are considered to be an existing Roman citizen. The inference of the rule from the natural law poses a lot of questions regarding the relation between ius naturale and ius civile, a subject of separate and in-depth research (Ferreti, 1999, p. 97-127). The applicability of civil law, however, is a requisite for the solution of a number of other problems, such as: to what extent abortion or stillbirth by fault of the obstetrician are deemed murder; what rights the newborn has if the father has died during the mother’s pregnancy or a divorce has taken place; what the liability is for murder or injury to a pregnant woman, etc.

The basic framework of these issues is in Title 5 of Book I of the Digests dedicated to the status of the persons (De statu hominum). It puts first the principle that the recognition of specific legal personality of nasciturus is justified only in so far as
this can be in his or her favour (*commodum*) – *D.1.5.7*. The logic behind this legal framework is to protect the property interest of the conceived but unborn child in case there is a conviction against one of the parents. The principle is later developed in *D.1.5.26* where two cases are studied – an enslaved pregnant woman and theft of a pregnant slave. In both instances the child follows the more favourable status that would have been granted to him or her – the right to restitution of the status (postliminium), despite the fact that he or she was born during the period of his or her mother’s slavery, respectively the child is also regarded as a stolen property in exactly the same way as the pregnant slave and the acquisition of ownership over him or her is not permitted on the grounds of a limitation period.

Apart from this hypothesis with the pregnant slave to which the civil legal concept is applied about the right to ownership over slaves, in other cases it is expressly stipulated that the child of a slave is a *partus* and not a *fructus* in *D. 22.1.28.1.* (*Di Nisio, 2016, p. 141-153*).

The autonomous existence of the foetus is also confirmed in the general title about the meanings of the different terms and definitions used in Roman law (*D.50.16. De verborum significatione*). Thus, in *D.50.16.153* Clementius deems that the fruit is also reckoned dead if it has been left in the womb of a dead woman, i.e. it is treated as a separate person. Following the same logic, the burial of a pregnant woman is prohibited unless the fruit has been removed from her womb (*qui in utero est partus*), correspondingly it was to be buried separately (*D.11.8.2*).

The right to life of the unborn child is protected explicitly in Title 8 of Book 48 of the Digests containing a commentary on Sulla’s law of 81 BC on the sanctions for murder and poisoning (*Ad legem Corneliam des sicariis et veneficis*). It envisages a significant punishment for a woman who has voluntarily aborted – loss of *status* (or the so-called civil death) and exile (*D.48.8.8*).

The negative attitude to abortion is expressed in other places in the Digests as well. In the time of the Principate as a general rule, abortion is not prohibited but strict sanctions are put in place in cases of intentional abortion aimed at harming the interests of the unborn child. Tryphonius in *D.48.19.39* refers to rules dating back to the time of the Republic by quoting Cicero’s speech „*Pro Caelio*“ (*D.48.19.39*).

If the interests of the mother and the fruit are significant and contrary by virtue of criminal liability the mother is sent in exile and this applies not only to Roman women but to all women on the territory of the Empire regardless of their local legislation (*qui in orbe romano sunt*) (*D.47.11.4*).
Again in relation to the interests of the unborn there are a number of provisions regarding his or her status. Thus, for example, if he is the posthumous son of a senator, the same rank is granted to him. The same rule applies if the father has been demoted from the senate before the birth but the child has been conceived within a valid Roman marriage and the wife is pregnant at the moment of the demotion in question. Ulpian’s opinion on this issue is based on the practice of the Republican jurists adopted and described by Labeo and Pegasus whose purpose is to strengthen the senators’ rank after Sulla’s proscriptions and the civil wars. The principle for granting the father’s status to the conceived within a legal Roman marriage and that of the mother in the event of an extramarital conception is applied unconditionally and if less favourable circumstances occur during the marriage, they are not taken into consideration.

The final determination of a child’s status, however, is left in a pending condition (in pendente conditione) until the moment of birth, respectively until the moment when the child is liveborn and viable. There are not explicit rules concerning a newborn life expectancy in case he or she has any injuries or malformations. Obviously in these rare cases the issue is resolved pragmatically in view of the parents’ social and economic status, the perspectives for normal development of a damaged child and so forth.

The right to life of the human foetus is related not only to providing the opportunity for the child to be born – for this purpose the special figure of the curatorventris has been introduced who assumes care for supplying food, shelter, clothing and everything necessary for the pregnant woman – but also an argument for the creation of this protectionist regime is mostly the care for the child and his or her interests, and subsidiarily – to his or her mother. From a more distant perspective, this regime is an expression of the social attitude to birth rate, family, social development and the overcoming of demographic problems. This is the reason why researchers of the issues relating to nasciturus look at it from three different positions: the interests of the conceived, but yet unborn, the mother’s interests and the interests of society as a whole.

3. Conclusion

Roman law demonstrates an incredibly in-depth legal thinking for the distance of its epoch. Indeed, the rights of the conceived but yet unborn child are settled in view of protecting his or her property interests. However, along with this, his or her existence is also protected by means of being deemed not
so much a separate part from the mother as it is actually biologically, but rather a separate legal “component”.

In the discussion on the exact way of determining nasciturus Roman jurists base their arguments on the tripartite division of the private legal issues, i.e. into persons, objects and actions. Apparently the child, given that he or she is conceived by free parents, cannot be possibly regarded as an object, this is not permissible even for the child of a slave mother. The explicit declaration of the child’s person, however, is not at all in line with the Roman concept of this term. Thus, after a long row of explanations, fictions and analogies the rights of the nasciturus are seen as dependent on the future birth and health condition of the newborn.

The study of the Roman legal framework related to the right to life of the human embryo reveals a pragmatic approach to this issue but also a deeply humane attitude and legal norms creation of a universal nature concerning pregnant women regardless of their status, citizenship, etc. and their children to be born. This spirit of Roman law has permeated modern legislations which despite the fact that in most cases determine the moment of birth as the time of occurrence of legal subjectivity, take into consideration many of the Roman law solutions on the topic. A particularly attractive and ambitious task is to make an overview of modern legislation in order to observe what part of it is a replica of the Roman legal framework. Yet the perception of the human embryo as a living creature with its respective rights and interests is part of that great legal heritage left to us by the Romans which we specify and enrich but, at the same time, retain as a foundation of modern law.

References


Freedom of Religion as a European Value

Abstract
The article discusses freedom of religion perceived as a European value. The cooperation between the European states that is becoming broader and broader causes the sharp divisions between them disappear. Meanwhile, the internal legal acts formulate objectives that create a relationship between the internal domestic intentions and the community goals, also in the area of common values and beliefs. The European law recognizes freedom of religion (Article 9 of CEDH; Article 2 of TEU; Article 10 of the Charter of Fundamental Rights of the European Union) and offers a mechanism guaranteeing freedom of conscience and religious pluralism. The internal autonomy of an individual demands a guarantee of freedom of “thought, conscience and religion or belief”, and thus the international documents ascribe an absolute profile to that freedom. A separate legal nature shall be ascribed to “externalization” of beliefs or religion. The axiological foundation for freedom of creating the religious communities stems from the ideas of pluralism, democracy and peaceful dialogue. The listed values shall be perceived on the background of general axiology of the European community of law taking into account the primary feature of a democratic society: pluralism.

Keywords: European values, freedom of religion, democratic society, pluralism.

1. Introduction
In the 21st Century, there’s a common belief that only a democratic state remains able to ensure compliance with the human rights within its boundaries. This happens in situations in which, at the very same time, it may be noted that democracies pretending to follow this belief have a problem with achieving a satisfactory level of respect for the human rights, within the full range of those rights. However, situation as such should not be surprising, especially when one takes the whole historical and contemporary context of liberal democracy into
account. This type of democracy is tied to a variety of political traditions, including ones that are differing or even contradictory of one another.\footnote{Morange, 2007, 73-74.}

1. **Axiological foundation for individual autonomy and for the autonomy of religious communities**

Protection of fundamental human rights in the EU is a result of long-running evolution of the Court of Justice case-law\footnote{Apps. 29/69 Stauder, LexPolonica no. 413528; 11/70 Internationale Handelsgesellschaft, LexPolonica no. 346428; 4/73 Nold, LexPolonica no. 1247716; 44/79 Hauer, LexPolonica no. 348678.}. The Court of Justice, on the basis of Treaty competencies to ensure compliance with the law (Article 19 of the TEU), has deployed certain basic guarantees for individual protection, in a form of “unwritten” rules of the law, the importance of which, within the hierarchy of the EU law norms, is equal to the importance of the Treaties\footnote{Opinion issued by the Advocate General 18.3.2004, C36/02 Omega case, section 49.}.

The internal autonomy of an individual demands a guarantee of freedom of “thought, conscience and religion or belief”, and thus the international documents ascribe an absolute profile to that freedom. A separate legal nature shall be ascribed to “externalisation” of beliefs or religion\footnote{Renucci, 2013, 165-166.}. The axiological foundation for freedom of creating the religious communities stems from the ideas of pluralism, democracy and peaceful dialogue, as autonomous existence of religious communities is required for the pluralism to exist in democratic society\footnote{ECtHR 26.10.2000 Hasan and Chausch v. Bulgaria, app. no. 30985/96, section 62; ECtHR 12.12.2004 the Supreme Holy Council of the Muslim Community v. Bulgaria, app. no. 39023/97, section 93; Garlicki, 2010, 577.}. This provides the religious communities with an appropriate protection from the public authorities getting involved, but it also imposes additional obligations on those communities. As the religious communities constitute an ingredient of a democratic society, they also need to respect the basics of this society\footnote{P. Cumper, 2014, 597-600.}. This justifies formation of limitations that may be stemming either from the state’s competency to protect its integrity, security and public policy\footnote{ECtHR 13.12.2001 the Metropolitan Church of Bessarabia and others v. Moldova, app. no. 45701/99, section 125.}, or from the obligation to protect values...
of general nature, constituting an ideological foundation for the Convention. It is an absolute obligation for the public authorities to maintain neutrality and remain impartial through actions “exercised its discretion reasonably, carefully and in good faith”. Neutrality does not equal isolation, as the state shall not have a character of negative secularism, it should adopt positive secularism instead. Thus, the state may act as an “organiser of the exercise of various religions, faiths and beliefs”. This is not synonymous with the order to treat all of the religious community in an equal manner. The historical and cultural factors, as well as the actual difference between the number of believers may justify a certain separation – in legal sphere and in the actual existence. This pertains especially to the model of a relationship between a country and the religious communities.

The cooperation between the European states that is becoming broader and broader causes the sharp divisions between them disappear. Meanwhile, the internal legal acts formulate objectives that create a relationship between the internal domestic intentions and the community goals, also in the area of common values and beliefs. The European law recognises freedom of religion (Article 9 of CEDH; Article 2 of TEU; Article 10 of the Charter of Fundamental Rights of the European Union) and offers a mechanism guaranteeing freedom of conscience and religious pluralism.

2. Freedom of thought, conscience and denomination as one of the foundations for a democratic society

Article 9. of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as ECHR) pertaining to freedom of thought, conscience and religion, adopts a solution which is reminiscent of other international documents. Freedom of religion includes the freedom to change religion or beliefs and freedom to externally express them – individually or jointly with other people, publicly or privately, by cultivating the religion, spreading it,

9 ECtHR 5.4.2007 the Church of Scientology Moscow v. Russia, app. no.18147/02, section 87.
10 ECtHR 13.2.2003 Refah Partisi and Others v. Turkey case, app. no. 41340/98, 41342/98, 41343/98 and 41344/98, section 91.
12 Chopin, 2018, 3-4.
practicing it and conducting rituals. The Court indicates four basic elements: freedom of thought, freedom of conscience and freedom of denomination all constitute one of the foundations of the democratic society; implementation of this freedom constitutes “one of the most basic elements defining the identity of the believers and of their life concepts”\textsuperscript{14}; this freedom constitutes a precious value for atheists, agnostics, sceptics and non-involved people, and their existence, and taking advantage of this freedom constitute a necessary premise for the “The pluralism indissociable from a democratic society, which has been dearly won over the centuries” to exist\textsuperscript{15}.

Freedom of “thought, conscience and religion” refers to a state of human mind, and only a natural person may be a subject to this freedom\textsuperscript{16}. Freedom of “thought” refers to being in possession of and shaping opinions and views pertaining to any matters possible and having any content\textsuperscript{17}. “Thoughts” do not have to form any holistic or coherent system for perceiving the world, they are a form of intellectual reaction of a human being to the surrounding reality. Thoughts constitute a basis and premise to formulate a more organised view of this world and the values, adopting a form of “conscience”, “beliefs”, “faith”\textsuperscript{18}.

Freedom of conscience refers to being in possession of and shaping of a set of opinions and beliefs corresponding with a specific system of values based upon the definition of “good” and “evil”. The conscience, considering its very nature, has an objective connotation, and despite its individual character it remains outside the scope of individual control, dictating proper assessment of the undertaken actions. The conscience’s feelings constitute an axiological foundation for empirical or perfect perception of the world taking on a form of beliefs.

The beliefs have a definition which is narrower than “thoughts” and “conscience” and “opinions” or “views”. However, it is somewhat close to the definition of “religious and philosophical beliefs”\textsuperscript{19}. Formally, the “beliefs” need to form a system

\textsuperscript{14} Renucci, 2012, 228-229.
\textsuperscript{15} ECtHR 25.5.1993 Kokkinakis vs Greece, app. no. 14307/88, section 31; ECtHR 13.2.2003 Rafah Partisi and others vs. Turkey, apps. no. 41340/98, 41342/98, 41343/98 and 41344/98, section 90; ECtHR 10.11.2005 Leyla Sahin v. Turkey, app. no. 44774/98, section 104.
\textsuperscript{16} Garlicki, 2010, 556.
\textsuperscript{17} Renucci, 2013, 160-161.
\textsuperscript{18} Garlicki, 2010, 556.
\textsuperscript{19} F. Sudre, 2008, 510-512.
that achieves a certain degree of “cogency, seriousness, cohesion and importance”\textsuperscript{20} and they shall constitute a coherent view of a problem of basic character\textsuperscript{21}. Within the material aspect, the issue of “beliefs” refers to the views that deserve respect in a democratic society and that do not contradict the human dignity, pertaining to the relevant and serious aspect of human life and conduct\textsuperscript{22}.

We had to wait quite some time for the important judgment issued by the ECtHR on May 23rd 1993, with regards to the Kokkinakis v. Greece case\textsuperscript{23}. The ECtHR emphasised freedom and its meaning decisively here. This is especially important as even though the content of this judgment was later being adopted in case-law, it then had a form which was milder and more cautious. The ECtHR frequently decided to refer to other articles of the European Convention, rarely reaching out to Article 9 of the said Convention\textsuperscript{24}. The European Court assumed that the states make use of a wide margin of appreciation in defining their relationships with churches, also referring to lack of a common standards within that domain, when it comes to Europe. This means that the European Court turned out to be very tolerant towards the states, getting involved in their legal solutions that often took into account solely a liberal perspective which has not always been right and effective\textsuperscript{25}.

It shall be noted though that the European Court of Human Rights was not hesitant in criticising the direct violation of freedom, both in case of individuals, as well as in case of religious minorities. The Court was also assuming an opposing stance, when it comes to the states getting involved in resolving the religious communities internal disputes, recalling the fact that the communities shall be making use of actual autonomy. Meanwhile, the state shall remain impartial and neutral within that regard\textsuperscript{26}.

Freedom of religion, even though this is not explicitly included in Article 9, includes an expectation, on the part of the believers, to be able to gather in a free

\textsuperscript{20} ECtHR 25.2.1982 Campbell and Cosans v. The United Kingdom, app. no. 7511/76 and 7743/76, section 36; Garlicki, 2010, 557.
\textsuperscript{21} Decision ECtHR 18.3.2008 Blumberg v. Germany, app. no. 14618/03.
\textsuperscript{22} ECtHR 25.2.1982 Campbell and Cosans v. The United Kingdom, app. no. 7511/76 and 7743/76, section 36; Garlicki, 2010, 557.
\textsuperscript{23} ECtHR 25.5.1993, Kokkinakis v. Greece, app. no. 14307/8.
\textsuperscript{24} Morange, 2007, 258.
\textsuperscript{25} Morange, 2007, 259.
\textsuperscript{26} ECtHR 13.12.2001 the Metropolitan Church of Bessarabia and others v. Moldova, app. no. 45701/99, sections 113-114.
manner, i.e. free from an arbitrary involvement of the state authorities. And thus, the freedoms indicated in the Article 9 of the European Convention shall only be considered on the background of general Convention axiology, not only oriented towards guaranteeing of individual rights, but also oriented collectively and towards establishment of a “democratic society”. Considering the above, one should note that pluralism is a basic and necessary feature of a society as such.

3. European value of human autonomy and subjectivity, based upon the inherent personal dignity

The fundamental rights guaranteed by the European Convention (despite the lack of formal joining of the EU to the Convention) are complied with by the EU, on the basis of Article 6 section 3 of the TEU. This is because they constitute general rules of the law. In practical terms, the Court of Justice of the European Union is driven towards maintaining compliance of its case-law with the interpretation of the European Convention as done by the Strasbourg Court. Charter of Fundamental Rights of the European Union is a legally binding document that constitutes the EU’s primary law. However, most of the rights contained within that Charter are not valid solely on the basis of the Charter itself, the rights in question already exist, since they constitute general rules of the law. The Charter only confirms them.

The first sentence of the preamble to the Charter of Fundamental Rights of the EU reads as follows: “The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.” This sentence indicates that the EU does not want to be perceived solely as a body of common interest, as it is also to be a community based upon common beliefs, a strong axiological foundation and on a spiritual, cultural and civilisation-derived community. This is clearly confirmed by the following sentence of the preamble:

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32 Zoll, 2016, 42.
“Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law”\textsuperscript{33}. The Charter of Fundamental Rights lists the human dignity within the Preamble alongside freedom, equality and solidarity as one of the indivisible and common values upon which the European Union has been founded. Article 1 of the charter reads: “Human dignity is inviolable. It must be respected and protected.” The Charter makes an attempt at ascribing a double meaning to the human dignity. On one hand it classify dignity, alongside freedom, equality and solidarity, as one of the fundamental rules of civilisation. On the other hand, it treats the human dignity as one of the values that are a subject to protection. It seems that lack of a clear emphasis placed on the fact that the human dignity constitutes a source of all freedoms and rights and also acts as a justification for any freedom, equality and solidarity is a certain deficiency of the Charter. The human dignity shall constitute a model for the law introduced, it shall also act as a criterion for eliminating the solutions breaching the human dignity from the legal system. No type of freedom and no right can be protected, if they attack the human dignity. The freedom cannot be a value that stands beside the human dignity, as it is not placed at the same level in the hierarchy of values. Only human dignity is innate and inalienable. All of the other values are often limited, to a varying extent. This also applies to all of the freedoms and fundamental rights\textsuperscript{34}.

The Article 2 of the TEU lists the values upon which the EU is based. The values correspond with the rules and principles recognised by the EU and contained in the detailed provisions of treaties and case law of the EU courts, including: human dignity, freedom, democracy, equality, the rule of law and respect for human rights and fundamental freedoms. The problem of axiological foundation of human rights makes it possible to assume that value of the human dignity shall be viewed as a basis for their existence and as their content\textsuperscript{35}.

Defining the basic values within the article 2 of the TEU has to shape the community’s European identity (alongside the identity of the nation member states), that would lead towards emergence of a feeling of European solidarity. Human dignity and freedom can be listed among the fundamental principles of

\textsuperscript{33} Charter of Fundamental Rights, Preamble.

\textsuperscript{34} Zoll, 2016, 46-47.

\textsuperscript{35} Piechowiak, 1999, 370-371.
the EU. Freedom is a value that is worthy of being protected, as it makes it possible to expand and reinforce the sphere of freedom in an individual dimension. This is a principle of ownership, since it is based on recognition of autonomy and subjectivity of a human being through a reference to a concept of a person whose dignity is innate. The human dignity is ranked at the top within the EU axiology, as a value of a fundamental meaning\(^{36}\). The freedoms listed need to be perceived on the background formed by general axiology of a community of law that recognizes pluralism as a basic feature of a democratic society.

The regulation of Article 1 section 1 of the Charter of Fundamental Rights of the EU explicitly copies the Article 1 section 1 of the ECHR\(^ {37} \). Even though the Article 10 of the charter does not repeat the statement made in Article 9 section 2 of the ECHR that reads as follows: “Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.” Meanwhile, section 2 of the Article 10 of the charter has been added that reads as follows: “The right to conscientious objection is recognized, in accordance with the national laws governing the exercise of this right.”\(^ {38} \) The Secretariat of the Convention preparing the textual layer of the Charter suggests that the right mentioned in Article 10 section 1 of the Charter corresponds with the right guaranteed by Article 9 section 1 of the ECHR, and in line with Article 52 section 3 of the charter, it covers a similar scope and has a similar meaning. It was established *expressis verbis* that limitation of freedom of thought, conscience and religion shall correspond with the limitations resulting on the grounds of

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\(^{37}\) A similar content is included in Article 18 of the Universal Declaration of Human Rights, that reads as follows: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.” Universal Declaration of Human Rights, issued on Dec. 10th 1948. A similar content is contained in the Article 18, section 1 of the International Covenant on Civil and Political Rights, within which it is stipulated that: “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.” International Covenant on Civil and Political Rights, Dz. U. 1977, vol. 38, item 167.

\(^{38}\) R. McCrea, 2014, 298-300.
Article 9 section 2 of the ECHR. Furthermore, the clarification notes that the rights guaranteed by Article 10 section 2 of the Charter corresponds with the domestic constitutional traditions and evolution of national legislation within that regard39.

The provisions contained in the Charter of Fundamental Rights, as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms, particularly in the light of the case-law of the European Court of Human Rights and the Court of Justice, resolve numerous European problems within the scope of the right to religious freedom. Ascribing a legal character (Article 6 section TEU) to the Charter of Fundamental Rights, and the will of the EU to join the Convention for Protection of Human Rights and Fundamental Freedoms (Article 6 section 2 of the TEU) are even more relevant, in the light of the above40.

4. Conclusion

Freedom of religion seen as a European value shall be perceived on the background of the general axiology of the European community of law, taking into account pluralism as a basic feature of a democratic society. Recognition of the European values is compatible with ideological neutrality of the organisation. Adopting a system of values extends beyond the area of ideology, since the human rights are not dependent on the system of ideology. They are rather dependent on the reality of the human existence. And thus, the internal autonomy of an individual demands a guaranteed freedom of “thought, conscience and religion”, hence the absolute character of that freedom. Meanwhile the axiological foundation for freedom of creating religious communities is formed by the ideas of pluralism, democracy and peaceful dialogue.

References


Abstract
The main subject and purpose of the paper is to touch in a short way the question of defining, the development and functioning the term of Fundamental Rights, especially liberty, equality and dignity that are usually embodied in modern time mostly in constitutional acts. In paper is displayed the process of the forming of Fundamental Rights in tradition of political reflection and also some very important aspect of their functioning. The paper presents also some reflections concerning the tendencies in their contemporary development and understanding.

Keywords: fundamental rights, early modern times, liberty, equality.

1. Introduction
Question whether the Fundamental Rights arise from the normative solutions constituting a rule or they are the result of political thought which only have an influence for preparing the normative regulations, and saying precisely, the question whether the origin of the Fundamental Rights is a rule or in other way the Fundamental Rights are natural rights existing objective of the man finding only his normative reflection through the political thought – seems still to be opened. From a regular point of view for the Fundamental Rights are usually numbered first of all the liberty, equality and dignity (this right relatively newly). All these rights were also embodied in modern time mostly in constitutional acts.
2. A short historical view

However the process of rising of Fundamental Rights in constitutional acts was long and not to the end explicitly\(^1\). But otherwise it is also not true that the legal construction of Fundamental Rights is an invention of modern times. The rights and liberties of the individuals were already earlier regulated normative\(^2\). Very often these rights were appeared in privileges conferred on the individuals or groups of the people formally instituted only through the monarch’s grace. That however didn’t mean that these people who were beneficiaries of the privileges had not the direct influence for their forming. From one side it could come under the compulsion of a threat of rebellion as it was for example in England, 1215\(^3\). In another way the nation staying against the necessity of election of the ruler, formed the principles of the government, enclosing also to it the catalogue of rights and liberties of the people, which was submitted to accept to the ruler elected through their will and made it as condition of entering upon his rules (as it was for example in Polish Commonwealth, 1573-1576)\(^4\). To be sure the normative regulations of these rights had then yet an incomplete and still restricted character\(^5\). Nevertheless several rights (including especially liberty, but up to the certain degree equality) were in these old laws distinctly exposed as a collection of the rights of individuals distinguished from amongst the all laws cause their higher place in the hierarchy of rights accepted by the people and states. Anyway the old constitutional acts

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have been grounded the idea of community where the legal order was standing its legal and constitutional guarantee arising of quick-witted concluded consent⁶.

3. Political and doctrinal conception of Fundamental Rights in Modern Times

However this understanding of the order of Community appeared soon already in the past insufficient. The searching of the origins of the society and then also the state which became a main subject of political reflection was connected simultaneously with searching for the rights of individuals that was founding their reflection in political and legal thought assuming from the 16th Century a character of an explicit tendency⁷. It was based not yet on a quite precisely conception of political claims finding then only their normative expression but it was supported on a rational trial of approach to an idea of liberty, equality that were made in a philosophical way which should give them a real substantiation of their existence⁸.

The enact of these rights had to recall to one process of thinking showing the circumstances and course of events connected with their arising but also with the grounds on which they were founded. Because generally it was not able to formulate this process as an evolution it was repealed to the hypothetical constructions showing the mankind in the transition from a conjectural state of nature to the community state. It was presumed that liberty and equality in the state of nature stated only that people had then no obligations in the presence of other people and they were not forced to appreciate another authority of it and the only border of their natural rights was their strength, because in the state of nature existed any objective natural law, that could be discovered through the reason which ordered the man an adequate for him and the others behavior.

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The conception of leave the menaces placed in the state of nature was the idea in searching of a community. The construction of the community processed in the early modern political thought which resulted with a loss of natural liberty, was however artificial. It was based on a contract that was concluded together by all the people. The contract was the way to set the people free from the dangers for their life and property having a place in state of nature. In contract was containing the idea bringing the people cause their staying in the state of nature the contractual expression of the people’s relations, principles and the manners of their existence. But the breach of the contract even through one person can destroy the whole community and bring them back to the wild and not comfortable but dangerous relations like in state of nature. In other way the contract became the most important instrument but also the principle of peoples actions permitting them to regulate all the situations amongst the people and to make all what is possible of the subject of contract (as well as subject of each transaction). This subject of contracts could be everything, even all human’s goods like property, liberty, equality and to some degree the dignity belonging not only the separate man or groups of people but as well the whole nations. The only essence of every social contract was the will of contracting parties because the man according with the nature has no obligations and if he has some of obligations they can arise only from his free will. The idea of liberty and equality resulting from the contract, was penetrated however to a common circulation, forming in a longer process of development the base for a normative constructions, drawing the position of a peculiar laws of individuals that were raised to range of the Fundamental Rights. They were standing the foundation for the ideological and next constitutional order.

With the idea of Fundamental Rights are connected the questions whether their catalogue is already closed, normative fixed, constant and inviolable, but perhaps we are able to say that this catalogue can be still opened and is dependent on this what we just now recognize as important or we are ready to admit it as important in one of admissible for us convention? We can also agree with concept that if the Fundamental Rights find and have their origins in the nature but however they are also expressed in law, and otherwise if we admit that Fundamental Laws are existing objective, it doesn’t mean that they have always to be normative formulated. Another problem is the question whether the Fundamental Rights are ruling or governing the law system or just in contrary the law system defining this what can be called as the Fundamental Rights showing us out simultaneously what are their borders?

The constitutional settlement of Fundamental Rights is contemporary obvious. When however the liberty and equality, but also the dignity became a general passwords in modern conception of laws finding their normative expression in the most important constitutions all over the world, in fact their contemporary meaning, their form and ideological background have been undergone an explicit evolution, what happened through an ideological emancipation that was evoked to cut of the legal notions of liberty and equality from tradition. If the human individual appreciate himself for an Absolut, in this way all the relations with the others should be submitted their own utility and all these relations have been taken a contractual character, especially as long as it gives us the profits.

This what we understand now as the idea of Fundamental Rights is based on the contemporary interpretation. It verifies the traditionally view of liberty and equality as the values very deep anchored and closed connected with the vision of community. In this sense the new view of liberty and equality have no restrictions. It is an interpretation of the conception of liberty without borders and everything what is not agreed with the meaning of an absolute liberty is rejected. The concept of liberty is reduced to the elimination, how it is said, all exterior restrictions of men’s will. This individualistic conception based on a modern interpretation of Fundamental Rights finding the man as an individual and also separate person from others subjects whose relations with the other people should be defined and determined only through the contract. The contemporary comprehension of no limited liberty as one of the Fundamental Rights arising today to a conviction in fact based on a myth in which the identity of men’s existence is the vision of social contract. In this case of course is not important whether we believe that
the society was founded as the result of peoples contract. This view was a mental experiment, a hypothesis which should prove that all collective bodies have to be found on an agreement of the individuals. The idea of social contract in fact was a reversal of traditional conception, that man from the very beginning is born in community and it also means that the man didn't create the community himself if he only wants it as is said very often. The view that community can be made through the separate man according to his free will is a denial of fact that man is always built by the culture which is a common work made by many people generations where the freedom consists in forming of an own fate, but always as a common enterprise. This liberty arise from the conscious that the man exists only in a community having there also the right to participate in his governance. This true coming from the tradition is remained in contemporary conception of liberty as explicitly impaired and even, as we can say, it was taken up a trial to his annulment. We can of course reflect on the consequences of abandonment our own anthropology which have their ancient roots, what also results a rejection of the acceptance of order in which we were born, created and educated, where the ethics was its ground.

3. Conclusions

The considerations connected with the modern, contemporary understanding of Fundamental Rights, especially these concerning the liberty, equality and dignity, in fact following of their false perception, a depraved vision where the catalogue of Fundamental Rights seems still to many contemporary people as insufficient. Actually we have now to do with the tendencies to extension of the catalogue of Fundamental Rights what goes now in a quite unrestricted manner. If someone, or one group of people acknowledge that in their meaning something is, or something also ought to be a Fundamental Right, they will strive to realize this idea first as an ideological point and next they also will try to reach for it his normative guarantee. The point of departure of these arguments can be one of already accepted now Fundamental Rights that will be occurred as a base for expressing of a new view of personal subjective right. The substance of this claim will be the expression of an individual will or another adopted point of view which after a time will be tried to set a new sense of the right in social and political turnover for customizing the others to the new conception, and then to make it as a heart of new legal regulation. And it means that if we come out from the place
of such comprehension of Fundamental Right as unlimited liberty permitting us to respect nothing beyond our free will, we can come to the conclusion that doing without any restrictions we can decide about all our problems ourselves also in such rudimental questions whether we want to have a child when it happened or we can order to kill him at one’s leisure for it appears from our personal subjective right, saying this in other words, because it is our personal subjective right. And in this way again we return once more after all to the question connected with the borders and restrictions of our freedom and liberties.

The problems concerning the Fundamental Rights in fact are the questions of civilization identity where the most important problem is our cultural identification. The contract which was used in past in political reflection but is also used today in political debate and actions as an instrument to make the people free from the restrictions and inconveniences of the state of nature it has become today as so called tool for the future detachment from traditional anthropology of our culture. However the most intrinsic question is that if we will formulate the Fundamental Rights trying also to indicate their origins, at the same time we will be able to preserve for us the very real understanding of Fundamental Rights. When we do it this idea should not bring us to an excessive extrapolation of the comprehension of Fundamental Rights which can conduct us to the loss of their meaning and to detachment from this what is the real essence of these rights.

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CHAPTER II

Ethical Principles and Fundamental Rights
Abstract
Gender violence or domestic violence, understood as that which is exercised against women for the mere fact of being women, is the result of a social and political structure that puts them in unequal conditions as opposed to men, and is currently one of the main concerns of States and international organizations. This article intends to analyze the jurisprudence of the different Courts and International Organizations specialized in Human Rights, when judging applications of individuals against Member States regarding acts of violence against women. The aim of the article is a mere approach to the case-law as a more comprehensive study would require longer extension. Specifically, case-law of the European Court of Human Rights and Inter-American Court of Human Rights will be studied. In addition, the article addresses the Views of the Committee of the United Nations on the Elimination of All Forms of Discrimination against Women. Within the range of human rights that may be involved in issues of gender violence, this article will focus on the right to life, effective judicial protection and the prohibition of torture and inhuman and degrading treatment.

Keywords: human rights, gender violence, violence against women, domestic violence, effective judicial protection.

1. Introduction
The purpose of this article is to relate the crimes committed by men against women for the mere fact of being women, with some of the human rights that may be involved in such processes. Among the judgments that address...
this type of crime, we will focus exclusively on international organizations on human rights as they unify doctrine for a group of Member States and have a broader and more global view of the problem. In particular, I will analyze certain relevant cases from the European Court of Human Rights, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights and the Committee on the Elimination of Discrimination against Women of the United Nations.

The focus of the article is based on the analysis of specific cases to develop the content of each right in order to make reading more dynamic and pedagogical.

2. Right to life

A) EUROPEAN COURT OF HUMAN RIGHTS

The right to life is enshrined in Article 2 of the European Convention on Human Rights, hereinafter the CHR, in the following terms:

“1. The right of every person to life is protected by law. No one may be intentionally deprived of his or her life, except in execution of a sentence that imposes the capital punishment dictated by a court to the offender of a crime for which the law establishes that penalty.

2. Death will not be considered as inflicted in violation of this article when it occurs as a result of a recourse to force that is absolutely necessary:
   a) in defense of a person against unlawful aggression;
   b) to arrest a person according to law or to prevent the escape of a prisoner or legally detained person;
   c) to repress, in accordance with the law, a revolt or insurrection”.

The Court in charge of assessing the violations of the rights enshrined in said Convention, the European Court of Human Rights, hereinafter ECHR, has delivered different judgments analyzing whether the Member State in question has violated this right in relation to an act of violence of gender.

Regarding this right, the ECHR has declared that Article 2 obliges Member States to take appropriate initiatives to safeguard the life of those within their jurisdiction\(^1\), and among their duties, their first is to include

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1 LCB v. Great Britain of June 9, 1998
sanctions in the penal laws that deter the commission of these crimes and which must be supported by the appropriate machinery for their prevention and punishment. It also implies that States must adopt preventive measures with respect to those at risk; however the Court recognizes the difficulties that modern societies entail, the unpredictable nature of the human being and the limited resources available. Thus, it can not be understood that Article 2 of the Convention imposes on States an impossible or disproportionate burden, nor can all alleged risk to the life entitle to preventive measures.

As more significant, we can mention:

a) The Branko Tomašić case and others v. Croatia, of January 15, 2009

What is really relevant in this case is the importance of curative measures or multidisciplinary treatments that are often associated with custodial sentences for gender-biased crimes, or imposed as a condition to suspend the custodial sentence. This type of measure is given a “minor” consideration in comparison with incarceration to which they are associated, however, their purpose is essential, both at the level of crime prevention and rehabilitation of the offender. Let’s not forget that criminal law acts at the last stage of the cycle of violence, once the three phases of the same have occurred and that prevention has a fundamental role to avoid the repetition of these crimes. Well, these treatments, which are usually associated with the prison sentence, have a purpose of special prevention and therefore they must be duly regulated and executed by the different States; something that occasionally does not happen as in the tragic case that we will analyze next.

The applicants before the ECHR are the parents and siblings of the deceased, MT. This young woman started a relationship with MM in 2004, they went to live together in the home of her family, and they had

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2 Cycle discovered by the psychologist LEONORE WALKER, in “The battered woman syndrome” of 1979. This cycle begins with a first phase of tension, accumulation with anger over anything and aggressive reactions to any discomfort, a second phase of burst of tension that accumulated in the previous phase and is discharged in an acute incident to punish the “inadequate” behaviour of the woman, and the third of “honeymoon” or repentance, in which the tension diminishes, he apologizes, threatens to self-harm, tells her that if she leaves him it will destroy his life, etc.

3 Special crime prevention seeks to prevent those who have already committed it from doing so again.
a daughter in 2005. From then on, MM began to argue with family members, and often threatened his partner MT, until finally MM left the house in July 2005.

On January 4, 2006 the Social Services of the city issued a report addressed to the Police stating, among other things, that MM had gone to its headquarters on day 2nd and had affirmed in front of everyone that he had a bomb and that he would throw it at his ex-wife and daughter. MT filed a complaint to the Prosecutor’s Office against MM on the 5th, alleging that on several occasions, starting in July 2005, (the date on which he left the family home, where she and her daughter were still living), he had threatened to kill her and her daughter with a bomb if she did not take him back. According to the complaint, MM repeated these threats over the phone and through SMS messages. On January 19, 2006, MT repeated the same threat to police officers.

MT was arrested on February 3, 2006 by order of the municipal court, and was examined by a psychiatrist who reported that MT suffered from a profound personality disorder, etiologically linked to a malfunction of the brain from birth, and to the highly unfavourable pedagogical circumstances of his childhood. Therefore, due to this disorder, his reactions to problematic situations were inadequate and had a pathological defence mechanism. He was not considered totally unaccountable at the time of the events but the psychiatrist considered it highly probable that he would repeat the same or similar crimes in the future, for which he recommended compulsory psychiatric treatment, with a predominantly psychotherapeutic approach in order to develop the ability to resolve difficult situations of daily life in a more constructive way.

He was finally sentenced on March 15, 2006 for continued threats, to five months in prison and a security measure for compulsory psychiatric treatment during incarceration, and subsequent, if necessary, in the terms recommended by the psychiatrist. However, the court of second instance reduced the security measure to the strict prison time.

MM served his sentence and was released on July 3, 2006. On August 15 he shot and killed MT, his daughter who was one year old, and then committed suicide.

In this case, the ECHR studies whether Croatia complied with its positive obligations to prevent the deaths of MT and her daughter, as well as other
issues that are not going to be analyzed in this article. After the investigation, it was ascertained that the psychiatric treatment that the court imposed, actually consisted in sessions of conversations between MM and the prison staff, the governor and the doctor of the same, and that instead of five months, it lasted at most two months and five days. It was also discovered that MM was a very introverted person who did not want to cooperate in the treatment.

This Court assessed that the State had acted proportionately with the facts because MM was sentenced to unconditional imprisonment and without prison benefits, however, despite the fact that he said repeatedly that he had a bomb, and therefore could well have other weapons, no order to register his home or vehicle was granted by the authorities. This, added to the negligent compliance with the security measure imposed by the court, (which was not provided by any psychiatrist, nor lasted the established time), and that there was no mental evaluation prior to the release of MM causes a violation of the right to life on the part of Croatia.

b) The Durmaz case v. Turkey, dated November 13, 2014

In this case, the ECHR makes an important reflection on the investigation and prosecution of crimes against women from a gender perspective. This perspective has been defined as an instrument of analysis and action, of analysis insofar as it explains the phenomenon as a manifestation of the historically unequal power relations between men and women; in which violence is used to maintain relations of domination, and an instrument of action as a necessary means to change the traditional conception of the role of women in society⁴.

Investigating and prosecuting this type of crime from this point of view is doubly beneficial because it impacts and benefits the whole of society, by lifting obstacles and discrimination, establishing more equitable conditions for the participation of half of society, and by relieving men of many gender assumptions that are also a burden and an injustice to them. In the words of Inés Alberdi⁵ “The gender perspective helps to understand the lives of women while not considering them as a necessary consequence of their nature.”

⁵ Alberdi, Inés. The meaning of gender in the Social Sciences.
The facts that were the subject of the Durmaz case against Turkey are the following: Mrs. Gülperi O., a nurse in a University Hospital in the city of Izmir, was married to OO, who worked in the same hospital’s pharmacy. The applicant before the ECHR is the mother of Mrs Gülperi. According to her, the fights between the couple were frequent and in them OO used violence against her.

On July 18, 2005 OO took his wife Gülperi O., conscious but drowsy, to the emergency department of the Hospital in which both worked and told doctors and nurses that his wife had taken an overdose of two medications called “Prent” and “Muscoril”. One hour and 45 minutes after OO took his wife to the hospital, a policeman talked to him, and he said they had had a fight that day, she had attacked him and he had beaten her. He left home and when he returned, his wife was not feeling well so he took her to the hospital. The statement lasted five minutes, and immediately afterwards, the policeman called the Prosecutor and the Prosecutor instructed him to receive a statement from both parties, OO and Gülperi.

Mrs. Gülperi’s pulse began to fall, resuscitation maneuvers were unsuccessful, and she died four and a half hours after being admitted to the Hospital. Her husband OO did not attend her funeral.

On July 20, the Police issued a report on the investigation carried out in relation to this death maintaining that it was a suicide due to drug overdose. The post-mortem study of the corpse, from which samples had been taken for analysis, had not yet been completed.

Mrs. Gülperi’s father filed a complaint with the prosecutor’s office on July 22, accusing OO of the death of his daughter, referring to a history of mistreatment, the intention of the latter to divorce, and a previous conversation that the deceased had had with her sister that same day that ran in the most absolute normality. In the framework of the investigation initiated as a result of this complaint, the Prosecutor discovered that Gülperi had been hospitalized twice for suspicious head injuries.

The final autopsy, after receiving the tests, issued on January 30, 2006, determined that no medicines, drugs or alcohol were found in the deceased’s body and that the patient had advanced edema in the lungs. The cause of death, according to the report, was acute alveolar swelling and intra-alveolar hemorrhage in the lungs. The forensic report ruled out the presence of external substances and in particular, the medicines “Prent” and “Muscoril”.
On February 28, 2006, the Prosecutor closed the investigation on the grounds that the death was due to pulmonary complications resulting from drug intoxication. Mrs. Gülperi’s mother appealed this decision on the grounds that OO acknowledged that he had beaten her daughter that day, that the Prosecutor’s statement contradicted the forensic report and that the couple’s home was not registered, which, according to her statements, was a complete mess, and even had broken windows.

At the request of the ECHR, three forensic experts from the Institute of Forensic Medicine verified that the samples taken from the body of the deceased did not match any of the substances known and included in the database, so they could conclude that she did not die as a result of any of them, without being able to totally rule out that she could have ingested another toxic substance not included in the database. These same forensics disagreed with the report of January 30, 2006, and consider that the cause of Mrs. Gülperi’s death could not be known.

The application before the ECHR is limited only to the effectiveness of the investigation carried out by the authorities in relation to the death of her daughter. The Court notes, as it usually does in these cases, that the obligation to protect the right to life enshrined in Article 2 of the Convention is not an investigation of results but of means, so that not every investigation must conclude successfully or according to the version of the facts of the applicant.

The ECHR notes that “neither the Prosecutor nor the investigating police officers kept an open mind during the investigation as to the cause of the applicant’s daughter’s death”, since both accepted from the beginning the version of events that OO gave them, even when no proof corroborated it. Likewise, it regrets that the prosecution did not take any other line of investigation apart from the alleged drug intake, even after the post-mortem and toxicological results, which completely dismantled the version given by OO. In the opinion of the Court, the point of departure of the Prosecutor should have been to question OO, because due to his false statements he caused the doctors to waste precious time to find out the real cause of her injuries and, therefore, to save her life. OO was never questioned by the prosecution, which for the ECHR was “crucial”. The Court notes that judgments such as those indicated follow the pattern of other investigations made in Turkey regarding domestic violence generally suffered by women, and about which there is a general and discriminatory judicial passivity that
creates a climate prone to the commission of these crimes. Consequently, the ECHR considered that the authorities did not duly investigate the death of Gülper O. and thereby violated Article 2 in its procedural aspect.

c) The Opuz case v. Turkey, of June 9, 2009

One of the most shocking cases is the Opuz case against Turkey, which ended with the death of Nahide Opuz’s mother at the hands of Nahide’s husband, Mr. HO. What is striking about the case, is the long period of time during which both Nahide (the applicant) and her mother, were ill-treated by their husbands, before the lack of action on behalf of the police and judicial authorities, in charge of responding to their repeated complaints. Nahide was married to HO, while Nahide’s mother was married to the father of HO. Nahide and HO had three children, all of them minors at the time of the events.

The complaints of the applicant and her mother are filed between April 10, 1995 and November 19, 2001, in a total of six. The first one is addressed to the prosecutor, by both women claiming that both HO and his father had threatened to kill and beaten them. They were examined by a doctor who observed several injuries coinciding with the reported facts. The prosecutor finally filed an indictment against HO and referred the matter to the court, which closed it for the injuries as both women withdrew the complaint. HO was acquitted of the threats.

The second complaint is initiated by a severe beating that HO gave the applicant. She was examined by a doctor who reported that the injuries were sufficient to endanger her life. The prosecutor accused HO and he was put into pretrial custody. However, at the hearing, held a month and three days after the events, the Court provisionally released HO until the trial considering the nature of the crime, and the fact that the applicant had already been healed of her injuries. A month later the applicant withdrew the complaint and said they had reconciled. Another month later, the matter was closed because the complaint was a requirement to prosecute the crime and it had been withdrawn.

The third complaint is filed by the applicant, her mother and her sister, alleging that they had a fight with HO in the course of which he took a knife and HO, the applicant and her mother were injured. The prosecutor did not accuse anyone having understood that there was not enough evidence to indicate that HO participated in the attack with the knife and that the
injuries and the damages could be paid civilly. Thereafter the applicant went to live with her mother.

The fourth complaint starts because HO hit the applicant and her mother with his car. The applicant’s mother had injuries that put her life in danger. HO told the police that he only wanted to take them somewhere, they did not want to, they kept walking and threw themselves on top of his car. The version of the applicant’s mother was that HO told them to get in the car or he would kill them, they started running, HO hit Gülperi with the car and she fell to the ground, her mother went to lift her up, the moment in which he backed into the applicant’s mother. HO remained in pretrial custody and was released two months later, until the trial was held. The applicant initiated the divorce proceedings in that interim, which she later abandoned due to threats and resumed living with HO. He was accused of attempted murder and stated in the trial that it was an accident, something that the applicant and her mother corroborated, so he was acquitted for the injuries to the applicant, but not for the injuries sustained by his mother-in-law, since they had been more serious. The sentence was three months in prison and a fine. The prison time was replaced by a fine.

The fifth complaint is made by the applicant’s mother, upon learning from one of her grandchildren that her daughter had been stabbed by her husband. The mother, with the help of the neighbours put the applicant in a taxi and took her to a hospital, where seven stab wounds were found, none of them, with risk to her life. HO surrendered to the police claiming they argued because she spent too much time with her mother, then she attacked him with a fork, and he lost control, took the knife for peeling the fruit and stabbed her. He explained that he did so because she is bigger than him and therefore he had to fight back. After that statement at the police station he was released. The mother filed a complaint with the Prosecutor regarding the continued mistreatment and that the fact that they withdrew the allegations was due to threats and pressure from HO. Finally, the act of stabbing was punished with a fine, to be paid in eight instalments.

The sixth complaint was lodged by the applicant for threats, which was closed due to lack of evidence.

Finally the mother filed a complaint with the Office of the Prosecutor against HO and his father due to continued threats to her and her daughter. HO denied everything, alleging that her mother-in-law had interfered in her
marriage, influenced her daughter to lead an immoral life and threatened him. HO was charged with death threats, and an investigation was initiated.

Three months later, when mother and daughter lived together again, they decided to move out of town. Once the furniture was loaded on the moving truck, the applicant’s mother asked the driver to let her sit in the passenger seat, which he agreed to. When they were on their way, a taxi pulled up in front of them and signalled to them. The driver of the moving truck stopped, thinking that they wanted to ask him an address, HO got out of the taxi, opened the passenger door, shouted “where are you taking the furniture?”, and shot her dead.

An intentional homicide investigation was initiated, and the accused claimed to have killed his mother-in-law for having incited his wife to lead an immoral life, and to leave him, taking his children, in short, in defence of his and his children’s honour. He was sentenced to life imprisonment for murder and illegal possession of weapons. However, considering that he killed her as a result of a previous provocation on the part of his mother-in-law (according to him when he asked about the furniture, she told him an expletive, and that she was going to take his wife and sell her), and his good behaviour during the trial, he was replaced with life imprisonment for fifteen years and ten months in prison and a fine of 180 Turkish lira. Since he was already in pretrial detention and the sentence had been appealed, he was released. As of the date of issuance of the ECHR judgment, the appeal had still not been resolved.

The ECHR analyzed whether the authorities had deployed the necessary diligence to prevent violence against the applicant and her mother and concluded that given the background described above, the authorities could have foreseen a lethal attack by HO. The Court notes that it could not have been known that things gone differently if the authorities had acted differently, but points out that the failure to adopt measures had a real chance of changing the outcome or mitigating the damage and that is enough to consider the State responsible. The ECHR adds that the non-uniform treatment that Member States give to the fact of the withdrawal of complaints of gender-based violence is indeed a problem, but that regardless of domestic legislation they have to take into account certain factors such as the seriousness of the offence, if the injuries are physical or psychological, if a weapon was used, if it was intentional, if there were minors involved, or the background of the couple, among other factors.
The applicant’s mother, in the Court’s opinion, became a target for HO, while her children became victims of psychological abuse after having witnessed so many episodes of violence. However, the local authorities did not take any of this into account and decided to close the criminal proceedings that she initiated without ascertaining the origin of the withdrawal of the complaints, and that these occurred whenever HO was released. On the contrary, they had given exclusive weight to their consideration as a “family matter” or a “private matter”. In the Court’s opinion, the authorities could have adopted protective measures on their own initiative, as provided by Turkish legislation, or adopt a restraining order, which they never did.

B) INTER-AMERICAN COURT OF HUMAN RIGHTS

The American Convention on Human Rights, signed in Costa Rica in 1969, also recognizes this right in Article 4, which, as far as we are concerned here, provides the following:

1. Everyone has the right to have their life respected. This right will be protected by law and, in general, from the moment of conception. No one can be deprived of life arbitrarily.

The Court competent to prosecute the violations committed against the rights recognized in said Convention is the Inter-American Court of Human Rights, who is also seated in Costa Rica.

One of the most relevant and innovative judgments of this body, when judging Member States for violating the right to life in relation to a crime of gender violence, is the case of Esmeralda Herrera Monreal, Laura Berenice Ramos Monárrez and Claudia Ivette González (cotton field) against Mexico, of November 16, 2009.

What is relevant, as innovative, in this case is the approach given by the Court in relation to the way in which the State of Mexico should repair the damage for having violated the right to life of the young Esmeralda, Laura Benerice and Claudia Ivette. With this judgement, the Court implemented the individualization of compensation and, for the first time, endorsed the notion of reparation based on gender with a transforming vocation.

This sentence judged Mexico for the performance of its police and judicial system, in relation to the disappearance and homicide of the aforementioned women in Ciudad Juárez, and included their relatives as victims in the
proceeding against the State of Mexico for the harassment that they suffered on the part of the authorities and other people due to their demand for justice before the disappearance and murder of the young women, including the theft of documents and equipment that they used in a civil organization created as a result of these events “Integración de Madres por Juárez”. These families were also subjected to defamation and harassment by local media. Such was the situation that the Monárrez family requested and obtained asylum in the United States of America.

Said judgment considers the text itself as a form of reparation *per se*, insofar as international law recognizes that the declaratory judgment of the responsibility of a State is a way of repairing non-pecuniary damages, in the same way that it is the mothers of the dead girls were heard. To this we must add that Provision two of the judgment imposes on the State the obligation to conduct the investigation again taking into consideration these facts from a gender perspective, undertaking specific research lines regarding sexual violence as established in the Belém do Pará Convention, and the behaviour patterns of the area.

Another form of reparation that includes this innovative judgement is the obligation imposed on the State to investigate within a reasonable time the officials accused of irregularities in the investigation, and those who harassed the relatives of the three victims. As a symbolic remedy, it imposed on the State the publication of the judgment in the Official Gazette of the Federation, in a newspaper of wide national circulation and in a newspaper of wide circulation in the state of Chihuahua; perform a public act of recognition of international responsibility and in honour of the memory of the three murdered women, and erect a monument in memory of women victims of homicide due to gender in Ciudad Juarez.

The reparations for the damage inflicted by this type of crime requires particular measures of compensation, in order to satisfy the specific needs of each woman, guiding the reparations to subvert, instead of reforming, the patterns of structural subordination, hierarchies based on gender, etc. which are the causes of the violence suffered by women. Hence the importance of this case, since as an International Court, it laid the foundations for the different judicial bodies of its Member States to apply this doctrine in their respective judgments.
3. Prohibition of torture and inhuman or degrading treatment

Article 3 of the CHR provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”

According to the ECHR, the abuse must be of sufficient severity to fall within the scope of Article 3 of the Convention. The assessment of said minimum or sufficient severity is relative and will always depend on the circumstances of the case, such as the nature and context, its duration, the physical and mental effects, and in some cases, the sex, age and health status of the victim. This article requires the Member States to develop effective legal norms to deter the commission of crimes against personal integrity, backed by a system to prevent, suppress and punish violations of such norms. The function of the Court will never be to determine whether the Member State acted in accordance with its domestic law, since they have the freedom to choose what type of measures to adopt, but, as has been said, an efficient penal system has been developed to prevent and punish mistreatment.

a) Case Valiulienė v. Lithuania on March 26, 2013

The applicant before the ECHR is Ms Loreta Valiulienė, who lodged a complaint with a Court in February 2001, so that an investigation could be initiated at her own request, not by the Public Prosecutor’s Office, for having been assaulted by her sentimental partner JHL on days 3, 4, 7 and 29 of January, as well as on February 4, 2001. Ms Valiulienė provided information from five witnesses who were neighbours to be heard in the proceedings, asked the police for evidence of the violence she had suffered, and provided medical reports on the injuries, coinciding with the dates with the facts reported.

The police, in response to her request, suggested that she should report the facts before the Court. However, in subsequent information the police reported that they went to her home on January 7 and February 4, 2001, and on those occasions the applicant had told them that she had been insulted and threatened, but not physically assaulted.

The investigation was initiated by the Office of the Prosecutor as a matter of urgency. The applicant told the investigator that at the beginning of 2001 she decided to end the relationship with JHL and he insulted and threatened to beat her.

6 Case Đorđević v. Croatia No. 41526/2010
and “fix her face”. From there the threats were continuous but she never reported them because the agents told her to initiate civil rather than criminal proceedings.

In February 2002 JHL was charged with continued abuse. The investigation was closed and reopened several times because he had failed to appear and was absconded. Each time the investigation was closed, the applicant appealed the decision. In December 2002, the investigator definitively closed the case on the grounds that there was not enough evidence to prove that JHL had beaten the applicant. The latter appealed, and the Prosecutor quashed the decision because the pretrial investigation had not been thorough enough.

In January 2003, the matter was again closed by the investigator, a decision that was upheld by the Prosecutor and quashed by a Senior Prosecutor, who ordered the investigation reopened.

The investigator who had so far handled the case was challenged because of doubts about his impartiality, and in June 2005 the prosecutor considered that there was sufficient evidence that JHL had strangled, beaten and kicked Mrs. Loreta on five separate occasions within the span of a month, in the family home. However, the investigation was closed due to a legal reform that came into effect in 2003, which established that minor injuries, as was the case, had to be sustained only by the victim before a Court and that in this case there was no public interest for the Prosecutor's Office to sustain the accusation.

After a long pilgrimage of appeals, the prosecution became time-barred in accordance with the new legislation both to be accused privately and publicly, and the case was definitively closed, without possibility of further appeal on February 8, 2007.

The ECHR in this judgment highlights, and assesses, the in-depth study on all types of violence against women, of the United Nations, in 2006, which reports that 32.7% of Lithuanian women will suffer physical violence by part of their partners throughout their life. The judgment also assesses the result of the survey conducted by the United Nations Division for Gender Equality and Women's Empowerment that concluded that 42% of Lithuanian women with a partner, between 18 and 74 years old, had been physically assaulted or threatened by their partners.

In the same way, the Court notes that the level of seriousness of the violence exercised against women makes it fall under the aforementioned Article 3, which requires the States to implement an adequate legal mechanism to dissuade crimes against personal integrity, backed by a system of prevention, suppression and
punishment of violations of these legal provisions. It insists once again that it is not its function to review whether prosecutors and judges correctly applied the national law, but rather the responsibility of the State under the Convention.

In this case, the Court points out that Mrs. Valiulienė filed a complaint one week after the last attack, describing in detail each incident, giving names and other information from five witnesses. Therefore, the Court considers that the Lithuanian authorities had sufficient information in their hands to suspect that a crime had been committed and were therefore obliged to act in accordance with that complaint. The Court notes that the State acted with due diligence when the matter was in the hands of the judge, but once it was referred to the Prosecutor’s Office, it was closed twice for lack of evidence, decisions that were persistently appealed by the applicant.

In addition, the Prosecutor decided to refer the matter to private prosecution, refusing to initiate a public accusation, two years after the legislative reform, which returned the applicant to “square one”, that is, to the same situation in which she was four years before. As anticipated, due to all the procedural delays and difficulties indicated, the facts reported, especially serious, went unpunished as a result of becoming time-barred due to the failures committed by the national authorities, despite all the attempts of the applicant to avoid it.

In short, the ECHR considers that Lithuania has violated Article 3 of the Convention, since the purpose of imposing criminal sanctions is to dissuade the offender from causing harm, however, if the evidence is not set by a competent court (the matter never came to leave the prosecution) it can hardly reach this aim.

b) The Opuz case v. Turkey of June 9, 2009

This case, previously mentioned, also analyzes whether there was a violation of Article 3 of the Convention in the conduct of the national authorities by not adopting protective measures to safeguard the applicant. The Court notes that the Turkish authorities did not remain totally passive before the facts reported by the applicant, since after each complaint, she was seen by the doctor, criminal proceedings were initiated, the accused was imprisoned and indicted. However, none of these measures prevented him from continuing to mistreat the applicant. In the opinion of the Court, despite all this, the local authorities did not show due diligence to prevent HO’s recurrent attacks on
his wife, since he committed them without hindrance and with impunity, (citing the Maria da Penha case against Brazil of the Inter-American Court) shown especially impacted by the fact that he was imposed a very low fine, and on top to pay in instalments for stabbing his wife seven times.

The Court considers that in addition to a lack of effectiveness, there was a certain degree of tolerance on behalf of the authorities, showing great concern that a case like this is not isolated in that country, where the authorities continue to be inactive, and that, in addition, only after the applicant had lodged the claim with the ECHR, had measures been taken for her protection, (distributing his photo and fingerprints to the police stations in the area for his arrest if he approached her) since HO was at liberty.

In short, the ECHR considered that Turkey also violated Article 3 of the Convention because its authorities did not take measures to dissuade HO from mistreating his wife.


The applicants in this case are Mrs. ES and her children. Mrs. ES left, together with her children, the family home in which they lived with her husband Mr. S. in March 2001. The purpose of this change of address was to protect their children from physical and sexual abuse by their father. In April of the same year, the wife filed for divorce in the Courts, and in June provisional custody of the three children was granted to the mother. The final divorce was granted in May 2002 and the mother maintained custody of the children.

Simultaneously, in May 2001 the wife reported the husband for ill-treatment of her and her children, and sexual abuse towards one of her daughters, she also requested an interim measure for the husband and father of the children to leave the family home, of which, until then, were both co-tenants. In that request, she provided an expert report that indicated that she and her children had been mistreated by the father and considered it absolutely necessary to separate them from him. Said request was dismissed in June 2001 when the Judge considered that since they were both co-tenants, the Court lacked the authority to restrict the use of the dwelling. This decision was upheld, deferring this decision to the divorce decree, and also the court of second instance understood that what the applicant intended was a disproportionate burden for the husband. As a result, the applicants left the house and the children changed schools.
Finally, the husband was sentenced in June 2003 for mistreatment, assault and sexual abuse to four years in prison. A month later, in July, the Constitutional Court considered that the ordinary jurisdiction had not adequately protected the applicants from the ill-treatment.

In January 2003 there was a change in legislation and in July of that same year the applicant repeated the request for a provisional measure that prevented the husband from entering the family home, which in this case was granted for a period of 15 days, and ordered the wife to fill an eviction request within thirty days of the notification of the provisional measure. This lawsuit was filed and was granted, the wife was since then, the sole tenant of the apartment.

Regarding the merits of the case, the ECHR assesses that the State admitted that its national authorities failed to take adequate measures to protect the applicants from domestic violence, and therefore that they violated Article 3 of the Convention. In addition to this failure, admitted by the State, the Court asks in the judgment, why, if the divorce ended in May 2002, the resolution of the lease was not granted until December 2004. The Court understands that given the seriousness and nature of the applicant’s allegations, she and her children needed immediate protection, which was not granted, on the understanding that for this reason there was also a violation of Article 3 of the Convention.

d) BS case v. Spain, of July 24, 2012

This case analyzes violence against women, but not in the family framework, like the previous ones, but from the point of view of police action.

a’) first complaint: The applicant, Mrs. BS, worked as a prostitute in July 2005, on a highway, when two policemen asked her for identification and told her to leave the place, which she did.

According to the complainant, a week later, after returning to the same place where she had been identified, the same policemen went towards her and she tried to flee. The agents caught her, beat her and again asked her for identification. According to her, this assault was seen by several witnesses who could be identified, and who heard how the police insulted her with expressions like “get out of here, you black whore.” Once the applicant identified herself to the agents, they let her go.

A week later, the same agents stopped her, and one of them hit her with a truncheon. That day the applicant filed a complaint with the Courts and
went to the Hospital. The Court asked the Police Headquarters for a report regarding what had happened. The report said that police patrols are common in that area due to numerous complaints of theft or injury by residents, which damages the image of the area. According to the report, the applicant tried to avoid being identified, and the agents neither humiliated her nor used physical force. On the identity of the agents, the report says that they were the members of the “Rayo 98” and “Rayo 93” patrols, while the applicant said it was the “Luna 10” patrol. In October 2010 the matter was closed for lack of evidence. The applicant appealed, and the second instance partially quashed the decision and ordered the file to continue as a misdemeanour. During this procedure, the applicant requested to identify the agents through a two-way mirror, which was rejected due to the lack of reliability of said method given the time elapsed and that the agents had worn helmets all the time.

The fact was judged in March 2008 and the officers were acquitted on the basis that the police report denied that there had been an incident when they spoke with the applicant, and that the medical report did not specify the date of its issuance, therefore it could not be established with certainty that the cause of the injuries was police action. This decision was upheld in second instance, and said body added that the two-way mirror had not added anything to the evidence already existing in the procedure.

b) second complaint: the same month of July 2005 the applicant says that she was stopped and interrogated by two policemen, who hit her with their truncheon, went to the emergency room in a health centre, where they found abdominal pain and bruises. The applicant reported these facts and that she was pointed out due to the fact that she is black, since there were other white prostitutes that the police did not address. She also states that she was later taken to a police station where she had refused to sign a document for which she admitted resisting the agents. She requested the removal of the agent who had hit her and the addition of this complaint to the previous one. Neither of the two requests was admitted.

The court initiated an investigation in which the applicant requested that the officers on duty on the day of the events be identified and in addition the identity of all those who had patrolled the area to identify them through a two-way mirror. Her request was dismissed. The court requested a report from the police headquarters, which said that the applicant admitted to working as a prostitute in the area, and that this activity had caused many
complaints from neighbours. As for the identity of the agents, it said that no intervention was recorded on that day. The file was provisionally closed. The applicant appealed in first and second instance, both appeals were dismissed. It was also dismissed by the Constitutional Court.

The ECHR considers that when a person makes a credible claim about having suffered police violence, Article 3 of the Convention, together with Article 1, requires an effective official investigation, capable of identifying and punishing the perpetrator, otherwise it leaves the prohibition of torture without efficacy in practice. In this specific case, the Court takes into consideration that the complaints were investigated, but concludes that this investigation was not effective, since the applicant made some requests that were not superfluous such as the two-way mirror or the statements of the witnesses that were dismissed. The judges limited themselves to requesting information from the Police Station. These requests, in the opinion of the Court, were not superfluous to identify those responsible. In fact, in one of the trials that took place, the defendants could not be identified by the applicant. Therefore the action of the Spanish authorities in this case was not considered sufficient to satisfy the requirements of Article 3 of the Convention.

4. Right to effective judicial protection

The right to a fair and impartial trial, as well as the right to have the facts prosecuted within a reasonable time, is part of the right to effective judicial protection.

Independence and impartiality, despite being concepts that might seem synonymous, are not synonymous in the eyes of the ECHR, although it itself has recognized that in certain cases they have to be examined together.

7 Mentioning other cases of the same Court, such as: Krastanov v.Bulgaria , no.50222/99, § 48, September 30, 2004; Çamdereli v.Turkey, no.28433/02, §§ 28-29, July 17, 2008; and Vladimir Romanov v.Russia, no. 41461/02, §§ 79 and 81, July 24, 2008

8 Case of Sacilor-Lormines v. France No. 65411/01 and Oleksandr Volkov v. Ukraine No. 21722/11. In the case of Tahir Durán v. Turkey, of January 29, 2004, the ECHR assesses both concepts, independence and impartiality jointly, considering this right infringed in a case of attack against the unit of the country in which the State Security Court which judged the applicant was composed of three career judges of which one was military and depended on the military judiciary. The ECHR understood that the complainant’s fears that the Security Court should be unduly guided by considerations unrelated to the nature of the case were objectively justified and therefore considered that this right was violated.
Impartiality has been defined by the ECHR as “absence of prejudice and predisposition”. There are two steps, a first subjective step in which it is necessary to analyze whether the judge has a personal conviction or a particular behaviour that suggests that he or she is predisposed to a decision (in which impartiality is presumed unless proof to the contrary), and a second objective step in which it is necessary to pay attention to the composition of the court itself, the existence of hierarchical or other relationships with the parties and the intervention of judges in other phases of the same process in order to be able to verify if the judge in question offers sufficient guarantees to exclude any legitimate doubt in this regard. The ECHR considers that it is necessary to study each specific case to decide if a certain link or relationship indicates a lack of impartiality and emphasizes that at this point even appearances are important, so that not only justice has to be done, but it also has to be seen that justice is done, because what is at stake is the confidence that the court awakens in the democratic society.

In regards to what should be considered as “reasonable time”, the ECHR deals, on the one hand, with the circumstances of the case, its complexity, number of parties, etc., and on the other hand, it addresses the procedural attitude of the applicant. It considers that the duration of the procedure may have been extended for reasons not attributable to the Administration of Justice. The ECHR considers the process as a whole and not the specific delay that a part of the procedure may have had.

In the cases that are presented below, the International Organizations considered that the States violated these rights of the victims of gender violence:

9 Case of Wettstein v. Switzerland No. 33958/96 and Micallef v. Malta No. 17056/06
10 Case of Le Compte, Van Leuven and De Meyer v. Belgium of June 23, 1981 and Micallef v. Malta No. 17056/06
11 In the Spanish case, Sentences such as the TSJ of Cantabria, Social Section No. 244/04, have declared that this right is violated when one of the Magistrates of the room is an associate professor at the defendant University in the procedure. Said judgment expressly invoked the case of the ECHR Pescador Valero case against Spain of June 17, 2003 in which the exact same thing happened and the Court declared that the applicant’s fears that the case was not addressed with the required impartiality were legitimate.
12 Case of Morel against France No. 34130/96, Luka against Romania No. 34197/02 of July 21, 2009 and Pescador Valero against Spain 62435/00
14 Case of Cominglersoll SA v. Portugal No. 35382/97
15 Case Demeter v. Germany of May 29, 1986
a) Case of Maria da Penha Maia Fernandes v. Brazil of the Inter-American Commission on Human Rights\textsuperscript{16}.

This Commission, located in Washington, together with the Inter-American Court of Human Rights forms the Inter-American System for the Protection of Human Rights. The Commission is not a court, so it does not issue judgments, but reports. For what concerns us here, the Commission’s function is to stimulate awareness of Human Rights in the Member States, issuing reports or recommendations so that the States that violate them take measures to respect these rights. In case these recommendations are not addressed, the Commission should take the case to the Court.

Article 8 of the American Convention on Human Rights provides:

1. Every person has the right to be heard, with due guarantees and within a reasonable time, by a competent, independent and impartial judge or court, established previously by law, in the substantiation of any criminal accusation against him, or the determination of their rights and obligations of a civil, labour, fiscal or any other nature. [...]  

Article 25 states:

1. Everyone has the right to a simple and prompt recourse or any other effective recourse before the competent judges or courts, to protect them against acts that violate their fundamental rights recognized by the Constitution, the law or this Convention, even when such violation is committed by persons acting in the exercise of their official functions.

The complainant of this case, Mrs. Maria da Penha, pharmaceutical, was sleeping at home when in May 1983 her husband Heredia Viveiros, economist, shot her with a revolver. As a result of these events, Mrs. Maia suffers from irreversible paraplegia and other physical and psychological traumas. The husband reported these facts claiming to have been the victim of an attempted burglary and aggression by thieves who had escaped. However, statements were collected that indicated that the husband intended to kill her and the police found a shotgun in the house, which he had denied possessing.

Two weeks later, Mrs. Maia returned to her home from the hospital, and while in recovery in June 1983, her husband tried to electrocute her while she was taking a bath. After this incident, Mrs. Maia decides to separate judicially.

\textsuperscript{16} Report 54/01, case 12.051 of April 16, 2001. In the debate and resolution of the case, the Brazilian member did not participate, according to the regulations of the Commission itself.
The Prosecutor reported the husband in September 1984. The judgment was delivered on May 4, 1991, for which he was sentenced to ten years in prison. That same day, his defence lodged an appeal that was untimely in accordance with Brazilian law. The Court of Second Instance considered that it was indeed untimely but annulled the sentence for the reason alleged by the defence, which is to say that there had been flaws in the questions addressed to the jury.

A second trial was held on March 15, 1996, in which Mr. Viveiros was sentenced to ten years and six months in prison. Again the Court admitted an extemporaneous appeal. As of the date of issuance of the report, this appeal had not yet been resolved.

During the more than fifteen years that elapsed between the commission of the events and the second conviction, Heredia Viveiros was released. The Commission notes that 17 years after the initiation of the investigation, the process remains open and a final conviction has not been reached, nor have the consequences of the crime been repaired, which places the case in a possible impunity for the statute of limitations of the crime and the impossibility of compensation, which in any case would be late. This impunity is decried by the Commission as a violation of the Convention of Belem do Pará, and implies a tolerance by the organs of the State towards domestic violence as a “systematic pattern”, which “perpetuates the roots and psychological, social and historical factors that maintain and fuel violence against women.”

The Inter-American Court considers that in order to assess whether a trial has been of a reasonable duration, the complexity of the matter, the procedural activity of the interested party and the conduct of the judicial authorities must be evaluated. In the opinion of the Commission, since the investigation ended in 1984, there was strong evidence to complete the trial and yet the procedural activity was postponed continuously. In conclusion, the Commission understands that Brazil has refrained from acting to ensure the victim’s exercise of his rights.

b) Case of Karen Tayag Vertido v. the Philippines from the Committee on the Elimination of Discrimination against Women of the United Nations, September 22, 2010

The mission of the Committee is to monitor the implementation of the Convention on the Elimination of All Forms of Discrimination against Women\textsuperscript{17} by the States that have ratified it.

\textsuperscript{17} Adopted by the General Assembly in its resolution 34/180 of December 18, 1979
In this case, the Committee, considered that gender prejudices affected the right of women to a fair and impartial trial, since they were stereotyped ideas that society in general has, and judges as a whole, those that led to the acquittal of the accused of raping Mrs. Vertido.

Among others, the legal precepts considered to be violated by the Committee’s decision were article 2.c) of the Convention that refers to the right to effective judicial protection:

**Article 2**

*The States Parties condemn discrimination against women in all its forms, agree to follow, by all appropriate means and without delay, a policy aimed at eliminating discrimination against women and, to that end, commit themselves to:*

*...*

*c) Establish the legal protection of the rights of women on an equal basis with those of men and guarantee, through national or competent courts and other public institutions, the effective protection of women against all acts of discrimination;*

Mrs. Vertido, now unemployed, was Executive Director of the Chamber of Commerce and Industry of Davao, and denounced having been raped by the President of the Chamber, who at the time of the events (March 29, 1996) was 60 years old. As stated in the complaint, after a meeting of the Chamber, the defendant took her and another colleague by car to their homes. At one point they were alone in the car and the defendant, JBC did not let her out, taking her to a motel. Mrs. Vertido, although she believed that the defendant was carrying a gun, refused to leave the car and JBC took her inside by dragging her on the floor to the motel (the garage was private) Mrs. Vertido searched for another exit inside the room but only found the bathroom where she locked herself. She left the bathroom when she stopped hearing noise and thought she was alone, in order to find a phone or leave. When she left the bathroom, she found JBC almost naked. He turned and walked towards her, and she thought he was going to get his gun. JBC pushed Mrs. Vertido on the bed and immobilized her with the weight of his body which barely let her breathe and she lost consciousness. When she recovered the defendant was raping her, she tried to get rid of him by scratching him and asking him to stop. He told her that he would take care of her and that he knew many people who could help her to advance in her career. In the end, Mrs. Vertido took him off by pulling his hair, dressed and took advantage of the fact that he was still naked, went out to the street, tried to open the car but could not. Finally she agreed to let him take her home.
A few hours later Mrs. Vertido was subjected to a forensic medical examination, which included the cause of the examination (alleged rape) and the name of the alleged perpetrator, and in the following 48 hours she reported JBC for rape. The Office of the Prosecutor initially dismissed the complaint because there was no probable cause and that decision was quashed following the appeal filed by Mrs. Vertido.

The prosecution filed a complaint in November 1996 and on the same day issued a warrant for the arrest of the accused, who was arrested more than 80 days later. The procedure was in the phase of first instance until 2005.

After the trial, the sentence that acquitted the defendant did so for the following reasons:

a) “It is easy to make an accusation of rape, it is difficult to prove it, but it is more difficult for the accused, even if innocent, to deny it” (principles derived from the jurisprudence of the Philippine Supreme Court),

b) in the crimes of rape, in which usually only two people intervene, the testimony of the complainant must be assessed with the utmost caution. In this case, given that the victim reacted with resistance to the aggressor in one moment and submission in another, it was considered not credible. In addition, the court considered it incredible that a man over sixty was able to reach ejaculation when the victim is resisting, so it questions the testimony of the complainant. Another fact that leads the court to have doubts about the responsibility of the defendant is that the victim did not try to escape despite the fact that the victim was not “a shy woman who could easily be frightened”

c) the evidence from the prosecution must be enough to disprove the presumption of innocence and justify the sentence, and can not find strength in the weakness of the evidence from the defence.

These arguments were considered as gender stereotypes by the Committee, and considered that the judgement was based on myths, such as that educated women can not be raped, or that a woman is considered as consenting to a sexual relationship when she does not resist the physical force used by the aggressor.

For all these reasons, the Committee understood that the application of these stereotypes had violated Mrs. Vertido’s right to a fair and impartial trial. In particular, the statement that “an accusation of rape can be made easily” reflects in itself a gender bias. In addition, although the Court in its judgment
recognizes that not all people react in the same way to emotional stress and that the fact that the victim does not try to escape does not mean that there has been no rape, did not apply any of these principles in the judgment when assessing the credibility of the victim. According to the Committee, the Court expected a rational and ideal response from a woman in a situation of rape, and as an example of it, indicates a paragraph of the sentence that is transcribed below:

Why, then, did she not try to get out of the car at the moment when the defendant should have stopped to avoid crashing into the wall when she grabbed the steering wheel? Why did not she get out of the car or scream for help when he should have slowed down before entering the motel garage? When she went to the bathroom, why did not she stay there and lock the door? Why did not she cry for help when she heard the accused talking to someone else? Why did not she run out of the motel garage when she says she could run out of the room because the defendant was still in bed, NUDE MASTURBATING\(^{18}\)? Why did she agree to ride again in the defendant’s car AFTER he had allegedly raped her, when he did not threaten her or use force to force her to do so?

Stereotypes are beliefs or generalized perceptions about the characteristics that are mentally associated with a group of people, and generate an expectation of behaviour\(^{19}\). Many of these stereotypes have a “core of truth” but they are still a generalization, sometimes exaggerated and can have both positive and negative effects. In the case of stereotypes based on gender, these can produce inaction or deficient action on behalf of the authorities, for example, inadequate treatment by the police, irregularities in investigations, disqualifications towards the victims, judicial passivity, unjustified delay etc, which prolongs the feeling of vulnerability and insecurity of the victim, producing so-called secondary victimization.

In short, these prejudices limit the exercise of human rights when they influence the performance of judges. That is why awareness of the use of these preconceived ideas and the consequent development of good practices to combat them is essential to advance towards their elimination, even though it is not a simple task since they are concepts so internalized that they influence us all unconsciously.

\(^{18}\) Capital letters are used by the Court in the text of the Judgment.

\(^{19}\) ONOFRE DE ALENCAR, EMANUELA CARDOSO. Women and gender stereotypes in the jurisprudence of the Inter-American Court of Human Rights. Eunomia Magazine in Culture of legality. No. 9, October 2015
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– Opuz case v. Turkey, dated 9 June 2009
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Abstract
One of the fundamental rights is the right to respect for private and family life. This right is connected, among other things, with the issue of the bonds of the people who are closest to us. Family ties are therefore a fundamental value. Protecting these ties can take different legal forms and tools. Satisfactory protection of these ties is an important challenge for contemporary legislators. This applies, inter alia, to civil law mechanisms, which should provide, among other things, for compensation for the infringement of family ties. Recently, however, more and more damage of this kind has been caused and more doubts have been raised. They concern, for example, whether, where, as a result of a tort or delict, a victim suffers serious damage to his health and the victim's vegetative condition results in such damage, provision should be made in the legal system for a mechanism of compensation for such damage to persons closest to the victim. The authors look at these issues from the perspective of two different legal systems, with different experiences in this area, discussing, among others, the latest achievements of national legislators and seeking answers to the question of the common future of law in Europe in this area.

Keywords: fundamental rights, human rights, right to respect for private and family life, non-material damages, compensation.
1. Family ties play an important role in human life. They are of great importance for society, and therefore they are an interest subject to legal protection. This protection refers to constitutional regulations, which guarantee protection and care from the State and provide assistance to families experiencing problems and difficulties. This is what happens in Italian law, Polish law or other legal systems. This is a solution typical of modern countries.

However, the law usually does not define the term of family. So there are different concepts of family – under different laws in different countries. For example, in the science of sociology there is a differentiation between the so-called small family and big family. A small family includes a man and a woman who are in marital relation with each other, as well as their minor children. A large family, according to this approach, consists of several small families (grandparents, parents, children), who are connected by close relatives relations. The described criteria for division are not the only ones. Also other concepts can be found. For example, in Polish juridical science, it is more likely to encounter the concept of family in a narrower sense (small family). They include spouses and children living in the same household. The creation of such a family takes place as a result of marriage. However, this is a rather traditional approach, because today social relations are much more complicated than even several years ago. Marriages are less and less often concluded, and relationships between the same-sex partners are more popular.

The law must react to this changing reality and generally it has. One of the areas that must keep up with the times is civil law, where legal relations and claims related thereto differ significantly from those from several dozen or several hundred years ago, when the solutions for this area were designed in the applicable acts (civil codes). This is particularly visible in the context of tort liability, where the

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infringement of interests protected by law, as well as the types of those interests, have undergone significant evolution\textsuperscript{7}.

The subject of this paper will therefore be an area combining family ties and tort liability. Over the years, in individual legal systems, personal interest in the form of the right to respect for private and family life has evolved\textsuperscript{8}. As is known, this right is connected with the ties of close relatives, which should be subject to legal protection, also by means of civil law mechanisms. In this respect, the issue of responsibility for non-pecuniary damage\textsuperscript{9}, deserves special attention even in the context of the claims of the close relatives of a victim, especially when the victim is in the vegetative state\textsuperscript{10}. In recent times, this issue raised serious doubts both in Italian law and Polish law\textsuperscript{11}. This is why the attempt to present it in a broader forum appeared.

2. Further considerations should start with the reminder that the family symbolizes an organized social unit, but the law does not provide it with legal personality. Subjects of legal relationships existing between individual family members are the members themselves and not the family as an organized whole. Various duties of family members, imposed by law, such as cohabitation, mutual help and cooperation for the good of the family (including raising and caring for children), require not only cooperation of family members, but also State support. The State should shape the legal system in such a way that the family would have


appropriate conditions to perform its natural functions and that the family ties would strengthen and not weaken\textsuperscript{12}.

Acceptance of this view, as one may think, underlies the constitutional solutions that are supposed to protect the social functions provided for the family. This is why in individual constitutions there are regulations concerning family protection and marriage, which are to enable protection of family ties, including by means of ordinary legislation. This is evident in Polish law, where the legislator in Articles 18 and 71 of the Constitution imposes an obligation to protect family ties and introduces as a constitutional rule the obligation to protect marriage and parenthood. In turn, according to Article 47 of the Polish constitution, everyone has the right to protect their private and family lives, honor and good name and to decide about their personal lives\textsuperscript{13}. Similarly, the Italian constitutional legislator, in Articles 29, 30 and 31 of the Italian constitution, indicates \textit{inter alia} that it is the State’s duty to support the families and to perform related obligations. The same regulations also contain other European constitutions.

Therefore, the legislator imposes on public authorities the duty to take into account in his social and economic policy the value of the interest of the family. This assistance must be provided to the extent that it helps to protect the durability of family ties. The detailed tools (instruments) of protection related to this are determined by statutory acts. Such an act can be, among other provisions of civil law, which should specify civil law mechanisms of values determined by the Basic Law. Therefore, civil law must take into account constitutional guidelines and implement them\textsuperscript{14}.

In the area of torts, and therefore liability related to causing damage are particularly important. If civil law does not provide compensation for the damage caused, then it may turn out that the legal protection of the values provided for in the constitution will only be illusory. However, the question arises whether this compensation should apply to people that are close relative of the injured, or under what conditions we can talk about their own damage and the liability of the perpetrator of the damage for its remedy? Can the basis for such liability of the

\textsuperscript{12} The trends in State support for families in Europe are very interesting. On the short presentation of the evolution of this support see: Anne Helene Gauthier, “Historical Trends in State Support for Families in Europe”, \textit{Children and Youth Review}, Vol. 21, No. 11-12, 1999, pp. 937-965.


perpetrator of the damage be sought in the protective regulations effective in this respect the right to respect for private and family life.

3. Legal systems generally provide for the responsibility for so-called material damage and moral injury. The essence of this responsibility is considered a pillar of law. Its various kinds are joined by one common feature, i.e. satisfaction of the damage to the property of a specific person, to whom the damage was caused. This first responsibility, as is known, is usually referred to as the loss consisting in the reduction of the injurer's property (*damnum emergens*) and the lost benefits associated with the lost opportunity to increase the value of the property if the liability was not incurred (*lucrum cessans*)\(^\text{15}\). In turn, the form of damage here is moral injury, where there is a non-pecuniary damage, related to, among others, negative psychological experiences of the person, pain or suffering. While in the first case, legal systems generally provide for specific and exhaustive regulation, the issue of moral injury and related liability for many years has raised significant controversies. Recently, this also applies to the issues covered by the subject of this statement.

It should be noted that in legal acts having a harmonizing meaning at European level, this problem is also not neglected. For example, the Article 2:202 (1) of the DCFR states that non-economic loss caused to a natural person as a result of another's personal injury or death is legally relevant damage if at the time of injury that person is in a particularly close personal relationship to the injured person. The same is true of another regulation aimed at approximating the laws of the Member States. The third sentence of the PETL Article 10:301 (1) states that non-pecuniary damage can also be the subject of compensation for persons having a close relationship with a victim suffering a fatal or very serious non-fatal injury\(^\text{16}\). Therefore, it is not the case that the problem discussed in this paper concerns only two selected legal systems. It is rather a problem for the whole of Europe. This is not surprising since the right to respect for private and family life is included in the European Convention on Human Rights (Article 8)\(^\text{17}\).


It should be remembered in this respect that the issues of family ties are an area that in civil law is subject to legal protection by means of structures characteristic of the protection of personal rights. Despite various doubts and objections, which in the discussion on this subject appeared in particular legal systems, both in Italian law and Polish law, it can be said today that the family relationship is considered to be a personal right, which opens the way for connected claims, by family members. However, the views in this respect are not uniform in many aspects there are various controversies.

What is interesting, both in Italy and in Poland, is that one of the most common facts that opens the way to the analysis of a case through the prism of infringement of the personal rights of relatives are traffic accidents. Most often, in those cases, there was a discrepancy in interpretation, and thus various judicial decisions (applying the law to similar facts differently). Different points of view in the basic areas, are a highly unsatisfying state.

4. In Polish law, the issue of liability for infringement of personal rights and compensation for the moral injury caused in their infringement is connected with the provisions of the Civil Code\(^\text{18}\). It should be recalled that Polish law distinguishes property damage from non-pecuniary damage and, in this respect, it provides for different solutions. A claim for non-pecuniary damage may only occur in the cases provided for in the Act (enumerated).

It should be emphasized that according to Article 23 of the Polish Civil Code, personal interests of a human being, in particular health, freedom, honor, freedom of conscience, surname or pseudonym, image, secret of correspondence, inviolability of a flat, scientific, artistic, inventive and rationalizing creativity, remain protected under civil law regardless of protection provided for in other regulations. According to Article 24 of the Polish Civil Code, the one whose personal interest is threatened by someone else’s action, may demand the abandonment of this action, unless it is not unlawful. In the event of a breach, he may also request that the person who committed the infringement, completes the actions necessary to remove its consequences, in particular to make a declaration of appropriate content and in an appropriate form. Under the rules provided for in the Code, he may also demand monetary compensation or payment of an appropriate sum of money for

\[^{18}\text{Act of 23 April 1964, Civil code, Journal of Laws, item 459, 2017.}\]
the indicated social purpose. In turn, the issues of payment of compensation in this case are determined by the provision of Article 448 of the Polish Civil Code, where the act stipulates that in case of personal rights violation, the court may adjudicate to whom the personal interest has been violated, the appropriate sum for financial compensation for the moral injury suffered or upon its demand to adjudicate the appropriate sum to the social purpose indicated thereby.

On such normative background, doubts appeared about the content of personal interest in the form of family ties. Recently, they mainly concerned whether the adjudication of redress is possible only when the tie between family members was completely broken (as a result of death), or even if the injured survived the event causing the damage (generally it was about a road accident), but suffered serious injuries resulting in a real break or significant limitation of the existing family ties.

Until recently, Polish case law has been divergent in this matter. For example, the Court of Appeals in Warsaw in April 2013 indicated that, for example, love for family members, although it is in the formula of values approved in society, is not in principle considered as a personal interest. Similarly, according to the Court of Appeal in Wrocław, according to the ruling of January 2015, in such cases, personal rights are infringed in the form of bodily injury and health disorder, but it is the personal interest of the injured, not his close relatives. Also, the Supreme Court in its judgment of January 2017 took a similar position, accepting, inter alia, the view that since the life of the closest family member was not lost as a result of an event causing damage, the family tie was preserved, even if the effect of the event is much more sacrifice and effort in maintaining family relations. This view was also shared by the Court of Appeal in Krakow in the judgment of January 2017. In turn, different opinions were held by other courts. For example, the Gdańsk Court of Appeal in the judgment of November 2015 raised that the right to have a family in which its members establish strong, lasting and deep emotional, social and economic relationships should not be disturbed, and the negative interference in this sphere is a violation personal interest. The Warsaw Court of Appeal in its judgment of January 2016 also emphasized that it was possible to infringe personal rights in the form of the right to undisturbed life

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20 I Aca 1143/12.
21 I CSK 444/16.
22 I Aca 1103/16.
in a full family, even though the family ties were not completely broken because no death occurred, but another event resulting in the lack of real opportunity to build, care and shape correct family relationships. This position was also taken by the Supreme Court in the February 2017 judgment, when it upheld the judgment adjudicating compensation to the victim close to the victim in a car accident, as a result of which he remained in a vegetative state. It should be noted that this last view of the Supreme Court expressed the opinion shaping in Polish law, in the jurisprudence of common courts, that family ties between close relatives, if permanent and real, are personal interests, and their infringement may justify the adjudication of redress. The ultimate expression of forming opinions in Poland were the resolutions of the Supreme Court, adopted on March 27, 2018, having the force of legal rules, stating that the court may award compensation for the moral injury suffered by the closest relatives of the injured party who suffered severe and permanent damage to health as a result of an unlawful act. Therefore, it seems that in Poland the trend of recognising the legitimacy of claims of this type has won. It is believed that the events resulting in the vegetative state of the victim limit the family tie, lead to situations similar to the breaking of this relationship. They exclude the possibility of building and caring for family ties, they are unique and therefore may be the basis for payment of cash benefits for the closest relatives.

At the same time, it should be added that in Polish law, the amount of compensation depends on the overall circumstances of the case. By determining its amount, the court determines the objective criteria of assessing the extent of the moral injury suffered by the injured person in a given case. The main premises defining its amount are: the type, nature, duration of physical suffering and negative mental experiences, their intensity, irreversibility of consequences, the degree of permanence of disability, associated loss of prospects for the future, or the accompanying feeling of helplessness caused by the need to take care of others and a sense of social unsuitability. An important circumstance individualizing in the assessment of the courts is also the age of the victim. Loss of the possibility of achieving the intended goals, deriving pleasure from life affects especially young people.

23 V CSK 291/16
24 III CZP 36/17, III CZP 60/17, III CZP 69/17.
25 See judgement of Appeal Court in Kraków, I Aca 1076/17.
5. Also in Italian law, over the years, there has been an evolution of views in the discussed area.

The basis for liability for such damage was sought in the Italian Constitution. It has to be explained that the Italian Constitution guarantees full protection for the fundamental rights under Articles 2, 29, 30 and 31, namely the moral integrity, marriage, family solidarity and relationship. On the basis of these provisions, it has been said that each member of the family has the right to a fair compensation for the loss of parental consortium. Initially, this concerned the death of a family member but wasn’t so obvious due to the fact that Italian law is imprecise. This is why in the last few decades the changes of the compensation rules have been mostly the result of the jurisprudence.

It has to be mentioned that compensation for damages, under the Italian Civil Code, according to the Article 1223, includes both the *damnum emergens*, as well as the *lucrum cessans*. Italian law is also aware of the responsibility for non-pecuniary damages. However, the Italian statutory rules do not provide for a definition of non-pecuniary damages. It only provides for a right of compensation under Article 2059 of the Italian Civil Code.26 This is why the legal issues related to the identification and quantification of non-pecuniary damages, suffered both by the first-degree victim of the wrongful act and possibly transferable (for some authors, but not for the United Sections of the Court of Cassation) to the heirs, under the profile *jure hereditatis*, as well as directly by the relatives with an autonomous right, *jure proprio*, are more complex27.

Damage and liability issues have given rise to a number of problems. One of the conception that has played an important role in the perception of many issues in this area was based on the notion of *validity*. This term was used to describe the psychosomatic efficiency relating to the implementation of every human activity. According to this view, every anatomical-functional loss reducing *validity* is to be considered compensable damage. The physiological value of the various functions with the reference to the importance in the implementation of the social and vegetative life, which also include the efficiency of the individual in his or her

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family and social environment should be considered. This view was discussed in Italy for many years. Of course, there were supporters and opponents of this view.

Finally the idea of non-pecuniary damages were recognized in the views of the courts. The Supreme Court of Cassation with five important decisions of May 2003, and the Constitutional Court, with the decision of July 2003, as well as the four decisions of the Supreme Court of Cassation of November 2008, have interpreted Article 2059 of the Italian Civil Code in context for the compensation for the non-pecuniary damages also to the victim’s relatives.

In the opinion of judges and some scholars, every loss or alteration of a parental consortium should be compensated, as long as it creates a particular type of damage to the relatives, called by some authors the “existential damage”. This type of damage is characterised by a serious disruption of living habits, with a change in the way in which people interact with each other, both inside and outside the family. The Court of Cassation, with a nearly consolidated jurisprudence, considered that compensation of this type of damage should be also covered to people unrelated to the family unit in the strict sense, for example to the

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28 The conception of validity was exposed by Cesare Gerin, a professor of Forensic Medicine in Bari, later a professor in Rome. See: La valutazione medico-legale del danno alla persona in responsabilità civile, Atti delle Giornale Medico-Legali Triestine 1952.
32 It should be underlined that 10 years ago, with the already mentioned decisions no. 26972-26975/2008, the United Sections established that art. 2059 of the civil code should be interpreted, avowing any subdivision in different subcategories of damages, because non-pecuniary loss is an unitary category (and it is not admitted any overcompensation or duplications in the compensation). In the Court of Cassation’s opinion, Italian judges might refer to different types of damages in describing the loss, but this must not lead to an assessment of different heads of damages. This restrictive approach was connected to the circumstance that the birth of the existential damage produced some «excesses» in the application of the category at issue by the lower Courts. Examples of case law evidencing the granting of an award of non-pecuniary damages according to the theory of the “existential damages” include compensation for the harm suffered as a consequence of an erroneous haircut, the loss of a pet, a delayed flight take-off on Christmas Day, the break of the shoeheel of a bride’s shoe, receiving illegitimate fines and so on. These are all examples of decisions by the first instance judges, Giudici di Pace (Justice of the Peace), who created the so called «bagatelle» damages (very small damages).
33 For the recognition of the damages suffered by relatives not belonging to the nuclear family of the de cuius, the Supreme College has however sometimes requested the demonstration of cohabitation. See, for example, the sentences No. 10823 of 11 May 2007; No. 16018 of 7 July 2010; No. 1410 of 21 January 2011; and especially No. 4253 of 16 March 2012. This restrictive position seems, however, passed.
The Right to Respect for Private and Family Life and Compensation for the Non-Materia... legally separated spouse\textsuperscript{34}, to the \textit{more uxorio} partner\textsuperscript{35} even if \textit{same-sex}\textsuperscript{36}. Recently, interesting views have also emerged on the compensation of damage that can be caused by the disruption of family ties, in terms of contacts with a person in a vegetative state. The Italian Council of State, with the sentence of June 2017\textsuperscript{37}, and the Regional Administrative Court in Lombardia, with the decision of April 2016\textsuperscript{38}, established that the damage consisting in infringement of the right to respect for private and family life may consist not only in the interruption of the emotional link with the victim on account of an event giving rise to a vegetative condition but also, interestingly, in the late, delayed interruption of artificially maintained parenthood. The case, which was of interest to the jurisprudence, was about the order to keep a child alive artificially, which was done against the will of her relatives. The existing legal regulations in Lombardy Region resulted in unjustified maintenance of the vegetative state, which, in the court’s opinion, resulted in illegal continuation of the situation in which relatives of a person in a vegetative state could not be relieved of this situation, which was not in accordance with their will. For this reason, the father of the girl in a vegetative state has been considered fully entitled to the right to obtain \textit{iure hereditatis} compensation for non-pecuniary damage suffered by the daughter to have been artificially kept alive against his will (one might say from the “delayed death”). Moreover, the court has also considered compensable - \textit{iure proprio} – another peculiar category of non-patrimonial damage, which could be defined as the damage for the “delayed interruption of a parental relationship” which become

\textsuperscript{34} In the sentence no. 21230/2016, the Court of Cassation underlined that in this case it must be proved that «the unlawful act has caused that pain and those moral sufferings that are usually accompanied by the death of a loved one, even though it is necessary for this purpose to demonstrate that, despite the separation, there was still a particularly intense emotional bond». In the decision it is also emphasized that «the status of separate - connecting to its non-definitiveness and to the possible resumption of family communion ... – in theory is not incompatible with the position of secondary injured».


\textsuperscript{36} Moreover, the art. 1, paragraph 49, of the law n. 76 of 20 May 2016, establishing the civil partnerships between persons of the same sex, now establishes clearly that “in the event of the death of the de facto partner, resulting from the unlawful act of a third party, in identifying the damage compensable to the surviving party same criteria identified for compensation for damage to the surviving spouse.

\textsuperscript{37} Sentence no. 3058/2017.

\textsuperscript{38} Decision no. 650/2016.
artificial and unwanted\textsuperscript{39}. According to the administrative judges, the patient was denied a series of fundamental rights: first, that of self-determination regarding the choice not to receive treatment, that “is a right to absolute freedom, effective \textit{erga omnes}”, and then also to the effectiveness of judicial protection\textsuperscript{40}.

It must be underlined that recently the Italian Court of Cassation has admitted the compensation of the damage for the loss of the parental relationship also in favor of the subject born after the death of the relative (and therefore deprived, ex ante, of the parent’s affection)\textsuperscript{41}.

Worthy of note is, for example, sentence no. 9700 of 3 May 2011, which explicitly recognized the right to compensation of damage for the non-constitution (due to an unlawful act attributable to a third party), of “an emotional and educational relationship that the law protects because it is normally a factor which permits a more balanced personality formation”.

According to the Supreme College there is “no problem concerning the juridical subjectivity of the conceived, since it is not necessary to configure it to affirm the right of the born to reparation and not, on the other hand, that subjectivity can be deduced from the fact that the fetus is the object of protection by the law».

6. This shows that the problem of compensation for non-material damage suffered in family cases is varied and complex. However, the future of this area

\textsuperscript{39} For example, the Regione Calabria “the health structures are delegated to take care of patients’ diagnostic and care” and in these structures “basic care must be ensured that consists of nutrition, hydration and care of the people”. And therefore, the medical staff could not proceed with the suspension of artificial hydration and nutrition, because they would have failed in their professional and service obligations.

\textsuperscript{40} The Consiglio di Stato redefined the amount due iure successionis to the father (the sole heir of Eluana), “because the total sum recognized does not seem adequate to the gravity of the injury caused, and appears illogical, even when compared with the sum recognized by way of compensation for damages in favor of Mr. Englaro, as if the damage done to him was greater than that suffered by his daughter”. And it recognizes to the interested party a sum equal to € 100,000 (and not € 30,000, as required by the first instance judge).

is not clear. It seems difficult, and not necessarily possible, to harmonise the principles of liability in this area, given the different values and interests that are protected in other countries. Although the unification of private law in Europe is a tempting problem and a major challenge, observing the case-law of individual European countries by the courts may be the way forward.

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Abstract
The right to fair trial is one of the most litigated human rights enshrined in the European Convention. The right to legal assistance is an important element of the fair trial. It is recognized, that when it comes to criminal proceedings, the support of a qualified lawyer is imperative to ensure the fairness of the trial and the effective enjoyment of procedural rights by a person suspected or accused of committing a crime. The European Court repeatedly pointed out that without any real access to legal counsel suspects and accused are extremely susceptible to being coerced into giving confessions and into waiving their rights without understanding the consequences. The article focused on the relevant European Court’s case law and highlighted practical challenges associated with the implementation of this right in criminal proceeding, in particularly the issue of the effectiveness of legal assistance. It has always been the position of the Court that the state is not accountable for the actions of an officially appointed lawyer. In Court’s opinion, the conduct of the defense is essentially a matter between the defendant and his counsel. Active state intervention is seen rather as an exception tolerated only in special circumstances. Nevertheless, without diminishing the importance of the independence of lawyers, it should not be seen as more valuable than providing qualified and practical legal assistance to a person suspected or accused of a crime. The effective legal assistance in the pre-trial stage, especially in the critical ones, should be considered as an integral part of the fair trial. When assessing whether adequate legal assistance was provided in specific case, the formal approach is inadmissible. The effectiveness of legal assistance should not be presume by the mere fact, that a person suspected or accused was “equipped” with a counsel whether retained or appointed. The question of the quality of legal assistance should not be seen predominantly as an internal matter of the lawyer’s professional association. There should be independent supervision specific to redress ineffective assistance by the counsel.

Keywords: European Court of Human Rights, fair trial, criminal proceedings, defense counsel, right to legal assistance, effectiveness.
1. Introduction

Among the rights provided by the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the right to a fair trial occupies a special place. It is recognized, that the violation of the right to a fair trial may result in a breach of other rights guaranteed by the Convention and its Protocols. “The idea of a fair trial is central to human rights doctrine, not only as a right in itself, but because without this one right, all others are at risk; if the state is unfairly advantaged in the trial process, it cannot be prevented in the courts from abusing all other rights” (Robertson, 2004, p. 80). This is one of the main reasons, why the European Court’s case law concerning art. 6 of the Convention is so extensive. It is regrettable that the right to legal assistance in criminal proceedings, while being an essential part of the right to fair trial, relatively rare becomes the subject of Court’s review. The reason may perhaps be found in the opinion expressed by the Court, that the state generally can’t be accountable for the actions of a lawyer and the conduct of the defense is essentially a matter between the defendant and his counsel. That fact is even more regrettable since the Convention doesn’t specify the requirements that legal assistance is expected to meet. The question, whether the right to legal assistance is a formal or a substantive one became a subject of the continuous scientific discussion.

The article adopt a twofold approach to the research topic. First, the initial exploration as to the European Court’s case law on the right to legal assistance. This analysis will emphasize the essence of the right to legal assistance, its role and purpose and also shows permissible restrictions. Second, it has to be proven, why effective legal assistance during pre-trial criminal proceedings must be considered an essential part of fair trial. This author addresses the issue using the case example.

2. The right to a fair trial

Since it was established in 1959 the Court decided on the examination of around 798,600 applications and has delivered more than 20,600 judgments. Around 40% of those judgements concerned three member States of the Council of Europe: Turkey (3,386), Italy (2,382) and the Russian Federation (2,253). Nearly 40% of the violations found by the Court have concerned art. 6 of the Convention, whether on account of the fairness (17.21 %) or the length (20.70 %) of the proceedings. In 2017 28,05 % of all violations found by the Court were

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1 Hereinafter referred to as the Convention.
related to the provisions of art. 6 of the Convention. Even those European countries, which has a relatively good reputation when it comes to the sphere of human rights, have “a number of judgments” on their account stating infringements of art. 6 of the Convention. For example, in the case of Denmark, which undoubtedly stands out among Western European countries, if we take into consideration the level of human rights protection (Christoffersen and others, 2014, p. 139-164, 313-319), the Court found 15 violations, nine of which were violations of art. 6 of the Convention. In eight cases, the dispute concerned the length of the proceedings, and in one case related to violation of the right to a fair trial. Against Italy, where the Convention was in force since 1955, a total of 2135 complaints were filed in 1959-2016. The European Court issued 1791 judgments in which it stated at least one violation of the rights guaranteed by the Convention. In 1480 cases, the Court found violations concerned art. 6 of the Convention, among others the violation of the rules of conduct within a reasonable time and principles of enforceability of judgments.

3. The right to legal assistance

The right to legal assistance is considered as an important guarantee of the right to a fair trial (art. 6 of the Convention) and the prohibition of torture (art. 3 of the Convention), although it was never regarded as the fundamental characteristic of the fair trial. The right to legal assistance is not even directly named in the Convention. The very term appears in official factsheets and in comments. In accordance with art. 6 § 3 (c) of the Convention, everyone charged with a criminal offence has “the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”. So formally the Convention recognizes the right of an accused to defend himself or in other words the accused’s right to be present at the trial so that he can participate in the criminal proceedings instituted against him. The right of the accused to participate in the criminal trial also includes the right to receive legal assistance and to follow the proceedings effectively (Schabas, 2015, p. 310; Cassim, 2005, p. 285).

The Convention itself provides very little information on the practical aspects of fair trial and the right to legal assistance in particular. The Member States have been permitted a wide discretion concerning the formalities of trial procedure, “provided the trials themselves are deemed to fulfil Convention requirements” (Greer, 2006, p. 251). The Court’s extensive case law concerning art. 6 of the Convention makes up
for the absence of specific legal provisions. Over the last decades the European Court addressed a range of important questions related to the right to legal assistance more often in connection with free legal aids: when the obligation to provide legal assistance arose, whether the state authorities can restrict the right of a person suspected or accused of a crime to legal counsel and for how long the deprivation of professional legal help can last. The Court has been addressing these issues in its judgements in Salduz v. Turkey from 2008, Ibrahim and others v. United Kingdom from 2016, Simeonov v. Bulgaria from 2017. On 20 December 2017, the Grand Chamber has heard the case of Beuze v. Belgium, which probably will have wide-ranging effects on the right to early access to a lawyer in criminal cases across Europe.

It should be emphasized that although an accused is entitled to be defended by counsel, the Court has not viewed this as absolute, but rather subject to limitations. In Salduz case the European Court concluded that the fairness of the applicant’s trial had not been prejudiced by his lack of legal assistance during his police custody. The Court held, that access to a lawyer had to be provided from the first police interview of a suspect, unless it could be demonstrated that in the particular circumstances there were compelling reasons to restrict that right. Even where such compelling reasons did exist, the restriction should not unduly prejudice the rights of the defense, which would be the case where incriminating statements made during a police interview without access to a lawyer were used as a basis for a conviction. The Salduz’s case has given impetus to the process of transformation of the right to legal assistance in criminal proceedings. Prior to the judgment in Salduz’s case, many national legal systems in Europe did not provide for the possibility of a suspect being assisted by a lawyer in police interrogation. On 22 October 2013 Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings was adopted. The Directive provides access to a counsel from the beginning of police questioning, allows adequate and confidential meetings with the defense counsel for the suspect to effectively exercise his procedural rights, allows the defense counsel to play an active role (“to participate effectively”) during preliminary interrogation. In accordance with the Directive 2013/48/EU the right to legal counsel can be derogated in exceptional circumstances, if there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person or immediate action by the investigating authorities is imperative to prevent a substantial jeopardy to criminal proceedings (Bachmaier Winter, 2015, p. 122). In Ibrahim and others v. United Kingdom the applicants claimed, that they had been interviewed by
the police (in connection with terrorist attack under the Terrorism Act 2000) without access to a lawyer and that the evidence obtained from those interviews was used at their respective trials. The Court has allowed derogations from certain rights under the Convention in the context of questioning and holding individuals suspected of terrorist activities. The Court found that there had been compelling reasons to delay the applicants’ access to legal advice in light of the exceptionally serious and imminent threat to public safety. The Simeonov’s case concerned the absence of legal assistance for the first three days of the pretrial detention. The Court held, that the fairness of the criminal proceedings taken as a whole had not been irremediably infringed by the absence of a lawyer and that the absence of a lawyer during the police custody in this particular case had in no way infringed applicant’s privilege against self-incrimination. The case of Beuze v. Belgium, in turn, concerns the scope of the right of access to a lawyer during the preliminary stages of criminal proceedings. The applicant, Philippe Beuze, sentenced to life imprisonment for intentional homicide, complained that the Belgian legislation did not provide for assistance by a lawyer at the initial stage of proceedings and that, in consequence, he did not receive the assistance of a lawyer during preliminary stage of criminal procedure against him. The Court (the Grand Chamber) will decide, whether individuals can be convicted if were unlawfully denied early access to a lawyer in criminal proceedings.

4. The effectiveness of legal assistance in the European Court’s case law

Although access to a lawyer at the earlier stages of criminal proceedings and the question of whether accused can be deprived of this right are vital issues an equally important element of the right to legal assistance is a matter of its effectiveness. W. A. Schabas noted, that art. 6 § 3 (c) speaks of “assistance”, not of “nomination” or “appointment”. Its an “important distinction because mere nomination or appointment does not ensure effective assistance” (Schabas, 2015, p. 311). Nevertheless, the term “effective” on its own is something intuitively understandable, but in criminal procedure could be easily misunderstood or interpreted differently depending on the assessment criteria. For the first time the Court discussed the problem of the effectiveness of legal assistance and the corresponding obligations of the Member States in Artico v. Italy of 1980. The Court held, that the Convention is intended to guarantee not rights that are
theoretical or illusory, but rights that are practical and effective, that the interests of justice sometimes require the provision of effective assistance. In Poitrimol v. France, the Court interpreted the word “assistance” pointed out, that “although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial”. In Ananyev v. Russian the Court noted, that “the procedural means offered by domestic law and practice must be shown to be effective where a person charged with a criminal offence has neither waived his right to appear and to defend himself nor sought to escape trial”. According to J. E. B. Coster van Voorhout, the “effectiveness” of the defense can be measured in terms of its contribution to an error-free process or accurate outcome (Coster van Voorhout, 2016, p. 55). In the context of evaluating legal assistance services, effectiveness also refers to a causal link between an activity and an outcome (Digiusto, 2012, p. 1). The main and obvious purpose of the criminal justice is to deliver justice for all, by convicting and punishing the guilty, while protecting the innocent. However, an accused and other persons participated in criminal proceedings can suffer from ungrounded restriction of their rights and freedoms. In such a situation it would be at least inhumane and in contradiction with the principle of a fair trial to wait for the final judicial decision. So the legal assistance in criminal proceedings in the pre-trial stages can be described as an effective, if a defense counsel managed to protect a defendant from unlawful and ungrounded accusations, and from the unlawful and ungrounded restriction of his rights and freedoms.

At the end of 2013 a new Guide on Article 6 concerning criminal matters was published. The Court noted, that art. 6 § 3 (c) enshrines the right to “practical and effective” legal assistance (para. 295). In 2018 a Guide on Article 6 of 2013 concerning civil matters was updated. In both documents the Court indicated that the State is not accountable for the actions of an officially appointed lawyer. It follows from the independence of the legal profession from the State, that the conduct of the defense is essentially a matter between the defendant and his counsel, whether counsel is appointed under a legal aid scheme or is privately financed. The conduct of the defense as such cannot incur the State’s liability under the Convention. However, the Court in accordance with its case law concluded that assigning a lawyer does not in itself guarantee effective assistance. “The lawyer appointed for legal aid purposes may be prevented from acting or may shirk his duties. If they are notified of the situation, the competent national authorities must replace him; should they fail to do so, the litigant would be deprived of effective assistance. It is above all the responsibility of
the State to ensure the requisite balance between the effective enjoyment of access to justice on the one hand and the independence of the legal profession on the other” (para. 297 and para. 107, respectively). Such an approach, however, could have a mixed impact on the access to effective criminal legal services. The independence of lawyers should not be seen as more valuable than providing qualified legal assistance to a person suspected or accused. Professional independence of a lawyer is not only just a privilege, but also its a duty as it serves as a guarantee of due process. The view, that the independence of the lawyer’s professional organizations would be endangered when the state would become responsible for shortcomings of the lawyer, leads to the unnecessary polarization of the two interests (the responsibility of the state for fair trial and independent advocacy) against each other. The profession of a lawyer is a public one, the state determines its conditions and scope, and therefore is directly responsible for the quality of legal assistance particularly in criminal cases, there are the consequences of ineffective actions or mistakes of a lawyer can be grave.

5. The importance of effective legal assistance at the initial stage of the criminal procedure

Being deprived of legal assistance either formally, or factually (in such a case, there would be ineffective legal assistance) a person suspected or accused of a crime, in most cases, cannot defend himself especially, if we take in to account the conditions under which initial police interrogations take place (Ericsson, Baranek, 1982, p. 50-51). The importance of effective and practical legal assistance can be showed by the following example.

Sergey, a 30-year-old software engineer of one of the leading Russian computer companies, created an account in a popular social network. For that purpose he used a SIM card registered to another person, which he’d bought off the Internet. On his profile Sergey introduced himself as a 16-year-old, who is looking for a girl “to spend time together”. One day, 13-year-old Kate wrote back to Sergey. As it turned out later, on her profile she gave her real name, surname and age. Sergey and Kate for a whole month talked with each other through the online platform. They talk mostly about love and sex. Sergey assured the girl, that regardless to his age, he had considerable experience in this area. He wrote, that he already had several sexual partners and knew well, what a girl in the age of Kate needs. One day Katherine proposed Sergey a meeting in the real
world. Sergey cautiously warned her that he had a little more years than he gave in his profile. Kate replied that such a difference between them in age did not bother her, and even assured Sergey that she was attracted to older men. During the first date, Sergey and Kate walked around the city for a long time, sit at the cafe, on the second they agreed to go to cinema. When planning a third date, Kate proposed to meet near her home. When they met (on this occasion they for the first time contacted each other via SMS, and Sergey used his authentic phone number), as always, they talked mostly about love. Kate stated that she wanted her first man to be like him. But after that she confessed, that she had already had sexual contacts with several partners, but only in anal and oral forms. She even gave him names of other men. At one point, she said her parents had left, so the flat was vacant, and she asked if Sergey would like to go there. They entered the house, took the elevator to the fourth floor, where the parent's apartment was located. The girl opened the door and then invited Sergey inside. Sergey took off his jacket and hung it in the wardrobe. At this point, Kate said that two days ago she had had the first natural sexual contact with another man. Sergey reacted quite relentlessly to this message saying that in that case he no longer wanted to see her, and then began to put on his jacket. Then Kate came to him from the back and began kissing while touching the pants under his waist. They had penetrative sex in natural and anal forms. Sergey ejaculated into his hand. Then he went to the bathroom, washed and wiped his hands. He did not talk to Kate, dressed and left the apartment. The next day, he wrote to Kate online, asking how she felt. Kate replied that she did not want to talk to him anymore. After a month, police officers knocked at the door of Sergey's apartment. He was unofficially deprived of liberty and waited for the initial interrogation for at least 7 hours. After 6 hours, police officer draw up official arrest report, after that the investigator officially interrogated Sergey as a suspect. Before the interrogation, the lawyer from the local bar was appointed by the investigator as defender. However, in the protocol of interrogation there was no single question asked by the lawyer, and Sergey later admitted that he did not talk to him. He did not get any legal assistance, but he was told that admitting guilt in his situation, it will be the best possible solution for him. Sergey gave the investigator the data necessary to log on to his false account. After a two-and-half hour interrogation, the investigator asked the district court to apply a preventive measure in the form of temporary detention. After hearing the parties, the court allowed the investigator’s request. During the
court session, Sergey allegedly confirmed the circumstances of the crime he was suspected of, although it was not possible to deduce from the content of the court documentation, what statements the suspect really made. Sergey was placed in the detention center. After a few days, he was charged with raping and performing sexual activities to the under-aged victim. Immediately after presenting the charges, Sergey was questioned in accordance with the legal requirements. The counsel advised Sergey to stick to the previously adopted “defense line”. Kate in turn testified that Sergey raped her covering her face with a pillow, that by accident her brother found out about what’s happened to her. Her mom persuaded her to inform police about rape. The details of the entire incident in her testimony generally coincided with those Sergey later described in his confession. One month later the investigator received the opinion of an expert in gynecology, which showed that Kate was a virgin, and on her body and inside it there were no evidence of her involvement in any sexual activities either in natural or anal form. At the same time, expert in urology found Sergey incapable to have normal sexual intercourse due to chronic illness.

The sequence and the way events were described by the suspect in his confession were kept deliberately. The author was the second defense counsel in that case. The content of Sergey’s confession, as well as the facts that preceded the first interrogation have called into question the defendant’s honesty. The results of the gynecological and urological examinations didn’t come et. But in Sergei’s confession, there were no details that would clearly indicate that he actually raped the victim. Moreover, in his confession there were no details indicating with no doubts that he ever had sexual contact with the victim. From the time the crime reportedly was committed to the moment the police officers arrested Sergey, one month passed. The chances that the investigators somehow will find objective evidence of the crime, as well as of Sergei’s guilt, were small. In such circumstances, every criminal lawyer should advise client to remain silent. There of cause might be an exception, when for example a defendant, despite everything, continues to insist on his guiltiness, the task of the counsel in a such situation is to ask questions about the details of the crime committed that can be objectively verified, to require that a medical examination of the defendant be conducted, and video registration of both interrogation and medical examination will be provided by the investigator. The first defender for unclear reasons refused to follow those recommendations. Moreover, he aggravated the situation of the defendant by advised him to accept the model of the events proposed by the
investigator. The author wrote the complaint against the first defend attorney and send it as the law required to the local bar association. The answer never came. At first the investigator ignored the demand to exclude the confession statement from evidence on the basis of the failure to provide legal assistance to the detainee and the possibility of coercive primary questioning. The situation changed, then the results of gynecological and urological examinations had come. Nevertheless, Sergey had spent more, then a year in strict isolation in the detention center before his case finely was referred for trial. He began to suffer medical problems, became depressed, lost his job and his fiancé left him after all.

According to the Court’s case law legal assistance should be provided rather in critical stages of the criminal proceedings, such as custodial police interrogations or other police evidence gathering acts, pretrial detention hearings, court trial, appeal and appeal in cassation. The term “critical” in Court’s opinion refers to the situations, where crucial evidence of guilt could be “produced” (for example during initial police questioning, then a confession may have been obtained from a suspect) or where such assistance ensured other, related defense rights and fair trial guarantees. Given that each state sets its own rules concerning the role of a particular stage or procedure, the importance of specific proceedings should be assessed case by case. Getting back to our example, it should be noted, that in Russian criminal procedure the investigation phase is not just a subordinate part of the criminal proceedings. In practice the most important evidence for the prosecution are “produced” during this phase. According to art. 276 of the Russian Code of Criminal Procedure of 2001, the announcement of the defendant’s testimony, which he has given in the course of the preliminary inquisition, as well as the reproduction of the materials of the photography, of the audio and/or the video recording and of the cinema shooting of his testimony, may be performed at the party’s petition. So there are no restrictions on the announcement of the defendant’s testimony including his or her confession during the trial. The confession is also popular way of avoiding a full criminal trial under the provisions of chapter 40 of Russian Code of Criminal Procedure. The example clearly shows that the adequate legal assistance in the pre-trial stages is one of the crucial fair trial safeguards. The lack of imperative objective supervision specific to redress ineffective assistance by counsel in a situation where means of the internal controls within bar association did not work leads to the fact that the right to legal assistance becomes formal (Coster van Voorhout, 2016, p. 272-273). In a situation like this, a person suspected or accused of a crime bears the consequences of inadequate
legal assistance, which in obvious way does not correspond to the meaning of the Court’s concept of a fair trial (Flynn and others, 2016, p. 229). Nevertheless, the prospect of applying to the European Court in connection with the inadequacy of legal assistance in the pre-trial stages, then when the defendant was formally granted a defense counsel, is not completely clear.

6. Conclusions

The international community, international human rights organizations focus on issues related to the effectiveness of free legal assistance or free legal aids systems in criminal proceedings. In this case, it should be recognized that the responsibility for the quality of the assistance provided by the legal aids system rests more with the state. However, one can’t help, but admit that in the framework of this one-sided approach, the interests of the remaining part of the persons suspected or accused (with privately financed counsels) remain in certain degree less protected.

The Global Study on Legal Aid conducted by the United Nations Development Programme and the United Nations Office on Drugs and Crime in 2014-2015 showed, that there is no difference in the performance and quality of services provided by legal aid lawyers, when compared with private lawyers receiving pay from private clients. The same found, that over a third of responding Member States have adopted specific quality and performance standards on legal aid, but close to half (46%) of experts called attention to the fact that there is no formal mechanism in place in their country to assess whether a legal aid provider is adequately qualified or prepared. Altogether, it can be assumed that cases where the effectiveness of legal assistance raises justified doubts are much more common than this could be judged from a relatively limited practice of the European Court. It can be assumed also that such violations can be systematic and at the same time remain unnoticed if the existing legal mechanisms do not ensure their timely detection. Based on the above, the main conclusions are as follows:

1) a fair trial in criminal proceedings is impossible without effective legal assistance especially in the pre-trial stage;
2) the independence of lawyers should not be seen as more valuable than providing qualified legal assistance to a suspected or accused;
3) when assessing whether an adequate legal assistance was provided, the formalism is inadmissible; it cannot be assumed that a person “equipped” with the legal counsel had actually received adequate legal help;
4) effective legal assistance should be provided in every critical stage of criminal procedure; the term “critical” in the case of preliminary investigation should be understood to refer to the situation, then crucial evidence of guilt could be “produced”, for example during initial police questioning, then a confession may have been obtained from a suspect; the question of the quality of legal assistance rendered by a lawyer in specific criminal case should not be resolved solely within the lawyer’s professional association; there should be objective supervision, for example judicial, specific to redress ineffective assistance by the counsel;

5) if the violations of the right to legal assistance in its material interpretation are systematic, it is the duty of the European Court to oblige the state to take adequate measures to resolve such situation by the appropriate modification of national law and (or) by the improvement of the mechanisms of its application.

References


**Legislation, judgements, other official documents**


Ibrahim and Others v. the United Kingdom (GC) – 50541/08, 50571/08, 50573/08 and 40351/09, Judgement 13.09.2016. Obtained (01.07.2018) from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-166680%22].


Abstract
The aim of the article is to focus on some aspects related to the child’s right to be heard in administrative or judicial proceedings, which they are part of due to various causes. This is an essential right to making the child part of the decision-making affecting him. This may happen in cases where the problem is resolved out of the court, but also in cases when a court decision is required. There are cases which relate to the emotional, economic and social welfare of the child, school relations, domestic or other forms of violence, adoption procedures, best interest in exercising the parental responsibility, cases related to children in conflict with the criminal law, etc. Now we are faced with the question: what is the level of child participation and how is the right of the child to be heard in decision-making that affect him, actually working? Do the authorities have the competence and knowledge required to guarantee this right? Are both the Albanian judiciary as well as other authorities prepared to effectively guarantee the right to be heard or are still remaining problematic issues? The article will additionally lay down some practical difficulties and suggestions for further consideration.

Keywords: Convention on the Right of the Child, Right to be heard, best interest of the child, role of professionals.

1. Child right to be heard in a de facto situation

Albanian legislation is built on the most advanced legal models and based on best traditions of domestic legislation. Regarding the right to be heard, Albanian
legal frame\textsuperscript{1}, is in line with international standards stemming from ratified conventions\textsuperscript{2}. This right is part of different Albanian laws. Its implementation, as Article 12 of the CRC\textsuperscript{3} provides, has its theoretical and practical difficulties.

What the law stipulates seems not enough if the responsible authorities, their institutional structure and infrastructure do not apply it or create difficulties throughout its application. It is expected that people who work with children have the necessary knowledge, the highest awareness and dedication to protect their rights, speak and understand their language, etc. There are a lot of challenges in order for this standard to be appropriately applicable. Even the most advanced law can turn into a worthless instrument if it falls into the hands of incompetent people who create a dangerous and non-amicable environment for the child. So professionals are and remain of having key role in this process.

What delivered on theoretical bases seems easy, not problematic and understandable. This is what I took out of my experience as a pedagogue in both, initial and continuous training program for judges and prosecutors at Albanian School for Magistrate. While theoretically authorities can learn the meaning and substance of this right and understand material and procedural content of the law and international standards, still implementation can face a lot of troubles. The difficulties appear one after another during moot courts or classes dedicated to case studies. But they are multiplied in the practice. Even experienced judges and prosecutors understand the imperativeness of additional efforts to meet child’s best interest. There is always place to learn and to explore in order to assure the right to be heard.

It is requested that professionals dealing with children should be well trained. They need practical skills. A number of practical questions may arise and be present on a case-by-case basis such as:

\begin{itemize}
  \item Albanian Family Code, Law no. 9062/2003, Article 6; Code of Criminal Justice for Children, Law No. 37/2017, Article 16; Law no 18/2017 ‘On the rights and protection of the child’, Article 9/2, 13, 30, etc.
  \item Article 12 of CRC: “1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”
\end{itemize}
What would be the best way for a child to express his views freely in a given situation?

What weight should the authorities give to these views? How to give the right weight in accordance with the age and maturity of the child?

Which are the issues that mostly affect a child in a given process?

How should the child be asked: directly, through a suitable representative or a specific body?

How do we fully appreciate the child’s physical, emotional, educational, economic, or/and health needs?

How to make a current and prospective assessment of the best interest of the child and ‘use’ the right to be heard as a potential effective instrument?

To overcome these difficulties, it is advisable that authorities know the reality where a child has lived and has grown up. Is important to know the social status of the child. This status influences the right to be heard and is a guideline for measures that should be taken by the authorities dealing with a child. Authorities need to have a convincing perception about who is the child or the child’s background. The child’s factual situation helps them to better understand and turn into reality what actually the theoretical principles and standards emphasize. Who is the child in the process: this is the main question to better fulfill the right to be heard. Reality helps understanding why the child is in this state? How happened? Afterwards the authority can decide on the best methodology that works for that child, thus the right to be heard can be made a reality and the child part of the decision-making process. Knowing the reality helps knowing the child not only as part of a group, but also individually.

Exploring the Albanian reality we can learn more about children. On 1 January 2018, Albania counts 2 million 870 thousand 324 people. In 2017, children accounted for 25.8% of the population from 27.8% of the population in 2011. Are the children happy? Some of them attempt suicide. In 2016, there are 16 children who committed suicide, contrarily to 11 that was the number in 2015. 60 children were attempting suicide in 2016 compared to 32 children in 2015. Children’s are victims of crime and abuse. For 2016: 186 [out of 276 in 2015] is the total number of children’s victims of criminal offenses. Out of them 133 victims of domestic violence, 2 children victims of sexual abuse, 19 children victims of ill-treatment and 32 children are victims of murder, shameful acts, kidnapping. In 2016, 42 children

4 Updated information is available in: http://countrymeters.info/en/Albania.
were victims of trafficking out of 46, which was the figure in 2015. There are cases where their parents abandon children, thus in 2016, the court issued a decision for 20 children with abandoned status. In 2015 this number was 40. Some juveniles are in conflict with the law. For 2016 there are 567 deprived of their liberty. They make up of 3.83% of the convicted persons. Out of these 13 are girls and 554 are boys. In 2015, this number was 650 convicted children. For 2016, the average number of children entering pre-trial detention based on the type of offense of every month was 61 [80 in 2015]. They are mostly boys who go into custody for criminal offenses. The largest number of children in detention is for theft. Parents use violence to discipline their children. 49% of children between the ages of two and fourteen have at least one episode of physical or psychological violence in the family. There are still young girls who marry at early age: about 1% of girls get married before the age of 15 and 8% under the age of 18.\(^5\) About 32% of children under the age of five have books for children in their families. Others do not. 11% of children have impaired vision and hearing impairment, speech defects, and learning difficulties (according to their mothers’ disability concept).\(^6\)

No matter the differences, each of these child has and should be able to enjoy the right to be heard.

2. ‘To be heard’ – means having access

EU law,\(^7\) European Convention of Human Rights and UN Convention on the Rights of the Child have strong meeting points regarding the right to be heard. Under the ECHR, there is no absolute requirement to hear a child in court.\(^8\)


\(^6\) Data taken from ‘Statistical Yearbook on Children’s Rights Issues 2016’. Publication of Agency for the Children’s Rights Protection in cooperation with central institutions and INSTAT. http://femijet.gov.al/al/wp-content/uploads/2017/12/Vjetar-Statistikor-p%C3%BBr%C3%87%C3%ABshtjet-e-t%C3%AB-Drejtave-t%C3%AB-F%C3%ABmij%C3%ABve-20161.pdf

\(^7\) Charter of Fundamental Rights, Article 24; CJEU, C-491/10 PPU, Joseba Andoni Aguirre Zarraga v. Simone Pelz, 2010 (right to be heard, international child abduction).

We cannot make-believe that a system like the justice one can be child friendly without hearing the child. The mission of the judiciary and of the other actors for ensuring the best interest of the child cannot be reached without the child right to be heard. In order for the family, schools, court etc., to be places where the children are themselves and where they are protected from every inhuman treatment – children should be heard. To be heard can be simply put as the way children can have access to the world. Have access to the world that belongs to them, now and in the future. By exercising the right to be heard is the only way to participate and the only entrance to having access to family and friends and enjoying their life as children and as human beings, and finally having access to justice.

Children have the right to be heard now, as children. They live and grow every day. Attention should be given to the children’s right to have their views heard at all levels of decision-making regarding issues that are related to them and affecting their lives. If this is not done at all or not done properly than every action has a reaction. And this time a negative one. Children become very soon adults. They will do the same or worse as parents, family members, authorities, judges, etc.

The right to be heard is a process. This relates to explanations, preparation and informing the child for hearings, feelings, trusts, listening’s, tones of voice, body language, closed and opened questions, seriousness, understanding, etc. So it is important for professionals to be prepared and to know what is expected from a child. Authorities can conduct interviews, collect statements from children; take and write decisions. To build trust they need specialization. This helps them increasing legal knowledge and communication skills. Helps them being understandable and understanding children. The training topics should be specific depending on duties and child’s situation. Training is a mandatory and continuous process – tailored made for those working with children. Training should be like preparing a team that works for the same standards, for the same goal, which is the best interest of the child. Following this, there is a good example from Albanian Juvenile Justice Code. In its Article 26 there are mentioned specifically some of the ‘training topics’ that any person assigned by the competent body administering criminal justice for children shall be trained. This topics cover: methodology of communication with the child; standards and principles guaranteeing the rights of the child; principles and ethical obligations related to their functions; signs and symptoms indicating that a criminal offence has been committed against a child; skills and techniques related to the assessment of critical situations, risk assessment, referral of cases and guaranteeing of the
principle of confidentiality; skills related to the technique of cross-examination of children, child psychology and communication with the child in a language convenient to the child; dynamics and nature of violence against the child, effect and consequences including the physical and psychological as well as that of the incitement to commit the criminal offence; techniques and special measures for the support and protection of the child victim and witness; methods of mandatory work for the professionals working with the children.

3. Age and maturity effects in the child’s right to be heard

Does Albanian legislation indicate any clear and fix time or age to hear a child in case the child is involved in judicial or administrative proceedings? Is the age independently important or it should be considered related to the fact of the child being capable of forming his/her own views and on child maturity? This correlation between age and maturity is clearly explained by the Committee on the Rights of the Child in its General Comment No.12 of the CRC ⁹ as well as by other scholars.¹⁰ Age and maturity together are the guidance of ‘the due weight’ given to what is expressed by the child to the authorities. In this process it cannot be left aside the level of freely (or not) expressing those views.

The right to be heard is an instant and immediate right. It is too late to wait for a child to become an adult, to be 18 years old. No one can wait the age of maturity to approach and hear the child and pretend to have better chances for him or her and the generation. If the child is not heard today, now, any time, there is a serious risk of perpetuating the violence and expecting a problematic future.

No child shall be excluded from the access to the right of being heard, only because of his/her age. Each part of the system should respect the initiative of the child to be heard about issues that affect him/her, except for the cases when it is deemed that that is not in the best interest of the child. Children should be informed about using effectively their right to be heard. On the other hand, judges and lawyers should explain to the child about his/her right to be heard and that

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not expressing their views might not necessarily determine the final outcome of the trial. These way children can understand that this is a right not an obligation. Court judgments that affect children should be reasoned in a language that the child is able to understand, and to provide clarifications, in particular about those views of the child that the court has not considered.

Why is the right to be heard important? There are some features of the right that put the authorities in several obligations and can be considered seriously:

- As a right, ‘to be heard’ is not an obligation for the child, while it is an obligation for the authorities to ensure and guarantee this right. ‘By not allowing children to be involved in decision-making processes which affect them, they are being denied their fundamental right to have their views considered in decision-making processes affecting them’.11
- The child is not an empty box. He or she has his/her own ideology. Authorities have to know this ideology. Children may belong to the same or different cultural groups and sub-groups. The similarities and differences are important to be known and considered in order to embrace the right to be heard at its full capacity. Children may speak a different language. Their socialization is different. Some children are at a real risk, some living in extreme poverty, others living with no parental care. Some of them are children that live in the streets and children immigrating to other countries without their parents, unaccompanied ones. Some children are even in conflict with the criminal law.
- The complexity of the right to be heard can result in failure of the guarantees provided by law. The complexity depends very much from the vulnerability of the child, which is strongly related to and because of the age; because of immaturity or different disability/es which can be present in specific cases; because of the parents influence and their relatives role; because of religion; etc.
- There are situations where it is evident the child’s lack of self-respect, existence of stigma and a strong non-integration profile. All mentioned could result in problematic access and in this way can even extinguish the right to be heard. Compulsory participation of child is not allowed.

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Communication disorder and stress disorder can negatively influence the communication with the child and worse the trauma.

There are a lot of insecurities that judges and other officials have in dealing with children and understanding the importance of the right to be heard and its application in an adequate way. ‘Judges dealing with children are a priority, they should be a priority’. But this is related not only to judges. This is not enough. Compulsory changing of mind of the authorities to take seriously the right to be heard is an adequate issue with a capillary effect. It is not an easy and simple issue or task to evaluate if the child is capable of forming his or her own views; to avoid obstacles and to make possible to express those views freely; to be given due weight in accordance with the age and maturity of the child. Collaboration with different experts such as psychology is important.

4. The right to be heard in practice

In both, judicial and administrative proceedings the right to be heard remains a principle, a standard and a guarantee, a strong tool and methodology to go into the right direction which aims towards achieving the best interest of the child. What is made evident by several decisions of the High Court of the Republic of Albania is that the fact-finding courts [instant court\textsuperscript{12} and appeal court] generally just point out and give importance merely to the fact that a child’s opinion/view is mentioned in a number of international instruments, such as the Convention on the Rights of the Child (Article 12 of the CRC), the European Convention on the Exercise of the Rights of the Child (Article 6) and domestic legal frame. However, the above-mentioned courts do this without listing all the procedural measures that are actually taken to guarantee this right during the process. In a number of decisions, the High Court draws the attention of the lower level courts to the need of carefully assessing the child’s right of being heard and weighting the views in accordance with child age and maturity. In practice, there are cases where the court has approved the parents’ agreement on child custody after divorce without further hearing the child and considering the child’s point of view. Also, the lack of giving the right place and proper weight to the views of the child has been assessed.

\textsuperscript{12} Decision no. 11-2015-5868/12.12.2015 of Durrës District Court; Decision no. 3998/12.05.2016 of Tirana District Court.
as a violation of the child’s rights in the practice of the ECtHR. For example, in the case of *Ignaccolo-Zenide v. Romania*\(^{13}\), the court has underlined the importance of giving the right weight during the decision-making of the child’s opinion.

Giving the right weight to child’s views is not an easy task. Albanian courts in some cases encounter difficulties regarding the child’s demonstrated thoughts and feelings and their connection with the truth. For example, in a practical case, the High Court,\(^{14}\) analyzed the minutes administered by the court bailiff. According to the bailiff’s minutes, turns out that the child, several times, refuses to meet his mother. Referring to the psychologist’s report the situation was different. As the decision of High Court highlights: “...According to this report, the child appears as being manipulated by his father's family, the way he was expressed against his mother, as if she has abandoned him when he was very small. The child introduces the aunt (father’s sister) as the mother, which, according to him, is she that gave the life to him. But when the psychologist's interview took place with the child in the presence of the mother, he [The child] changed the behavior, approached her, hugged and kissed, saying he missed her. ... Looking at these minutes, the conclusions reached in the psychologist’s act are clear or more precisely confirmed, that the behavior of the infant is manipulated or influenced by her father’s family”. In another similar case,\(^{15}\) the High Court has evaluated as not appropriate the way the first instance court has concluded ‘ ... the express consent of children since taken without considering the age of 9 and 6 years old as well as the psycho-physical development/maturity...’ Under these conditions, the High Court estimates that the Court of Appeals “should make a thorough analysis of how the children consent was expressed during the first instance trial and how this court placed it in relation to the level of their psychological, emotional and social development and assessing a number of other factors, in a way that consent could be accommodated to the best interest for children’s needs for growing up and education.”

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\(^{13}\) European Court of Human Rights, *Ignaccolo-Zenide v. Rumania* (application no. 31679/96). Judgement 25.01.2000: “Due weight should also be given to children’s views”; European Court of Human Rights, M.K. v. Greece (application no. 51312/16); European Court of Human Rights, M. and M. v. Croatia (application no. 10161/13); ECtHR, Sahin v. Germany [GC], No. 30943/96, 2003 (hearing a child in court in access proceedings) etc.

\(^{14}\) Decision no. 163/24.03.2015 of the Civil College of the High Court.

\(^{15}\) The same analysis is done in the Decision no. 345, date 02.07.2015 of the Civil College of the High Court. This court found the same fact: “... In taking this decision, the district court has reasoned that: “The child asked by the court in the presence of psychologists MP was found [after taking the psychologist's opinion], that he is processed by his mom and is confused in his answers ... because of the age'.
The child’s opinion does not have the same value as the testimony given in a process. The Civil College of the High Court of Albania in a decision\(^{16}\) has underlined that ‘... the way of getting child opinion from the court cannot be in the form of a testimony. So not allowing the parties to be present and to address questions to the child. This conclusion is reached in order to protect the child from the pressure exerted by the parties or their representatives, in order not to feel compelled to give opinions and considerations that do not show child’s true will.’

Protection from any form of child discrimination helps actors involved in the process to play the role in order to guarantee the children’s rights to be heard. There are a lot of ethical barriers in communications because of discriminating behavior that can destroy the essence of the right to be heard in specific cases.

A checklist of the child situation analysis helps the court to properly grasp the right to be heard and evaluate every child’s opinion. Of course, such lists are not exhaustive since they are also individualized in conformity with child specific and special situation and needs, maturity, intellectual and physical development, skills, etc.

It is important to take measures for children to be heard in appropriate facilities, considering their age, their level of maturity and possible communication difficulties. The examples can be from criminal matters where a child is victim and/or witness. Audiovisual statements from children victims or witnesses should be encouraged as much as possible. Even the European Court of Human Rights (ECHR), in the case of W. S. versus Poland (Application no. 21508/02) suggested some ways of testing the credibility of the child victim should be more appropriate, and not through direct interviews. The Court proposed that the process of the interview of the child may be conducted via the psychologist, who is given the questions in advance in written form, by the attorneys of the parties in the proceeding, or another alternative could be to interview the child in a studio that makes possible the presence of the lawyers through videoconference or through a mirror that the child is not able to detect it. In case that it is necessary that the child-victim is involved in more than one interview, they should possibly be performed by the same person, in order to ensure coherence for the best interest of the child. On the other hand, the number of child interviews should be as limited as possible, as well as the duration, which should be age-appropriate.\(^{17}\) ECHR in

\(^{16}\) Decision no. 374, date 12.06.2014 of the Civil College of the High Court.

\(^{17}\) Paragraph 61 of the Case W.S. v. Poland.
the case of S.N. *versus* Sweden (application no. 34209/96)\(^{18}\) ruled that in the cases of criminal offenses related to sexual violence, the courts may apply specific proceedings, in particular when the victim is a child.

Child-friendly justice entails guaranteeing respect and effectiveness of enforcement of the rights of children, at the highest attainable levels, in the system of justice in the country. This requires, particularly that justice is accessible, age-appropriate, fast, and focused on the needs and rights of children. This includes due legal process, the right for participation and understanding the procedures, the right for respect of private life and home, as well as of integrity and dignity. All mentioned are strongly related with the right to be heard. This concept should be perceived *in an integral manner*, and should serve as a frame for the development of a justice system, for cases when children are either involved or affected.

Other difficult cases are those where, for example, in family matters, the opinions and feelings expressed by the child and the opinion of psychologist’s are in conflict with each other. How will the court act and to which of them should the court give more weight?\(^{19}\) Article 157 of the Albanian Family Code stipulates that regarding the children’s consequences of divorce the judge takes into consideration: a) the agreement between the former spouses; b) the opinion and feelings expressed by the child, assessing the age and development of the child; c) the opinion of the psychologist or of the social services sector in the municipality after they have heard the child.

One of the questions that arise is whether Article 157 have any prioritizing value of the aspects that the court should take into consideration or not. In our opinion, the criteria do not compete with one another. The court cannot ignore any of them. That is why the legislator uses the phrase “takes into consideration”. On the other hand, it is incumbent on the court to specify in its case analysis the reason why it moved more in one or the other aspect and consolidated it in decision-making and why it has a different attitude to another aspect. The Court analyzes all these aspects in the spirit of the principle of the best interest of the child. The court decides after having received and analyzed these criteria in harmony with one another. To this end, it is the court that determines the greater or absolute weight of one or the other criterion based on the assessment made by the concrete case.

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\(^{18}\) Paragraph 47 and 52 of the case S.N. v. Sweden.

So if the child’s opinion is different from the psychologist’s recommendation or the parent’s opinion and agreement, then it is the highest interest of the child leading the court’s decision as to which of them is of interest to the child. This is also what High Court decided. But this is not in any case what district an Appeal court do.

Family members, parents, every institutions and actor within our society, are responsible for the child. Child protection and child’s best interest is the responsibility of every adult. Lawyers in general and judiciary especially have an increasingly important role to play in child protection and child’s best interest and especially towards securing their voice to be heard.

5. Conclusion and recommendation

What can be improved?

- Communication with the child is a vital element. Hearing the child is the essence. Absenting should be a concept and a reality that should cease to exist;
- Do children trust the adults? Eliminating the deficit in trust in all the process of hearing the child and young people is very important for all the actors;
- Child and youth mobilization to better understand their rights and the right to be heard - is an issue that should be better explored and tailor-made;
- The right to be heard is a right that should be used properly. It means that there is no time not to use this opportunity;
- Eliminate all the legal black hole in procedures, which can influence negatively in the right of the child to be heard. The suspension of rule of law and constitutional provisions is the most dangerous thing that professionals can do.
- Taking the child away from the situation, which is not safe for him/her – should be taken under consideration while realizing the right to be heard.
- Professionals are all required to be on track. The lack of sustainability has been a highly ‘pervasive’ tradition for Albania.

20 Decisions no. 188/01.06.2016 of the Civil College of the High Court.
21 Decisions no. 347/04.06.2013; no. 345/02.07.2015 and no. 416/26.06.2014 of the Civil College of the High Court.
- Taking away persons to whom a final decision has been made for a deliberately committed offense against juveniles or acts of domestic violence. Such measures lie up to the capillary level including non-profit organizations that prove services for the child and young adults in order to ensure that persons convicted as juvenile offenders have no contact with them.

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CJEU

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The Responsibilities of Universities to Students with Disabilities in Today’s Hungary

Abstract
Young people and young adults living with disabilities (physically disabled persons [motion impairment], persons with hearing impediments [sensory impairment], visually impaired persons [sensory impairment], persons with severe speech difficulties [speech impairment], persons with dyslexia, dysgraphia, dyscalculia [mental developmental disorder], and autistic persons) have had the opportunity to participate in higher education for almost 15 years. A growing number of the members of that group have entered higher education and have become more and more active in recent years, which is the result of loyalty and social openness that is due in part to education. In my presentation and study, I aim to provide an overview of the situation of disabled students participating in higher education in the last 15 years, in particular the milestones of this process, legal and social environment, and support network. By following the timeline, integration issues that are considered to be of importance from an educational point of view and need to be addressed within the framework of higher education – such as institutional role, the relationship between able-bodied students and students living with disabilities, institutional responsibilities, and special services for students with special needs – need to be highlighted. A further important point to note is whether human rights are fully respected within that institutionalised framework of education.

Keywords: disability, students, accepting, social inclusion, institutional responsibilities.

1. Introduction

The 21st century presents a multitude of challenges – inter alia, combating various diseases, realising a healthy society, managing cultural conflicts, and promoting the society members’ willingness to integrate into society – to the society. The present study
deals with an interesting research gap in the field of disability: changes in the situation of young people with disabilities and the recognition of their rights at institutional level. Students with disabilities (physically disabled persons [motion impairment], persons with hearing impediments [sensory impairment], visually impaired persons [sensory impairment], persons with severe speech difficulties [speech impairment], persons with dyslexia, dysgraphia, dyscalculia [mental developmental disorder], and autistic persons) have been admitted to higher education institutions in Hungary since the 2000s, and the proportion of them who are involved in higher education keeps rising every year, though their number cannot be considered to be significant.

From the perspective of achieving equal opportunities, education represents a great opportunity for the group concerned, but the degree to which persons with disabilities are accepted within a society and are socially integrated is considered to be low. Concepts relating to disability are defined and the universally accepted interpretations of these concepts are provided in the first section of the study. The opportunities of the students concerned, data relating to their retention in higher education, and legal and funding issues are set out in a summarised form in the overview of the institutional framework of education and training. Disability issues in Hungary are addressed in higher education; higher education institutions are paying a great deal of attention to disadvantaged students, including students with disabilities, and the attention paid by these institutions can be considered to be outstanding in an institutional structure in education.

Therefore, this study seeks to provide a brief outlook on students with special needs who provide their very best performance in a wide range of activities and in various institutions established for the society.

2. On disability

The International Classification of Functioning, Disability and Health (ICF) provides health-related definitions, of which disability is defined as follows: ‘Disability is an umbrella term for impairments, activity limitations and participation restrictions. It denotes the negative aspects of the interaction between an individual (with a health condition) and that individual’s contextual factors (environmental and personal factors).’ The ICF (WHO, 2001) treats disability as an umbrella term, covering mobility difficulties and activity limitations. A person’s pathological health condition (it is considered that their health condition equals to their disabilities) and the physical context in which the person lives imply
passive interaction between personal factors. The medical model views disability as a person’s problem caused by a pathological condition or an injury-related impairment, which requires medical care provided in the form of individual treatment by professionals. In this perspective, management of the disability is aimed at cure or the individual’s adjustment and behaviour change.

### 3. Brief Overview of the Legal Framework for Disability Legislation in Hungary

There was no act summarising the rights of persons with disabilities in Hungary until 1998. A ground-breaking act on equal opportunities (Act XXVI of 1998 on the Rights and Equal Opportunities of Persons with Disabilities) was adopted in 1998, and the aim of the Act has been to secure equal opportunities of persons with disabilities. The Act does not define disability as reduced capacity to work or social participation restriction but recognises it as a condition that hinders their social inclusion. However, the rights of persons with disabilities cannot always be enforced, as services to be provided to disabled people are often unavailable, too expensive and restricted to them. Furthermore, culture, societal attitudes, socialisation and tolerance have also an influence on the enforcement of rights. For the purpose of the harmonisation of legislation at European level, Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities was adopted not only to uphold the rights of persons with disabilities, but also to ensure equal treatment for all private individuals and any groups thereof.


### 4. Access to Education and Higher Education for Disabled Young People

Before describing the situational picture, the issue of equity should be examined first. In recent years an increasing emphasis has been placed on the principle of equity in Hungary, despite the fact that Hungary is ‘the weakest link in the chain’ among the Member States of the European Union in this respect.

‘In developed societies, education is the main means for reducing social inequalities. Several international conventions and regional documents provide
that everyone has the intrinsic right to education. Mention should be made of the Universal Declaration of Human Rights adopted in 1948 – which sets out, for the first time, human rights to be basic standards –, Article 26(1) of which stipulates that: “Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.” A similar sentiment is reflected in Article 11 of the Fundamental Law of Hungary’ (Méltányosság az oktatásban [Equity in Education], 2016:1).

The principle of equity in higher education means that more attention should be paid to students who have limited access to higher education and limited opportunities to successfully complete their studies.

Equity in education is defined by OECD in 2008 as follows:

‘Equity in education has two dimensions. The first is fairness, which basically means making sure that personal and social circumstances – for example gender, socio-economic status or ethnic origin – should not be an obstacle to achieving educational potential. The second is inclusion, in other words ensuring a basic minimum standard of education for all – for example that everyone should be able to read, write and do simple arithmetic’ (OECD, 2008)

Equity in higher education is interpreted slightly differently. Accordingly, equitable higher education systems ensure that access to, participation in higher education and outcomes are based only on the individual’s innate ability and study effort. Furthermore, they ensure that the achievement of educational potential at tertiary level is not the result of personal and social circumstances. Personal and social circumstances may include, inter alia, age, ethnic origin, or a common characteristic of members belonging to a group, e.g. disability; the present study focuses on one of these groups: students with disabilities.

The group of students with disabilities is different from country to country, depending on what a given country considers to be disabilities. As already mentioned, students with physical disabilities, (a particular type of) mental disability, and skill deficiencies are considered to be students with disabilities in Hungarian higher education, while the highest proportion of students with disabilities in higher education are students with chronic diseases in Germany, and students with hidden disabilities represent the highest proportion of students with disabilities in Great Britain.

The number of students with disabilities has been gradually increasing in the European Union since the 1990s, however they continue to be under-represented.
The family and the immediate environment play a pivotal role in fostering the social integration of young people and young adults living with disabilities; furthermore, the group of secondary social communities – such as educational establishments, peer groups, various cultural spaces and places of leisure – is also essential. These institutions provide a framework for the integration of people with disabilities and their active participation in the process for the oft-repeated inclusion in practice. In respect of persons with disabilities, the concept of subculture is far from negligible; belonging to a group also implies the self-preserving force of a community, including the processes of integration and segregation. Those who belong to subcultures share the same sense of value and group consciousness, and also have in common to belong to a group of disabled people. However, the latter may have a significant impact on relations between the majority and minority, as well as self-isolating tendency (Laki, 2009:2). Figures concerning Hungarian people living with disabilities are available since the 1990s, and, in all cases, those concerned are interviewed in population censuses since then. The purpose of this study is to compare the data of the 2001 and 2011 population censuses for the purpose of determining the changes in the scope of statistics between the two periods. According to the observed disabilities, different types/categories appeared and disappeared among the designations of disabilities both in the 1990 and 2001 censuses. The following categories of disabilities disappeared between 2001 and 2011: lack of upper or lower limb(s), other deficiencies in body, and blind in one eye; and the following categories appeared: autism, mental impairment (psychological damage), speech impairment, severe internal organ impairment, and unknown – a very high proportion of people living with disabilities were classified in the latter category. The data of the two population censuses show that the overall proportion of people living with disabilities dropped, which, of course, seems unlikely; it is more probable that individuals concerned did not declare their disabilities in census interviews or interviewers placed persons with disabilities in the category of the so-called ‘persons with long-term illnesses’. Thereby the data shows a ‘decreasing trend’. Nevertheless, the data also suggests that the number of people belonging to the group concerned decreased by 86,428 persons, i.e. by 8.5% (between 2001 and 2011).
5. Disabled Students in Higher Education

Young people and young adults living with disabilities are definitely a remarkable cohort, as they will be society builders and labour market participants in the future. When looking at the issue solely in terms of the above aspects, being building blocks of society is needed to be highlighted, since the more young people and young adults living with disabilities are involved in higher education and later appear on the labour market, the more social mobility and a model of ‘open society’ based on Karl Popper’s principles will prevail. In Hungary, Act CCIV of 2011 on National Higher Education regulates higher education, which also reflects to the group of admissible students living with disabilities. Accordingly, ‘student with disability’ is identified in the Act as a student with motor, sensory or speech disability, or multiple disabilities, autism spectrum disorder or any other disorder of psychological development (serious learning, attention-deficit or behavioural disorder).

Students with disabilities are admitted to Hungarian higher education institutions since 2002. Prior to the 2000s students belonging to this group could not obtain entry to higher education or higher degrees owing to their seriously reduced educational opportunities.

The past 15 years have seen major changes in this regard, since various education decrees and curricula have increasingly broadened opportunities for students with disabilities, according to their disabilities. ‘In developed societies, education is the main means for reducing social inequalities. Several international conventions and regional documents provide that everyone has the intrinsic right to education’ (Méltányosság az oktatásban [Equity in Education], 2016:40).

The number of disabled students involved in higher education is still very low in Hungary, the reason for which is multi-faceted; the secondary school leaving certificate results of the students concerned do not offer transition to tertiary education, on the one hand, and there are a number of disabled students who require accessibility in higher education, on the other hand, hence if an institution does not ensure accessibility, they do not apply for admission to that higher education institution.

The improper treatment of students with disabilities, the lack of inclusive climate and their better social integration are further constraining factors for them in the Hungarian education system. All these factors therefore narrow access to higher education because of the situation of those concerned.
The Responsibilities of Universities to Students with Disabilities in Today's Hungary

The figure below shows that the number of disabled students involved in higher education has increased four-fold since the academic year 2006-2007. The numbers partly reflect the reality, as students are not required to declare their disabilities, so if students do not wish to reveal their disabilities, they are not reflected in the data relating to students with disabilities. Therefore, it appears likely that the true numbers could be a multiple of the relevant statistical data provided by the institutions.

**Figure 1**
Total number of students with disabilities per academic year (academic year/person)

<table>
<thead>
<tr>
<th>Academic Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>2016/2017</td>
<td>2437</td>
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<tr>
<td>2015/2016</td>
<td>2176</td>
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<tr>
<td>2014/2015</td>
<td>2025</td>
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<td>2013/2014</td>
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<td>2010/2011</td>
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<td>2009/2010</td>
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<td>2007/2008</td>
<td>1013</td>
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<tr>
<td>2006/2007</td>
<td>590</td>
</tr>
</tbody>
</table>

Source: Educational Authority, 2018

Students with disabilities are entitled to preferential treatment in order to assist them to gain access to and improve their retention in higher education. However, it is also true that more than half of the students do not need either extra points or other preferential treatment, as they can gain access to higher education without special treatment merely on the basis of their results and knowledge. The principle of preferential treatment is a sensitive issue in respect of higher education and equity. The Hungarian practice still shows that there are major differences between students with disabilities and students without disabilities, which can be counterbalanced through preferential treatment.
Hence higher education institutions have/should have a considerable responsibility in ensuring equal treatment of their students and recognising student rights, but, at the same time, students should also observe the same principles, including granting preferential treatment to students with disabilities, which would contribute to the creation of an inclusive society.

Such institutions should have a responsibility to develop practical cooperation among students and academics and to build frameworks promoting the creation of the society of tomorrow, whether or not it is a legal obligation.

Pursuant to the government decree on the admission to higher education institutions, preferential treatment granted to disabled young persons during the secondary school-leaving examination – longer preparation time, the use of aids applied during their studies, and, if necessary, having a written test instead of an oral test, or an oral test instead of a written one – shall also be granted to them during the entrance examination. On account of preferential treatment, applicants with disabilities shall be given extra points in the admission procedure for all tertiary vocational, bachelor’s, master’s and single-cycle long programmes.

Under Hungarian Act CCIV of 2011 on National Higher Education, students with disabilities shall be given the opportunity to prepare for and take examinations
in a manner adapted to their disabilities, and shall receive assistance for meeting the obligations arising from their student status. In justified cases, disabled students shall be exempted from the obligation to take certain courses or certain parts thereof, or the obligation to undergo an assessment. Where necessary, exemption shall be granted in respect of a language examination, or a part or level thereof. Disabled students shall be allowed a longer preparation time when taking an examination, to use aids, such as a typewriter or computer, at written examinations and, where appropriate, the option of taking a written examination instead of an oral one or an oral examination instead of a written one. The exemptions pursuant to this paragraph shall be granted only in respect of the grounds thereof and shall not entail exemption from the basic academic requirements that are requisite to the award of the professional qualification certified by the bachelor’s and the master’s degree, or of the vocational qualification evidenced by the certificate of higher-level vocational training.

A person may participate in tertiary education programmes, including tertiary vocational programmes, funded through Hungarian state scholarship for a total period of twelve semesters. Higher education institutions may extend the period of funding by up to four semesters for students with disabilities.

Additional normative per-capita grant that amounts to HUF 120,000/person/year shall be granted to higher education institutions after the actual number of their students with disabilities. Additional normative per-capita grant shall be used for the funding of tasks necessary for the improvement of conditions for their education according to the special needs of students living with disabilities.

Higher education institutions shall maintain an information and counselling system to help the integration and progress of students during their studies in higher education, giving particular attention to students with disabilities, and provide assistance in career planning during and following the completion of their studies.

In accordance with the higher education institution’s rules for organisation and operation, it shall:

- assess the applications submitted by students with disabilities for assistance, exemption and preferential treatment;
- perform its tasks and appoint an institutional coordinator to provide assistance to students with disabilities;
- provide or organize personal and technical assistance and services – which are provided by the institution itself or are not provided by the institution but are otherwise available – for students with disabilities according to the type and severity of their disability;
make available for students with disabilities the special notes or other technical aids that substitute notes and help students in preparation.

The duties of Faculty Disability Coordinator:
- taking part in the assessment and registration of the applications submitted by students with disabilities;
- keeping contact with students living with disabilities and their personal helpers;
- ensuring the availability of the aids and assistance for students with disabilities during their studies and at examinations, and organizing consultation sessions at the students’ request during the study period;
- giving suggestions on the use of the normative per-capita grant for assisting the studies of students with disabilities and on the procurement of equipment necessary for providing assistance.

Summary

This summary seeks to give a brief overview about relations between students and institutions in the higher education of Hungary. Changes in recent years have resulted in a more open society, but social acceptance is not yet full. Higher education is in a fortunate position of being a fast-evolving level of the education system for people with disabilities, however, if primary and secondary education lags far behind, a decreasing number of the students concerned will be involved in higher education.

‘Changes in social norms and the inclusive approach have resulted in the openness of higher education institutions to students with disabilities. All this has had a positive impact on that youth group’s living conditions and perspective for the future’ (Pusztai–Szabó, 2014:1).

It is difficult enough to create terms relating to groups of people with disabilities, it is therefore advisable to use the existing definitions in various fields. Issues relating to students with disabilities may be easier to address, as members belonging to this group are also identified on the basis of their age and certain disability types, in legal or medical/social terms. The first part of the study briefly describes that matter. The intended purpose of the overview of Hungarian and international students with disabilities is to make the proportion of disabled students involved in higher education known. It can be seen that the number of the students concerned in higher education is low in Hungary, despite the fact that
current legislation and economic regulation benefit them by providing significant support and assistance. It is also evident that facility disability coordinators provide support to students with disabilities in order to ensure equal opportunities, equal treatment, institutional integration and the provision of information on opportunities offered by the institution.

Although an increasing number of students with disabilities participate in higher education in Hungary, their number appears to be rather low, when compared to European countries and, in particular, countries outside Europe.

Higher education institutions have a responsibility towards students with disabilities, since a higher number of students belonging to this group may participate in higher education in the future, and they have special needs and expectations of these institutions and their functioning.

Furthermore, it should also be borne in mind, besides the responsibility of the institutions, that a major culture-change, i.e. change in community attitudes toward greater inclusion and acceptance, is needed, as the approach to those educational issues is still prejudiced and discriminatory.

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Download: https://net.jogtar.hu/jogszabaly?docid=A1300062.TV&txtreferer=99800026.TV (08.08.2018)

Abstract
The article is devoted to the analysis of the norms of the Universal Declaration of Human Rights, 1948 and the Constitution of the Republic of Belarus concerning the right of the child to life and the rights of the child to health care. The purpose of the study was a comprehensive description of the above institutions, where the child is a special subject of constitutional and legal relations. This work aims to compare the norms of the Constitution of the Republic of Belarus concerning the rights of the child to life and health care with the provisions of the Declaration of Human Rights, as well as to determine their conformity. The constitutional right to life and the right to health protection are two complementary institutions, implemented on the basis of constitutional norms on the relevant rights of citizens and the rights of children subject to special protection in accordance with international human rights obligations.

Keywords: human rights, child’s right to life, child’s right to health.

Modern society is characterized by a widespread and universal proclamation of natural and inalienable human rights and freedoms. This required a great historical path, beginning with indifference to childhood life in the Middle Ages, and only in the twentieth century children were recognized as an object of special attention and protection from the whole world community. This was facilitated by the United Nations Convention on the Rights of the Child, adopted in 1989 and ratified by most countries of the world, including the Republic of Belarus.
It was only in the 20th century when the world community came to the need to develop and implement the legal confirmation of the rights of the child as an independent subject of legal relations – related primarily to protection of the child’s life and health. In this respect, establishment and development of legal provisions on the right of the child to life and the right to health care – envisaged by the legislation of the Republic of Belarus – represent an interest.

Human life and health – as objects of legal protection – have passed a long historical path before being enshrined in the Constitution of the Republic of Belarus.

The historical and legal analysis of the development of provisions relating to international consolidation of the need for legal protection of children’s life and health shows that the Universal Declaration of Human Rights, 1948 [1] refers to the global fundamental act upon which the Constitution of the Republic of Belarus is based. For example, Article 8 of the Constitution of the Republic of Belarus stipulates that ‘the Republic of Belarus shall recognise the supremacy of the generally recognised principles of international law and shall ensure the compliance of laws therewith’ [2].

This work aims to compare the norms of the Constitution of the Republic of Belarus concerning the rights of the child to life and health care with the provisions of the Declaration of Human Rights, as well as to determine their conformity.

The preamble of the Declaration of Human Rights emphasises that all human rights are universal, indivisible, interdependent and interrelated – thereby proclaiming the absence of discrimination by age. Article 2 of the Declaration of Human Rights reads: ‘Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind’ [1].

The right to life is the fundamental right of every person and belongs to the category of personal constitutional, inalienable rights. Article 24 of the Constitution of the Republic of Belarus fully complies with Article 3 of the Declaration of Human Rights: ‘Everyone has the right to life’ [2] – which well confirms this fact. By saying ‘everyone’, the Constitution of the Republic of Belarus also means a child.

According to the constitutional provisions, rights and freedoms of a person must act as a guide in activities of the state, its bodies and officials – as enshrined in Article 2 of the Constitution of the Republic of Belarus: ‘The individual, his rights, freedoms and guarantees to secure them are the
supreme value and goal of the society and the State’ [2] – hence the main guarantors of observance of human rights are envisaged on the constitutional level.

The modern understanding of the term ‘health’ is defined in the Constitution of the World Health Organisation and is widely used by specialists of different fields of activity. It reads: ‘Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity’ [3]. Although the Declaration’s principles do not directly address the children’s right to health, this is manifested in every principle of the Declaration – implying protection of their physical, mental and psychological health. For example, Article 25 of the Universal Declaration of Human Rights establishes a provision when everyone has the right to a standard of living adequate for the well-being of himself and of his family – including food, clothing and housing.

There is no doubt that protection of housing rights is an integral part of the right to life and the right to health care. Article 48 of the Constitution of the Republic establishes the right of citizens of the Republic of Belarus to housing which can be granted to citizens who are in need of social protection free of charge. Moreover, Article 21 of the Constitution of the Republic of Belarus states that ‘everyone has the right to a decent standard of living, including appropriate food, clothing, housing and a continuous improvement of conditions necessary to attain this’ [2]. This right is secured to everyone, thereby emphasising the absence of any age discrimination. Moreover, it is proclaimed that the state shall guarantee the rights and freedoms of citizens of Belarus envisaged by its international obligations.

In our view, the Declaration of Human Rights has an important provision that maintenance of people’s well-being must be ensured in the event of sickness, disability or lack of livelihood in circumstances beyond their control [1]. The provisions on the right to medical care and social services – enshrined in the Declaration of Human Rights – are envisaged by the Constitution of our country. An important feature of the Constitution of the Republic of Belarus is that citizens of the Republic of Belarus are guaranteed the right to health care, including free treatment at state health care institutions (Article 45) [2]. At the same time, the state acts as a guarantor of the availability of medical care for all citizens. Comparison of the provisions of constitutions of the Republic of Belarus, the Federal Republic of Germany, the Austrian Republic and Sweden [4] shows that guarantees of the kind are not envisaged by Western European
legislators – which speaks of a more progressive approach to protecting children’s health in the constitutional provisions of the Republic of Belarus. This fact confirms the legislator’s interest in resolving the issues of improvement of the modern demographic situation and is one of the directions for the practical implementation of this problem in the state.

At the same time, an analysis of the international situation shows that global problems related to children’s survival are not yet resolved: children with acquired immunodeficiency syndrome, refugees, displaced persons, children in prison, in the zone of an armed conflict and other critical situations. With this in view, the above-mentioned global problems pose new challenges for health authorities and bodies of legal regulation of children’s rights to life and health care [5]. Proceeding from this, the Constitution of the Republic of Belarus guarantees the right to social security in the event of illness and disability (Article 47) [2]. The Constitution-guaranteed opportunities for the use of health facilities, development of physical culture and sports and measures to improve labour protection are the principles of health care, including of children.

Articles 4, 5, 7, 9 of the Declaration of Human Rights implicitly result in recommendations to states on the need to protect health: prohibition of slavery, torture, cruel treatment and punishment, arrest, detention and expulsion, arbitrary interference with privacy and family life, arbitrary assault on immunity dwellings [1].

Meanwhile, it should be noted that Article 25 of the Universal Declaration of Human Rights does not mention directly human – including child’s – rights. For example, in defining the right to care for maintaining health, provisions of the Declaration use such a broad concept as ‘everyone’. The use of this ‘everyone’ concept emphasises that the interpretation of the provisions under review makes it possible to attribute this right to the rights of every person regardless of age – which refers the content not only to adults’ rights but also to the rights of children.

The study of the Declaration of Human Rights shows that the role of the family as the main guarantor of the child’s life and health is noted for the first time in an international legal act. Its Article 16 reads: ‘The family is the natural and fundamental group unit of society and is entitled to protection by society and the State’ and, according to Article 25, ‘Motherhood and childhood are entitled to special care and assistance’ [1]. Accordingly, the need to protect the mother and child is recognised at the international level, while the society as a whole and the state act as the guarantor of their rights.
Article 32 of the Constitution of the Republic of Belarus also envisages special protection for the family and motherhood. At the same time, the Constitution of the Republic of Belarus obliges parents and persons substituting them to take care of the child’s health [2].

The importance and necessity of special legal protection of an employed minor is also envisaged by the Constitution. Workers are guaranteed healthy and safe working conditions (Article 41), while minors have the right to equal remuneration for work of equal value (Article 42). Moreover, it is emphasised that ‘no child shall be subjected to cruel treatment or humiliation or engaged in work that may be harmful to its physical, mental or moral development’ (Article 32) [2].

Without specifying age limits of the child, Article 32 of the Constitution guarantees young people the right to their spiritual, moral and physical development which is an integral part of the right to health care [2].

It should be noted that – in times when the Declaration of Human Rights was being prepared – industrial interference in the environment and its littering, as well as deterioration of the state of ecological systems were less critical for the human health and were not reflected in the Declaration of Human Rights for the above reasons. At the same time, according to the Constitution of the Republic of Belarus, the right of citizens to health care is secured by measures to improve the environment (Article 45), ‘everyone shall have the right to a conducive environment and to a compensation for the loss or damage caused by violation of this right’ (Article 46). The right to receive information on the state of the environment – guaranteed by Article 34 – can be realised, if necessary, as the right to preserve life and protect health.

According to Art. 1 of the Constitution, the Republic of Belarus as a unitary democratic social legal state, protects its independence and territorial integrity, constitutional order, ensures law and order, including by recognizing the rights, human rights and freedoms as the highest value. A person, his rights, freedoms and guarantees for their realization are the supreme value of society and the state (Article 2 of the Constitution of the Republic of Belarus). At the same time, the state is the guarantor and responsible for creating conditions for free and dignified development of the individual. Thus, everyone, regardless of age, has the right to life (Article 24 of the Constitution of the Republic of Belarus) and a decent standard of living (Article 21 of the Constitution of the Republic of Belarus).
In accordance with Art. 182 of the Marriage and Family Code, all children have equal rights, irrespective of origin, race, nationality, citizenship, social and property status, sex, language, education, attitude to religion, place of residence, state of health [6]. Equal and comprehensive protection is enjoyed by children born in and out of wedlock. When analyzing the legal status of a child in the Republic of Belarus, the following elements should be singled out: 1) the citizenship of children; 2) the principles of the legal status of children; 3) rights, freedoms and duties; 4) legal capacity and capacity; 5) guarantees of the rights of the child, means and ways of their protection. It should be noted the following peculiarity that the Constitution of the Republic of Belarus also uses the terms «everyone» or «citizen of the Republic of Belarus» to designate the constitutional legal status, thereby affirming that underage citizens of the Republic of Belarus have equal rights with adults.

The period of childhood has a time limit, respectively, and the legal status of the child is limited by time. In the legislation of the Republic of Belarus, it exists from the moment of birth until reaching adulthood. The child is an independent subject of constitutional law. The basis of its isolation from the mass of other individuals is based on age criteria. In the category of «child», it is necessary to emphasize the predominant role of the definition of the «legal status of the child», since the specificity of real relations with his participation is such that their content is formed primarily by the will of other subjects (legal representatives, government bodies, public organizations). In the Republic of Belarus, the rights of the child and their protection are provided by local executive and administrative bodies, the prosecutor's office and the court, which in their activities are guided by the priority of protecting the interests of children. Also, state bodies support the activities of public associations and other non-profit organizations that promote the protection and realization of the rights and interests of the child.

Thus, the peculiarities of the legal status of the child in the Republic of Belarus are: protection by the state at the constitutional level of childhood, the state is the main guarantor of the rights of the child, the will of other subjects of legal relations in the exercise of children's rights, as well as the age criteria when protecting and guaranteeing the rights of the child by the state.
Conclusions

1. The Declaration of Human Rights and the Constitution of the Republic of Belarus recognise the child as a subject of the right to life and the right to health care who has all the rights of an adult.

2. The child’s right to life and right to health care are interrelated and interdependent. The Constitution of the Republic of Belarus guarantees physical, mental and psychological health – which meets the provisions of the Declaration of Human Rights.

3. Under the Constitution of the Republic of Belarus, three institutions are declared the main guarantors of the child’s rights to life and health care: the family, the society and the state.

4. Unlike constitutions of Western European countries, the Constitution of the Republic of Belarus stipulates a provision on the protection of the child’s health, with a guarantee of receiving free medical care in state institutions. A provision of the kind confirms the Republic of Belarus’ interest and concern – as a state – in development of the younger generation and improvement of the demography, at the constitutional level.

References


The right to a fair trial: the case of administrative sanctions

Abstract
The right to a fair trial becomes a guarantee for all of the other human rights. Therefore, the discussions concerning the development of a contemporary charter of fundamental rights, which was the purpose of the 4th International Conference on Human Rights in Bari, had to include a reflection on this highly important human right: the right to a fair trial. The right to a fair trial, is normatively guaranteed both in international law and in domestic legal systems. However, it turns out that these numerous normative guarantees of the right to a fair trial, i.e. the right to have the case examined by a “competent,” impartial, and independent court, are not always sufficient. One type of cases that pose problems in terms of implementing these normative declarations are cases concerning administrative sanctions. The court’s control over cases in which public administration authorities decide about penalties cannot be limited to controlling legality. This raises the question of whether the Polish solution consisting in court control over the imposition of administrative sanctions being entrusted to administrative courts ensures proper implementation of the right to a hearing of one’s case before a “competent” court, as provided for in Article 45 of the Constitution of the Republic of Poland.

The doubts are related to the fact that Polish administrative courts are courts of law and not courts of fact. The Polish system of administrative courts has two instances: the first instance are the regional administrative courts (there are 16 of them, one per region) and the second instance is the Supreme Administrative Court. However, the task of these courts is not to adjudicate on administrative cases, but only to control the activities of public administration authorities. Polish administrative courts do not adjudicate on the subject matter, they do not decide about the rights and obligations of individuals; they only control if, in the given case, public administration authorities acted in accordance with legal regulations.

Keywords: administrative sanctions, right to a fair trial, human right, Polish administrative court, Polish Constitution, administrative law, criminal law, competences of administrative courts.
1. The right to a fair trial as a human right

It is commonly acknowledged that the concept of human rights is vague. This concept, covering the fundamental rights of the man and of the citizen, evolves in time due to civilizational and social changes. However, its scope should be understood in a universal manner in every legal culture, and as broadly as possible. Observance of the fundamental rights is the foundation of making sure that humans occupy the central position in contemporary world. This should be the priority of all decision-making bodies, in particular public authorities. In turn, the observance of these rights by these bodies should be guarded by courts. Consequently, the right to a fair trial becomes a guarantee for all of the other human rights. Therefore, the discussions concerning the development of a contemporary charter of fundamental rights, which was the purpose of the 4th International Conference on Human Rights in Bari, had to include a reflection on this highly important human right: the right to a fair trial.

The role of the right to a fair trial, as one of the most important human rights, is reflected in legal regulations. This right is normatively guaranteed both in international law and in domestic legal systems. In Article 6, the European Convention on Human Rights provides for a right to a fair trial. The same is guaranteed in Protocol No. 7 of 1984, which introduced the prohibition of being tried or punished twice. The right to a fair trial is also among those guaranteed by the International Covenant on Civil and Political Rights of 1966. The right to an effective remedy and to a fair trial is guaranteed in Article 47 of the Charter.

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1 The Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, subsequently amended by means of Protocols No. 3, 5, and 8 and supplemented by means of Protocol No. 2 (Polish Journal of Laws No. 1993.61.284, as amended). Sentence one of Article 6 provides that “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”


3 Sentence one of Article 14.1 of the International Covenant on Civil and Political Rights opened for signature on 19 December 1966 (Polish Journal of Laws No. 1977.38.167) provides that – All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”
of Fundamental Rights of the European Union. The Polish Constitution also guarantees the right to a fair trial, providing that “Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.”

However, it turns out that these numerous normative guarantees of the right to a fair trial, i.e. the right to have the case examined by a “competent,” impartial, and independent court, are not always sufficient. One type of cases that pose problems in terms of implementing these normative declarations are cases concerning administrative sanctions.

2. The concept of an administrative sanction

By administrative sanctions, I understand all kinds of sanctions imposed by administrative authorities in accordance with administrative law for violations of the norms of that law. This means various types of consequences of violating norms of administrative law that follow from the right to apply administrative coercion, which is the fundamental measure of ensuring the efficiency of public administration. This broad category comprises various forms of reactions of public administration authorities to disobedience or passivity of citizens, such as administrative financial penalties (e.g. a penalty for cutting down a tree without a permit, a penalty for driving a non-normative vehicles on a public road, a penalty for offering gambling on EGMs outside of a casino, etc.), loss of rights (e.g. revocation of driving license as a result of speeding, loss of a license to sell alcoholic beverages, loss of a license to drive a taxi, etc.), as well as orders (e.g. an order to demolish a building) and prohibitions (e.g. a prohibition of gatherings).

The issue of whether the right to a fair trial is properly ensured in such cases is particularly topical today in view of the spreading phenomenon of decriminalizing sanctions, i.e. transforming them from criminal sanctions to

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4 OJ C 83 of 2010, p. 2. Article 47 provides i.a. that “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.” On the issue of the scope of application of the Charter, cf. e.g. N. Półtorak, Zakres związania państw członkowskich Kartą Praw Podstawowych Unii Europejskiej, Europejski Przegląd Sądowy, September 2014, pp.17–28.
The reason for this clear tendency to move the penal function from criminal law to administrative law, thus broadening the scope of administrative sanctions, is primarily the simplified procedure of imposing administrative sanctions. Unlike the procedure of imposing criminal sanctions, it is unconnected to individual reasons for liability; in particular, there is no need to determine the perpetrator’s guilt, consider the principle of innocent until proven guilty, take into account the elements excluding the perpetrator’s liability, etc. This method of imposing a penalty is based on strict liability, i.e. it is limited to concluding that a violation of administrative law has occurred, without the need to examine the reasons for this violation, which makes it undoubtedly easier, faster, and cheaper. The scope of the entities on which these sanctions can be imposed is also much wider. These include not only natural persons, but also legal persons and organizational entities without legal personality, while criminal law, in principle, applies only to the first of those.

As a result, the boundary between criminal law and administrative law is becoming blurred, and the legislator is often acting completely without reflection, penalizing similar behaviors sometimes in criminal law and sometimes in administrative law, with no consideration for the fundamental differences

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5 For instance, originally, construction law provided for a fine, i.e. a measure belonging to criminal law, for illegal use of a building; currently, the legislator uses an administrative sanction for such a violation.

between these two branches of law. Naturally, the concept of regulating repressive (i.e. criminal) sanctions in administrative law, i.e. in a branch that formally is not a part of criminal law, is acceptable as such. However, the legislator should not do this completely arbitrarily, without paying attention to the differences between these two branches of law in terms of concepts of liability and the models of application of law. Unfortunately, this is often the case, which leads to a number of threats for fundamental rights, such as the *ne bis in idem* principle, the principles of equality and proportionality, and the eponymous right to a fair trial.

3. Limitations of Polish administrative courts

In academic literature and in the body of rulings of the European Court of Human Rights, it is emphasized that in order to ensure compliance with the Convention for the Protection of Human Rights and Fundamental Freedoms, it is not necessary for certain cases to be qualified as belonging to criminal law, but only for the standards laid down in Article 6 of the Convention to be observed. Therefore, in a proceedings other than strictly criminal, it is necessary to ensure a standard of protection of individuals that offers adequate trial-related guarantees.

One of the most important procedural standards concerning administrative sanctions is guaranteeing the party with the right to a fair trial. This means in particular that the court’s control over cases in which public administration authorities decide about penalties cannot be limited to controlling legality.

This raises the question of whether the Polish solution consisting in court control over the imposition of administrative sanctions being entrusted to administrative courts ensures proper implementation of the right to a hearing of one’s case before a “competent” court, as provided for in Article 45 of the Constitution of the Republic of Poland.

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7 Hereinafter as the “ECHR.”
8 Cf. e.g. the judgment of the ECHR in *Malige v France* (23 September 1998) where the Court concluded that the sanction of a loss of driving license is repressive, but since France did ensure guarantees of a fair trial that are required in criminal cases, Article 6 of the Convention was not violated.
9 Cf. the judgment of the Polish Constitutional Tribunal sitting as a full court of 14 October 2009, in the Kp 4/09 case, OTK ZU No. 9A of 2009, item 134.
10 The judgment of the ECHR in *Belilos v Switzerland* (29 April 1988).
The doubts are related to the fact that Polish administrative courts are courts of law and not courts of fact. The Polish system of administrative courts has two instances: the first instance are the regional administrative courts (there are 16 of them, one per region) and the second instance is the Supreme Administrative Court. However, the task of these courts is not to adjudicate on administrative cases, but only to control the activities of public administration authorities. Polish administrative courts do not adjudicate on the subject matter, they do not decide about the rights and obligations of individuals; they only control if, in the given case, public administration authorities acted in accordance with legal regulations. The sole criterion in this respect is legality, which significantly limits the scope of control. This form of shaping the competences of administrative courts results in the courts being bound by the so-called principle of relevance, i.e. the need to consider the legal and factual state of affairs that existed at the moment of the given public administration authority issuing its decision. Furthermore, presentation of evidence before Polish administrative courts is highly limited. These courts can only admit evidence in the form of documents, and even in this respect to a limited extent, if this is necessary to clear significant doubts and provided that it will not result in excessive prolongation of the proceedings. However, they cannot hear witnesses or admit evidence in the form of expert opinions. As a result, their capability of verifying the conclusions of public administration authorities as to facts is limited. This leads to doubts: for instance, even if courts had the statutory right to apply sanctions on a spectrum, they would not have tools sufficient to verify if the imposed penalty is fair. This is because administrative courts have no possibility of determining the given person’s guilt.

11 Sentence one of Article 184.1 of the Constitution of the Republic of Poland provides that “The Supreme Administrative Court and other administrative courts shall exercise, to the extent specified by statute, control over the performance of public administration”. This is confirmed by Article 1 § 1 of the LPBAA, which provides that “Administrative courts shall ensure justice by means of controlling the activities of public administration authorities and solving disputes as to competence and relevance between entities of local governments, local government boards of appeal, and between these bodies and government administration authorities”. Article 1 § 2 adds that “The control referred to in § 1 shall concern compliance with the law, unless statutory regulations provide otherwise”.

12 Article 106 § 3 of the Polish Law on Proceedings Before Administrative Courts (the “LPBAA”).

13 This issue was raised in a dissenting opinion by judge W. Hermeliński in a case K 13/08 OTK ZU No. 7A of 2009, item 105, pending before the Polish Constitutional Tribunal that concerned the Polish Law on Fishery.
These serious limitations of the extent of court control constitute a definite threat for the protection of the party’s rights in proceedings for the imposition of an administrative sanction, thus forming a basis for questioning whether the right to a fair trial is guaranteed in such cases.

4. Instruments intended to guarantee the right to a fair trial in cases concerning administrative sanctions

Due to the limitations of court control described above, the adjudicating of Polish administrative courts with respect to administrative sanctions requires a special kind of diligence and thoroughness, so as to minimize, as much as possible, these deficiencies of legal protection of the party to the proceedings. One has to remember that these sanctions are often severe, close in nature to criminal sanctions, while, contrary to them, their imposition is not related to determining the degree of guilt. This nature of administrative sanctions means that it is particularly important to establish guarantees for individuals that the sanctions will be imposed in accordance with the law.\(^{14}\) However, this requires increased vigilance and sensitivity from the court.

One of the methods to counterbalance the limitations of administrative courts is the skillful use of the existing (although, by nature, limited) procedural instruments, including in particular the possibility of admitting evidence in the form of a document, which is provided for in Article 106 § of the LPBAA. In cases concerning administrative sanctions, courts expand the scope of acceptable documentary evidence, so as to cover situations where the requested evidence “is linked only to evaluating the legality of the challenged administrative act.”\(^{15}\) For instance, with respect to the sanction consisting in the loss of driving license as a result of speeding, circumstances such as errors in measuring the speed of the vehicle may be brought up and considered not only at the stage of administrative proceedings (before the starosta, i.e. the head of the district, and before the local government board of appeal), but

\(^{14}\) The Polish Supreme Administrative Court pointed this out in the judgment of 5 March 2009 (II OSK 291/08).

\(^{15}\) See e.g. the judgment of the Polish Supreme Administrative Court of 24 September 2010 concerning an additional tax obligation determined on the basis of the VAT Law, which was classified as an administrative sanction by the Court of Justice of the European Union in the judgment of 15 January 2009.
also before the administrative court, where they may be verified and possibly taken into account.\textsuperscript{16}

In cases concerning administrative sanctions, administrative courts should be particularly sensitive and make sure that the person subject to administrative liability is heard before the decision about an administrative sanction is made. A party cannot be deprived of this important procedural guarantee.

Administrative courts also use another method, which is direct application of the Constitution in order to weaken the automatism of public administration authorities, which sometimes results in a complete lack of reflection when applying legal regulations concerning sanctions.

For instance, in the body of rulings, it is strongly emphasized that an entity that failed to comply with an administrative obligation must have the possibility to defend and demonstrate that the non-compliance was a result of circumstances for which it was not responsible. This is because the application of provisions imposing financial penalties cannot lead to a result that would be in conflict with the fundamental constitutional principles.\textsuperscript{17}

Following this pro-constitutional approach, the Polish Supreme Administrative Court concluded that, in spite of the fact that under the Law on Environmental Protection, an entity using the environment has to pay higher fees in the case of not having a permission to emit gases and dusts, the reasons for the lack of this permission have to be taken into account. The Court, referring to Articles 2 and 7 of the Constitution of the Republic of Poland, decided that since the lack of the permission was a result of the prolonged proceedings before the authority competent to issue this permission, then the company is not responsible for not having the permission. This means that the Court used a kind of counter-type, even though it was not provided for in statutory regulations.\textsuperscript{18}

A similar example is a judgment in which the court concluded that the sole fact of liability being strict does not mean that this liability is absolute.

\textsuperscript{16} This was pointed out by the Polish Constitutional Tribunal in the judgment of 11 October 2016 (case K 24/15, OTK ZU A/2016, item 77), in which it concluded that in this respect, the VAT Law is in conflict with the Constitution.

\textsuperscript{17} The case concerned Article 23.2.1 of the Law on Road Transport of Hazardous Materials: the entity transporting hazardous materials failed to send one copy of its annual report to the governor of the region on time; the deadline fell on a Saturday, which, however, was not a statutory holiday; the judgment of the Polish Supreme Administrative Court of 15 February 2012 (II GSK 1191/10).

\textsuperscript{18} Judgment of the Polish Supreme Administrative Court of 1 June 2010 (II OSK 871/09).
Therefore, the entity can release itself from liability if it demonstrates that it has done everything that could be reasonably expected of it in order to prevent the violation of legal regulations (i.e. the entity has exercised due diligence in the performance of its duties and, objectively, could not act in any other way). Rejecting this possibility would be in conflict with the fundamental constitutional principles following from the concept of a democratic state of law: the principle of the citizens’ trust to the state and the principle of legal security.19

In cases concerning administrative sanctions, it is also accepted that the basis for liability should be the legal regulation in force on the day of committing the act covered with the sanction and not the one in force on the day of issuing the final decision, unless the latter is more favorable for the perpetrator. This is a clear deviation from the general rules of adjudication of administrative courts. There are no clear legal bases for such a deviation; however, courts justify this exception by referring to the specific nature of the cases that concern sanctions. In the body of rulings, it is emphasized that the entity violating legal regulations may expect—considering the guarantee function of repressive law and on the basis of the principle of trust to the state and the laws introduced by the state, stemming from the principle of a democratic state of law—that sanctions will be imposed on it on the basis of the legal regulations that were in force when the violation occurred. In each individual case, when making a decision on applying a new law, it should be considered whether this could produce results that are unacceptable from the point of view of the constitutional principles of legal order.20

Another way to ensure the best possible protection of the party’s rights in proceedings before administrative courts is basing judgments on the requirements specified in the Recommendations of the Committee of the Council of Ministers No. R (91) of 13 February 1991 regarding Administrative Sanctions. Polish

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19 The case concerned a penalty for failure to report a vehicle for licensing. The party demonstrated that the vehicle was reported for licensing, but the registered letter was not delivered to the public administration authority and it was not the party’s fault; judgment of the Regional Administrative Court in Białystok of 25 July 2007 (II SA/Bk 267/07), upheld by the Supreme Administrative Court in the judgment of 13 September 2011 (II GSK 816/10).

20 The judgment of the Polish Supreme Administrative Court of 11 January 2005 (OSK 994/04), in which the Court questioned the possibility of imposing a financial penalty for illegal transport of goods by road as per the legal regulations in force on the day of issuing the decision, concluding that the penalty should be lower, in accordance with the legal regulations in force on the day of committing the act.
administrative courts follow this approach, even though the *Recommendation* is not a formally binding source of law in the Polish system of sources of law. As a result, it does not constitute applicable law, but rather lays down certain standards of conduct of public authorities in a specific area, which are accepted and used by administrative courts.\(^{21}\) The *Recommendation* has introduced i.a. the principles of informing the party about the charges against it, providing the party with sufficient time to prepare for the case, informing the party about evidence against it, providing the party with a possibility of being heard prior to the decision being made, and placing the burden of proof on the public administration authority. These principles are also laid down directly in the Polish Code of Administrative Procedure; however, in a situation where the object of the proceedings is the imposition of an administrative penalty—i.e. a sanction similar to a criminal sanction—it becomes even more important to observe the procedural rights of the parties and the principles of explanatory proceedings.

In cases concerning administrative sanctions, administrative courts cannot ignore the obligation to weigh goods and values.\(^{22}\) The essence of the principle of proportionality, as expressed in Article 31.3 of the Constitution of the Republic of Poland, is that the measures used by the legislator have to be sufficient to achieve the intended goals, but, at the same time, that they have to be necessary to protect the interest they are related to and that their effects have to be proportional to the burdens placed on citizens. The penalty should be strict enough to prevent future violations. At the same time, it cannot be excessive.\(^{23}\) The objective nature of administrative liability cannot lead to unreflective violations of the principle of proportionality. In order for administrative sanctions to be effective, it is necessary that they are inevitable and onerous, but

\(^{21}\) Cf. e.g. the judgment of the Polish Supreme Administrative Court of 5 March 2009 (II OSK 291/08).

\(^{22}\) Cf. e.g. the judgment of the Polish Supreme Administrative Court of 12 October 2010 (II GSK 860/09) concerning a financial penalty for constructing an exit from a national road without the required permit, which contains a reference to the fact that Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms is exclusively of civil and criminal nature, introducing the requirement of maintaining a reasonable balance between public interest and the protection of the complaining party’s fundamental rights; cf. also the judgment of the Polish Constitutional Tribunal of 14 June 2004 (SK 21/03; OTK-A 2004, No. 2, item 56).

\(^{23}\) Cf. e.g. the excessively high penalties for cutting down a tree without a permit that were declared unconstitutional by the Polish Constitutional Tribunal in the judgment of 1 July 2014 (case SK 6/12, OTK ZU No. 7A of 2014, item 68).
also that they correspond to the nature of the violation.\textsuperscript{24} Although concurrence of administrative and criminal liability does not violate the principle of \textit{ne bis in idem} (as discussed above), it should not lead to the violation of the prohibition of excessive repressiveness or result in disproportionate severity due to a cumulation of negative consequences of one situation.\textsuperscript{25} In the process of applying law in terms of administrative sanctions, there should also be no violations of the principle of equality, as guaranteed in Article 32.1 of the Constitution of the Republic of Poland.\textsuperscript{26}

Protection of individuals in cases concerning administrative sanctions could also be increased by adopting a model of control based on subject-matter adjudication by administrative courts, which would be tantamount to undermining the adequacy of the cassation-based model of control of sanction-imposing decisions by administrative courts. The model of subject-matter adjudication would certainly solve a number of issues related to proper implementation of the right to a fair trial in cases concerning administrative sanctions. However, this issue is highly controversial and has been a subject of unsolvable disputes in academic literature since the very beginning of the existence of administrative courts.

5. Summary

The unclear boundary between an administrative and a criminal delict makes it possible to determine the nature of the given sanction only through a decision of the court adjudicating in the given case. An example illustrating the difficulty of making the distinction is the request for a preliminary ruling made by the Polish Supreme Court to the CJEU in the decision of

\textsuperscript{24} Cf. the judgment of the Polish Constitutional Tribunal of 14 June 2004 (case SK 21/03, OTK-A No. 6 of 2004, item 56).

\textsuperscript{25} Cf. e.g. the judgment of the Polish Constitutional Tribunal of 9 October 2012 (case P 27/11; OTK ZU No. 9A of 2012, item 104) confirming the violation of the constitutional principle of equality by legal regulations which provide that different employees are entitled to a different number of days off; cf. also the judgments of the Polish Constitutional Tribunal of 14 October 2009 (sitting as a full court, case Kp 4/09, OTK ZU No. 9A of 2009, item 134) and of 29 April 1998 (case K 17/97, OTK ZU No. 3 of 1998, item 30).

\textsuperscript{26} Cf. the judgment of the Polish Constitutional Tribunal of 29 June 2004 (case P 20/02, OTK ZU No. 6A of 2004, item 61) concerning the charging of the same additional fee for using public transport without a document confirming the entitlement to a concessionary ticket and for using public transport without a ticket or without entitlement to a concessionary ticket.
12 October 2010, asking about the legal nature of the sanction provided for in Article 138 of Regulation 1973/2004 consisting in not granting direct aid in the years following the year in which the farmer provided false data concerning the declared area\textsuperscript{27}. The response to this request was crucial to determine if the \textit{ne bis in idem} principle would be violated in the related cases, since, at the same time, criminal law provides for liability of the perpetrator for making a misrepresentation in order to obtain aid under false pretenses.\textsuperscript{28} Another example of the difficulties in determining the nature of a specific sanction is the sanction consisting in assigning penalty points to drivers for speeding, which ultimately leads to the loss of driving license when the number of points is high enough. In the body of rulings, decriminalization of this measure has been accepted as a possibility, but, at the same time, it has been pointed out that it is necessary to ensure proper procedural guarantees due to its repressive nature.\textsuperscript{29}

In cases concerning the imposition of administrative sanctions, full court control should be possible, i.e. control exercised by an independent and impartial court established by law, competent to adjudicate on the matter, and permitted to use the full range of measures in terms of evidence. Entrusting court protection in cases concerning administrative sanctions in Poland to administrative courts could be seen as corresponding to the requirements regarding the right to a fair trial, as laid down in the Polish Constitution and the relevant conventions, but these courts have to be active in the application of law—without this, considering the existing limitations of court control and the lack of comprehensive provisions regulating the imposition of administrative sanctions, it would not be possible to ensure full protection of rights and freedoms.

\textsuperscript{27} The judgment of Polish Supreme Court of 27 September 2010, case V KK 179/10, OSN-wSK 2010, No. 1, item 1796.

\textsuperscript{28} In the judgment of 5 June 2012, case Bonda v Poland C-489/10, the Court of Justice of the European Union decided that Article 138.1 of Regulation 1973/2004 of 29 October 2004 must be interpreted as meaning that the measures provided for in the second and third subparagraphs of that provision, consisting in excluding a farmer from receiving aid for the year in which he made a false declaration of the eligible area and reducing the aid he can claim within the following three calendar years by an amount corresponding to the difference between the area declared and the area determined, do not constitute criminal penalties.

\textsuperscript{29} The judgment of the Polish Constitutional Tribunal, sitting as a full court, of 14 October 2009, case Kp 4/09, OTK ZU No. 9A of 2009, item 134.
As a de lege ferenda postulate, it should be stated that it is necessary to regulate, in statutory provisions, precisely and comprehensively, the principles of using administrative sanctions. The recent amendment to the Polish Code of Administrative Procedure concerning administrative financial penalties\(^{30}\) is a step in the right direction; still, this is insufficient. It should be postulated that the legislator, when creating various types of liability, should finally start rationalizing prosecution and penalization. The decision to classify the given sanction as an administrative or criminal penalty is an element of legislative policy and an expression of the legislator’s belief that the given nature of the penalty will be better to achieve its purpose. However, this decision cannot be arbitrary, as it is limited by the axiology of the Constitution—the reasons for liability have to correspond to the nature of the violation and the severity of the sanction. The law needs to be axiologically “legal” and must ensure proper substantive and procedural guarantees.

The doubts related to administrative sanctions not being regulated are clearly visible not only in Polish law. Currently, the works on a code of administrative procedure of the European Union are under way. These works were initiated by a group of academics forming the ReNEUAL, which has developed a draft (model) of the code, which comprises six books. However, none of them contains provisions regarding sanctions, even though the authors do see the need for such a regulation. The draft constituting an annex to the Resolution of the European Parliament of June 2016, which in fact is the ReNEUAL model cut down to two books, does not contain regulations concerning sanctions, either. Therefore, even though the lack of a comprehensive regulation of administrative sanctions is noticed in the European academic literature and body of rulings, no specific draft of such regulation has been produced. The conclusions reached in academic literature in this respect and active adjudication by administrative courts are an attempt to fill this gap. However, this is insufficient to compensate for the lack of such a comprehensive regulation.

The concept and the contents of the particular human rights should be redefined. As part of this process, one cannot forget about the courts, which guard human rights, i.e. about the right to a fair trial before a “competent,”

\(^{30}\) Section IVa – “Administrative financial penalties,” added to the Polish Code of Administrative Procedure under Article 1.41 of the Polish Law of 7 April 2017 (Journal of Laws No. 2017.935); the amendment came into effect on 1 June 2017.
impartial, and independent court, with the procedural rights guaranteed to the party to the proceedings.

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CHAPTER III

Human rights in the activities of public structures
Abstract
The subject of this study is a discussion about the influence of the state reason or national interest on the content and respect of human rights. Each state is guided by its own national interest. The very notion of “reason of state” is an expression of the specific interest of the ruling group. The aim of the study is to show the dependence of human rights from the politicized concept of “reason of state”. In fact, the reason of state (national interest) is the ideology of the ruling group, whose aim is to gain the public support and maintain power. The work uses such methods as: analysis of legal provisions, functional method, descriptive method and legal-comparative methods. Contemporary dominant ideologies are: the rule of law, a democratic state, a social state, a secular state or a democratic state of law. Europe, totally, departed from Christian ideology, which even in the 1960s was widely present in the constitutions and programs of many political parties. Human rights are a system of values to which various ideologies now quite commonly refer to. The subject of this study is to show the influence of various state interests on the shaping of the content of selected human rights, in particular the right to live, the right to freedom of speech and expression or the right for participation in scientific research or the use of scientific achievements.

Keywords: human rights, reason of state (national interest), political programs, constitution, ideology of the modern state.

1. Introduction

The term “reason of state” (French: raison d’état, Latin: ratio status) is relatively new and dates back to the 16th century. It is assumed that for the first time this term was used by the archbishop, inquisitor and diplomat in one person – Giovanni
della Casa in the work entitled Oratio to Carlo V in 1549. Thanks to this term, he could distinguish between civil and moral obligations. Those first obligations are proper, according to him, to the state\(^1\). The notion reason of state (raison d’état) was a reflection of the thoughts of the modern era about the state. The era of medieval universalism ended: the world based properly on two pillars, it means – on the German Empire and on the papacy. The order of that world did not create space for the independence of rulers and states, that is: the kingdoms and principalities which they were ruling.

Undoubtedly, the concept of raison d’état was therefore unknown in the ancient world or in the era of the Middle Ages. However, the concept of the state or social order influenced the position of human being. The subject of this work is to present the concept of the state and its relation to a person and to her or his rights through the prism of the history of various authorities in the context of the raison d’être, sovereignty, and national interest. As a research hypothesis, one should assume that human rights, their content and the respect for them are strictly dependent on the forms of political power. However, this political power always wants to realize its vision of social or political order through the prism of its experience, historical context or political program.

2. Human rights in the Roman Empire

In my opinion, human rights should be viewed through the prism of the political system in the first place and, secondly, from the economic and social, including religious, point of view. It is a methodological error to submit the evaluation criteria from one age to another. In this way, the actual picture becomes dark. Hence, it is difficult to speak about human rights in Roman law in their modern sense. This does not mean that the Romans did not see these problems\(^2\).

The history of the ancient Roman system essentially includes four types of political regimes. From the point of view of the purpose of this study, it

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is important to distinguish the republican and imperial regimes. In the latter case, two sub-periods: principate and dominate, were combined. Although they are differed from each other, they showed some similarities, which will be discussed below.

A characteristic feature of the republican period was that the concept of the state was identified with the nation. *Populus Romanus* was a real subject of power. The possibility of deciding on important matters during popular gatherings (*comita*), including making laws (*lex*) and choosing the most important state officials (*consuls and praetors*) was an expression of such situation.

This quite positive and quite modern sounding constitution of the Roman Republic, however, had its negative sides. *Populus Romanus* was created only by men and only if they were full-fledged Roman citizens. Therefore, the women and the people who do not have Roman citizenship (*peregrines*) were omitted. In addition, until the 4th century BC, only the patricians had exclusive access to public offices. Only two-century struggle of the plebeians for equal rights caused that first the plebeian offices were established with the plebeian tribune at the head, and then they gained access to the office of the consul or praetor.

As a result of leveling this social differences, a new group of rulers developed, that is aristocracy (*nobilitas*), including rich old patrician families as well as new plebeian ones. Such a political system was later replaced by new rich and influential families. Such people were referred to as *hominis novi*. The first consul of this newly-formed group was elected already in 223 BC.

In the last century of the republic, the conflict between two groups within the nobility: the optimates and the populares, has become more acute. The first of them sought to maintain the republican system, while others were aiming for the introduction of the autocracy. Julius Caesar was undoubtedly a symbolic figure for the populares.

It can be said that although the republic was a period of people’s rule (*populus*), the political system was constructed in such a way that only privileged classes had access to public offices, mainly due to the economic reasons. At that time, the elites

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were transformed over time, but the mechanism of access to the public offices remained the same. The other *cives Romanorum* formed a kind of system of political clientele supporting one or another candidate for the office of a praetor or consul\(^6\).

Res publica, originally, was identified with the narrow elites in power. But at the end of this system the term res publica was used interchangeably with such terms as: *populus, plebs*, but also *senatus, equites*\(^7\).

The situation changed with the principate time. Beginning with Octavian Augusta, the center of political power began to focus around the emperor. The plebeian and people’s congregations disappeared, the Roman senate and republican officials lost their significance and basically they had their functions only in nominal terms. The citizens lost their right to apply for public offices. These were occupied according to the criteria adopted by the emperor and his surroundings. It can be concluded that during the abstract concept of a state which owns its citizens, was born. The ruler, *princeps or imperator*, provided only the aristocracy with the possession of material goods and with the position in the social hierarchy. The concept of *populus Romanus* was only a background to the policy of the principate and dominate periods\(^8\). The very important moment was to give citizenship to almost all inhabitants of the Roman Empire in 21, 2 on the basis of *Constitutio Antoniana*\(^9\).

While talking about human rights in ancient Rome, one should also look at them through the prism of the rules typical for private law. The division of people into two groups – free and slaves was the most important issue there. The Romans, however, realized that this division was not compatible with the nature of things. Hence, Florentinus wrote that all people are born free. Only the human law, *ius gentium*, causes that some are born as free people, others as slaves\(^10\).

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\(^9\) From this right, *peregines dedetici* were taken out.

\(^10\) D. 1.5.4 pr.-1 (Florent. 9 inst.): pr. Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur. 1. Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur.
The respect for human rights was also evident in the legal institution called *favor libertatis* (presumption of freedom). It means that all doubts about human freedom were settled in favour of freedom\(^{11}\). The elements of human rights can be found in the care of the poor and the sick – the disadvantaged groups. In order to protect their rights, quite a number of foundations were formed in the post-classical period\(^{12}\). One can also mention the system of nutrition of people with low incomes through the system of free distribution of grain – *frumentatio*. At the peak period, in Rome, there were even about 300,000 people entitled to free assistance and help\(^{13}\).

## 3. Human rights in the Middle Ages

The period of the Middle Ages, lasting from the fifth to the fifteenth century, was very diverse, both from the political and social point of view. In the literature you can find different divisions of this era. The most common systematic are its division into: the early Middle Ages, the rise of the Middle Ages and the end of the Middle Ages. However, without going into methodological issues, its characteristics are the most important.

As a rule, it was a time in which there were two competing power centres: the Papacy and the German Empire, attributing themselves as the continuation of the Roman Empire. Both secular and ecclesiastical power created the concept of power and its origin for the defence of one’s own interests and reasons\(^{14}\). The most famous was the theory of two swords, according to which all authority, both secular and religious power, was given by Christ to Saint Peter and his successors. Successors of St. Peter may decide whether the two authorities are to perform alone, or whether the secular sword is given to a lay person. Both authorities, therefore, come from God\(^{15}\).


The ordered world was also based on the social hierarchy, headed by the aristocracy and the clergy. Regardless of doctrinal conflicts, the created concepts primarily served to maintain the status quo of the social system. This hierarchy also applied to the rulers who ultimately had to be subordinated to the Emperor of Germany or the Pope.

Such an ordered world, despite conflicts in views that sometimes transformed into religious wars, was based on Christian doctrine and its systems of values. In this doctrine, human being played a huge role. The salvation was given to every person, regardless of gender, financial status, age or social position. In fact, the situation of a particular person was difficult—especially people of lower social status, such as peasants and burghers, lived in very difficult conditions. In spite of quite large actions and activities undertaken by the Church in the field of care, especially for children and the poor, this care was insufficient. Unfortunately, there was definitely no support from the secular authorities who were rather interested in maintaining their position. There was no social welfare system as it was in ancient Rome. As a consequence, the descriptions from that period sometimes show the drastic examples of human position, despite the evangelical command to care for another human being. It should be explained rather by weak political or state power, which was not organized, and maybe even it was not interested in taking actions to defend people and their rights.

4. Human rights in the modern age

The new order of the European world, which was born on the ruins of the order of medieval universalism, began to be based on the concept of sovereign states, or rather on the rulers of kingdoms or principalities seeking to become independent. These rulers sought to ensure that their power was sovereign or independent of other rulers, mainly from the German emperor and the Pope. Nomen omen, it was during these changes in Europe that one more event, completely contrary to the new spirit, took place. We are talking here about the Prussian homage (1525), which made Prussia dependent from the Kingdom of Poland.

The spirit of transformation and the ideal of the ruler of the new period were quite well described in the work from that period named the Prince from 1513 (Il principe), which author was Niccolo Machiavelli (1496-1527). This author is probably the first person, since the antiquity time, to reveal the true face of power. The power, according to him, is not given by God, but it is acquired as a result
of intrigue, rape, deceit, and especially as the result of the various social factions struggling with each other. For the literary prince, whose prototype was Caesar Borgia, the most important thing was to become independent of someone’s fate and weapons. It was obvious, however, that the ruler depends on those who elected him. The ruler should strive for their favours. Basically, the ruler can be supported by people or by magnates. The interests of both groups are contradictory. The people see in the ruler a defender of those who are oppressed by the actions of the magnates. If the prince is supported by the nobles, they demand that he would satisfy the interests of this group. According to Machiavelli, one cannot speak of any created ideal of a king or prince. The ruler is as it is16.

In the further development of the modern era, there were several political powers in Europe, such as: France, Germany, Austria, England and Russia, which made other smaller states dependent on each other or led to the liquidation of their sovereignty, just as it happened with the Republic of Poland.

However, the industrial revolution that began in England was the most important event of this period. In some way, it was inspired by the French Revolution and colonial achievements. As a result, so-called the workers’ issue and the process of cultural diversity in Europe were initiated by the fact of bringing people from the colonies17.

The emerging capitalism has created social diversity on an unprecedented scale. Huge crowds of poor people were created. The solutions to these problems, in fact – the issue of taking care of human rights, appeared in the writings of great thinkers of this period, as well as in the individual legal acts or enunciations of the Catholic Church18. The need to protect human rights, although it was noticed, was not the main goal of the reasons of state or national interest of the individual states.

16 The ideal of the ruler was described, in principle, by N. Machiawellegao in item IX of his work. See: N. Machiavelli, Książę, http://www.knhd.law.uj.edu.pl/documents/3035628/ ba8cc9a5-998c-41e4-9dd9-499141898f61


18 DThe encyclical letter of Pope Leo XIII entitled Laborem exercens (1891), in which fundamental human rights have been clearly defined was a quite important document from that time. See: G. Molinari, La „Rerum Novarum” e i problemi sociali oggi, in: A. Luciani (ed.), La „Rerum Novarum” e i problemi sociali oggi, Massimo, Milano 1991, pp. 11-22.
5. Human rights after World War II

The Second World War, and, to a large extent, the First World War, played a significant role in the process of defining and protecting human rights. In both wars, the weapons of mass destruction were used on a previously unheard scale. During the Second World War, German extermination camps and Soviet gulags of extermination were created, in which millions of innocent and helpless people were killed. Due to the state interest of both countries, there was no place for human rights, quite clearly defined and postulated in the international arena of that time period. The Nazi doctrine was based on such values as: the superiority of the Aryan race, the necessity of defining the enemy (mainly Jews and Slavs), creating of the living space for the master race (Lebensraum) or the domination of one nation over the world.

In turn, the state of the communist ideology, in accordance with the doctrine proclaimed by K. Marx, the put in the first place the struggle of classes, which should lead to the abolition of class system and the rule of the working class. The bourgeoisie and kulaks should be resocialized or physically suppressed. Socialism, therefore, essentially aimed at building a world communist state based on the working class. As a result of this ideology, physical exterminations or forced emigration of social classes in Russia, and later in other countries of the former socialist bloc, including Poland, took place.

The very traumatic experiences of the Second World War caused that one of the first activities of the created United Nation (1945) was the adoption of the Universal Declaration of Human Rights (1948). As the consequence of the Declaration, the subsequent acts of international law declaring human rights were issued. Among them, the European Convention on Human Rights (1950) should be mentioned, on the basis of which the European Court of Human Rights in Strasbourg was created. Also there are: the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966) and the Charter of Fundamental Rights (2000). There were also numerous international law acts concerning specific social groups, such as the Convention on the Elimination of All Forms of Discrimination against Women (1979).

An important stage in the process of shaping human rights was their constitutionalisation. After the Second World War, the majority of the Constitutions were enacted by the declarations of respecting the specific set of human rights by state authorities. Such provisions even existed in the constitutions of totalitarian or communist states, such as in the constitution of the Polish People’s Republic of 1952. Human rights thus became a fairly important element, at least declarative, of the raison d’état or national interest in a particular state. The creation of new concepts of the state and their declaration in the constitutions was the undoubted strengthening for respect for human rights. It includes the concept of a state of law, a welfare state, or, as the Polish constitutional lawmaker wants – the democratic state of law.

However, it must be noticed and said that the mechanism of the declaration of human rights and the systems of their protection, in practice, depends on the political programs of particular political groups in power. Their implementation becomes the temporary raison d’être of a given state, also in relation to human rights. The interest of the ruling group determines which human rights are more strongly respected and which are limited or even neglected. The basic criterion for the selection of these rights is the political will, usually subordinated to maintaining the party’s listings or winning the upcoming elections.

In practice, in most European countries, for a long time, a very strong emphasis is placed on respect for, and even promotion of, social rights. This is undoubtedly a typically populist action aimed at obtaining political support that translates into electoral votes. At the same time, the political or civic rights, which are typical for a democratic system, are overlooked and limited. The rulers, using the apparatus of power, are increasingly restricting the rights of the opposition to express their views, by monopolizing the media market or controlling the network.

The similar actions can also be seen in the area of fundamental rights, in particular the right to live. The extremely liberal environments are forcing the legalization of unrestricted abortion and euthanasia. They call for freedom of choice and self-determination. The right-wing environments, in turn, promote the protection of life from the moment of conception to the natural death. Both sides refer to scientific research. In this discourse, however, a priori ideological settings of specific social groups are clearly visible without taking into account the actual content of the right to live. In this case, the raison d’état is replaced with the raison d’être of certain social groups, most often of an international nature.
6. Conclusion

Human rights and the national and international systems of their protection has surely been the great achievement of humankind since the time of ancient Rome. The experience of totalitarian systems of the twentieth century undoubtedly contributed to their listing in various acts of international law, and then to their constitutionalisation. The existing legal regulations, their elaborations and national and international advocacy indicate what these rights should be and how should they be guaranteed by public authorities, private institutions (for example: companies, universities, natural persons conducting economic activity) and finally by people themselves in contacts between them.

Meanwhile, the respect for human rights in practice or human rights in action looks different, even in countries with high legal culture\(^{20}\). The United Nation or the Council of Europe, but first and foremost, the international organizations, including the Red Cross, the International Helsinki Federation for Human Rights, the Amnesty International or the Helsinki Foundation for Human Rights register and make public numerous violations of human rights. Many of them are related to the implementation of the raison d’etat identified with the current policy of the ruling option. The question that must be posed in this circumstance concerns the way in which human rights are independent and implemented from the current policy. Another issue is whether this purely theoretical procedure is possible to be implemented in practice?

References


The influence of reason of state (national interest) on the observance of human rights


Abstract

Purpose: The purpose of the article is to explain the problem of the disease as an obstacle in the exercise of the highest functions and public offices. The analysis of international and national regulations making the highest functions and public offices dependent on the health status of candidates was made.

Methods: The article was prepared on the basis of the following research methods: legal dogmatic, systematic and comparative method. In the alternative, the systematic method and case law analysis were used.

Results: The research confirmed the thesis that the existing health regulations of officers are functional. Their aim is to provide state protection in the event of illness of a person responsible for the public sphere.

Discussion: Further research should be given to whether the solutions proposed by the national legislator are partially compatible with international regulations obliging candidates for public office to undergo medical examination or disclose certain medical data, including the scope of health information.

Keywords: diseases, illness, public officials, public health, international law, constitutional.

1. Introduction

The aim of the article is to examine and determine to what extent appropriate regulations have been provided at the national and international level relating to the health check of persons holding the highest public functions. The regulations should meet the requirements of the public need and, at the same time, not of the passive electoral law. The main hypothesis was that disease, that is a state contrary to health, in some situations constitutes an obstacle in the exercise of public functions: national
and international. The additional objective will be to verify to what extent the solutions proposed by the national legislator coincide with international regulations obliging candidates for public positions to disclose data about their state of health or resignation from the office of persons who already have a mandate.

2. Research methods

Research is conducted in the following fields of science of law: constitutional, international and public health. In order to verify the hypothesis, the following methods were applied: legal dogmatic, systemic and comparative. An auxiliary method was used to analyse the jurisprudence of tribunals and committees, and the systemic method based on the combination of a universal, European and national protection system was used.

3. Health as a legal value

Illness, that is a condition contrary to health, is an obstacle to the exercise of public functions. In the light of the WHO regulations, any deficiencies in the physical, mental and social health of decision-makers determine not only the decision made by him, but also the entire legislative process (Grad, 2002, pp. 982-984). They also affect the functioning of executive and representative activities. With the taking of public office, decision-makers are covered by special forms of protection and healthcare. Therefore, different legal systems provide for various mechanisms ensuring protection of the state in case of illness (Tabaszewski, 2016, pp. 75-84). This applies to three stages: the selection of healthy candidates for public positions provided for by the norms of electoral law; the stage of holding a public office; and the moment when the existence of a serious illness which is an obstacle to the exercise of a public function is established.

Undoubtedly, the poor health of people making key decisions in the state has an impact on the legal security of citizens (Czarny, 2010, pp.1-9). Therefore, you can not demand from people who can not take care of their own health, that they properly conduct the affairs of other people, entire communities and the nation. At present, the norms of international law recognize that illness, that is a condition contrary to health, is an obstacle to the exercise of public functions. Lack of adequate health, diseases and other dysfunctions of the organism are an obstacle to possible recruitment and taking up positions and state offices at various
levels (Post, 1995, p. 759). It is necessary to prove the premise of an „appropriate” state of health. Also, constitutional norms recognize that the absence of life-threatening diseases is a premise enabling and conditioning the exercise of state functions, the exercise of public service, or the performance of a given profession, or the exercise of a mandate (Kołodziej and Plac-Bobula, 1995, p. 27-32). At present, various systems of legal states differ in their approach to this issue (Dziewulak and Łukasz, 2010, pp. 3-11). This also applies to European countries.

Health is a desirable and protected value by the UN and regional international organizations: CoE and EU (Abbing, 1994, pp. 123-126). For many years, however, health was related to the state of the entire population, and the health condition of people performing public functions was taboo even in the countries of liberal democracy. The paradigm changed only at the end of the 20th century and after the departure from the binary interpretation of the concept of health (Declaration of Alma-Ata; UN Millennium Declaration; UN 2005 World Summit Outcome.). They were presented negatively, i.e. as a lack of poor physical state of the individual (disease) determined by doctors and medical personnel using qualified quantitative and qualitative measures. The holistic model promoted by the WHO was adopted defining health not merely the absence of disease or infirmity but is of complete physical, mental and social well-being (Constitution of The World Health Organization). In 1993 at the WHO conference in Vienna it was also recognized that health was a set of traits and a long-lasting attribute. States have been obliged to prevent, treatment and control of epidemic, endemic, occupational and other diseases (Vienna Declaration and Programme of Action).

Lack of illness as a condition enabling taking care of and using one’s health appears in the constitutions of the world (Dziewulak and Łukasz, 2010, pp. 14-15). Because, apart from the WHO definition, no act of international law precisely defines the condition of a healthy person, that is why states use different names: good health, health condition, optimal health, illness or health impairment (Blaxter, Warszawa, p. 10). In the text of the Polish constitution alone, the concept of health appears 8 times (Tabaszewski, 2016, pp. 170-173). There are various concepts in national law that refer to describing the state of health, which should be characterized by the politician holding public functions.

Health, as a personal attribute, is the value of every human being (Tabaszewski, 2016, p. 30; Wołoszyn, 2009, pp. 108-120). It affects his legal capacity and legal activities, as well as his ability to act in the public sphere. Health, however, is not an absolute value. In the event of a disease, various human rights can be
restricted, including passive electoral rights (Marks, 1995, p. 209-238; Greer, 1997, pp. 24-29). On the European continent it is possible with the help of so-called limitation clauses located in Article 2 and Article 8-11 European Convention of Human Rights and Fundamental Freedoms (ECoHR) and Article 31 European Social Charter (ESCh). The HRC also recognized that political and civic rights are not absolute and can be derided by the general rule of Article 21 Universal Declaration of Human Rights UDHR and Article 12 International Covenant on Civil and Political Rights (ICCPR) (Hannum, 1998, pp. 145-158; Tabaszewski, 2017, pp. 14-15; Toebes, 1999, p. 178). W pewnych sytuacjach zdrowie może stanowić również przesłankę typu cenzusowego (Banaszak, 2013, pp. 1236-1238). It is worth noting that in the light of HRC General Comment No. 25, for reasons of public health it is permissible to restrict passive electoral law and the right to participate in the public service, if the restrictions and reasons for exemption are determined by law and which are objective and reasonable (CCPR General Comment No. 25). In particular, this applies to people affected by infectious protection and quarantined.

The scope of passive electoral law can be limited, while in the process of selecting candidates for public and political positions, changes should be taken into account in the physical, mental and social spheres (Czarny, 2007, pp. 33-35). Deficits in the human psychic sphere affect to a much greater extent the inability to make rational and based on a conscious choice of electoral decisions than those resulting from the sphere of physical and spiritual human health (Klein and Grossman, 1967, pp. 149-152; Douglas, 2008, pp. 200-201). HRC confirmed that “confirmed mental incapacity can be the basis for denying a person the right to hold office”. The Siracusa Principles allow the exclusion of passive electoral law and the exercise of a mandate due to the lack of specific characteristics or qualifications due to: illness, infirmity, disability, health exclusion, physical and mental defects. (The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights; Schriner, Ochs and Shields, 1997, pp. 75-96).

4. Disease as an obstacle in the exercise of functions in international law

Illness or lack of health may be an obstacle in the exercise of the mandate of an international official. Good health, understood as the highest level of fitness, is often a criterion of recruitment in addition to substantive qualifications, impeccability of character, fair geographical representation, gender parity
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and formal criteria (Stein, 1962, pp. 9-32). In the light of Article 101.3 UN Charter, the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity (UN Charter and Statute of the International Court of Justice). UN regulations also specify that employees of its organization should display good health not only during the recruitment stage, but also throughout its entire period of its exercise.

Particular concern for the health of UN employees is dictated by the fact that its statute in four places directly refers to the protection of human health (Article 13, 55, 57, 62). According to Article 5 of the Convention on the privileges and immunities of UN of February 13, 1946, employees of the UN, ICoJ and specialized organizations in the Member States enjoy diplomatic privileges and immunities, including health care on preferential terms. Their individual contract concluded with the UN specifies details. The organization’s secretary-general may grant a sick leave of absence to staff members who can not perform their duties due to sickness or accident or whose presence at work is undesirable for the protection of public health. The detailed conditions applicable to the parties when making decisions are set out in the statutes and regulations of the personnel (e.g. Article 106. 1 of the UNESCO Regulations).

The requirement of the absence of diseases of a potential candidate applies not only to the UN, but to all international organizations affiliated and closely cooperating with the UN, especially to specialized organizations. Therefore, the Standards of Conduct for the International Civil Service regulations specify that while an executive head assigns staff in accordance with the exigencies of the service, it is the responsibility of organizations to ensure that the health, well-being, security and lives of their staff, without any discrimination whatsoever, will not be subject to undue risk. The organizations should take measures to protect the safety of their staff and that of their family members. At the same time, it is incumbent on international civil servants to comply with all instructions designed to protect their safety (Gërçhhi, 2014, pp. 894-896). This means that in the light of Article 41 each of the international organizations should take care of the highest level of health protection of their staff and provide special care in case of illness.

Also in the recruitment process at the Council of Europe, there is a requirement for a certain state of health. It has been specified in the Statute Statute of the Council of Europe and General Agreement on Privileges and Immunities of the Council of Europe of September 2, 1949. It follows from Article 36 of the Statute of the
Council of Europe that the members of the Secretariat’s staff are appointed by the Secretary General in accordance with administrative provisions. This means that only candidates who best meet certain criteria are considered for the initial selection for all levels. They are: health condition that allows you to work on a given position, no terminal diseases and threaten public safety. During the recruitment process, the recruitment committee is free to choose the candidate, based on the submitted documents, including medical certificates, vaccination cards submitted, a list from the insurer and candidate’s written declarations (General Agreement on Privileges and Immunities of the Council of Europe). With regard to people already employed who, due to a disease that makes it impossible to appear at work, the relevant provisions of the labour law are applied, and in the case of the Secretary General, the disease determined means the takeover of the function by his deputy by the power of law.

Health as a formal requirement for the exercise of functions in the EU has been mentioned in the new Code of Conduct of 2018 for Commissioners and EC employees (Article 6, point 2). During the process of applying for a given function, candidates present documents confirming their state of health issued by their home countries (Commission Decision of 31.1.2018). In the EU, however, there are no regulations governing the procedure of dismissal or termination of the mandate of a sick person who is permanently or temporarily unable to perform his functions. Therefore, a special role should be attributed to the so-called hearing during which candidates for Commissioners are questioned individually or collectively by their respective parliamentary committees. The health condition, the lack of disease and physical activity have so far been the subject of occasional interest of EP deputies. Specific restrictions are foreseen for judges and advocates general of the CJUE (art. 253 Treaty on the Functioning of the European Union Consolidated and art. 19 Treaty on European Union). They should have the qualifications required to occupy the highest judicial positions in their Member States. States may impose on their representatives additional health requirements, guaranteeing the undisputed independence and independence of the judges.

5. Disease as an obstacle in the exercise of functions in national law

The rules of exercising the right to health have been included in almost 90% of all constitutional orders of world countries, but only a small part of all constitutions specify the health situations of persons holding public functions
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(Tabaszewski, 2016, p. 161). Usually, the functional approaches dominate in this respect, specifying the means of taking over by virtue of law the tasks of the person holding the highest functions in the state by a legally appointed deputy. This is the case if the so-called transient obstacle in the performance of the function is revealed. It can be a physical illness, a mental illness or an accident. In light of the ECoHR judgment in the Adamsons v. Latvia case, the Court has recognized that states have the option of introducing stricter requirements for candidates for the highest state functions than restrictions on active electoral law (Adamsons v. Latvia, App. No. 3669/03). This means that restrictions on passive electoral rights are acceptable for candidates for public positions who do not enjoy “due”, “appropriate” or “proper” state of health. The burden of proof will rest on the candidate. The blocking of a given candidate because of his transient disease may be considered discriminatory in light of the established case law of international bodies.

The taking over of the president’s office in the event of emptying this office is regulated by the 25th amendment to the oldest constitution of the world, that is to the United States Constitution, which entered into force on February 23, 1967 (United States of America’s Constitution of 1789). A similar model view of the situation in which it is possible to remove the decision-maker is set out in Article 104 of the Azerbaijan Constitution. It specifies that the powers of the President of the Republic of Azerbaijan shall be considered to have expired before the official end of his or her term when he or she retires, loses the ability to fulfill the duties of his or her office for health reasons, or is removed from office in the conditions and in the procedure specified by the present Constitution (Azerbaijan’s Constitution of 1995). Constitutional regulations are necessary and preventive in nature, because a longer absence in the performance of public functions may result in total disorganization of the state. (Ferrell R. H., 1998, pp. 185; Patyra, 2013, p. 23). However, the role of decisions and medical decisions is of the utmost importance. These documents are important for determining whether a given disease and illness, which a politician suffers from, can realistically influence his/her actions.

In the light of Article 131 of the Polish Constitution of 1997, poor health may constitute an obstacle to the office of the President (Zubik, 2010, p. 71). If the President of the Republic is temporarily unable to discharge the duties of his office, he shall communicate this fact to the Marshal of the Sejm, who shall temporarily assume the duties of the President of the Republic. If the President
of the Republic is not in a position to inform the Marshal of the Sejm of his incapacity to discharge the duties of the office, then the Constitutional Tribunal shall, on request of the Marshal of the Sejm, determine whether or not there exists an impediment to the exercise of the office by the President of the Republic. If the Constitutional Tribunal so finds, it shall require the Marshal of the Sejm to temporarily perform the duties of the President of the Republic (Constitution of the Republic of Poland). The literature emphasizes that the shape of the above constitutional regulations resulted in rumours that Lech Wałęsa’s imbalance was also caused by leaps and disorders caused by diabetes.

The Polish Constitution also provides for a situation in which the President, in a life-threatening situation, is unable to inform the Marshal of the Sejm. The Marshal of the Sejm shall, until the time of election of a new President of the Republic, temporarily discharge the duties of the President of the Republic in case of a declaration by the National Assembly of the President’s permanent incapacity to exercise his duties due to the state of his health. Such declaration shall require a resolution adopted by a majority vote of at least two-thirds of the statutory number of members of the National Assembly. The sick president is entitled to a retirement pension or health benefits. It is worth noting that apart from the President, the act grants special health care to his spouse, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, spouses of these persons and family members who are dependent on them (Ustawa z dnia 31.07.1981 r. o wynagrodzeniu osób zajmujących kierownicze stanowiska państwowe). The purpose of this care is to enable uninterrupted performance of public functions without any disruptions caused by an accident or illness (Cornell, 2017, pp. 2-7).

6. Final Remarks

Certain diseases are an obstacle to the function of politician in the country, as well as an official of an international organization. Good health is much more often required for international than national positions. However, the constitutions are much more likely to specify situations in which the disease becomes an obstacle to continue holding the highest state functions. In practice, however, determining the health status of a person affected by the disease may face considerable difficulties. First, health is still a concept that is legally out of focus, before which civil rights give way. Secondly, due to the development of medical sciences, certain diseases that were considered threatening life in the 20th century currently do not
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present an obstacle to normal human functioning. Thirdly, the exercise of power by addicts and those affected by civilization diseases, which do not threaten the life of the politician, but make him vulnerable to environmental influences, is problematic. It is difficult to require people who do not care about their health to properly take care of the health and safety of the entire population.

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Abstract
This article is devoted to the issue of Human Rights in Special Services. The intention of the author is to bring closer the need for control over the services, especially in the context of observing human rights as a universal paradigm of individual freedom as well as other rights, which are related to every interference of power in the personal sphere of human rights. The material analyzed in this context the problem of management of special services and the ongoing monitoring of their observance of human rights. The result of the analysis is conclusions regarding the reactivation of issues related to human rights, especially in the training process of officers of the services.

Keywords: special Services, management, coordination, Human Rights, crime, terrorism, intelligence, political control, personal data.

Both issues related to the operation of special services as well as the broadly understood human rights system have already been repeatedly the subject of scientific research and public debate. In spite of numerous publications, there is a relatively
underdeveloped number of scientific and expert studies regarding the study of human rights in these specific institutions whose task is generally to protect order and legal order. This is significant not only because of the importance of a broad legal and social category that creates human rights, but above all, the specificity of the services. These services operate not only in a way that is significantly different from other state institutions, but are subject to permanent changes, both in formal and legal way regarding the organizational, personnel and task framework, and above all the philosophy of operation as well as the methods used by them.

They are distinguished from other institutions of the state, not only by the nature of the tasks performed for the purpose, which is worth recalling again: ensuring security in the national and external dimension, but above all, because of the hidden way of work, which make that their work effects as well as methods of action are special. It is this quality that determines that special services should be subject to specific forms of control both by state authorities and non-governmental organizations, due to legal forms of action that directly and directly undermine human rights and freedoms.

Currently, when observing the activities of the services in the context of spurious information that reaches the public space and confronting it with the definitional meaning of the term human rights, one should consider how the observance of human rights is understood by their officers. Human rights are, of course, one of the basic concepts used in legal transactions. In the dictionary sense law means: “freedom, means of protection and benefits, which, all people should be able to demand from the society, in accordance with currently accepted freedoms”\(^2\). Here, the moral right to demand of respect for human rights is emphasized.\(\)\(^2\) According to L. Henkin, human rights are the rights of individuals living in society, which is supposed to oblige them to realize claims arising from these rights. They are supposed to have universal character and belong to all people living in every society. They are also of a basic nature and do not need to be substantiated by reference to any other rights. This does not mean, however, that human rights are absolute, they can be subject to restrictions, but only in exceptional predetermined cases and according to specific procedures and not at any discretion\(^3\).


Their basic character in accordance with the material criterion determine that fundamental rights are the most important from the point of view of the interests of citizens and the state, necessary to guarantee other civil rights regarding the basic areas of the individual’s social life as a person and citizen. Human rights are, therefore, a minimum of the rights that an individual is entitled to, a minimum without which he would not be able to exercise other rights. They are also fundamental because the state, while striving to achieve various socially important goals, can’t omit these rights4.

Human rights regulate the relations between an individual and the state, its organs and officers exercising authority at various levels5. This is called a vertical impact of these laws. There is a dispute over the horizontal operation of human rights – that is, whether human rights are also directly applicable in relations between people. The concept of horizontal action of human rights is recognized and accepted in many western countries. In Polish case-law, however, it has not found a greater reflection6.

In the context of operation of special services, their activities should be confronted with the basic functions of human rights. According to Osiatyński, human rights should fulfill three functions and all of them have a guarantee and protection character. The first function is to protect the freedom of the individual against its violation by the state, the second – the need to create a state the possibility of realizing the rights of the individual and the third – to protect the individual’s rights and freedoms from violation by others7. Therefore, when talking about human rights in connection with the activities of special services, the first of these functions should be considered. When discussing it, one should state that human rights play the role of a shield which role is to protect the individual, and especially his/her freedom, from the state. The essence of the state is to exercise power, regardless of whether it is just power for power (person or group), or is it to implement such tasks as ensuring internal and external security of the state, or realizing the common good or achieving other goals organized by the state. State, fulfilling its tasks, uses instruments it has chosen. Its essence is the possibility of applying coercion. Even the state counted among the most just countries, is always stronger than the individual obliged to obey law it issues..However, coercive

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4 W. Skrzydło, Polskie prawo konstytucyjne, Lublin 2003, p. 159.
5 Ibidem p. 155.
6 W. Osiatyński, Wprowadzenie do praw człowieka, www.hfhr.pl, access: 01.06.2018
7 Ibidem.
power can be abused. When state acts as an arbitrator, there is the possibility of arbitrary decisions taken by its official.

What's more, state decisions are made by specific people who can be guided by their own interests, people who are hardly unaffected by their own subjective judgments, prejudices and emotions. They may misuse or abuse their power. That is why there is a need to protect the individual against the state and people in power on his behalf.

Protection of an individual against the danger of abuse of power can take many forms. One of them is limiting the ability of the state and officials to interfere in certain spheres of human life. The individual’s freedom, such as, for example, personal freedom, freedom of conscience and religion, freedom of assembly, freedom of association, freedom of movement and freedom of management serve this purpose. Freedoms are a kind of shield that is supposed to protect the individual against the greater strength of the state. They protect the autonomy of the individual and prevent the state from interfering with the sphere of individual freedom. It should be added that human rights protect not only against unjust that an authority can inflict on the individual. They also protect the individual against violations of its autonomy by the authority pursuing its vision of the common good or public policy objectives.

As was mentioned earlier, the problem of human rights in the activities of special services has been repeatedly addressed. In the theory and practice of human rights the real issue of the so-called Mccain turned out to be a real milestone, when in 1988 in Gibraltar British SAS soldiers killed three members of the IRA suspected of preparing a bomb attack. This incident and subsequent judgment of the European Court of Human Rights, which stated violation of art. 2 of the European Convention on Human Rights, caused the need to seek new legal solutions in the field of special services, but also put a new question about the acceptable limits of justified state interference in the sphere of civil rights and freedoms. It seems that this judgment was important to the European legal culture and the activities of the services.

This judgment undoubtedly affected the activities of Polish police and special services and was reflected in the training programs of individual services. He was, for example, discussed at the officer’s course of the Prison Service. It should be

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8 Ibidem
noted that during the creation of the foundations of the democratic Polish state after 1989 and system transformation (also regarding police and special services) to the issue of human rights in the context of service activities, the importance is high. On the other hand, as time passed, until the present day, the mutual relation of human rights to broadly understood security became almost universal – and thus treated without proper validity and often omitted at all. A good example of such a state of affairs has become the problem of supervision over special services in Poland. Its model and the legal provisions that constitute it, may be a factor hampering the full implementation of human rights. At the moment, this is not about deliberately defined actions of the state directed against this law, but about certain inconsistencies and deficiencies in the systemic model that may prove sufficient to cause damage to freedoms and civil rights.

There are currently 5 special services in Poland. In art. 11 of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency, the legislator introduced the subject definition of special services. According to this provision, the special services are: the Internal Security Agency (ABW), the Foreign Intelligence Agency (AW), the Military Counterintelligence Service (SKW), the Military Intelligence Service (SWW) and the Central Anticorruption Bureau (CBA). To co-ordinate the activities of these services, a constitutional body was established in the form of the Minister-Member of the Council of Ministers of the Coordinator of Special Services.

On November 18, the Prime Minister signed the Regulation regarding the detailed scope of activities of the Minister-Member of the Council of Ministers Mariusz Kamiński – Coordinator of Special Services (hereinafter the Regulation). Exercising supervision over special services is undoubtedly one of the most important administrative and factual tasks in the state. The manner of appointing the Minister-Coordinator itself does not raise any serious comments here, it seems that issued on the basis of art. 33 para. 1 point 1 and 2 of the Act of 8 August 1996 on the Council of Ministers, the Regulation meets formal and legal requirements. However, large reservations should be made regarding the

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10 C.t.. Dz. U. 2002 r. nr 74, poz. 6776 – with later d.
11 Dz. U. z 2015 r., poz. 1921, with later d., changed then Rozporządzenie Prezesa Rady Ministrów z dnia 13 grudnia 2017 r. w sprawie szczegółowego zakresu działania Ministra-Członka Rady Ministrów Mariusza Kamińskiego – Koordynatora Służb Specjalnych; Dz. U. 2017, poz. 2332.
pointing name and surname of the Minister-Coordinator for in the case of his dismissal from the office, the services will probably not be left without supervision, while for the full legal authorization of his successor, it will be necessary to develop a new regulation. The lack of such regulations alone may therefore pose a threat to civil rights and freedoms, as the competences of the previous Minister (of course, if the current model is left behind) must be transferred to another person. Therefore, this wording should be considered not very fortunate, especially in the case of a long period of legislation. This may give rise to specific legal consequences.

Irrespective of the above observation, it should also be noted that referred legal act is not complete and the Minister’s competences were also specified in the previously mentioned Act on the Internal Security Agency and the Foreign Intelligence Agency, the Act of 9 June 2006 on the Military Counterintelligence Service and the Military Intelligence Service and the Act of 9 June 2006 on the Central Anticorruption Bureau. In addition, the Minister Coordinator implements a package of tasks under the Act of 5 August 2010 on the protection of classified information. In the Polish legal system, such a division of competences does not constitute something special, while on such an elementary issue as the observance of human rights by state institutions, grouping in one legal act all of its competences would be desirable. Especially in a situation when it is not complete and does not contain even the explicit obligation to inform the Prime Minister and members of the Council of Ministers about the activity and actions of special services. Of course, it is difficult to claim that such an information obligation towards the Prime Minister is not met, but for the sake of transparency and mutual relations in the government administration, it should be directly expressed. Analyzing the contents of this legal act, it is impossible to get the impression that the Special Services Coordinator, in the scope of his duties, takes over the function of managing the services, not control and, as a rule, coordinating. This is evidenced by the wide range of its competences, which seems to go beyond institutional supervision and coordination. His tasks include: supervision and control over the activities of special services, coordination of services, support of the Council of Ministers in shaping the main directions of the government’s policy regarding the operation of services – §2 of the Regulation.

14 C.t..Dz. U. z 2017 r., poz. 1993 with later d.
The activity of the Minister Coordinator on the basis of the Regulation referred above take on features of a specific exclusiveness, judging from the provisions concerning, for example, the issue of human rights in special services already addressed in this study. First of all, the legislator should be given the opportunity to reflect the existence of the problem of mutual relations between human rights and the activities of services in the text of the Regulation. According to §3.3. the tasks of the Minister Coordinator in the scope of control of the operation of special services include “analyzing and assessing the application by the special services of powers enabling interference in the rights and freedoms of man and citizen, in particular by virtue of the powers specified in art. 27-29 of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency, art. 31-33 of the Act of 9 June 2006 on the Military Counterintelligence Service and the Military Intelligence Service and art. 17-19 of the Act of June 9, 2006 on the Central Anticorruption Bureau.

The references of the Internal Security Agency and Intelligence Agency Acts, Military Counterintelligence Service and Military Intelligence Service as well as the Central Anti-Corruption Bureau referred to in the Regulation apply broadly to operational and intelligence activities carried out by special services. Activities are the most invasive forms of service activity and can realistically harm human rights. Their improper use (i.e. without proper political and judicial control) leads to a violation of human rights by a straight path.

Therefore, the application of special supervision by the management body over the use of operational and intelligence activities is undoubtedly an element that should safeguard civil rights and freedoms – also human rights. On the other hand, it is a pity that this guarantee function was limited only to analysis and evaluation, and not to the level of control before applying these measures. They are carried out by other bodies, but the Minister Coordinator himself could perform an additional role in this system, for example in relation to the personal data protection system.

Based on §6.9 of the Regulation, the Minister has the right to read the information of the plenipotentiary for control of processing of personal data by the Central Anticorruption Bureau about the violation of the provisions of the Act of 9 June 2006 on the Central Anticorruption Bureau and the regulations on the protection of personal data. Additionally, pursuant to §6.10, read and express opinions on annual reports submitted by the plenipotentiary for control of processing of personal data by the Central Anticorruption Bureau.
The issue of personal data protection is the second, in addition to the above mentioned operational activities, which is subject to particular interest of the Minister of Coordinator due to the possibility of threat to civil rights and freedoms. Unfortunately, in this particular case, they are limited to only one service which is the Central Anticorruption Bureau. Existing legal regulations (Article 22 (1) of the Act on the Central Anti-Corruption Bureau) authorize the CBA to obtain information, including classified information, collect it, check it and process it. The consent expressed by the legislator extends also to sensitive personal data within the meaning of art. 27 sec. 1 of the Act of 29 August 1997 on the protection of personal data, without the knowledge and consent of the persons concerned (Article 22a paragraph 1 of the Act on the Central Anticorruption Bureau). The only condition in accordance with the principle of the purpose of personal data processing (collection of personal data should be made for marked, legitimate purposes and not processed further than these purposes) and the principle of adequacy (the administrator should only process such they are necessary due to the purpose of their collection, the relevance of data should be assessed at the moment of collection) is the performance of tasks by the Central Anticorruption Bureau defined in art. 2 para. 1 of the CBA Act. The office for the performance of its tasks can obtain data free of charge from data sets maintained by public authorities and state or local government organizational units (Article 22a paragraph 2 of the Act on the Central Anticorruption Bureau).

What is worth emphasizing, it is the legal possibility of processing personal data without the knowledge and consent of the persons they concern. This significant interference in the system of personal rights and freedoms requires special guarantees provided, among others, by efficient internal control institutions. The protection of personal data in the Central Anticorruption Bureau is based on two principles: 1. Responsibility of the personal data administrator, which remains the Head of the Central Anticorruption Bureau. 2. Autonomous supervision system based on the control apparatus of the plenipotentiary for control of processing of personal data by the Central Anticorruption Bureau (hereinafter: the personal data representative), whose autonomy is guaranteed by the Act on the Central Anticorruption Bureau, including a special mode of appeal from the function.

The aforementioned plenipotentiary is a special institution that other services do not have (eg. ABW, SKW, AW, Police, Prison Service) and it is specially fixed not only in the structure of the Bureau organization, but also in the special services system, constituting a model example of the independence of the
services from the world of politics and giving a real opportunity for the CBA to comply with constitutional civil rights and freedoms. The proxy for personal data in the Central Anticorruption Bureau is obviously not the same as the institution of the plenipotentiary for the protection of classified information. First of all, they operate on the basis of different legal acts (the Act on protection of classified information and the Act on the Central Anticorruption Bureau), but above all, the personal data representative at the CBA supervises the compliance of processing personal data collected by the CBA with the provisions of the Act on personal data protection. And the plenipotentiary for protection of classified information, who reports directly to the head of the organizational unit, is responsible for ensuring compliance with provisions on the protection of classified information. It is the specific form of subordination of the personal data representative that is one of the elements shaping his independence and guaranteeing the effectiveness of his function.

The Minister Coordinator is therefore the body that analyzes the protection of personal data in the Central Anticorruption Bureau. Due to the aforementioned fact that the proxy institution only exists in the CBA, it is a very limited supervision, which is therefore concentrated exclusively in one special service. It may surprise that having almost a model solution successfully operating in the CBA, which for years has built its own autonomous system of personal data protection, coexisting with the national order of personal data protection, no action was taken. The Minister Coordinator is, after all, entitled to create similar or to duplicate this one existing in the Central Anticorruption Bureau. Therefore, monitoring the observance of human rights in the field of personal data protection is very illusory – limited to only 1 out of 5 special services. This is particularly important, for example from the point of view of the new personal data protection system based on the GDPR, applicable from 25 May 2018.\footnote{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).Dziennik Urzędowy Unii Europejskiej L 119 4 maja 2016} Popularly referred to as the General Regulation on the Protection of Personal data, it is directly applied in every EU country. Detailed description of its use in Poland, so-called new act on the protection of personal data – Act of 10 May 2018 on the protection of personal data, in art. 6. 2 exempts all Polish special services from the use of the GDPR.\footnote{Dz. U. z 2018 r. poz. 1000.}
Therefore, on the basis of the provisions of the Act expressed in art. 175 and the Act on the Central Anticorruption Bureau, only this service conducts institutionalized protection of personal data based on its own system. From the point of view of the functioning of the services, this is probably a convenient solution, but other circumstances may imply specific threats for entities and natural persons cooperating with the services even at the level of business transactions – public procurement or providing certain services to the services – such as training activities. These entities, unlike services, are forced to use the GDPR. Hence, at the interface of mutual civil law relations, there is a duality of the legal relationship, and this can give rise to specific threats also to the rights and freedoms of natural persons.

Analyzing the legal possibilities of the Minister of the Coordinator’s actions it is difficult to indicate directly his competences and duties related to the protection of human rights. Traces of concern for basic civil rights and freedoms can be found in many provisions of the Regulation. Bearing in mind that special services are an institutional part of the national legal order, the Coordinator of special services must respect civil rights and freedoms when carrying out his duties. This is of course a presumption that can’t be violated, if only because the Republic of Poland is a democratic state with large freedom traditions. Therefore, what is worrying is not the philosophy of special service regulations (and even the shortcomings mentioned in a small part), but the quality and manner of respecting human rights, and sometimes even their understanding.

These are not empty claims. Returning to the tasks and activities conducted by the Minister Coordinator, it should be mentioned that his service will be provided by the Chancellery of the Prime Minister (§8 of the Regulation). “The College for Special Services operates at the Council for Ministers, hereinafter referred to as” the College“, as an advisory and consultative body for programming, supervising and coordinating the activities of the Internal Security Agency, AW, Military Counterintelligence Service, Military Intelligence Service and Central Anticorruption Bureau, hereinafter referred to as” the services special “and actions taken for the protection of national security of the Police, Border Guard, Military Police, Prison Service, Government Protection Bureau, Customs Service, tax offices, tax chambers, fiscal control authorities, financial information authorities and reconnaissance services of the Armed Forces of the Republic of Poland.17 The College in

17 Art. 11 Ustawa z dnia – 24 maja 2002 o Agencji Bezpieczeństwa Wewnętrznego i Agencji Wywiadu (Dz.U. 2018 r. poz. 730)
the light of the content of art. 12 of the Act on the Internal Security Agency and the Foreign Intelligence Agency does not deal with the analysis of the observance of human rights by special services and other state services cooperating with them. What is interesting, however, is the fact that both the College and the Minister Coordinator operate within the structure of the Department of National Security of the Chancellery of the Prime Minister. Department of National Security.”18

The mere fact of organizational and substantive support for both the Minister of Coordinator and the College for Special Services should not cause controversy. The merits of the operation of these institutions is the same and the real proximity of organizational solutions certainly affects the good performance of duties. However, it is anxious to point out that the organization of the management of special services is prepared organisationally by one department of the Chancellery of the Prime Minister. The question arises whether this organizational unit is sufficient to provide work in the field of service coordination. Or rather, it should not be dealt with by a separate unit in the rank of an independent ministry, so as to ensure real monitoring of the organization and operation of services also in the area of observance of civil rights and freedoms.

Considering the activities of Polish special services in the context of their observance of human rights in their current activities, when analyzing legal acts regulating their functioning, it is difficult to form a direct critical and objective evaluation. These provisions partially normalize the necessity of civil rights and freedoms by the services, but it is impossible to resist the impression that they do so chaotically and selectively, raising the problem only when it is absolutely necessary.

It is impossible to resist the impression that there is no systematic approach to controlling and monitoring the observance of government-based human rights services. This is evidenced by the missing elements in legislation as well as the current practice of the operation of services, which is not mentioned in this text, but it is known to the careful observers of public life in Poland.

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Abstract

One of the principles provided by the Polish Code of Administrative Procedure is that of fostering citizens’ confidence in public authorities. It is a declarative principle which derives from the constitutional principle of the democratic rule of law. It functions in the jurisprudence of the Constitutional Tribunal.

This principle is a source of two directives for the administrative authorities’ officials: firstly, an official should be competent and kind with a petitioner, and secondly, under the same (or similar) facts of case and legal environment, similar decisions should be adopted. Otherwise people will lose their reliance on administrative bodies. This principle is best manifested in administrative proceedings regarding foreigners or refugees.

Keywords: principle, public authority, foreigners, refugees, administrative procedure.

The principle of fostering parties’ confidence in public authorities in administrative proceedings regarding foreigners or refugees – selected issues

I Democracy is not only the right of the majority, but also guarantees of respect for the rights of minorities. And in Poland, foreigners and persons applying for refugee status are a minority. They are in a special situation. They stay on the territory of a foreign country which they are not citizens of, among people with a different mentality, culture, customs, using a foreign language, often incomprehensible at all. Public authorities dealing with their affairs act on the basis of regulations worded in a foreign language and unknown to them. Not every case of a foreigner or a person applying for refugee status as handled by these authorities is going to result in a positive outcome. However, in each of the proceedings aimed at resolving the case of such persons, the general principle of administrative proceedings should be implemented with particular care, defined as the principle of fostering confidence in public authorities.
II Firstly, it should be clarified that in Polish legal language the term ‘foreigner’ does not necessarily mean a natural person. In the legal definition contained in Article 1 (2) of the Act of 24 March 1920 on the Acquisition of Real Estate by Foreigners [consolidated text: Journal of Laws of 2017, item 2278], the term is defined as follows: “The foreigner, within the meaning of this Act, is:

1) natural person without Polish citizenship;
2) legal person based abroad;
3) non-corporate company of persons referred to in points 1 or 2, based abroad, established in compliance with the legislation of foreign states;
4) legal person and non-corporate commercial company based in the territory of the Republic of Poland, controlled directly or indirectly by persons or companies referred to in points 1, 2 and 3.”

However, most of the comments contained herein will refer to the issues related to participation in administrative proceedings of a natural person commonly referred to as a ‘foreigner’.

III According to the data of the Office for Foreigners, Poland is the second most frequently chosen country by foreigners in the European Union. The UK is the leader in terms of the number of visas and residence permits issued. However, when Brexit becomes a reality, it is most likely that Poland will be the European leader in receiving migrants.

The number of foreigners applying for residence permits in Poland has been growing steadily since 2014. In 2017, applications for residence permits in Poland were submitted by 202 thousand foreigners. The number of applications for legalization of stay filed at Polish public administration bodies has grown by 33% and 71% in comparison with 2016 and 2015, respectively. Temporary migrations predominate. In 2017, as many as 88% of applications concerned temporary residence permits (up to 3 years), 10% permanent residence, and 2% long-term EU residents. 87% of all submitted applications were accepted, 9% were rejected and a small number of cases were discontinued. [https://udsc.gov.pl/zezwolenia-na-pobyt-w-2017-r- podsumowanie/].

The main applicants for residence permits in Poland were citizens of countries outside the European Union (192 thousand). The number of applicants from the EU amounted to mere 10 thousand. Most often, those willing to live in Poland were the citizens of Ukraine. It was they who filed the majority (62%) of the applications (125 thousand in total). Residence permits were also applied for by 9.5 thousand Belarusians, 8 thousand Indians, 6.4 thousand
The principle of fostering parties’ confidence in public authorities in administrative...

Vietnamese and 6 thousand Chinese. The growing interest in legalizing one’s stay in Poland is particularly noticeable among the citizens of Belarus (who apply for permanent residence more frequently) and India (who apply for temporary residence more frequently), who in 2017 submitted respectively 98% and 95% more applications than in 2016. In the case of citizens of EU Member States, in 2017 the stay in Poland was most frequently registered by Germans (2.3 thousand), Italians (1.1 thousand), Bulgarians (0.8 thousand), and citizens of Romania and the United Kingdom (0.7 thousand each). [https://udsc.gov.pl/zezwolenia-na-pobyt-w-2017-r-podsumowanie/]

In the same year 2017, 3 thousand people applied for international protection, i.e. for refugee status or subsidiary protection. This means that the number of applications for protection decreased by 60%. Under international law, it is irrelevant whether a war is taking place in the country of origin of an asylum-seeker. A person who is threatened with persecution for reasons of race, religion, nationality, belonging to a particular social group or political views, shall be considered a refugee. Each such case must be examined on its own merits. 93% of the applicants came from the countries of the former USSR, as many as 71% were submitted by the Chechen minority. Only 8% received some form of international protection: 170 people from Ukraine, 43 from Russia and 19 from Syria, 11 from Tajikistan and 5 from Belarus. 1.3 thousand people (41%) received negative decisions and more than half of the cases (51%) were discontinued. [https://udsc.gov.pl/uchodzcy-2/uchodzcy/sprawozdania/]

Participation of foreigners in administrative proceedings is not limited to issues related to obtaining Polish citizenship, asylum, refugee status or a residence permit. Natural persons who do not have Polish citizenship are also parties to proceedings in cases concerning social assistance, health benefits and benefits from the social security system. The number of foreigners who work or conduct business activity in Poland has been growing. Legal employment means that they pay contributions from which the Social Insurance Institution (ZUS) pays current benefits. For example, 330,000 foreigners were registered at ZUS for insurance until 31 March 2017. Most of them in Mazovia – 96,500, the least in the Świętokrzyskie Voivodship – ca. 3.5 thousand. In total, in the beginning of 2017 in Poland 227,503 Ukrainians, 16,040 Belarusians, 6,682 Vietnamese and representatives of 83 other nationalities were insured in ZUS. [https://codziennikmlawski.pl/2017/06/21/liczba-cudzoziemcow-pracujacych-w-polsce-rosnie/]

In 2016, 57,119 foreigners studied at Polish universities. For comparison,
in 1990 the number was only 4.3 thousand, and in 2000 – 6,563 persons. Among them, European students accounted for 83.3% (47.6 thousand in total). The largest group were Ukrainians (53.6%). Each of these persons is a party to proceedings concerning enrolment and removal from the list of students, awarding scholarships or ordering reimbursement of benefits unduly paid. [https://www.studenckamarka.pl/serwis.php?s=73&pok=2060].

Acquisition by a foreigner of the ownership right or the right of perpetual usufruct of a real property or acquisition or taking up by a foreigner of shares in commercial companies with their registered office in Poland which are owners or perpetual usufructuaries of real property located in Poland requires a permit from the Minister in charge of internal affairs. Between 1991 and 2016, 41,219 such decisions were issued (e.g. in 1991 – 635, in 1992 – 1238, in 1999 – 3641, in 2014 – 591, in 2015 – 659 and in 2016 – 608 decisions). In 2016, foreigners submitted 486 applications. 478 concerned acquisition of real estate, 8 acquisition of shares and stocks. The Minister issued 781 decisions, including 356 permits (252 for the acquisition of land property, 96 for the acquisition of residential premises and 8 for the acquisition of shares in companies), 7 promises, 35 negative decisions, 9 amending decisions, 1888 discontinuance decisions and 13 confirming decisions. Among those interested in purchase were Ukrainians (109 permits), Belarusians (33 permits), Russians (16 permits), Armenians (10 permits) and Chinese (10 permits). http://orka.sejm.gov.pl/Druki8ka.nsf/0/B2A218D57A06BD8DC12580F900378867/%24File/1462.pdf

In addition, foreigners in Poland apply to public administration bodies in matters related to conducting business activity, construction investments, public information.

All these matters are settled through administrative decisions. It shall be noted here that proceedings in matters settled in the form of this administrative act should be conducted in accordance with the provisions of the Act of 14 June 1960 – Code of Administrative Procedure, in force in Poland continuously since 1 January 1961 [Sejm of the Republic of Poland 2017].

IV In Chapter 2 of Part I of the Code of Administrative Procedure, a catalogue of general principles of administrative proceedings has been included. One of them is the principle with the broadest scope – that of increasing the trust of citizens in the State bodies, to be found in Article 8 of the Code of Administrative Procedure. This has already been expressed in the original wording of the Code, albeit with different words from those used today.
In the Code adopted on 14 June 1960, Article 6 of Chapter 1 entitled ‘General Principles’ of Part I of the Code, used to read as follows: “State administration bodies should conduct their proceedings in such a way as to increase the trust of citizens in State bodies”. In the first edition of his commentary (dated 1961), E. Iserzon stated that, at first sight, the rule of conduct specified in Article 6 was vague. He claimed that this provision only expressed a demand as to the ‘climate’ that should prevail in the office in order to foster citizens’ trust in public bodies. The author pointed out that this is an issue of humanization of relations in administration, which belongs not only to the field of administrative law, but also to the science of administration. Various material and moral means are used to achieve the desired climate: “appropriate reception facilities, designed and arranged in such a way as to contribute to an atmosphere of mutual trust and friendliness, appropriate staff training, etc.” [Iserzon 1961, p. 26]. The author, citing Langrod’s views [1959, p. 912], emphasized that the issue of administrative proceedings goes beyond the boundaries of the science of administrative law. It also requires an approach involving the science of administration. It has been pointed out that this is an issue in which, apart from strictly legal elements, psychological, sociological or economic ones also play a very important role. “The issue of the <<climate>> between the administration and the <administered>> is crucial in this respect... Administrative proceedings can be a decisive element of mutual trust between the state and the citizen, of targeted cooperation, and a symbol of common interest... It has advantages that (...) are an effective means of infusing confidence in the public mind.” According to E. Iserzon, the legal instruments used for this humanisation are the institutions provided for in the Code of Administrative Procedure. “Their strict observance in the spirit of benevolence for citizens and upholding the interests of the community leads to the implementation of the postulate expressed in Article 6 of the Code of Administrative Procedure” [Iserzon 1961, p. 27].

Since the Code’s amendment in 1980, the principle of confidence has been expressed in Article 8. Its wording was further modified by the amending acts of 3 December 2010 and 7 April 2017. As of 1 June 2017, it has been expressed as follows: “Public administration bodies shall conduct proceedings in a manner that fosters confidence of its participants in public authority, guided by the principles of proportionality, impartiality and equal treatment”. In the second decade of the 21st century, replacement
of the words “increase the trust” with “foster confidence” draws attention to the legislator’s awareness that it is not a duty or natural characteristic for the participants in a procedure to have trust in a public authority. It is the administrative authorities who are responsible for exercising due diligence in the exercise of their statutory powers in order to achieve the objective set out by the authors of the Code of Administrative Procedure: “to infuse confidence in the public mind”.

A number of legal guarantees for the individual derive from this principle in case law and literature, such as the requirement to conduct proceedings and resolve cases lawfully and fairly, to act in a manner that is understandable to participants, the obligation to conduct exhaustive investigations, the obligation to settle doubts in favour of participants, and the prohibition to exploit their unawareness or mistakes, as well as the need to ensure predictability and consistency of actions of public administration bodies.

The principle of fostering confidence has the broadest scope among all the general principles of administrative proceedings. The source of this principle in the Polish legal system is Article 2 of the Constitution of the Republic of Poland, in which the legislator stipulated that the Republic of Poland is a democratic state governed by the rule of law. In interpreting this provision, the Constitutional Tribunal has stipulated several standards expressing the rules, compliance with which will allow to build citizens’ trust in the state. The principle expressed in Article 8 of the Code of Administrative forms a keystone which integrates all the general principles of administrative proceedings. It covers a wide range of other general principles [Łaszczyca, Martysz, Matan 2005, p. 137]. And each of them should also be observed in administrative proceedings in which a foreigner or a refugee is a party or another participant. I am going to analyse some of them below.

The duty to respect the dignity of an individual should be derived from the principle of fostering confidence in public authorities. This imperative is the cornerstone of all human rights protection systems. In interpreting it in accordance with Article 30 of the Constitution of the Republic of Poland, public administration bodies should treat every natural person, including those who do not have Polish citizenship, with due respect, dignity and understanding, regardless of the matter they are dealing with and regardless of the outcome of proceedings. While respecting human dignity, cultural differences must be respected.
The obligation stemming from the principle under examination is to that of equal treatment. According to Article 32 of the Constitution of the Republic of Poland, everyone is equal before the law, and no one may be discriminated against in political or economic life on any ground. Restrictions on foreigners’ rights may be imposed only by an act. An example is the Act on the Acquisition of Real Estate by Foreigners, in force since 1920. Although literally until 31 May 2017 the principle of equal treatment was not included in the wording of Article 8 of the Code of Administrative Procedure, such an injunction was one of the components of the principle of confidence. It is unlawful for a decision to be taken in respect of an individual which differs from a previous decision and relates to a similar factual and legal situation [e.g. judgment of the Supreme Administrative Court of 26 October 1984, II SA 1161/84].

The implementation of the principle of confidence is also reflected in the respect for the constitutional principle of the rule of law. Since, in accordance with Article 7 of the Constitution of the Republic of Poland and Article 6 of the Code of Administrative Procedure, public authorities may act only on the basis of the provisions of generally applicable law, it is unacceptable, for example, to demand from a foreigner documents not specified by the legislator or information not relevant to the administrative case under consideration, or to decide on the basis of beliefs or circumstances which do not constitute a statutory premise.

In Article 7 of the Code of Administrative Procedure in fine, the legislator stipulated that when resolving an administrative matter, a public administration body is obliged to take into account ex officio the public interest and the legitimate interest of citizens. This principle applies to decisions based on administrative discretion. Although literally referring to the interests of ‘citizens’, it is appropriate, when applying systemic interpretation, to assume that this principle should be respected in respect of each individual. Therefore, to determine a priori that public interest outweighs private interest, without taking account of the overall situation and the consequences for the individual, should be assessed as a breach of the principle of confidence [judgment of the Supreme Administrative Court of 23 October 1982, II SA 1031/82].

Undisputedly, detailed explanation of the factual state in accordance with the principle of objective truth expressed in Article 7 and Article 77 (1) of the Code of Administrative Procedure is yet another form of implementation of the principle of confidence. Especially when considering cases concerning persons who do not know the language and legal regulations on the basis of which their cases are
settled, a breach of this principle is equivalent to a gross violation of the law and an action preventing confidence in Polish public authorities.

Public authorities’ compliance with the principle of providing due and exhaustive information to parties to proceedings, as laid down in Article 9 of the Code of Administrative Procedure, in the case of foreigners may only be acknowledged if such information has been provided in a manner that is comprehensible to the foreigner. Acting in accordance with the injunction expressed in Article 9 of the Code of Administrative Procedure, one should bear in mind that foreigners in contact with the authorities of a foreign state are more awkward than Polish citizens, they do not know the law and do not understand the specific legal language, let alone the specific official jargon. Consideration should be given to whether they have access to an interpreter or a lawyer.

The right to information and that provided for in Article 9 of the Code of Administrative Procedure, and to public information, which according to Article 2 of the Act of 6 September 2001 on Access to Public Information is vested in everyone, i.e. also in a natural person who does not have Polish citizenship, shall be exercised only if the information provided by a public authority is adjusted to their perception and, as far as possible, provided in a language they understand. Special provisions may express this obligation explicitly. Thus, through Article 7 of the Act on Foreigners, the legislator unequivocally ordered that in the so-called legalisation proceedings the authorities are obliged to instruct the foreigner in a language that they understand about the rules and procedures of proceedings and about their rights and obligations. Article 53 (2) and Article 54e (2) of the Act of 14 June 2003 on Granting Protection to Aliens within the Territory of the Republic of Poland lay down the obligation for the authority to inform the applicant in writing in a language which they understand about the legal basis of the decision, the decision itself and the available remedies. Article 30 (6) of the Act stipulates that the Border Guard authority competent to receive an application for international protection shall provide assistance of an interpreter in submitting the application. However, there is no general provision, e.g. in the Code of Administrative Procedure, which provides for the right of a foreigner to communicate in an intelligible language or the right to a free interpreter. It is from the general principles expressed in Arts. 8, 9, 10 and 11 of the Code of Administrative Procedure that such a right shall be derived. If a Polish citizen has the right to information and active participation in proceedings, then a message sent by an official to a foreigner must be
The principle of fostering parties' confidence in public authorities in administrative procedures is understandable for the person to whom it is addressed. Without denying Article 27 of the Constitution of the Republic of Poland, through which the legislator indicated that the official language is Polish, it seems justified to claim that employees of public administration bodies referring to Articles 4 and 5 of the Act of 7 October 1999 on the Polish Language in relation to persons who do not speak that language and who participate in administrative proceedings, is an action contrary to the analysed principle of confidence. It should also be remembered that Article 14 of the European Parliament's European Code of Good Administrative Behaviour adopted in September 2001, which is the so-called soft law, sets out the principle of replying to letters in a citizen's language. https://www.rpo.gov.pl/pliki/1192700305.pdf

It is worth noting that the second sentence of Article 9 of the Code of Administrative Procedure obliges public administration bodies to take care not only of the parties to the proceedings, but also of its other participants, ensuring that they do not suffer any damage as a result of ignorance of the provisions of law. The authors of the 1960 Code, back when Poland was a country much more closed to people from other countries than it is today, took care of guarantees for foreigners in administrative proceedings. In its Article 64 (2) (now Article 69 (2)), it was ordered as follows: “In the minutes of the hearing of the person who gave the testimony in a foreign language, the content of the testimony submitted should be provided in the translation into Polish, indicating the person and address of the interpreter; the interpreter shall sign the report of the hearing.” The content of this provision unequivocally proves that for the authors of the Code, it was undisputed that a person who did not speak Polish should act with the assistance of an interpreter when performing a procedural action before a public administration body.

The principle of information is linked to the principle of the party's active participation in every stage of the administrative procedure. A reservation should be made that, in accordance with the letter of the law, the action of the body conducting the proceedings is not equivalent to the action taken in accordance with the spirit of the law and the implementation of this principle. For example, just providing a foreigner with access to the case file does not mean that they were able to exercise their right to review the evidence collected. If the file is in Polish, then a person who is not fluent in this language will exercise the 'right of access', but will not be able to exercise their right to participate actively in the proceedings concerning them. Infringement of the principle of information, e.g. by not communicating the content of the case file, the rights of appeal or the
right to participate in appeal proceedings initiated by another entity in a manner that is comprehensible to the party, shall prevent the party from knowingly and actively exercising their rights, including the right to present their standpoint, views or statements.

Separately from the principle of information, the legislator expressed the principle of persuasion (Articles 11, 107 (1) and 124 (2) of the Code of Administrative Procedure). A precise statement of reasons for an administrative decision is one of the most important factors for strengthening confidence. The reasoning wherein the authority failed to explain why some evidence had been accepted and other rejected, and to reveal the reasons for its (particularly discretionary) decision, seriously undermines trust [judgment of the Supreme Administrative Court of 22 October 1981, I SA 2147/81]. The principle of confidence is also undermined by a vague statement of reasons, or making reference to non-statutory statements [judgment of the Supreme Administrative Court of 8 June 2000, V SA 2278/99]. Especially in proceedings aimed at issuing decisions unfavourable for foreigners, e.g. refusing to grant the refugee status or to issue a residence permit, which gives rise to the necessity to leave the territory of Poland, it is essential that the determining authority explain the validity of the premises it followed on its own initiative and unilaterally. In doing so, care should be taken to avoid, as far as possible, the use of coercive measures. It should be emphasised that through Article 18 of the Act of 17 June 1966 on Enforcement Proceedings in Administration, both the principle of persuasion and the principle of fostering confidence in public authorities are applied in administrative coercive procedure.

There is no doubt that only those public authorities that process matters quickly deserve to be trusted. The passage of time makes even the right decision lose its value. The principle of speed is particularly important in cases concerning natural persons who do not have Polish citizenship. Staying on the territory of a foreign country with a sense of one’s indefinite status, uncertainty as to the future of oneself and one’s nearest, fearing deportation as a result of simply not considering an application for refugee status or a residence permit on time, is a huge stress that has a destructive impact not only on the applicant, but also on the members of their family. Since for some cases concerning persons who do not have Polish citizenship the legislator sets longer time limits than those specified in Article 35 (3) of the Code of Administrative Procedure (granting the refugee status: 6 months, a permit to settle: 3 months), they should be observed all the more.
Summary

Polish public administration bodies are conducting an ever growing number of proceedings aimed at resolving rights or obligations of natural persons who do not have Polish citizenship. In some authorities – as in the case of voivods, for example, it is still growing, but only a margin of cases, other authorities were established solely to deal with the affairs of such persons, such as the President of the Office for Foreigners or the Council for Refugees. Administrative proceedings are a sequence of actions aimed at issuing a sovereign decision in the form of an administrative decision. Employees of the administration authorities exercise the powers conferred by the State or local authority. However, when deciding on the rights or obligations of individual entities, especially natural persons who are not Polish citizens, stay on a foreign territory and often do not speak Polish fluently, such employees should not use this power in a manner leading to abuse of the law or human rights violations. Such behaviour should be prevented by the principle of fostering confidence in public authorities and an absolute injunction to comply with it, as set out in the Polish Code of Administrative Procedure.

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https://codziennikmlawski.pl/2017/06/21/liczba-cudzoziemcow-pracujacych-w-polsce-rosnie/
Abstract
The chapter presents normative possibilities of protecting property rights Legal Persons of Religious Associations against discrimination. The discussed protection stems from the human rights system. It seems that the system of human rights protection does not apply to non-human entities, although at times it does protect the rights of legal persons. Research analysis of the human rights norms and the case law of the European Court of Human Rights in Strasbourg allow determining the – important protective elements defined in the human rights system. Three scopes of protection may be differentiated: protection of freedom of conscience and religion – Art. 9 of the ECHR; a person's right to peaceful enjoyment of his possessions – art. 1 Protocol 1 to the ECHR; prohibition of discrimination – art. 14 ECHR.

Keywords: Legal Persons of Religious Associations, – property rights, freedom of conscience and religion.

1. Introduction
The aim of this article is to present the possibilities of protection of property rights of legal persons of religious associations, for example protection of parishes from unequal treatment in the system of human rights. On the surface it seems that the system of human rights does not refer to the protection of rights of entities other than individual persons, but in fact it is not so. Sometimes this system also protects the rights of legal persons, which will be presented below.

The analysis conducted in the article indicates the normative framework of human rights as well as the case law of the European Court of Human Rights
in Strasbourg, which allow one to identify the relevant protective measures provided on the basis of this normative ground. The system of human rights, as a system of international agreements, allows one to indicate a hierarchically correct interpretation of lower-order legal standards, including national standards.

It also allows to indicate effective human rights that provide factual and not false protection. This is essential, as sometimes it happens that legal persons are treated differently by the state and its bodies only because they have been established by religious associations.

Therefore the article is an attempt to present an assessment of such unequal treatment, but on the basis of the system of human rights, which will be possible thanks to the analysis of the case of law of the ECtHR. It will allow to find a balance in and a correct interpretation of national regulations, as well as to find any possible effective complaints in proceedings before the Court in Strasbourg.

2. The system of human rights

It is necessary for the clarity of the analysis to present in short the essence of the division of human rights and freedoms¹ and the duties of the state that arise from them.

It should be emphasized that human rights are meant to express, more or less effectively, the inherent dignity of every human being², which is the source of all rights of individuals. One should agree that the definition of freedom “is highly

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controversial and difficult to grasp”, yet “freedom is a fundamental, natural (primary to written laws) attribute of human existence that is protected by law and refers to a person’s capability to autonomously and authentically command themselves, their freedom of choice and the way in which they realise their values as well as to their capability to freely guide their actions.”

Freedom is a sphere of capability to act in a certain way, e.g. action or omission, with which the state cannot interfere, so it is a right in a negative sense, and a person may choose to use or not use their freedom. Therefore the state is not fully released from acting for the protection of freedom and it consists in setting only the necessary boundaries of its protection. If there is freedom protected by law “three simple modalities should be distinguished: prohibition of the state’s interference, prohibition of interference from other entities, order for the state to grant legal protection.” Thus, the state is obligated to refrain from interfering and, at the same time, to grant protection to individuals, so that they can exercise their freedom.

On the other hand, attempts have been made to define human rights in the same way as subjective rights are understood in civil law, i.e. as a sphere of capability of a given entity to act in a certain way that is regulated by law and follows from the legal relationship. Thus, a human right is the sphere of capability in which individuals can exercise their freedom as a possibility to act, entitlement, and/or competence; yet it this case the state should be active and provide protection of the right by creating regulations of positive law. Therefore, human rights are the kind of freedom, entitlement or competence for which a person wanting to exercise them can request the state’s protection and the state is obligated to provide it. A distinctive feature of human rights is that the obligation to respect them is first of all the state’s obligation. The assumption is that this system allows to provide protection to individuals against the negative operation of the state apparatus and to order the state to protect the

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4 D. Dudek (ed.) et al., Ibidem, p. 105.
5 A. Michalska, Podstawowe prawa człowieka w prawie wewnętrznym a pakty praw człowieka, Warszawa, 1976, p. 64.
rights and freedoms of individuals. Thus, if one assumes that a given freedom, understood as the sphere of the possibility to act, entitlement and/or competence is a human right, then the state has the obligation to create a system of positive law in such a way so as to enable exercising individual rights arising from this human right.

3. The human right to freedom of conscience and religion

Intuitively, the first human right that should be analysed is the right to freedom of conscience and religion. The legal source of the freedom of conscience and religion is the International Covenant on Civil and Political Rights, and in the European (continental) system the essential regulation is especially Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter ECHR), the content of which is repeated in Article 10 of the Charter of Fundamental Rights (hereinafter CFR).

The freedom of conscience and religion contains two elements: internal – forum internum and external – forum externum. From the point of view of the European Convention on Human Rights, the internal element is the freedom of conscience, thought and religion. Forum internum is less significant for the reasoning of the article.

The element important in the analysis is forum externum, which consists in the freedom to manifest religion in four forms listed in Article 9 paragraph 1 ECHR: worship, teaching, practice and observance, where the order is not accidental and with it the scope of permissible interference increases. It should be noted that Article 9 paragraph 1 ECHR allows one to remain independent in

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12 L. Garlicki, Idem., point 23.
the internal/spiritual sphere and this freedom cannot be limited in any way, “yet it does not mean that manifestation of convictions and religion will be provided with the same protection”\textsuperscript{15} that is provided to forum externum.

It seems that the freedom of conscience and religion in both its forms (\textit{forum internum - forum externum}) does not affect the economic aspect of the functioning of religious associations. However, it was rightly indicated in the doctrine that the case law of the ECtHR allows one to point to the sphere of protection of religious groups’ freedom in the form of their autonomy, which in turn includes determining the organizational structure of the church, and its external premise is usually to obtain legal personality, which determines the protection of property rights.\textsuperscript{16}

Thus, the property component of the activity of religious associations falls within the sphere of the exercise of \textit{forum externum} and deserves protection from the perspective of Article 9 ECHR.

This was clearly stated in the judgement of the ECtHR of 1 October 2009 in the case of \textit{Kimlya and Others v. Russia}, where the Court emphasized the right of a religious association to start and run a business.\textsuperscript{17} Therefore, the human right to property and its influence on the protection of the rights of religious associations and the rights of legal persons appointed by these associations should be discussed further. What is more, the Court emphasized that the rights resulting from legal personality, and related to the property sphere, are necessary to exercise the right to manifest religion, which ensures independent protection under Article 9 ECHR, which is supported by Article 6 ECHR (right to a fair trial) and Article 11 ECHR (freedom of assembly and association).\textsuperscript{18}

\begin{itemize}
\item \textsuperscript{16} L. Garlicki, Idem, points 40, 42.
\item \textsuperscript{17} ECtHR judgement of 1 Oct. 2009, Case of Kimlya and Others v. Russia, Applications nos. 76836/01 and 32782/03, points 54, 85.
\item \textsuperscript{18} Such conclusion may be drawn from the reasoning of the above-mentioned judgement and other case law, cf.: ECtHR judgement of 31 July 2008, Case of Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria, Application no. 40825/98, point 63; ECtHR judgement of 13 Dec. 2001, Case of Metropolitan Church of Bessarabia and Others v. Moldova, Application no. 45701/99, points 105, 118; ECtHR judgement of 5 April 2007, Case of Church of Scientology Moscow v. Russia, Application no. 18147/02, point 81; ECtHR judgement of 14 June 2007, Case of Svyato–Mykhaylivska Parafiya v. Ukraine, Application no. 77703/01, point 117; ECtHR judgement of 27 Feb. 2007, case of Biserica Adevărat Ortodoxă din Moldova v. Moldova, point 34.
\end{itemize}
Certain importance may only be given to the conditions of limitation clauses in Article 9 paragraph 2 ECHR.\textsuperscript{19} For the limitation of religious freedom to be possible, the restriction must result from a statute, so it must have the form of a specific legal regulation. Furthermore, the restriction must be necessary in a democratic society. Treating property rights of a religious association or of the legal person of a religious association differently only because it is the legal person of a religious association or the religious association itself is a violation of human rights. This is the case if the very course of proceedings of a given body is not necessary in a democratic society, which is essentially pluralistic in nature.\textsuperscript{20} It seems obvious that the participants of the exchange are legal persons of religious associations and the associations themselves, and their activity is also based on economic activities. Especially given that legal persons of religious associations may appoint other legal persons governed by public law, in particular commercial law companies, just like other market participants.\textsuperscript{21}

The structure of the freedom of conscience and religion indicates that although there is no \textit{expressis verbis} reference to the property structure of legal persons of religious associations, the ECtHR indicates protection, legitimately claiming that rights arising from legal personality and connected with the property sphere are necessary to exercise the right to manifest one’s religion.

Obviously, this legal standard “takes into consideration” the fact that individuals form a religious structure that participates in civil law transactions and within it legal persons of a religious association may run an enterprise or a company. However, this particular freedom serves to protect the element of human dignity that is associated with religion and conscience. This happens when a business entity is treated less favourably only due to its connections with the legal person of a given religious association. In other words, the protection under Article 9 ECHR is granted when

\textsuperscript{19} Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.


\textsuperscript{21} For more see: M. Skwarzyński, ‘Ochrona przed nierównym traktowaniem spółek, powołanych przez osoby prawne związków wyznaniowych w europejskim systemie praw człowieka’, \textit{Przegląd Sejmowy} no. 2, 2018, p. 75 ff.
there are violations of equal treatment because of religious connections or character. Thus, the violation of the freedom of conscience and religion takes place to the extent related to the discrimination against the legal person of a religious association because of its religious nature. The nature of a legal person recognized in a state as the legal person of a religious association cannot restrict its freedom to participate in economic life because of its religious character.

Such a discriminatory treatment is connected with the human right to property, which allows for self-protection against unjustified unequal treatment.

4. The human right to respect for property

The key element of the analysis is analysing the human right to property, which is formulated in the European system as the right of every person to respect for property. It should be noted that in Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, prepared in Paris on 20 March 195222 (hereinafter Protocol No. 1 to the ECHR), Article 1 defines the human right to property. The content of this Article is intentionally expressed in general terms and the wording is: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.” This standard occurs in the European system as a first-generation human right, as opposed to the universal system, therefore the Council of Europe system can ensure its effective protection.

It should be indicated that Article 1 of Protocol No. 1 to the ECHR contains three standards: „The first standard, expressed in the first sentence of the first paragraph, is general and introduces the principle of an undisturbed use of property; the second standard, contained in the second sentence of the first paragraph, refers to deprivation of property and subjects the deprivation to certain conditions, the third standard, included in the second paragraph, recognizes that States - Parties are entitled, among other things, to control the use of property for the general interest.”23 However, in the Charter of Fundamental Rights of the European Union24, Article 17 paragraph 1, it was indicated that: “Everyone has the right to own, use, dispose of and bequeath his or her

22 Dz.U. 1995; no. 36, item 175/1 as amended.
lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.” The content of the regulation of Article 1 of Protocol 1 to the ECHR expressis verbis refers to legal persons. There is also no exclusion of legal persons of religious associations in the limitation clause. However, due to the unfortunate wording of the provision of Article 1 of Protocol No. 1 as „respect for his possessions”, it is necessary to refer to the case law of the ECtHR. It is a way to determine whether the property rights of legal persons are protected and whether the rights to the company resulting from being a shareholder, stockholder, partner etc. „respect his possessions” or not.

The way to determine what is the subject of the protection of this human right is to trace the case law of the European Court of Human Rights in Strasbourg in the field of protection of the human right to respect for property.

It seems that a linguistic approach cannot include a share, a stock, or a business partner’s role, because it is difficult to recognize it verbally as „his possessions”. However, the interpretation of the Convention’s provisions by the ECtHR is not a linguistic interpretation but a dynamic one, focusing more on the purpose of the regulation than the linguistic side. The phrase „his possessions” cannot be understood in strict accordance with civil law. The Court’s extensive case law will show that in specific cases, pursuant to Article 1 of Protocol No. 1 to the ECHR, the Court granted protection to goods that are difficult to recognize as one’s own or as property.

As simple examples one should mention granting protection to the right of inheritance, intellectual property rights or the protection of the expectation itself.25 In the conventional definition of property, apart from ownership, other property rights are also included26 as well as rights granted to legal persons, not only to natural persons, which is unique in the system of human rights, but is included expressis verbis in Article 1 of Protocol 1 to the ECHR. In the European Convention on Human Rights and its Protocols, there is no provision specifying directly the

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26 ECtHR judgement of 16 Sept. 1996, Case of Matos de Silva, LDA., and Others v. Portugal, Application no. 15777/89, point 75.
human right to inheritance, intellectual property or even virtual property.\footnote{See: M. Skwarzyński, ‘Prawa człowieka a „własność” wirtualna’, Wrocławskie Studia Sądowe, no. 4, 2014, pp. 206–210.} The same applies to the protection of expectation. A number of judgements regarding intellectual property may be found in the case law. One of the most important is the case of Anheuser-Busch Inc. v. Portugal, where it was noted that „the complaining company could claim that it is entitled to a „legally legitimate expectation“.\footnote{ECtHR judgement of 11 Jan. 2007, Case of Anheuser–Busch Inc v. Portugal, Application no. 73049/01, point 76 and 78.} In the Polish doctrine, when analysing this judgement, it was proved that the definition of ownership defined in Article 1 of Protocol 1 of the ECHR „also covers the interests of legal persons that have a measurable asset value, and are not necessarily protected in a given legal system by the structure of a subjective right.“\footnote{Ł. Żelechowski, ‘Glosa do wyroku ETPC z dnia 11 stycznia 2007 r., 73049/01’, EPS, no. 4, 2008, p. 48.}

Therefore, the provision of Article 1 of Protocol No. 1 to the ECHR and the phrase „peaceful enjoyment of his possessions“ cannot be treated as the source of property protection strictly as understood in civil law. The consequence of this autonomy of definition offered by the Convention is that the concept of „possessions“ does not have to be equivalent to the concepts used in the constitution of a given state or in its civil law. It was rightly observed that the concept of „possessions“ under the Convention also covers the protection of property in administrative proceedings.\footnote{J. Chlebny, ‘Ochrona własności w sprawach administracyjnych na podstawie EKPCz’, EPS, no. 9, 2008, pp. 39 – 44.}

It follows from the reasoning of the European Court of Human Rights that stated that “The concept of “possessions” referred to in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions” for the purposes of this provision.”\footnote{ECtHR judgement of 29 Jan. 2008, Case of Balan v. Moldova, Application no. 19247/03, point 32.}

Therefore, the ECtHR’s case law cannot be seen as surprising, as it indicates that rights arising from shares or stocks are protected under Article 1 of Protocol 1 to the ECHR.\footnote{For more see: M. Skwarzyński, ‘Ochrona przed nierównym traktowaniem spółek, powołanych przez osoby prawne związków wyznaniowych w europejskim systemie praw człowieka’, Przegląd Sejmowy no. 2, 2018, pp. 75-81, 84-85.}
doubt that legal persons are entitled to the protection of the human right to property. The doctrine rightly indicates that the nature of this view follows from a permanent - fixed line in jurisprudence. An example is the case of Sovtransavto Holding v. Ukraine, which concerned the protection of shares in the company or the case of Pokis v. Latvia, which concerned the protection of stocks of the company.

With such case law, there is no doubt that protection under Article 1 of Protocol 1 of the ECHR refers to property rights covered by the human right to property to which religious associations are entitled. Since the state grants legal personality to a religious association and its legal persons, by allowing them into the exchange it also provides them with rights resulting from protection of property. Therefore, it is clear that the legal person of a religious association, and the religious association itself, has the human right to property. It is granted to the legal person of a religious association or to the association itself as its subjective right. This does not change the nature of the entity being a shareholder, a stockholder or a partner, which is the legal person of a religious association, e.g. a parish, or the religious association itself. In this case, there are no reasons for the application of the limitation clause specified in Article 1 sentence 2 and 3 of Protocol 1 to the ECHR. This means that the unequal treatment of such companies, that is, treating them differently than other companies, is a violation of religious rights of legal persons who are shareholders, stockholders or partners. In addition, as indicated above, in the face of the ECtHR’s case law this would mean violation of Article 9 of the ECHR, but it is also related to the prohibition of discrimination.

5. The prohibition of discrimination

The third normative source in the system of human rights that provides protection against unequal protection of property rights of legal persons of religious associations and religious associations themselves is the so-called prohibition of discrimination. This is one of the model examples of editing human rights from the negative perspective, i.e. the system of human rights indicates which behaviours are perceived in the system as incompatible, and not what right of an individual is protected.

33 A. Wróbel, ‘Komentarz do art. 1 Protokołu 1 EKPCz’, p. 488, point 32.
34 ECtHR judgement of 22 July 2002, Case of Sovtransavto Holding v. Ukraine, Application no. 48553/99, point 91.
35 ECtHR decision of 5 Oct. 2006, Case of Pokis v. Latvia, Application no. 528/02, Part B Application based on Article 13 of the Convention.
From the normative point of view, it should be indicated that the prohibition of discrimination and the related principle of equality are included in most sources of international protection of human rights. The linguistic content of the prohibition of discrimination is important.

For example, it is specified in Article 7\textsuperscript{36} of the Universal Declaration of Human Rights\textsuperscript{37}; in Article 2 paragraph 1\textsuperscript{38} of the International Covenant on Civil and Political Rights\textsuperscript{39} (hereinafter ICCPR) in the universal system of human rights. It is also included in the European system in Article 14 ECHR\textsuperscript{40}, or Article 21 paragraph 1\textsuperscript{41} CFR. Of course, the aim of the article is not to present any issues related to equality and prohibition of discrimination in international law\textsuperscript{42}, but to discuss the elements of an effective system of

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\textsuperscript{36} All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

\textsuperscript{37} The content of the Declaration was not published in any official journal, it is in the collections of acts of international law and the version used in the article comes from the official UNESCO website, accessed on 3 May 2017: http://www.unesco.pl/fileadmin/user_upload/pdf/Powszechna_Deklaracja_Praw_Czlowieka.pdf.

\textsuperscript{38} Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.


\textsuperscript{40} Prohibition of discrimination. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

\textsuperscript{41} 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.

protection of human rights that indicate the existence of the prohibition of discrimination on account of property or financial issues.

Consulting the legal standards of the international system of human rights, defining equality and prohibiting discrimination, makes it clear that the system prohibits the latter “on any grounds”, “in any circumstances”, as well as directly because of “religion”, “financial position” or „property”. Although the view that “in certain circumstances it may also justify different treatment of various religious communities or offer them different forms of cooperation. In this respect, relations between the state and religions can take various forms, depending on the context” seems justified in the case of religion, different treatment of religious associations because of their religious nature is not justified at the economic level.

The issue of indicating the verba legis of property shows that the economic situation and property rights cannot be the source of discrimination. As part of the prohibition of discrimination, it should be emphasized that the case law and the doctrine indicate that the prohibition of discrimination based on the ICCPR is underused in the practice of applying the Pact, so it is the source of fewer cases that could be connected with the problem of religious associations.

The essential regulation here is Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court in Strasbourg, on matters relating to professional activity, remuneration, working conditions, etc., stated that the complaint made cannot only be about violation of Article 14 of the ECHR - prohibition of discrimination, but it should be connected with other material provisions of the Convention, although the case law recognizes the trend of an increasingly independent approach to Article 14 ECHR.

The European Court of Human Rights re-established certain standards and found that discrimination occurs when there is no objective and rational justification, and in this respect one should take into account the purpose and the effects of measures assessed in this regard and the principles applicable in democratic societies. Discrimination is particularly visible when it occurs in the

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45 M. A. Nowicki, Ibidem.
event of different treatment of persons in an analogous or similar situation. The prohibition of discrimination in the Strasbourg system is open and does not limit the number of prohibited differentiation criteria. What is more, in order to recognize that differentiation was discriminatory, it should be noted that: prohibited discriminatory criteria were applied to people in a comparable situation; the distinction is arbitrary, i.e. there is no objective and rational basis to justify differentiation; a person is treated less favourably than people in a comparable situation; the measure applied is disproportionate to the intended purpose, which must be a legitimate purpose.

Of course, each decision of the ECtHR should be treated as published in a specific case, in the context of a specific factual state and in a specific system of national law, in accordance with the so-called concept of margin of appreciation that has particular justification in the case of the prohibition of discrimination.

6. Conclusions

In the light of the analysis of international law on human rights and the case law of the European Court of Human Rights, it is obvious that religious associations and their legal persons are entitled to the protection of the human right to property.

The system of human rights prohibits the different treatment of property rights only because the entitled entities are religious associations or legal persons of these religious associations. It is similar when the legal person of a religious association appoints a company or does not have a majority of shares or stocks.

Such unequal treatment violates human rights at three levels. First, protection of freedom of conscience and religion - Article 9 ECHR, second, human right to respect for property - Article 1 of Protocol No. 1 to the ECHR, and third, prohibition of discrimination - Article 14 ECHR. Of course, unequal treatment, in fact discriminatory, will only be treated as such on the basis of these three standards. An independent indication of Article 9 ECHR as the source of

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48 A. Wróbel, Idem, p. 769 ff., point 30 and case law quoted therein.
protection will be difficult despite the formal possibility, and the complaint about the violation of the Convention is definitely strengthened by connecting it with Article 14 ECHR, along with Article 1 of Protocol 1 to the ECHR. However, it is not possible to invoke separate protection of each of these human rights.

Thus, due to the content of the right to freedom of conscience and religion, the autonomy of associations and the state, and the fact that legal persons of religious associations and the associations themselves have legal personality, so also the right to incur liabilities and acquire rights, it is clear that this can only happen on the same terms that apply to other entities, under the human right to respect for property.

The second effective means of protection will be limiting the rights of religious associations and legal persons of religious associations to „respect for property”. This protection is independent of religious freedom and is limited to the exclusive protection of property rights. Its impact will be similarly strengthened if it is combined with the prohibition of discrimination due to property issues. The prohibition of discrimination itself should only be exceptionally applied as an autonomous protective provision due to the limited practice of applying Article 14 ECHR independently by the Strasbourg Court.

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CHAPTER IV

Human Rights and Environmental Rights and Fundamental Rights, Neuro knowledge, Robotics and Inspection perspective
Abstract
Computer science and technological developments of the last decades has impacted considerably on the forms and methods of production and circulation of wealth, encouraging the spread of new activities completely dematerialized within a social and economic context characterized by frenetic circulation of knowledge and information available than just a “click” and from a production, distribution and consumption of goods increasingly virtual and intangible. As activities that might acquire economic value, in terms of tax, we wondered if, in order to face emergencies raised by virtual economy, is sufficient to adapt existing fiscal instruments or is necessary, rather, developing new forms of levy, creating a virtual world taxation. The question arose, first, for e-commerce, both in direct as in indirect form. Not minor insights presents the theme on the taxation of the network itself, because internet is a place of social interaction and legal environment in which arise and develop new forms of wealth. Special emphasis hiring then tax profiles of the activities carried out by large multinational companies, digital society, with subsidiaries in several countries, that can produce very high incomes, hardly taxed in the source State or otherwise frequently taxed to a lesser extent than the ordinary tax regime. The Italian legal system has tried to remedy this widespread phenomenon, with timid actions which seek to establish, first, a Google tax, then a digital tax, before arriving to the web tax, recently adopted, but from an uncertain future.

Keywords: digital economy; tax profiles; e-commerce; bit tax; google tax; digital tax; web tax.

1. Tax profiles of the digital economy: origins, criticality and evolutionary perspectives

Computer science and technological developments of the last decades has impacted considerably on the forms and methods of production and circulation of
wealth (Uricchio, 2005, p. 753-754), generating that peculiar phenomenon called “globalization telematics” (Romani – Liakopoulos, 2009), whose consolidation has encouraged the spread of new activities completely dematerialized (Inzitari, 2001, p. 128 ss.) – becoming network the paradigm of loss of physicality of goods distributed in modern economies (Marello, 1999, p. 602) – within a socio-economic environment characterised by hectic circulation of knowledge and information available than just a “click” and the production, distribution and consumption increasingly of virtual and intangible assets, whose unifying is given by digital essence (Adonnino, 2002, p. 4; Molinaro, 2015; Nellen, 2015; Westberg, 2015, p. 737; Tremonti, 2016, p. 1).

These virtual entities are hardly exploitable, as well as easily transferable from one State to another, with obvious repercussions on tax matters, related to the difficulty of quantifying the taxable values, identify the country where the the same must be, in whole or in part, taxed and the fact that founding institutes the tax matters were drawn and designed to be applied to «transactions between present with objects with a well defined threshold sensory recognition» (Marello, 1999, p. 595).

In this light, the new economic forms of production of wealth, based on network utilization, «require the interpreter legal instruments to verify the adaptability of its underlying reality» (Marello, 1999, p. 595).

In other words, the development of the internet – contraction of the english phrase interconnected networks (Uricchio, 2015, p. XVII) – and the tools of information technology (IT) has encouraged the spread of economic relations intersubjective in transnational scope (Valente, 1998, p. 408), expounding a multiplicative factor in terms of development and socio-economic growth of a country (Scaglioni, 2013, p. 233): being activities that might acquire economic value, in terms of tax, we wondered if, for to emergencies raised by the digital economy (on the matter, comp. Hammond, 1996; Kamerling – Negroponte, 1996; Tapscott, 1996; Van Der Putten, 1997, p. 11 ss.; Coyle, 1998; Garrone – Mariotti, 2001; Valente, 2014; Cellini, 2015; Valente – Ianni – Roccatagliata, 2015), is sufficient to adapt the existing fiscal instruments (status quo approach) (Westberg, 2001, p. 100; Marino, 2001, p. 145) – choosing less costly, cautious, conservative and apply immediately, based on the assumption that the cyberspace is mere offshoot of the physical world (Del Federico, 2014, p. 919) – or is necessary to devise new forms of levy (revolutionary approach) (Tremonti, 1998, p. 79), creating a virtual world taxation (Uricchio, 2005, p. 754; Cipollina, 2003, p. 289 ss.; Del Federico, 2014, p. 919; Marello, 1999, 595; Corasaniti, 2003, p. 609, nt. 6. On the matter, comp. Cigler – Burrit

It is known that the tax law analyses the changes in the economic reality in order to locate the ability to pay to be subject to tax (Melis, 2008, p. 64). In this context, the network does not address taxation issues are completely new, but old problems – involving the allocation of tax claims between those who hold the taxing rights – in a radically revamped: the digital economy, the web and the interactions that are made (Garbarino, 2000, p. 870).

The cornerstone of the digital economy is made up of information technology; its scope, however, is not limited to the analysis of single web economy, being much larger as it also includes the economic effects arising from the use and the sale of hardware and software tools (on the matter, comp. Ravaccia, 1998, p. 623 ss.; Dan, 1999, p. 1759 ss.; Boccia – Leonardi, 2016); the digital value chain are large multinationals, namely the operators over the net (known as “Over The Top” – OTT) – that, using IP networks, operating on the digital prairies, providing services, content and applications and creating revenues, through sales to end users of such intangible entity, together with the granting of advertising space – alongside the producers of that segment of the market (Scaglioni, 2013, p. 232; Sepio – D’Orsogna, 2017).

The tributaries profiles of the network must be analyzed in three perspective (national, transnational and virtual), which reflects its scope, on account of the differences between the online transactions, a vocation tend incorporeal and intangible, and traditional activities, characterized by only two dimensions (national and transnational), by reason of the character of the same material and tangible: taxation of the internet has, therefore, for both national in scope as that transnational virtual products income (Garbarino, 2000, p. 873-877).

The question concerning the tax issues raised by network (Bernardi, 2015, p. 307 ss.), has set itself above all for e-commerce (Valente, 1998, p. 385, which means by “electronic commerce”, «the multiplicity of transactions effected by electronic means concerning the supply of goods and provision of services»), both in direct form – where goods and services transaction object dissolve to be transferred or provided using the network (online delivery) – as in indirect – where, to the disposal concluded electronically, is accompanied by the physical delivery of the goods or the provision of services, subject matter of the contract, according to the traditional channels (offline delivery), as in a normal “distance selling”, in which the client shall forward to alienating your order by mail or telephone
On the tax plan, direct e-commerce has particular relevance, since the transmission breaks down thing (understood as something that can be the subject of rights, ex article 810 cod. civ.) from material reality, rendering him incorporeal and, apparently, invisible to the tax authority, because of potential traceability featuring online transactions (Valente, 1998, p. 385; Peirolo, 2014; Zaccaria, 2015); by contrast, indirect e-commerce becomes a merely instrumental phenomenon, as it allows you to perform the same operations as in the traditional trade, through a dematerialised trading, ended up using electronic instruments (Adonnino, 2002, p. 2).

As a result, at least in terms of income tax, e-commerce, in theory, should be subject to the same principles that govern traditional trade, by virtue of a principle of tax neutrality; the latter, however, are not always easy application to the transaction carried out digitally, which assumes, as an alternative, the possibility of identifying a subject’s personal link, owner of the income, with sorting (known as world wide principle) or a connection between the source and the income-producing territory subject to the fiscal sovereignty of the State (the source principle) (Adonnino, 2002, p. 2 e 4).

In fact, e-commerce, allowing the development of economic activity in a given State even in the absence of material resources and personnel, brings out the limits of a revenue tracking system anchored to the presence, within the national territory, of a taxpayer’s business (Corasaniti, 2003, p. 609; Tesauro – Canessa, 2002), «with all that this entails in terms of territoricity of VAT, of identification of the place of establishment of the activity and, consequently, of possible tax arbitrage» (Del Federico, 2014, p. 920); to deal with these issues, you must locate the “permanent establishment” also in the performance of tasks across the network or develop alternative income taxation and localization schemas (Melis, 2008, p. 64-65; Corasaniti, 2003, p. 615).

Also with regard to indirect taxation, trade in goods and services online involves a number of issues of no small importance: think of the value added tax, whose assumptions (subjective, objective and territorial) are questioned from e-commerce operations, resulting in the need to adapt the concept of “supply of goods” and “supply of services”, taking into consideration the particularities arising from e-commerce direct, adjusting, also, subjective and territorial part of the tax to the characteristics of digital transaction (Senni, 2001; Corasaniti, 2003, p. 623).
In this context, also subject online transaction to duty on legal research (stamp duty and registration tax) is discussed, owing to existing contracts, which tends to be virtual telematic, antinomies and dematerialized, and these types of tributes, with nature tend to be “cartulary” as applied to “records, documents and registers” (Mocci, 2001, p. 155 ss.): if the digital contract is concluded for facta concludentia (for example, by downloading a software or a the video, in which the notice of credit card constitutes acceptance of the contractual conditions), stamp duty and registration will not apply, in the absence of the objective requirement of materialization paper (Corasaniti, 2003, p. 627 ss.).

2. Taxation instruments of the network. Fiscal reflections on the activities carried out by the giants of the web

No minor insights presents the broader theme concerning the taxation of the network itself, since the internet is a place of social interaction and legal environment in which arise and develop new forms of wealth, designed as both benefits and usefulness, which as a mere saving of expenditure (Uricchio, 2005, p. 755-756; Garbarino, 2000, p. 870; Corasaniti, 2003, p. 608, nt. 2).

Next to electronic commerce and to any network, taxation instruments within the cyberspace develop further activities, likely to gain economic benefits due to income categories (autonomous and employee), miscellaneous income and capital gains, along with forms of virtual advertising and commercial exploitation of personal data provided by users when subscribing to websites or social networks (Del Federico, 2014, p. 915).

In this context, special emphasis hiring tax profiles the activities carried out by large multinational companies (Google, E-bay, Amazon, Apple, Facebook, Twitter, Airbnb, Netflix, Spotify, Alibaba, Didi Chuxing) company, with subsidiaries in various countries, that can produce very high incomes, hardly taxed in the source State, or at least frequently taxed to a lesser extent than the ordinary tax regime.

In doing so, those who work in the digital economy can create dangerous phenomena of international tax planning (Garbarino, 2008, p. 670 ss.), resulting in a significant erosion of the tax base (Mastellone, 2017, p. 46 ss.), through the artificial transfer of profits reduced taxation or tax havens in countries (Corasaniti, 2003, p. 613, nt. 23; Uckmar, 2002, p. 17; on the preferential tax regime countries, comp. Garbarino, 2008, p. 657 ss.).
In this context, the traditional principles of international taxation soon appeared inadequate, as the term «of a distant time when the physicality of the goods appeared to ensure the preservation of tax claims» (Valente, 1998, p. 383).

The Italian legal system has tried to remedy this widespread phenomenon, with timid actions which seek to establish, first, a Google tax, then a digital tax, before arriving to the recently adopted web tax, but from an uncertain future.

The operators of the “digital economy”, taking advantage of regulatory deficiencies of various legal systems, not in line with the fast-paced technological development, and displacing their activities in privileged taxation states, implement a series of “steps” aimed at limit the tax burden.

These behaviors that would be difficult to implement in the old economy and that they would have resulted in tax penalties, by way of tax avoidance, in the new economy does not seem to be attributable to a net and defined framework, in given the high degree of “dematerialisation” and “relocation” which characterises the economic activity carried out.

In fact, e-commerce and the internet are sources of income that is difficult to apply the rules on territoriality, due to immateriality network boundaries and vocation transnational actions carried out basically web users. The phenomenon appears even more evident in the indirect electronic commerce, since swaps online are not related to tangible property and at a specific place, unlike what happens in traditional commerce. In this context, it appears quite difficult finding a connection with a particular legal system or with a given territory (on the matter, comp. Tarigo, 2016, p. 343 ss.). Therefore, not being territorially defined good and place of exchange, it is necessary to intervene on the tax residence of the enterprise e-commerce operator and locate the place of supply of services.

3. Digital transactions and online operations: from “no tax land” to the preparation of tax instruments

ss.; Santacroce, 2003, p. 744 ss.; Melis, 2008, p. 63 ss.; McLure, 1999; Montalcini – Sacchetto, 2015, p. 111 ss.), term referring to transactions effected by applying computer technologies and digital infrastructure (Adonnino, 2002, p. 2; Corasaniti, 2003, p. 612, nt. 18; Garbarino, 2000, p. 866), or using one of the methods related to technical protocols of electronic filing of data (Corasaniti, 2003, p. 627), economic operators are supporting the products directly on the web, through the creation of a website that acts as a “virtual store”, and can leverage an indefinite number of users located beyond national borders: e-commerce is, therefore, a market without geographical boundaries (Corasaniti, 2003, p. 608).

This configuration of the task, in a supranational dimension tend to realize benefits in terms of increased revenue, resulting from the supply of goods and services at a highly competitive price, that of lower costs, because of negligible advertising, personal and pass the need for exposure of goods in physical places and certain (Uricchio, 2005, p. 756, nt. 9).

In this light, electronic commerce has the advantage to achieve technical and organizational developments in the management of the enterprise, creating new opportunities for international trade and helping to increase competitiveness among firms for the benefit increasing the quality of consumer goods and services offered, with simultaneous reduction of the purchase price (Valente, 1998, p. 384).

Therefore, e-commerce develops new products and new markets, strengthening and simplifying transactions, by reducing distances and speeding up of time of conclusion of contracts, so as to contribute to conform, much more dynamic, relationships between businesses and final consumers (business to consumer) and between different businesses (business to business), which are found to operate in a globalised context (Adonnino, 2002, p. 2; Melis, 2008, p. 65).

However, in tax matter, the natural vocation of transnational online transactions, together with the celerity and uncertain localization of electronic transactions, often carried out in a different place than the one in which the economic operator (Adonnino, 2002, p. 2), does nothing but increase the tax competition between states (on the matter, comp. Biasco, 2015, p. 119 ss.), on account of differences inherent in the various legislations; moreover, no less irrelevant appear the difficulties to be faced in order to identify, in intermediate steps, when imposing obligations (taxation points), since often, while being easy to identify the owner of the web site’s domain (Martorano, 2005, p. 1 ss.; Corasaniti, 2003, p. 613, nt. 21, who rebuilding the domain name as an «element that identifies the subject that intends to operate on the network», being «alphanumeric code consisting
of a so-called top level domain (TLD), such as “it” or “com” etc., and a second level domain (SLD), placed immediately to the left of the TLD that consists of a name or expression freely chosen by the party concerned to the allocation of a domain»), the same can be said about the not correct identification of the operator (service provider) and users (content provider) (Adonnino, 2002, p. 2). Only international cooperation, implemented with multiple instruments [information exchange (Garbarino, 2012, p. 661 ss.; Dorigo, 2015, p. 480 ss.); OECD model tax conventions (Garbarino, 2008, p. 621 ss.); international conventions against double taxation (Garbarino, 2008, p. 85 ss.)], aimed to establishing formal criteria localization and adopt measures to eliminate any tax distortions, lets tackle the risks raised by electronic commerce (Valente, 1998, p. 398-399).

In addition, the mere use of the network, through accessing, browsing, exchange of information, experience and knowledge that will improve the quality of human life, it seems, in itself, activities such as to constitute a manifestation of ability to pay, as such liable to be subject to tax, pursuant to article 53 of Constitution (Uricchio, 2005, p. 756).


In this light, internet appeared a merely virtual phenomenon wholly unsuitable to be subject to its own discipline, being a tool through which multiple computers, in contact with each other, send and receive electronic pulses, without any tangible movement (Uricchio, 2005, p. 758).

In other words, originally, the cyberspace (Valente, 1998, p. 386, nt. 11, that defines cyberspace as «three-dimensional space created by a computer network in which electronic audio and video signals travel freely»), such as virtual environment developed by the interaction between the different users of the network, was intended, in legal terms, as a “non-place”, an anarchy, a kind of “space without sovereignty” or, better yet, as a “telematic far west (contra Rossi, 2002, I, p. 751; Hinnekens, 2009, p. 9 ss., according to whom «cyberspace is not an extraterrestrial realm; is the territory of one or more States»), devoid of its own territory and characterized by the principle of material freedom (Uricchio, 2005, p. 758).
By transposing these principles to tax matters, the web appeared as a “no tax land” (Gilmore, 1999), a kind of tax haven, which not likely to be subjected to new forms of levy: the fiscal moratorium—whose legal basis is found in the “Internet Tax Freedom Act” (IFA), approved by the United States of America in 1998, which recognized the merit of their paralyzed, not only in the country of adoption, but also in Europe and in the rest of the world, every initiative to introduce new forms of taxation of network (Del Federico, 2014, p. 922; Bernardi, 2015, p. 309, nt. 3) – was justified by the international community and national authorities, for reasons of the virtuality of the phenomenon and the desirability of not discouraging the use of the web, through the provision of stringent legal restrictions, taxation fiscal and formalities, encouraging the spread of online activities, through the provision of tax legislation to favor (Uricchio, 2005, p. 758-759).

However, soon, with the expansion of the digital economy, was felt more than ever the need to draw up a precise regulation of the web, which, far from being a “non-place” without boundaries, is the environment in which legally relevant activities that require regulated (De Rosa, 2003, p. 361) and subject to tax (Uricchio, 2005, p. 760).

To this end, it cannot neglect yourself the “strategy of leapfrogging” has always adopted tax, which consists in identifying and subject to imposition of new forms of circulation of wealth (Cipollina, 2003, p. 317). In truth, however, in the case of taxation of the network, the frantic evolution, internationalisation and de-materialization of the phenomenon, carried to the extreme, can undermine even the most advanced tax systems (Cipollina, 2003, p. 318).

4. Electronic commerce: profiles of civil and tax law

systems electronical; responsibility of the trader; consumer protection), in order to qualify the offence and identify the applicable law (Uricchio, 2005, p. 760; Corasaniti, 2003, p. 607 ss.; Valente, 1998, p. 387 ss.).


In fact, this solution, in the absence of a specific provision, it would not have been completely taken for granted owing to the dematerialization of operations carried out through the use of the network that require you to verify your eligibility as the dichotomy “supply of goods/services” to pinpoint electronic transactions – even considering the gradient and heterogeneous character of the concept of goods and services computer scientists (Del Federico, 2014, p. 920; Pierro, 2003, p. 267; Serranò, 2007, p. 606; Montanari, 2014, p. 1063) – how much of the “territoriality” (Maspes, 2000, p. 48 ss.; Miceli, 2004, p. 581 ss.) guarantee the neutrality of value added tax, so as to prevent a distortion of competition (Melis, 2008, p. 65; Mocci, 2000, p. 14361 ss.; Mocci, 2003, p. 3905 ss.).
Moreover, given the spread of electronic transactions involving digital assets, have spread guidelines (Garbarino, 2000, p. 867 ss.; Pierro, 2003, p. 222; Marello, 1999, p. 598 ss.) aimed to broaden the category of services than goods (Del Federico, 2014, p. 919).

The purpose of this discipline, having Community origin, is to avoid that taxation may lead to distortions in the context of electronic commerce and that the final price of a good or service is reconnected to exogenous factors, such as vendor’s tax residence (Melis, 2008, p. 70).

With regard to taxation on income (Corasaniti, 2003, p. 611 ss.), electronic commerce had soon to face substantial problems – such as the identification of the case of taxation (goods or services), the qualification charges (income or royalties) (Corasaniti, 2003, p. 619 ss.; Galli, 2000, p. 313 ss.; Mayr, 2001, p. 1400 ss.; Melis, 2008, p. 68-69.), the identification of the place of residence and fiscal transactions of operators, the applicability of the principles of competence and inherently – and with procedural problems (on the matter, comp. De Renzis Sonnino, 2002), regarding certain tools and moments of redemption and assessment procedure (Adonnino, 2002, p. 3). In fact, in electronic transactions there are some peculiarities not found in traditional commerce: the transformation of physical goods in digital goods difficult to identify; a substantial disintermediation, for reasons of the disappearance of the subject with a key role in the implementation phase of tribute; the danger of pipelines linked to international tax avoidance and tax evasion (transfer pricing, treaty shopping, abroad dressing) (Melis, 2008, p. 65).

In the Organization for economic cooperation and development (Oecd) (Oecd, 2001) – body who first delved, in the document “Electronic commerce: the challenges to tax authorities and taxpayers”, presented in Turku on 11 November, 1997, which followed by the Ottawa Conference on 8 October 1998 on the theme “A borderless world: realising the potential of electronic commerce”, the issues raised, in tax matters, from e-commerce (Melis, 2008, p. 66; Corasaniti, 2003, p. 609-610; Bernardi, 2015, p. 308) – the taxation of e-commerce was informed by the following principles: fiscal neutrality, understood as equal treatment compared to traditional commerce (Costanzo, 2000, p. 362); certainty and simplicity in the application of taxes; efficiency, in terms of reducing compliance costs, to be paid by the taxpayer, and the investigation for the tax authority; effectiveness and transparency, minimizing the tendency to engage in behaviors contra legem; flexibility and dynamism in order to adapt the technological and

Also, in article 5 of the model convention against double taxation it is pointed out that the presence of a website on a server (Melis, 2008, p. 65, according to which the server is “in the mainframe, with its own specific software, able to store and exchange information, through the mediation of the telephone network, a modem or a suitable software allows the personal computer of the user to access information and services on the Internet”; it houses “websites through which Internet content provider makes and carries out its activities on the Internet”) or the use of an internet service provider (ISP) (Melis, 2008, p. 65, which identifies the role of internet service providers in “he who manages the server, allowing access to the Internet and its services and carrying out web hosting, namely publishing web pages related to another subject (Internet content providers – ICP) through the server to it belongings) do not constitute permanent establishments of non-resident (Uricchio, 2005, p. 762-763; Corasaniti, 2003, p. 616-617; Adonnino, 1998, p. 99 ss.; Garbarino, 1999, p. 592 ss.; Garbarino, 2000, p. 882 ss.; Adonnino, 2002, p. 7; Adonnino, 2000, p. 23 ss.; Galli, 2000, p. 113 ss.; Galli, 2001, p. 79 ss.): a web site lack of materiality and is unfit to become a fixed place of business, resulting from the combination of software and electronic elements; an internet service provider has no power to conclude contracts on behalf of the non-resident entity and acts within the framework of its natural assets, consisting in offering users the network connection service and the ability to store web pages using your own server or owned by the same provider (Adonnino, 2002, p. 7; Melis, 2008, p. 67; Corasaniti, 2003, p. 618-619). On the contrary, it might become a “permanent establishment” a server if it is the full availability of the business operator, being electronic machinery fitted with the requirements to constitute a fixed place of business, through which the non-resident entity carries out all or part of its business activities (Melis, 2008, p. 67; Corasaniti, 2003, p. 617). According to the OECD, “fixity” should be understood not as an anchor to the ground, but as a economic/functional link, devoid of a temporary nature, between the place of business and the geographical area; in this context, the server is still “fixed”, although it can be transferred from one place to another (Melis, 2008, p. 67).
5. Tax instruments that affect the different forms of wealth created by the web: the bit tax and the other tax measures of the network

In fact, focus only on e-commerce looks rather reductive, limiting the study to the topic of online transactions, seizing one aspect of the wealth produced through the network and neglecting other activities (navigation on web sites; use of social networks; gambling and betting online; advertising online) to create social and economic interaction and to transmit knowledge and experience: these activities are likely to acquire economic benefits and thus to secure tax relief (Uricchio, 2005, p. 763).

As we have seen, although initially it was felt not to impose new forms of taxation online activities, in order not to hamper the dissemination and development of the network, subsequently, also in view of the large number of users and access to the internet, it is felt, in many quarters, the need to give a new digital taxation structure, instituting new tax instruments aimed to hitting the various forms of wealth that the web can create (Uricchio, 2005, p. 763-764).

The first proposal, put forward by north american doctrine (Soete – Kamp, 1994; Soete – Kamp, 1996, p. 353 ss.; Soete – Kamp, 1996, p. 57 ss.; Soete, 1997; Goulet, 1997), consists of a new form of levy – based on the physicality of impulses transmitted by using the network, rather than on its effects and income tax valuations (Garbarino, 2000, p. 894) – called “bit tax” (Roccatagliata – Valente, 1999, p. 5514 ss.; Bernardi, 2015, p. 308; Gallo, 2017, p. 1643-1644), by reason of his assumption, consisting of the digital transmission of information. In this perspective, the information would constitute a new legal thing (Pecoraro, 2001), which may be taxed in proportion to the number of bits received or sent online, in an amount equal to 0,000001 cents for each bit, namely a cent of a dollar for every megabit (Uricchio, 2005, p. 764-765).

This tribute would be to an indirect planetary tax, commensurate with the amount of data released over the internet (Marello, 1999, p. 596, nt. 2), with any expectation of differentiated rates depending on the size or turnover of the taxpayer; the correct and uniform application of that tribute would require the agreement of all States.

In computer science, the bits that represent the smallest unit of storage and transmission of information, are also referred to by the industry “quanta” of digitized information (Uricchio, 2005, p. 765, n. 43).
The ratio of bit tax is obvious: the new wealth, ability to pay index, is to be found in the digital information transmitted over the web, expression of transactions, conversations and interactivity of the network (Cordell, 1996).

Thus, the offence is constituted by the intensity of information transmitted online, represented by the number of bits; passive subjectivity is identified with regard to the person that, holding the computer, transmits this information; localization of the case is based on the residency of the service provider; for the purposes of quantum debeatur, determination of the number of bits can be made through special gauges, similar to electric power meters, to be installed at every user on the network (Uricchio, 2005, p. 765).

The tribute has a peculiarity: the premise of taxation is quantitative and not qualitative, assuming the volume of relevant digital streams transmitted through use of the network, regardless of the value or nature, commercial or private, of the operation put in place (Uricchio, 2005, p. 766; Cipollina, 2003, p. 291).

That fact, on the empirical level, can be appreciated in that time to counteract the “computing pollution”, reducing negative externalities arising from clogging the network and the information garbage on the same broadcast, in low or zero marginal cost: the bit tax rises, therefore, a tribute to environmental protection computer, as it seeks to remedy pollution particularly widespread in cyberspace, called information pollution, reducing the overcrowding of the network and selecting relevant information, with evident saving of time and energy (Uricchio, 2005, p. 766; Cipollina, 2003, p. 291).

On the strictly legal plan, however, the downside is anything but positive, because of the problems and doubts of constitutionality raised by the instrument of taxation, particularly in relation to the principle of ability to pay under article 53 of Constitution: assign relevance only to the amount of transmitted information (bits), regardless of the type and value of information, as well as the quality of the subject that the broadcasts would hit a manifestation of wealth without the character of effectiveness, there is no equal bits transmitted, for the purposes of tax treatment, no difference between a user’s access to your mailbox or to a social network, aimed to reading a normal private message or chat’s operations, and the conclusion of a major online financial transaction (Uricchio, 2005, p. 766).

Nor, indeed, would it be possible to return the bit tax under tax or almost commutative performance (on almost commutative performance, comp. Fedele, 1971, p. 4 ss.; d’Amati, 1991, p. 256 ss.; Del Federico, 2000), lacking
the characteristic of these types of taxes, consisting of his pay against a divisible public service, namely concerning directly the person obligated (Uricchio, 2005, p. 766-767).

In fact, despite the assimilation of the bit tax to motorway tolls, because of similarities exist between terrestrial and telematics highways, where traffic is taxed for bit transmitted, rather than in proportion to the number of mileage, you cannot qualify as a public service the online transmission of information, applying technical rules and procedures that break down communication in independent packages and recompose the receiver that connects to the network (Uricchio, 2005, p. 767).

Actually, the motorway toll, consideration which has been given the use of a service, can be assimilated, rather than a tribute, at the price paid by you to the telephone operator for the use of the service-internet connection.

Also, it doesn’t even look like the bit tax can be introduced in place of the value added tax applicable to e-commerce, because of the different scope of two tributes (Uricchio, 2005, p. 767; Valente, 1998, p. 395): value added tax affects the supply of goods and the services supplied in the exercise of business or trades and professions in the territory of the State and imports by anyone; the bit tax applies, however, to the transmission of bits even if it is made in the absence of the conditions of application of VAT.

Equally to be excluded is the introduction of the bit tax in addition to the VAT payable in relation to e-commerce transactions, since, otherwise, online transactions they would discount an imposition greater than the traditional commerce (Melis, 2003, p. 71, nt. 17).

Finally, even wanting to admit the legitimacy of the tax, despite the doubts, difficulties arise in connection with the application disclosed concrete determination of quantum debeatur (Luz, 1997) and at the stage of investigation, since, in order to quantify the amount, you have to install, even if only through a mobile application (app), at any data processor, whether it be a computer, smartphone or tablet, a gauge of bits, the cost of which, in the absence of express statutory provisions, could it weigh on you.

In order to tax assessment, then, would be required controls, particularly invasive, in every place where you set a computer or each user who is using a smartphone or tablet to surf the web, in order to check the prior installation and the correct operation of the measuring equipment (Uricchio, 2005, p. 767-768). Not to mention further the difficulties concerning the identification
of the taxable person – the one who sent the bits – on grounds of character tends to be anonymous in the network and the ability to camouflage the IP (Internet Protocol) used to make the connection, so it does not uniquely identify the device connected to the computer network (Uricchio, 2005, p. 768).

Based on these premises, it is clear the inadequacy of the bit tax, feeble attempt to taxation because of network problems and contrast with different founding paradigms the tax matters, such as the principle of ability to pay and minimising compliance costs and tax assessment (Uricchio, 2005, p. 768).

Equally inadequate are the solutions adopted in some European countries, such as Hungary, France and Spain (on the spanish experience, with particular reference to Catalonía, comp. Rozas, 2015, p. 211 ss.), consisting of excise duty proportional to the number of gigabytes used, situation similar to bit tax or ad valorem taxes on the data consumed, in an amount equal to a certain percentage of the value of the uperstands billed for advertising purposes, or in payment of a fee by producers.

Additional proposals for taxing the network envisaged by careful doctrine (Uricchio, 2005, p. 768 ss.), consists of the tax on registration of domains, IP addresses, license fee by the imposition on advertising online and by the imposition of access (hit tax).

Such tax instruments could help to alleviate the tax burden normally levied on productive activities (income of enterprise and work) and be designed as a substitute tax compared to ordinary taxation, that cyberspace, through the phenomenon of disappearing taxapayer (about his phenomenon, comp. Del Federico, 2014, p. 915, nt. 7; Owens, 1997, p. 16 ss.; Hinnekens, 2004, p. 798), steals corporate tax matters (Del Federico, 2014, p. 923).

6. Fiscal reflections of the activity carried out by multinationals of the network

No less irrelevant in this context tax profiles appear related to activities carried out by the big corporations of the digital economy (Google, E-bay, Amazon, Apple, Facebook, Twitter, Linkedin, Airbnb, Groupon, Microsoft, Tripadvisor, Netflix, Spotify, Alibaba, Didi Chuxing) company with subsidiaries in several States, which derive substantial profits, often exempt or taxed as a result of evasive maneuvers poorly designed to allocate incomes in countries with privileged taxation (on the matter, comp. Cipollina, 2015, p. 356 ss.; Fregni, 2017, p. 51 ss.).
In such cases, the Italian legislator, echoing the experiences of other European Union Member States and non-EU citizens (Bernardi, 2015, p. 311-312), has tried to remedy with the establishment of the web tax, fiscal tool who lived a regulatory procedure rather tormented and for which it has been necessary proposals, united by the same finality: to subject to tax network giants to ensure tax fairness and ensuring compliance with the competition rules.

In this light, it is clear the alternative between a dual perspective: on the one hand, the appropriateness of the rules and traditional legal categories, on the other, the need for innovative legislative measures (Del Federico, 2014, p. 917). This tax is particularly complex, due to the fiscal interest (Boria, 2002) and publishing connotations of matter, of the principle of legality in the imposition of tax competition between States, the risk of relocation of industry (Del Federico, 2014, p. 917).

In the intent of the legislator, the web tax represents the feeble attempt to refer to tax those who provide digital services, operating on the network and making profits in several States: the finality is to fight tax avoidance that you log in online transactions, beyond the tax regulations of the country where they are taken off the goods supplied and services rendered and which produces income. In other words, you want to avoid that foreign companies operating mostly in the virtual, do not comply, as they should, the tax burden, for example, by fixing the headquarters in countries with privileged taxation, while operating effectively in States characterised by a much higher taxation. The effect of such “fiscal choices”, you reduce the taxable amount than that provided for by the tax system of the State in which the revenues were actually achieved, shifting part of the profits, legally, in jurisdictions in which they are taxed less (Scaglioni, 2013, p. 245; on the matter, comp. Cipollina, 2014, p. 21 ss.).

In particular, the digital giants, taking advantage of the corporate structure of the group, they do so as not to bill in the country, foreign affiliates located in countries with high taxation, advertising or sales practices, limited recording as revenue services supplied to another group company located in a country with lower rates (Scaglioni, 2013, p. 243). This result is also realized using transfer pricing practices on production costs, focusing on the sale or licensing of intellectual property rights developed in high-tax countries to a subsidiary located in a country with low taxes, which will transfer these rights to other overseas branches; thus, foreign profits, made using the parent company’s technologies, are made available to regional offices based in low-tax countries, which act as the collector of the cash between related parties polling (Scaglioni, 2013, p. 244).
7. The foreign experience: the “Diverted Profits Tax” of the United Kingdom and the “Finanziaria Levy” of India

Actually, the most significant experiences regarding web tax, before Italian law, certainly not a forerunner in this area, have affected certain foreign legislations, both in advanced economic systems and developing development: these tax measures have been taken to ensure equal treatment between resident and non-resident taxpayers, taxpayers in the event that these subjects, in spite of the significant economic activity carried out in the territory not residence, do not have the minimum requirements for subjecting to tax income in the source State; in the absence of concrete web tools such as the web tax, it would be a risk that those economic operators, not taxed either in the market or the State of residence, will benefit from an unfair advantage, even in terms of competition, against resident taxpayers who perform the same activity (Avolio – Pezzella, 2018, p. 526-527).

Among the advanced economies, most notable is the experience of the United Kingdom, that, to meet the tax strategies used by giants of the digital economy, introduced, starting in fiscal year 2015, the “Diverted Profits Tax” (Gallo, 2015, p. 609), peculiar instrument taxation affecting, at the rate of 25%, income tax deducted in an elusive in the source State as moved by multinationals of the web in countries with low taxation; these are situations where you have reasonable reason to believe that the non-resident taxpayer carries out an economic activity in the United Kingdom, avoiding, artificially, the rise of a permanent establishment, or resident who successfully to evade taxation in the United Kingdom through the conclusion of agreements or by third parties devoid of economic substance (Avolio – Pezzella, 2018, p. 526). This measure of taxation – finding application in the presence of a significant economic activity conducted on the territory of the State, regardless of the existence of elements suitable to set up a permanent establishment, and after demonstration of behavior, held by the non-resident taxpayer, designed to circumvent the rules on permanent establishment – overcomes the ordinaries connecting factors (Avolio – Pezzella, 2018, p. 526, nt. 4). Application effects of the tax are the same as those that arise where the taxpayer has operated in the relevant territory through a permanent establishment or a subsidiary: on the hypothetical income generated by them is applying the “Diverted Profits Tax” (Avolio – Pezzella, 2018, p. 526, nt. 4).

Among emerging economies, you can cite the experience of the Indian legal system, which, with effect from fiscal year 2016, introduced the “Equalisation Levy”, the main purpose of remedying the missed revenue from advertising
online, where the multinationals of the web, in the absence of a connecting factor, achieve massive profits, completely exempt (Avolio – Pezzella, 2018, p. 526). This tribute, whose nature seems more like a contribution to a tax, striking as far as 6%, revenues from digital advertising in the presence of two assumptions: lack of a permanent establishment on the Indian territory to attribute these incomes; significant economic presence, demonstrated by overcoming, in the field of online advertising, the amount of revenue required by law ($ 1,500) (Avolio – Pezzella, 2018, p. 526; Tomassini, 2018, p. 172).

In truth, the conformation of both tax measures can lift interpretive and applications issues, because, the same, being breaking free from a significant physical presence, are likely to lead to discriminatory treatments, turning into a iniquitous tool of protection of residents subjects, at the expense of those non-residents; in addition, as it emerged from Conference IFA, held in Madrid from 25 to 30 September 2016, anything but potential and hypothetically is the risk of giving rise to phenomena of double taxation in cases where the non-resident company is already subject to taxation fair and effective in the State of residence, not being at all granted the opportunity to benefit from a tax credit for the amount paid, as a web tax, in the foreign state (Avolio – Pezzella, 2018, p. 527; on the matter, comp. Malherbe, 2015, p. 23 ss.). In fact, such alternative measures, «acting only in case the taxation of income attributable to a permanent establishment (which does not exist, nor contested), imply that its tax liability cannot be regarded as a “tax on income” for the purpose of applying the conventions for the avoidance of double taxation» (Avolio – Pezzella, 2018, p. 527, nt. 5).

8. The troubled italian experience: the “Google tax”

Also in the Italian legal system, to deal with that, over time, has become a real emergency, arrangements were made by fiscal caution (Worstall, 2013; Iaselli – Tomassini, 2014, p. 297 ss.; Lupi, 2015; Scalera, 2015, p. 93 ss.): the first timid attempt was performed by article 1, paragraph 33, law 27 December 2013, n. 147 (Stability law 2014), embodying the primal version of the web tax, also called “Google tax” (Del Federico, 2014, p. 913 ss.; Trenta, 2014, p. 889 ss.; Quarantino, 2014, p. 211 ss.; about comparative profiles of the institute, comp. Ariatti – Garcia, 2015, p. 247 ss.). By virtue of that provision, was inserted in article 17-bis, decree of the President of the Republic, 26 October 1972, n. 633, on the VAT system which make the purchase of advertising space online
by foreign giants (such as Google) which, while maintaining stable relationships with Italian operators often do not pouring, as they should, taxes in Italy, staring at the registered office abroad – mostly in Ireland (as in the case of Apple, Google, Facebook) or Luxembourg (such as for Microsoft and Amazon), countries with the lowest tax, in terms of rates or of determination of the taxable amount, income of enterprise at Community level or in privileged fiscal jurisdictions or in tax havens such as the Cayman Islands or the British Virgin Islands – or using artificial tax maneuvers, elusive character, aimed to limiting the revenue not only for the host country but also to the country of origin (Scaglioni, 2013, p. 234).

The entry into force of the provision, originally set at 1 January 2014, was subsequently postponed until 1 July 2014; before that date, however, the rule was repealed by the article 2, paragraph 1, lett. a), decree-law, 6 March 2014, n. 16, converted with amendments by law 2 may 2014, n. 68.

Actually, the Italian “Google tax”, although it never entered into force, has not been free from criticism of who (Del Federico, 2014, p. 913 ss.; Trenta, 2014, p. 889 ss.), while recognizing the shared objectives of the news statement, it stressed the inadequacy, because of existing differences compared to EU principles – founding the European single market – and the BEPS project (Base Erosion and Profits Shifting) (OECD/G20, 2014; Rizzardi, 2014; Bernardi, 2015, p. 316 ss.; Salvini, 2017, p. 768 ss.), intervention promoted by the OECD, during the G20 Summit in Moscow with the action plan of 19 July 2013, in order to combat conducted made by digital multinationals, aimed to minimizing the tax burden through tax base erosion and transfer of profits between different tax jurisdictions (the transfer of profits (profits shifting) in the jurisdiction most advantageous for tax purposes can be achieved through funding policies or by transfer pricing practice, as part companies belonging to the same group, as a result of which, the multinational enterprise sets a lower price for the goods sold subsidiaries located in countries with higher tax rates and a higher price for goods sold to affiliated companies located in countries with lower tax rates; thus, the flow of trade to (or from) companies located in countries with higher tax rates will be low (or high), compared to trade to (or from) companies located in countries with lower tax rates; on this point, comp. Scaglioni, 2013, p. 236-237 and 247; Valente, 2014).

Therefore, the idea of imposing restrictions of subjective and territorial nature in the field of VAT, to online advertising, has attracted quite a few misgivings, which helped to speed the repeal of article 17 bis of decree of the President of the Republic n. 633/1972 even before its entry into force (Del Federico, 2014, p. 916).
The reasons behind the failure of the legislative news can be summarised as follows: lack of a preliminary phase of study, being a legislative news in emergency character, contingent and improvised; lack of coordination with the OECD and addresses with similar initiatives taken by other countries; ambiguity of legislative intervention, whose drafting technique is characterized by large and innominate formulas – for example, online advertisements, sponsored links online – which does not shine with some clarity and precision; the marginal nature of the measure, in view of the limited scope of digital advertising services; poor coordination with the Community VAT discipline substrate in the field of electronic services; limitation in the purchase of online services; need for providers of online advertising arm of VAT number issued by the Italian Revenue Agency; contrary to the constitutional principles and Community competition and freedom of economic initiative and the principle of proportionality, given the tightening and excessive restrictions provided for by article 17 bis of decree of the President of the Republic n. 633/1972, even if you want to justify the rigidity of the arrangement in an anti elusive optics or tax evasion contrast (Del Federico, 2014, p. 916-917; Trenta, 2014, 892 ss.).

9. The proposal establishing of the “digital tax”

Subsequently, there was a bill introduced on 27 April 2015 (Atto Camera dei Deputati, n. 3076, 2015), which, resuming the studies developed by the Oecd, in order to counter tax avoidance transactions conducted electronically, amended the definition of “permanent establishment” (Garbarino, 2009, p. 663 ss.; Ricci, 2015, p. 57 ss.; on the previous concept of permanent establishment, comp. Corasaniti, 2003, p. 615; Lovisolo, 1983, p. 1128 ss.; Fantozzi, 2002, p. 9 ss.), under article 162, decree of the President of the Republic 22 December 1986, n. 917 (Tuir), and promoted the establishment of “digital tax”, consisting of a withholding tax, amounting to 25%, payments made by persons resident in Italy at the time of purchase of products or services digital at a digital operator (e-commerce), residing abroad (Mobili, 2015). As you know, as part of the digital economy you can operate in a local market without having to maintain a physical presence inside, configurable as permanent establishment, resulting in liability to taxation in such State of profits of the intangible company. However, consumers cannot be qualified as a substitute for sets, the only way to apply the withholding tax is to involve the financial institutions in charge of regulating the payment of online purchases, except if the digital multinationals have not secured a permanent establishment on the
Italian territory or have concluded an agreement with the financial administration (tax rulings), in order to subject to tax the proceeds of the activity carried out in Italy. This bill, however, has remained a dead letter, having received no approval.

10. The transient “web tax”

A further step in this regard was made in the conversion of decree law 24 April 2017, n. 50, by the law 21 June 2017, n. 96, through the inclusion of article 1-bis, laying down the rules of procedure “enhanced cooperation and collaboration”, which, on the lines of existing arrangements, such as the international ruling and cooperative compliance (Avolio – Pezzella, 2018, p. 526), allows multinationals, whose revenues are in excess of 1 billion euros annually and have carried out supplies of goods and services in the territory of the State in an amount exceeding 50 million euro, to give life to a strengthened compliance through advance arrangements with the Agency Revenue in order to verify the existence of the requisites constituting a permanent establishment and access to collaborative compliance regime, so to prevent the emergence of disputes with the Italian Revenue Agency, averting also the application of sanctions following the finding of misconduct.

In the presence of its requirements, even the giants of the web can take advantage of the compliance procedure: indeed, the norm, although applicable in theory to other economic operators, is meant primarily to facilitate the great player of network, surging to major recipients of available (Avolio – Pezzella, 2018, p. 526). In doing so, these taxpayers have the ability to regulate their relations with the tax authority, bringing out profits in the abstract subject to taxation in Italian territory, but they hardly appear to be in practice, because of the obstacles inherent in identifying a permanent establishment in Italy: the enhanced compliance procedure serves to determine in advance the amounts due in order to comply with the tax burden as a result of activity on the italian territory (Avolio – Pezzella, 2018, p. 525-526).

Therefore, the tool, commonly defined, atmospherically, “transient web tax” (on the matter, comp. Avolio – Imperato, 2017, p. 2269 ss.; Molinaro, 2017, p. 2203 ss.; Rossi – Ficai, 2017; Sepio – D’Orsogna, 2017, p. 3020 ss.), rather than build a real set, represents a form of voluntary emergence – given the optional nature – with prize effects on sanctions plan, of the permanent establishment in Italy of non-residents working in the field of digital economy and with the requirements of available (Avolio – Pezzella, 2018, p. 525).
11. Digital transactions tax (Italian web tax)


This instrument of taxation, whose connotations are much closer to those of indirect taxation (Avolio – Pezzella, 2018, p. 527), represents the Italian response to the debate on procedures for taxation of the digital economy; many, though, are the profiles of critical issues raised by current legislation and in view of the differences compared to similar initiatives taken in other legal systems (Avolio – Pezzella, 2018, p. 525).

The domestic tax web appears a buffer and emergency solution, becoming almost a “turnover tax”, which, it could become definitive (broadly sceptical, comp. Avolio – Pezzella, 2018, p. 529), because of the difficulty in achieving broader structural funding – international level the multilateral – susceptible to change and conventional forecasts, entrenching taxing even taking into account the location of the “significant presence”, as well as identifying suitable income allocation policies in order to contest digital activities to the creation of value (Della Valle, 2018, p. 1508).

With regard to the objective scope, the budget bill 2018, resuming the definition of article 7, paragraph 1, of Council regulation EU n. 282/2011 of 15 March 2011, implementation of directive n. 2006/112/EC on the common system of value added tax (so called “recast directive”) considers “supplied by electronic means” the services provided using the Internet or an electronic network, the nature of which renders the provision essentially automated, with minimum human intervention and impossible to guarantee in the absence of information technology (Della Valle, 2018, p. 1508; Odetto, 2017, p. 188; Avolio – Pezzella, 2018, p. 528).
It is a broad concept and unnamed, able to cover multiple services provided through the use of electronic networks, such as mobile networks used for telephony, and those used for financial services those that serve to transmit radio and television signals (Avolio – Pezzella, 2018, p. 528).

The domestic web tax incorporates a rate of 3% on the value of the transaction, namely the digital fee payable for these obligations, net of VAT, irrespective of the place of conclusion of the transaction (Della Valle, 2018, p. 1508; Avolio – Pezzella, 2018, p. 528). The tax is applied against the party lender, whether resident or non-resident, irrespective of the legal form, which carries out, over the course of a calendar year, a total number of transactions greater than 3,000 units (Avolio – Pezzella, 2018, p. 527; Della Valle, 2018, p. 1508, nt. 2, which stresses that it is «interesting to see if the term transaction here is equivalent or less than single service or, in other words, if the 3,000 units, which is the State for the purposes of the tax with regard to transactions made in place should be understood or not as 3,000 services»), regardless of their value; given the wide wording of the provision, the quantitative threshold is calculated taking into account only the number of potentially taxable transactions, that is made in respect of clients having the status of withholding agent (Avolio – Pezzella, 2018, p. 528).

This parameter, which, in the intention of the legislator would serve to exempt from the obligation to pay the tribute occasional providers of services, as individuals whose risk is rather limited, might, in fact, appear inefficient, since, in the absence of a parameter of economic importance, it would be paradoxical situations such as that of subjecting to tax those who implement multiple small transactions, exempting, by contrast, operators who, despite the small number of work accomplished, they perceived huge sums (Avolio – Pezzella, 2018, p. 528).

The tribute is withdrawn, upon payment of the consideration, by the purchasers of services, as a source-withholding tax, with the obligation of recourse on providers, except where registrants provide indicate in to invoice for the benefit or in any other appropriate document to be sent together with the invoice, not to exceed the above limit of transactions within a calendar year (Della Valle, 2018, p. 1508; Avolio – Pezzella, 2018, p. 529); the correct identification of concerns arise time reference (previous calendar year than in performing a benefit or, rather, the current calendar year) (Avolio – Pezzella, 2018, p. 529). The same customers are required to pay the tax within the 16 day of the month following that in which payment of the consideration (Della Valle, 2018, p. 1508; Avolio – Pezzella, 2018, p. 529).
Digital reality and tax rules: from the bit tax to the web tax

Therefore, are taxable persons of the tax as much residents as non-residents providing services by electronic means in favour of persons residing, designated as withholding agents, ex article 23, decree of the President of the Republic n. 600/1973, and for the benefit of permanent establishments of non-residents in the territory of the State (Della Valle, 2018, p. 1508; Avolio – Pezzella, 2018, p. 527), which are also withholding agents as indicated also by the tax authority (Ministerial Circular, 23 december 1997, n. 326/E). Are excluded from the scope of the digital web tax transactions made against individuals (B2C), the latter cannot be qualified as withholding agents, the “minimum tax payers” (article 1, paragraphs 54-89, law 23 december 2014, n. 190), of those using the scheme tax advantage for “young entrepreneurs” and for workers on the move (article 27, decree law 6 july 2011, n. 98, converted to law 15 july 2011, n. 111); this exemption operates in one direction, that is only in the case of services rendered for these subjects and not the opposite (Avolio – Pezzella, 2018, p. 527; Confindustria, 2018, p. 103).

The territoriality of the tax is determined as a function of the subject customer and not of the service provider, irrespective of the place of conclusion of the transaction (Avolio – Pezzella, 2018, p. 527). This configuration, with reference to the non-resident company, raises critical issues, because such persons must comply with the web tax, «new tax, similar in some respects to VAT tribute – with all that could be achieved in terms of any community complaints, such as “duplicate” of VAT – in addition to the ordinary direct taxation, without granting any tax credit» (Avolio – Pezzella, 2018, p. 527).

The higher tax burden, digital operators residents, could result in a disadvantage, in terms of competitiveness, compared to non-residents; in fact, while revenues produced by the first would be to pay the new tribute, along with other direct taxes, with the rates in force in Italy, for non-resident corporations the web tax could allow to address, once and for all, to tax obligations in Italy, continuing to correspond, privileged taxation countries of residence, a tribute with derisory rates (Avolio – Pezzella, 2018, p. 528).

Not to mention that the network giants, being fitted with a market power greater than that of Italian firms, could translate the toll on prices of digital services, while maintaining competitiveness; in this light, even the expectation of a rate relatively low (3%) is a compromise between two opposing requirements (on the one hand, countering tax avoidance and, secondly, not penalize excessively traders residents) (Avolio – Pezzella, 2018, p. 528).
Given this configuration, the home web tax does not appear a “equalization levy”, namely a compensatory levy aimed at hitting, at the place of production revenues, companies that don’t discount tax loads, nor in the country of residence, nor in the source, since even non-residents with a permanent establishment in the State, including “non-physical” under article 162, letter f-bis (this is the so called “virtual” permanent establishment, identified in «ongoing and significant economic presence in the State built in such a way as not to do be a physical substance in the territory itself»; about the matter, comp. Pedaccini, 2015, p. 895 ss.; Perrone – Stevanato – Lupi, 2015, p. 121 ss.; Avolio, 2018, p. 265 ss.) of the TUIR, are affected by taxation; in addition, the tribute is not the only business to business transactions (B2B), since among the withholding agents, identified in the purchasers of digital services, there are also non-commercial bodies, even where not productive of business income, and condo buildings (Della Valle, 2018, p. 1508).

The tribute, as structured by the 2018 fiscal law, assumes the features of sectoral and discriminatory tax, even though transient, although, owing to the difficulties mentioned earlier, to elaborate a global solution is easy to predict transformation into a type of structural withdrawal (Della Valle, 2018, p. 1509): its theoretical justification (Gallo, 2015), therefore, raises many concerns, since, as confirmed by the Constitutional Court on a number of occasions (Corte Cost., 22 aprile 1997, n. 111; Corte Cost., 11 ottobre 2012, n. 223; Corte Cost., 5 giugno 2013, n. 116; Corte Cost., 16 luglio 2014, n. 201), including the previous known “Robin Hood Tax” (Corte Cost., 11 febbraio 2015, n. 10), such a form of taxation would be legitimate only if not arbitrary or unreasonable, it being necessary that «any diversification of the tax system, economic area or type of contributors», is «supported by adequate justification, without which the differentiation degenerates into arbitrary discrimination» (Della Valle, 2018, p. 1509).

No shortage more critical profiles: think of the circumstance, assumed by the legislature but unproven, greater ability to earn profits that digital would businesses than traditional ones, when, instead, the only comparison between traditional and web giants enterprises brings out differences negligible both in terms of profitability which characteristics of business (Della Valle, 2018, p. 1509); in addition, the italian web tax as structured, would hit, in the presence of its requirements, not just the giants of the network (known as “Over the top” – OTT), but also small and medium-sized enterprises operating on the web (Della Valle, 2018, p. 1509); the reference to the overcoming of 3,000 transactions for
year, regardless of the value of the transaction, does not warrant «a selection of taxable line with the intention of the legislature that is to hit headers and users of so-called Big data, so the giants of the web» (Della Valle, 2018, p. 1510) and is not fully consistent with the principle of ability to pay; for non-resident taxpayers with permanent establishment in Italy taxation revenues will add to the income levy generated in Italy and although its deductibility as production cost, would end up hitting, in a totally unreasonable, loss-making subjects (Della Valle, 2018, p. 1510); not to mention that “turnover tax”, its weight will eventually weigh on consumers of digital services (Della Valle, 2018, p. 1509).

The entry into force of web tax is fixed at 1 January 2019, but, in fact, it is doubtful that actually happen, making the legislature refer to 1 January of the year following that of its publication in the official journal of the decree of Minister of economy and finance, which will have to be concretely identified the services subject to the new tribute, together with any exemptions; such modus operandi can only leave perplexed, since, refer positive assumption of taxation and any boundary exemptions to a ministerial order, in the absence of any governing policy might violate the principle of legality under article 23 of Constitution (Della Valle, 2018, p. 1510; Tomassini, 2018, p. 173); nevertheless, the adoption of the decree by the Mef, laid down by the legislature by 30 April 2018, has not occurred.

Aspects of the investigation, sanctions, the collection and litigation of domestic tax web is governed by provisions concerning the value added tax, to the extent of compatibility (Avolio – Pezzella, 2018, p. 529).

12. The experience of the European Union: the proposal of directive aimed to establish the tax on digital services (European web tax)

Not hiding, however, the perplexity raised by the provision of a domestic tax web, resting their bases on national legislation, foreseen but there, however, the opportunity to a harmonised tribute, at least at Community level, if not even international, in order to prevent contradictions that may arise between internal systems and that transaction in order to impose digital supranational.

In fact, as I have already had occasion to point out (supra § 7), within the various legal systems, Italy included, were developed a myriad of web tax, which, in the absence of harmonisation, they hired the physiognomy of unilateral fiscal measures, different them both as regards the scope of application for the founding principles;
ensued a fragmentary regime that ended up creating more problems than they’ve helped solve (Avolio – Pezzella, 2018, p. 529; Della Valle, 2018, p. 1510, nt. 10).

Therefore, in the absence of a shared solution at OECD level as regards taxation mode of the digital economy (on the matter, comp. Maisto, 2017, p. 2566-2567; Padovani, 2018, p. 257 ss.) and because of unreasonable distortions of competition between States and between enterprises, depending on the degree of digitization of same, created by the current location of wealth income policy, it was necessary, at the very least, action at Community level (Rizzardi, 2014; Della Valle, 2018, p. 1510).

In this context the proposal presented by the European Commission on 21 March 2018 (comp. www.europa.eu/rapid/press-release_IP-18-2041_it.pdf) to establish a European web tax, called “digital service tax” (ISD), which initially would be equipped with temporary, to be subsequently applied to the regime, at the rate of 3%, annual gross revenues, exclusive of VAT and other similar taxes arising from some specific digital activities, where it is believed to have more meaningful user contribution to the creation of value for the digital enterprise; these are the so called “digital services” defined in article 3, paragraph 1, of the proposal for the directive (selling advertising online; transfer of data generated by information provided by users; digital brokerage operations that allow users to interact with each other through digital interfaces multilateral agreements, in order to facilitate the sale of goods and services) (Della Valle, 2018, p. 1510-1511; Di Tanno, 2018, p. 1531 ss.; Tomassini – Sandalo, 2018, p. 1395 ss.).

Thus, the new European tribute, unlike the home tax web would really hit only specific digital transactions carried out by large multinational of web (Della Valle, 2018, p. 1513).

Digital services tax is collected by the Member States in which the users reside and apply to companies (in particular, article 4 of the draft directive treats taxable entities with digital services tax revenues exceeding the thresholds mentioned and the article 2 means for entities «any legal entity or legal institution that conducts its business through a company or a transparent structure for tax purposes», excluding, therefore, from the category of taxable subject natural persons; on this point, comp. Della Valle, 2018, p. 1511) with total annual revenue, worldwide, over 750 million euros and, at European level, over 50 million euros, in order to exempt small companies from paying the tribute (small/medium businesses and startup, in relation to which the burden of the tax and compliance burdens could generate disproportionate effects) (Della Valle, 2018, p. 1511).
Therefore, the passive European toll subjectivity, detected in taxable services providers, independent digital undertaking establishment in an EU Member State, being anchored to the mere passing of two parameters related to the amount of gross revenues (community and world) achieved in the financial year, both indexes expressive of ability to pay (Della Valle, 2018, p. 1511).

The first threshold, refers to the total annual worldwide revenue, is explained as only businesses of a certain size have established market positions, enabling him to harness the power of the network, through the use of big data, and to establish their business models on the participation of users, so as to benefit economically; in particular, as a result of such models of business organization, characterized by the ability to attract a large number of users, creating a gap between the place where service is taxing and that that creates the value (Della Valle, 2018, p. 1511).

The second threshold, concerning the total annual revenues at European level, has the function to limit the scope of application of tax on digital services to offer a significant EU-wide fingerprint (Della Valle, 2018, p. 1511).

The place of taxation, identified by article 5 of the proposed directive, coincides with the territory of the Member State where service users of corporate tax are during the tax period: it is not the place in which payment of taxable services is made, but one corresponding the IP address of the device you use to connect, without prejudice to the possibility of identifying a more accurate localization method (Della Valle, 2018, p. 1512). The rationale for this choice stems from the need to introduce a tax powers with rational allocation policy: the value is taxed where it is created, or in the State where your users reside, as their participation generates value for the digital enterprise (Della Valle, 2018, p. 1512; Fransoni, 2015).

To head off any double taxation, the considering number 27 of the proposed directive, where the revenues subject to taxation on digital services are also taxed for income taxes, requires Member States to allow deductibility of the first tribute as an expense from taxable profit of the second, regardless of which the two taxes are paid in the same or different Member States (Della Valle, 2018, p. 1513).

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Ministerial Circular, 23 december 1997, n. 326/E. www.finanze.it


Abstract
Once falling under the right to privacy as a mere sub-set, now the right to data protection enjoys a fundamental status. The introduction of the famous General Data Protection Regulation marks especially an important step towards elevating the status of the fundamental right to data protection. The new Regulation provides a stronger framework for contested issues such as consent under a strong accountability regime, however mere compliance with the law is not sufficient. This paper emphasizes the need for an integrated ethical approach, which combines ‘the concern for the law’ with a very strong emphasis on managerial responsibility for the firms’ organizational privacy behaviors. What is ultimately required is a value-driven data protection approach, executed by privacy officers with due concern for the very real impact that data related practices may have on the lives of people.

Keywords: fundamental rights, GDPR, consent, accountability, ethics.

1. Introduction
Privacy is not simply an absence of information about us in the minds of others, rather it is the control we have over information about ourselves.

As society faces a relentless pace of technological change, we witness the continuous struggles of governments, companies and individuals to keep up with this fast moving world, especially with regard to data protection. Reflections on the changes happening in front of our eyes are often outpaced by an inherently unpredictable future, which also renders regulation an increasingly elusive exercise.

Against this backdrop, the EU forcefully asserted privacy and data protection as core objectives by conspicuously flexing its regulatory clout with the introduction of the General Data Protection Regulation\(^2\) (GDPR), which came into force on 25 May 2018.

Both the Council of Europe and the EU have expressed shared concerns on protecting the privacy and online identity of individuals, emphasizing especially the fact that even mandatory rules on data and privacy protection can become meaningless if their implementation is not supported by moral and ethical considerations. As expounded upon in the section below, these two organizations were instrumental in elevating privacy concerns, with the Council of Europe initially taking a leading role and the EU now cementing data protection as a fundamental right with the introduction of GDPR.

The protection of our individual online identity, however, did not garner much attention among internet users before affairs such as Snowden or Schrems revealed the risks\(^3\) and paved the way for unilateral EU imposed regulatory globalization – through the mechanism dubbed the Brussels Effect.\(^4\) These revelations increased EU’s resolve to push forward the protection of data while taking an exceptionally uncompromising stance in support of full EU standards of privacy protection. This allowed for the EU to impose its regulatory preferences upon third countries, thereby also exporting the underlying norms and values\(^5\) – most notably the notion of privacy protection as a fundamental right.\(^6\) Now, the right to data protection is more strongly embedded than ever before in our legal and political discourse and can be expected to stay for at least the next decades.\(^7\)

GDPR outlines highly contentious issues as consent, while advancing the accountability principle. This approach aims towards rebalancing the relationship between individuals and data collectors to the benefit of the former.

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\(^5\) Ibid.


However, considering the ethical implications of the digital era—challenging not only existing data protection principles, but also our (shifting) societal mores and values—mere compliance with GDPR is not enough. Data protection should thus cannot be regarded from a purely legal or administrative perspective.

Therefore, this paper explores the urgency of an ethical reflection at the intersection of the digital environment and fundamental rights. Principles such as consent[^8] or accountability,[^9] once simple concepts, spur a lot of discussion when considered under the GDPR. This paper will argue that consent should be seen in the light of an overarching principle of accountability, where any data privacy related issues should be principally guided by ethical considerations. This approach emphasizes organizations’ corporate social responsibility.

### 2. Data protection as a fundamental right

The origins of the right to data protection can be partially traced to the data protection rules from northern European countries[^10] during the 1970s, and the Council of Europe Resolutions on data processing.[^11] Indeed, the Council of Europe issued the first frameworks for data protection on a European level.[^12] Interestingly enough, early instruments developed for the protection of data were mostly announced as relating to the right to privacy. Rather than a self-standing right, data protection was seen as a subcategory of the fundamental right to privacy. Such was the case also with the Council’s Resolutions with regard to

[^12]: Council of Europe Resolution (73)29 ‘On the protection of the privacy of individuals vis-à-vis electronic data banks in the private sector’ (1973); Council of Europe Resolution (74)29 ‘On the protection of the privacy of individuals vis-à-vis electronic data banks in the public sector’ (1974).
protecting the privacy of individuals vis-à-vis electronic banks. These Resolutions regarded the processing of data, which takes place in the private and public sector, as integral part of and falling under the right to privacy.13

Gradually the EU started to engage in the field of the protection of data by adopting a slightly different stance on data protection than the Council of Europe, which regarded the matter through a human rights lens. Within the EU the processing of the data was two-faceted. Firstly, it was partially seen as an economic matter, as the EU traditionally focused on perfecting the internal market in this particular case accommodating the free flow of data. This is reflected by the legal basis of Directive 95/46 was Article 100a of the Treaty Establishing the European Community, which indeed concerned the regulation and functioning of the internal market. Secondly and similarly to the perspective of the Council of Europe, the EU also connected the right to data protection to the fundamental right to privacy.14 This was also reflected in the data protection Directive that preceded the GDPR15, where under the Article 1, concerning the objective of the Directive, it is held that Member States should offer protection to fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of data.

Since the entry into force of the EU Charter of Fundamental Rights (Charter) in 2009, the right to data protection has enjoyed fundamental right status. This happened after the European Court of Human Rights (ECHR) had already acknowledged that it partly fell under the protective scope of Article 8 of the European Convention of Human Rights (ECHR) which refers to the right of respect of private life. Following this, Article 7 of the Charter guarantees the right to privacy, while the following Article 8 introduces the right to data protection. The ultimate interpretative authority of all EU law, the European Court of Justice (CJEU) is also clear in its position with regard to data protection. Dating back to the time when the Directive was still in effect, the Court reaffirmed the status of the right to data protection in its Coty

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13 The Resolution (74)29 of the Council of Europe (on the public sector) also stated explicitly that the use of electronic data banks by public authorities has given rise to increasing concern about the protection of the privacy of individuals’ 87.


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judgment,\(^\text{16}\) regarding it as a fundamental right of every person while making reference to Article 8 of the Charter and Directive 95/46 and considering the overall implementation of the Directive in relation to the mentioned Article 8 of the Charter. Additionally, the Court in *Digital Rights Ireland* maintained that the Retention Directive 2006/24 did not provide clear and precise rules governing the interference with the *fundamental rights* enshrined under Article 7 and 8 of the Charter.\(^\text{17}\)

Since the days of mere ‘engagement’, the role of the EU in the field of data protection has evolved significantly. With the introduction of GDPR the Union now decidedly assumed a leading role as it effectively exports its data protection regulatory regime and respect for a fundamental right. Importantly, the rights to privacy and data protection are no longer used as interchangeable concepts. By the removal of seemingly all reference to privacy, data protection has been fully disconnected from the right to privacy- at least on a terminological level.\(^\text{18}\) As a fundamental right on its own, it now is essentially comparable to other more classic human rights such as the right to a fair trial, the right to privacy or freedom of expression.\(^\text{19}\) This is also reflected in the legal basis by which the GDPR was adopted. Contrary to Directive 95/46, the GDPR is founded on Article 16 of the Treaty of the Functioning of the European Union, which safeguards protection of the data.

The new Regulation thus affirms the position of the EU as the guardian of the individuals’ data while very importantly introducing the right to be forgotten, data portability and accountability. It also included clearer notion of consent with stricter requirements.\(^\text{20}\) GDPR guarantees full protection of individuals with consistent and clear obligations to all stakeholders involved in the process. The extraterritorial nature of the Regulation also binds companies


\(^{17}\) ECJ, Digital Rights Ireland Ltd v Minister for Communications et al., Cases C-293/12 and C-594/12, 8 April 2014, para 65.

\(^{18}\) See also: L. Costa and Y. Poulet, ‘Privacy and the regulation of 2012’ (2012) 28 no. 3 *Computer Law & Security Review*. Note that, often, still, the CJEU often discusses the right to privacy (Article 7) and the right to data protection (Article 8) together and in close connection.


located outside the EU and fines for non-compliance with GDPR can amount up to four percent of global turnover.\footnote{See Article 83 par. 6, General Data Protection Regulation.}

However, even a EU level Regulation imposing strict compliance is not enough to keep up with the many challenges that ever-evolving technology poses. The luring new possibilities that come with rapid technological advancement and their seemingly elusive susceptibility to regulation should not be allowed to compromise the protection of private data. Building trust and confidence among the public should defeat public skepticism and the rising tide of fatalism regarding the prospects for privacy protection. This also requires these concerns to be embedded in broader discussions on regulating technology within democratic societies, which prize the rule of law.

As argued in the next section, the GDPR provides a means towards the required trust-building: its basis if formed by a meaningful notion of individual consent under a strong accountability regime and due regard of ethical considerations. The GDPR intertwines legal regulation with ethics. Only by keeping these two inseparable, will its benefits materialize.

3. Guarding the fundamental right of data protection — from the notion of consent and accountability to moral responsibility

3.1. The sensitive notion of consent and accountability under GDPR

Often enough, studies reveal how the cessation in engaging Internet services by users is often correlated to their shared fear that their data is being collected and misused.\footnote{The GSMA Foundation. (2011). GSMA research shows mobile users rank privacy as an important concern when using applications and services. Privacy concerns can prevent consumers’ engagement with mobile Internet services. For further information follow: http://www.gsma.com/newsroom/press-release/gsma-research-shows-mobile-users-rank-privacy-as-an-important-concern-when-using-applications-and-services/.} It is thus not uncommon that data protection is sometimes seen as simply an anachronistic concept, especially in a world where the most basic social and economic processes require easy flow of information.\footnote{J.M. Rule, Privacy in peril: How we are sacrificing a fundamental right in exchange for security and convenience (2007 Oxford University Press) 168.} The concerns are usually a result deriving from the misconception that privacy and the free flow of
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data are contradictory rather than complementary concepts.24 This misconception is not unjustified however.

Dating back to the Article 29 Working Party’s25 letter to WhatsApp regarding the terms of service and privacy policy, the former expressed serious concerns especially with regard to the validity of users’ consent, specifically on the effectiveness of the mechanisms providing for the effective exercise of this right.26 Yet, despite efforts to clarify such a notion, there is a growing uncertainty as to what extent proposals to strengthen consent – such as clearer privacy policies and fairer information practices – can actually and potentially overcome a fundamental flaw in this model: namely the assumption that individuals can understand all facts relevant to true choice at the moment of pair-wise contracting between individuals and data gatherers.27

Following this, Opinion 3/201028 suggested the insertion of a general provision in order to reaffirm and strengthen the responsibility of data controllers as well to include an obligation on the latter to take the appropriate measures to implement the principles of data protection.29 Indeed under GDPR, accountability shifts towards the implementation of internal measures and procedures that put into effect the data protection principles and ensure their effectiveness.30 Compliance is no longer a merely legal administrative issue, but is to become entrenched in any

25 The Article 29 Working Party is to be replaced by the European Data Protection Board. See Article 68-76 of the General Data Protection Regulation.
30 Article 5 of GDPR thus introduces the notion of accountability such as “the controller shall be responsible for and be able to demonstrate compliance with general principles.”
business practice. The new Regulation is replacing ‘reporting’\textsuperscript{31} with development of comprehensive in-house\textsuperscript{32} documentation where in case of an investigation, a company should be able to provide all the relevant information on their activities. WP173 considers transparency\textsuperscript{33} and the ability to demonstrate that consent has been obtained\textsuperscript{34} vis-à-vis data subjects and the general public as one of the main factors contributing to accountability of data controllers.\textsuperscript{35}

However, accountability under the GDPR needs to be addressed realistically and tied to binding principles as technological advancement does not allow for it to remain a rigid concept. This concept helps to go from theory to practice with compliance being the cornerstone. A growing awareness hereof results in stronger determination of all the actors involved in the process of safeguarding the data as it freely flows between collectors on both sides of the Atlantic.

Contextual integrity, as coined by Nissenbaum, ties the adequate privacy protection to norms for specific context, demanding that information gathering and dissemination be appropriate to that context and obeys the governing norms of distribution within it.\textsuperscript{36} Thus, consent as one of the legal grounds for processing personal data does not exclude the possibility of other grounds – which could perhaps be more appropriate from both the controller’s and data subject’s perspective.

However, there are aspects that law cannot always capture. When it comes to collection of data, consumers are considered vulnerable in their dealings with businesses due to a lack of information about and an inability to control the subsequent use of their personal information. Having said this, the data

\textsuperscript{31} In the former regime, companies were subject to DPAs and provide files and updates on their activities.
\textsuperscript{32} Information Commissioner’s Office (ICO). Accountability and Governance. For more detailed information follow: https://ico.org.uk/for-organisations/data-protection-reform/overview-of-the-gdpr/accountability-and-governance/. See also Article 5(2) GDPR.
\textsuperscript{36} H. Nissenbaum, ‘A contextual approach to privacy online’ (2011) 140 no.4 Daedalus 32.
gatherers are not only accountable but these organizations also have moral responsibility vis-à-vis consumers, to avoid causing harm while exercising reasonable precautions.\textsuperscript{37}

3.2. From consent and organizational accountability to moral responsibility

The protection of data calls for an integrated ethical approach, which combines ‘the concern for the law’ with a very strong emphasis on managerial responsibility for the firms’ organizational privacy behaviors. Thus inserting ethical reasoning into the organizations privacy programs and more specifically, the moral responsibility to \textit{do no harm}. Scholarly contributions suggest that, at least when compared to businesses, customers suffer to a certain extent from information and control deficits, thereby leaving the organizations with a lot of responsibility which goes beyond legal compliance, but also calls for a moral duty to take reasonable precaution and prevent harm in using this data.\textsuperscript{38}

Taking into account the social impact of privacy problems and in particular data breaches, two aspects of morality stand at the center of the complex relationship between those who collect and use the personal data and the individuals who provide their information. These two aspects of morality as emphasized by literature are: \textit{vulnerability} and \textit{avoiding harm}.\textsuperscript{39}

Firstly, \textit{vulnerability}, as the term suggests, occurs in a relationship where one of the parties is at a disadvantage with regard to the other. Usually this situation arises when one of the parties suffers a lack of information and control.\textsuperscript{40}

Solove in ‘I’ve Got Nothing to Hide’\textsuperscript{41} also mentions this type of power imbalance is the root of large-scale privacy harm resulting from the large amount of personal information gathered from the consumers.

Secondly, \textit{avoiding harm} should be the guiding pattern for managers of personal data, which exemplifies a sort of minimum moral responsibility to

\textsuperscript{37} M.J. Culnan and C.C. Williams, ‘How ethics can enhance organizational privacy: lessons from the choicepoint and TJX data breaches’ (2009) \textit{Mis Quarterly} 673.

\textsuperscript{38} \textit{Ibid}.

\textsuperscript{39} \textit{Ibid}.


cause no harm when they treat the information, especially when such a treatment unnecessarily fortifies customers’ *vulnerable* status.\(^{42}\)

To this end, privacy, as a legal right, should be conceived essentially as an instrument for fostering the specific yet changing autonomic capabilities of individuals.\(^{43}\) An approach that aims toward reconstructing trust based on concepts such as fairness and respect goes beyond legal compliance and supports an ethical based approach. The Council of Europe Consultative Committee Convention 108 also emphasizes this approach, through the ‘Guidelines on the Protection of Individuals with regard to processing of personal data in a world of Big Data’ in January 2017.\(^{44}\) The Guidelines support an ethical and socially aware use of the data in conformity with values and norms, including the protection of human rights. This principle stipulates that when processing personal data, controllers should adequately take into account the likely impact and the broader ethical and social implications.

As the world of technology becomes more complex, ethical problems associated with it also tend to increase.\(^{45}\) Theories to address these challenges, however, remain underdeveloped.\(^{46}\) What is ultimately required is a value-driven data protection approach, executed by privacy officers with due concern for the very real impact that data related practices may have on the lives of people.

### 4. An ethical approach to data protection

Internet as an ecosystem of different players interacting poses great concerns in relation to the protection of individuals’ online identity. However, as legislators now struggle to give answers to questions before considered easy, such as how to define responsibility and the notion of consent; European Data Protection

\(^{42}\) *Supra* note 37.


\(^{44}\) Council of Europe Guidelines on the Protection of Individuals Data with regard to Processing of Personal Data In a World of Big Data (2017).

\(^{45}\) J.H. Moor, ‘Why we need better ethics for emerging technologies’ (2005) 7 no.3 *Ethics and information technology* 111.

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Supervisor – Ethics Advisory Group (EAG), through workshops shows a common effort to consider the ethical impact of the digital era.\textsuperscript{47}

The EAG reaffirms that compliance with GDPR is not enough.\textsuperscript{48} Though the cliché of fast moving world rings true, that only means that we have to hold tight onto our values by adjusting at the same pace. Following this, consent as a notion is based on how things work in a simpler world making it unrealistic to apply such a notion at its full capacity. Henceforth, it is suggested that consent is more likely to be seen in the light of a broader principle of accountability and ethics should be seen and worshiped as standards that one can count and rely on as they create the base for life.

On this note, organizations should implement strong internal data governance framework, which facilitates the development of a strategic approach to data. Such an approach would ideally be capable of combining the value maximization of information deriving from the data, while minimizing the risks of non-compliance, especially with regard to a breach of trust. A data governance framework designed to overcome data governance failure points, will not only change and transform the way an organization manages the data.

The type of ethical based approach taken, be it an ethical value or policy statement, an ethics committee, or formal data impact assessments including an ethics assessment, should all aim towards reaching the same objective. Such approach would ensure that personal information must be processed in a fair, transparent, responsible and ethical manner.\textsuperscript{49} This way, a possible ethical based approach and data impact assessments would show the ability to build trust and transparency with consumers, ultimately delivering long term benefits to both the consumer and the organization. Compliance would thus result in a competitive advantage while further advancing the citizens’ fundamental right of data protection.


\textsuperscript{48} The EAG continues to work on identifying the ethical responsibilities of online actors.

\textsuperscript{49} See also the ICO Report ‘Big data, artificial intelligence, machine learning and data protection’ points out [par 176] that ‘a large organization may have its own board of ethics, which could ensure that its ethical principles are applied, and could make assessments of difficult issues such as the balance between legitimate interests and privacy rights’; See also the EU ‘Guidelines on the protection of individuals with regard to processing of personal data in a world of Big Data’ par. 1.3. The Guideline provides that an ethics committee should stand as an independent body with highly qualified selected members who perform their duties impartially and objectively.
To this end, technology cannot dictate our values and ethics at least can help to keep the concrete effect of the GDPR robust. Regardless of how strong the law is if not accompanied with the morality and ethics of every practitioner, can become a dangerous grace for every individual, in a society where even the most powerful is vulnerable.

This is the time when the individual and the processor institution both support a full legal framework where morality and ethics become more important than penalty implementation.

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Developed of artificial intelligence and his impact on right to work

Abstract
The purpose of this article is to discuss the influence of artificial intelligence, which currently is developing rapidly, on the law, in particular on the labor law which is one of human social law and human rights. It is clear that, fourth industrial revolution will change lives of societies as well as previous revolutions. To this end a review of the literature in this area and the latest legal solutions that appear on labor market was carried out. The conclusion comes from this analysis that artificial intelligence will effect on labor market – relation between employers and employees, as well as their privacy and monitor them. It also will influence on hiring and dismissing employees. The main question is how to create law with respect for new technical solutions and human dignity, according to international law and human rights. What consequences artificial intelligence will bring with?

Keywords: artificial intelligence, human rights, labor law, labor market, right to privacy.

1. Introduction
According to a report of the future of jobs of the world economic forum, humanity stands at the threshold of the fourth industrial revolution. Industrial revolutions appeared over the centuries and were caused by large technological achievements that echoed the lives of societies. First industrial revolution, started in 1760 with the invention of the steam engine, changed lives from agrarian and handicraft style to industry and manufacturing societies. The greatest achievement of the second revolution, which began in 1900 was facilitation to mass production by providing oil and electricity (Xu, David, Kim, 2018, p. 90). The preceding third revolution started in 1960 was connected with the development of information technology...
which was used to automate production. Information and communications technology is characterized by a fusion of many technologies, like computerization and access to the Internet, which undoubtedly changed the way of functioning of entire societies (Xu, David, Kim, 2018, p.90). The fourth industrial revolution, which is an extension of information communication technologies (ICT), will be based primarily on computer systems with high computing power, robots, extended ICT technologies. This revolution is not a sudden moment – is was a long process. In literature is emphasized that goal of creating non-biological intelligence goes back millennia (Spector, 2006). However, the big data and artificial intelligence are going to take crucial role. The development of artificial intelligence is not a future, but this is the present reality. Currently, it is estimated that the size of the artificial intelligence market is around USD 664 million, by 2025 a sharp increase to USD 38.8 billion is expected – such statistics were indicated in the opinion of the European Economic and Social Committee from 1st June 2017 Artificial intelligence: the influence of artificial intelligence on a single market (digital), production, consumption, employment and society. In the opinion the main interesting subject is included: making new law with regards on human dignity and human rights, like right to work or right to privacy. It is also a question of this article, how to make law in accordance to human rights. In article short analysis of new methods based on artificial intelligence will be presented, too.

2. The concept of artificial intelligence

However, there is no simple answer to the question what artificial intelligence is. In general terms, artificial intelligence is known as a study of cognitive processes using the conceptual frameworks and tools of computer science (Rissland, 1990, p. 1957). In this sense, the science of artificial intelligence has developed in the mid-fifties (Rissland, 1990, p. 1957). Martin Minsky, one of founder of artificial intelligence said that “artificial intelligence is science of making machines do things that would require intelligence if done by man” (Rissland, 1990, p.1958).

According to opinion of European Economic and Social Committee from 1st June 2017 AI is divided into few fields: cognitive computing (algorithms that reason and understand at a higher (more human) level), machine learning (algorithms that can teach themselves tasks), augmented intelligence (cooperation between human and machine) and AI robotics (AI imbedded in robots). According to this document there are two types of artificial intelligence: narrow and general. Narrow
AI is dedicated to specific tasks, AI in general meaning is capable of carrying mental tasks as human. In recent years science has made great progress in the field of narrow AI. In opinion was indicated that research also focuses on reasoning, knowledge acquisition, planning, communication and perception (visual, auditory and sensory). In literature it is broadly known that artificial intelligence should also have features like humans – creativity (Boden, 1998, p. 347).

However, each of these solutions may involve other effects in the legal sphere. For this reason, it is important to define artificial intelligence on the basis of legislation. It is still lack of legal constructions in the full extent of AI. The need to define concepts related to artificial intelligence was expressed in the opinion of the European Economic and Social Committee, too. According to Comitee, the code of ethics in the development, implementation and use of artificial intelligence is necessary, so that artificial intelligence systems throughout the operational process are compatible with human dignity, integrity, freedom, privacy, cultural and gender diversity and, most importantly, fundamental human rights.

Law and artificial intelligence are fields strongly connected with each other. There are two ways of these connections – legal solutions for using AI and separate field of science. For example law and AI is a field of science started thirty years ago (Rissland, Ashley, Loui, 2003, p.1). Solutions based on artificial intelligence helps with negotiations, online dispute resolutions, argumentation etc. It will develop so far.

Due to such rapid progress, arises question how this civilization gain will serve humanity and how will it affect human rights, and in particular the right to work that interest me and the related with it right to privacy? The Comitee recommends adopting an approach to artificial intelligence based on human-in-command, including in particular responsible, safe and useful development of artificial intelligence and assuming that machines remain machines and that people are always able to control them. However, the question arises whether these postulates are feasible in the context of the protection of human rights?

3. Right to work as a human right

Talking about the right to work, the history should be briefly outlined. This right is regulated in many legal acts. The first international document in which the right to work was formulated was the Universal Declaration of Human Rights of 1948 proclaimed and adopted by the United Nations General Assembly. According to art. 23 (1) Everyone has the right to work, to free choice of employment,
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to just and favourable conditions of work and to protection against unemployment. Another, very important document is the International Covenant on Economic, Social and Cultural Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 in art 6, which recognizes right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. There is a number of other documents, just as the Constitutions of individual countries, which also regulate these matters. For example in Polish Constitution exists article 65 which provides that everyone shall have the freedom to choose and to pursue his occupation and to choose his place of work. Exceptions shall be specified by statute. Due to the status of legal acts concerning the right to work, this work is known as a human right (Trivedi, 1981, p. 131). This is also one of the basic human social rights (Bucińska, 2006 p. 139).

4. The influence of artificial intelligence on the realization of right of work? Opportunities and threats for employees

For sure, AI will have an impact on employment levels and the nature and character of many jobs and on social systems. There is a discussion whether AI influence on labor market will be positive or rather negative. For example, according to the Mc Kinsey and Company report to 60 percent of occupations in the near future will be gradually replaced by computer systems using artificial intelligence. Among the examples of such works, there are mainly those that are characterized by high repeatability. However, the EESC rightly points out that the current technological change can be called the second age of the machine. Older machines replaced muscle strength, while new ones also replace mental potential and cognitive skills, so it also applies to professions related to analytical work. The catalog of professions threatened with replacement by artificial intelligence is very wide. The AI will affect on all sectors simultaneously, on low – skilled employers and highly skilled ones (Szczurowska M, 2017). It will automate easy employee’s obligations for example cashier in shop, but also these more complicated requiring more complex processes – it will helps lawyers in searching law regulations and argumentations. Unfortunately, this is a reality and not a distant future, that now employees lose their jobs as a result of replacing them with technologies. However, the chance that the machine will fully replace human work is very small (Bradford, 2018). Experts say that
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along with the elimination of many professions, there may also be new ones that will be a response to the development of artificial intelligence.

According to opinion indicated above artificial intelligence should function based on human-on command system. This role can be realized for example in using smart computers for eliminate overtime work or accidents at work. Algorithms will also reducing the risk of making a mistake by employees. These are positive aspects of functioning artificial intelligence. Many authors declare that for the sake of human dignity regulators should create legal regulations with much caution (Brownsword 2017, p.117). There are issues that require a lot of consideration in order to properly regulate. One of such examples are autonomous vehicles that already travel on roads today. They not only replace professional drivers, but there is a subject of liability for accidents caused by these vehicles. Another examples are autonomous weapons and criminal trials provided with assistant of smart machines.

Moreover, hiring and dismissal of employees by artificial intelligence could be also a new solution for labor law. In 2016 Bridgewater Associates, one of the largest financial funds in the world, announced the automation project of company management, including hiring and dismissing employees (Walsh, 2018, s. 234). The question arises about such solution whether all strategic decisions, including in particular dismissal of employees, can be made by machines? Is this consistent with respect for human dignity?

5. Right to privacy

Artificial intelligence will affect not only the amount of work available, the choice of the type of work, but also the type of work performed. Artificial intelligence develops significantly in the field of employee monitoring, and so it calls into question the autonomy and privacy of employees. Monitoring with the use of artificial intelligence in the workplace is available, according to General Data Protection Regulation (GDPR), if the monitoring method is adequate to the purpose and employees are informed about it. Artificial intelligence probably will broaden this matter in other activities.

For example, in London in the company Status Today employers use the metadata provided by clients to monitor employees. Employer can see information about when an employee browsed files, when using a magnetic card and the algorithm build the company image and inform in case of
deviations. Behavior of employees is evaluated for understand the behavior and productivity of employees. There are many disadvantages of such solution. Data tells a lot about the personality of an employee, they can reveal what is its resistance to stress, show how an employee can behave outside of work, show the character traits that an employee does not want to disclose at work. On the other hand, employees may experience a lack of confidence on the part of the employer and in their opinion, constant supervision does not have to positively affect employee motivation; on the contrary, it may reduce their productivity. Apart of that, AI and such systems can help in work by preventing accidents, informing about dangers, such as computer vision in cooperation with Microsoft cloud.

6. Conclusions

Changes in societies because of AI is currency problem also for law and law makers. However, we should see in artificial intelligence a chance for development. Every industrial revolution carried a positive transformation in societies lives. However, the conclusion from this analysis is respect for human rights despite the upcoming changes and The European Economic and Social Committee also calls for this.

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Universal Declaration of Human Rights of 1948 proclaimed and adopted by the United Nations General Assembly
Abstract
Purpose: This paper aims to analyse the effects of climate change and the public actions and regulations approved accordingly regarding with Water as essential wellbeing issue, and if possible we aim as well, to show how to improve regulations on this matter.
Methods: The methodology used in this paper is focused in analyse the main enacted laws in Spain and the ones approved by European Union Institutions to preserve Water and to give a solution to the consequences of the climate change in this scope.
Results: We have notice that the problems that involve shortage and excess of Water are two questions linked with each other, so the improvement of regulations is due to take into account this relation between them.
Discussion: Water is an essential good for animal and vegetable species subsistence on earth, and also for human beings subsistence. As a consequence of this, the regulation that is enacted to preserve it becomes a vital regulation for the human being and is part of the normative set to rule the accuracy of our environment. Currently, there are some policies on Water regulation in the European Union that take into account the effects on Water that occur as a consequence of climate change. These Water regulatory policies are extended to the effects of its shortage, which produces dramatic damages adopting the form of drought, and the effects of it excess that can wreak havoc through floods. This paper aims to analyse both sides of the effects of climate change, and the public actions and regulations approved accordingly, and the relation between them, in order to enhance them.

Keywords: water, environment, climate change, drought, aids, floods, civil protection.

1. Introduction
There are currently some public policies on Water regulation in the European Union that take into account the effects on water that occur as a consequence of climate change. This Regulation consider the Right to enjoy Water as a Human
Right as in different places on the planet it is done (Moreno Molina, 2009, p.459). These policies are extended to rule its deficiency, which produces dramatic damage adopting the form of drought and the effects of its excess that can wreak havoc through floods. In view of that, there is a need of harmonizing the regulation of the two scenarios. The research that concerns us is addressed to the incorporation of normative measures that can be considered preventive of floods, but at the same time they can be preventive of drought situations and focused on the purpose of improving the regulation of managing and planning security in dams and watersheds, avoiding floods by rupture or overflow of them, and furthermore proposing measures that preserve the surplus in this last scenario in order to preserve that legal right that is Water for situations of hypothetical future drought.

2. Research methods

The methodology used in this paper is focused in analyze the main enacted laws in Spain and the ones approved by European Union Institutions to preserve Water.

3. Water European regulation as a consequence of climate change

Climate change affects to the quality and quantity of water available for humans and species in a balanced situation of the environment. The regulation of this essential resource is necessary since Water is an essential natural good for life, which also affects economic and social activities, and the value of territories (Álvarez Fernández, 2007, p.318).

The EU Water Framework Directive does not directly rules issues related to climate change, but its consequences, and aims to protect surface, underground, coastal and transition Waters (Delgado Piqueras, 2009, p.269). Through it there is a strong legislative basis in the EU for integrated long-term Water management, including frameworks to apply Water fees (eg tariffs), and measures (eg water saving devices, educative campaigns, and awareness), in order to get its most efficient use.

Firstly, water pricing policies implemented in combination with other measures are prove to be the most effective in reducing water consumption at home. Water demand management strategies must find the right
combination of pricing instruments and mechanisms without pricing, given the essential and basic nature of water. Nevertheless, water prices continue to be a key instrument to achieve cost recovery of water services in order to guarantee the maintenance and financing of existing and future water infrastructure.

However, the Water Framework Directive (Directive 2000/60/EU) prescribes that water is not a commercial good like the others, but a heritage that must be protected, defended and treated as one of the most valuable goods. The Water Framework Directive configures it as an ecological resource and its preservation is identified with the protection of the environment (López Menudo, 2016, p.264). The regulation of water in Europe is a part of environmental regulation and it is inserted in the regulatory set that aims to serve as a guarantee of sustainable use of natural resources (Lozano Cutanda, 2016, p.411). In this sense, Water Framework Directive aims to be the framework for the protection of European waters (Bueno Hernández, 2007, p.5).

Despite all, the transposition of the Water Framework Directive into the national law has encountered difficulties in some Member States, and because of that in some countries the deadline to have done the adaptation has been overpassed as it has been reflected in several judgments of the Court of Justice of the European Union. The most common difficulties had been the recovery of management costs, or the adaptation of the hydrological planning (Embid Irujo, 2007, p.21).

In addition, water supply is a service of general interest, as it is defined in the Commission Communication Services of general interest in Europe, having traditionally been considered, in Spanish law, as a public service (Valles Ferrer, 1974, p 39). But the common use by citizens is not the only application that it have, because it is used for irrigation, industry, generation of electricity, etc. (Belenguer Muía, 1997, p.188). All this requires adequate regulation, which must be sustainable, in accordance with current international criteria (García Matíes, 2016, p.96).

Effective Water regulation policies require greater integration and harmonization of the EU Member States, and collaboration mechanisms. A coherent, effective and transparent legislative framework is also necessary, which is committed to the sustainability of the management, protection and disposal of Water resources. As a consequence, European regulation is focused on the regulation of floods, or in the regulation of droughts, but separately. However, the regulation of both facets is ot absolutely independent of the other, as we will analyze.
4. The Flood Directive and its transposition into Spanish Law

Directive 2007/60/EC, of the European Parliament and of the Council, of October 23, 2007, about assessment and management of flood risks, so-called European Directive on Floods—has the purpose of increasing security in the relation with the risk of floods as a public competence that can give rise to a patrimonial liability, especially by omission of the duty of acting to remove the hazard in this scope (Fernández García, 2010, p.131). European regulation has three objectives: 1. Reduce the negative consequences of floods regarding human health, environment, cultural heritage, economic activity and infrastructure; 2. Create the necessary instruments for the proper knowledge and evaluation of the risks associated with floods; 3. Achieve coordinated action by all public administrations involved and society to reduce the negative consequences of floods.

Directive 2007/60/CE was transposed to the Spanish legal system, mainly through the Royal Decree 903/2010, July 9th, on assessment and management of flood risks, but also by the various reforms in the Regulation of the Public Hydraulic Domain. Lastest reform in this matter was made by Royal Decree 638/2016, of December 9, which modifies both the Regulation of the Public Hydraulic Domain approved by Royal Decree 849/1986, of April 11, and the Hydrological Planning Regulation, approved by Royal Decree 907/2007, of July 6, and other regulations on flood risk management, ecological flows, hydrological reserves and wastewater discharges. Through the reform, the current regulatory framework is updated, eliminating some gaps, as well as creating a normative substrate for the coordination of the river basin management plans and the flood risk management plans (Blasco Hedo, 2017, p.23). It is noteworthy that the approval of the hydrological plans requires citizens participation in the processes of preparation and revision (Pallarès Serrano, 2008, p.352), which serves to ensure transparency and their adaptation to their purpose to the European regulation.

The purpose of the Directive is to generate new instruments at European level to reduce the foreseeable consequences of floods through risk management, to look for the reduction of danger and risk, and to reduce the negative consequences of floods. The main instruments that can be used for achieve this goal are: 1. Clarification of the legal concepts of river channel, zone of servitude and police zone; 2. Implementation of a proper National System of Cartography; and 3. Regulation of flood zones.
In relation with the normative clarification of the legal concepts of river channel, area of servitude and police area we must emphasize that these are not fixed concepts, which are specified depending on different criteria. As a result, natural streams are considered to be continuous or discontinuous currents, the ground covered by the waters in the maximum ordinary increasing is based on geomorphological and ecological data considering the existing hydrological, hydraulic, photographic and cartographic information, as well as historical references available.

Secondly, the creation of the National Cartography System allows the Hydraulic Administration to have a management tool to act effectively against these harmful effects, highlighting the cartographic delimitation of the public hydraulic domain, the preferential flow zone, and the flood zones. National Cartography System is connected with Civil Protection activity because it is a decisive preventive element to fight against the actions that produce environmental damage caused by a flood. However, it should be noted that civil protection regulations require the identification of flood areas, through a zoning that is not necessarily coincident with the delimitation that is made according to water legislation, but must take it into account (Menéndez-Rexach, 2015, p.40).

With the regulation of floodplains as it is required in the European Floods Directive, a flood zone will be considered so determining the theoretical levels reached by flood waters with a statistical return period of 500 years, based on geomorphological, hydrological and hydraulic studies. It is referred to lakes, lagoons, reservoirs, rivers or streams. The set measures include retention or relief of the flows of water and cargo transported during floods or shelter against erosion. The regulation of flood areas has great importance in the security scope, since the consequences of floods can involve losing human lives and suffering economic damages.

Undoubtedly, one of the most important instruments that is useful to reinforce safety in the prevention of a possible flood is the Dam Emergency Plan, whose design must now be compatible with the European Flood Directive. The Floods Directive has already entered into force, the implementation of the Directive is beginning and the timetable is clearly established.

5. Public actions context in which the European Flood Directive is inserted

The European Flood Directive is not an isolated regulation, because it is part of a legal framework about Water regulation. The whole regulation is extended to
security in case on flood, and dam rupture, but also to the environment protection. In the European legislation this is a forecast consequence of climate change, but it transcends a purely environmental policy perspective, because it is also considered a regulation of public safety.

In this sense, the European regulation on flood risk is an extension of the competences assumed on the environment by the European Community in the Single European Act, which contains recommendations related to the state of the waters from an ecological perspective (Delgado Piqueras, 2009, p.288). The aggravation of the problems of Water scarcity and the virulence of floods as consequences of climate change in the current European regulation is based on the competences that the European Union assumed in relation to the common policies of the environment.

Therefore, the European Flood Directive of 2007 must be understood in relation to the Water Framework Directive -Directive 2000/60/EU- (Delgado Piqueras, 2009, p.273), and be open to some coordination between them. In fact, strategy for the common implementation of the Water Framework Directive (2000/60/EC) and the Floods Directive (2007/60/EC) needs to take into account the combined interpretation of the two of them. In particular, the following rules must be met:

- The execution of the flood risk management plans must be coordinated with the basin management plans.
- Citizens’ participation when approving these plans should be foreseen, so that, by the application of the combined action of both, all the evaluations made, prepared maps and plans will be available to the public.
- Member States are due to coordinate their flood risk management practices in shared river basins, including with neighbor States.
- Member States do not perform measures that increase the risk of flooding in neighboring countries for reasons of solidarity.
- The United States took into consideration long-term developments, including climate change, as well as sustainable land use practices in the flood risk management cycle contemplated in the 2007 Directive.

6. Measures to regulate water scarcity in Spain

As starting point water parameters in Spain highlights that it is one of the world’s largest water resources if we consider the number of dams, reservoirs, and lakes, but all of them are smaller than in other countries much more humid.
Water, regulation of its shortage and its exce

(García Diez and Remiro Perlado, 2014, p.4). For this reason, it is vital to preserve them and to mitigate the effects of its shortage. It should be noted that drought is not a new or extraordinary situation derived from climate change (López Piñeiro, 2006, p.47), although this phenomenon has exacerbated its effects.

Spanish Law number 1/2018, of March 6th, amended the Water Law of 2001 to mitigate the effects produced by drought, in a context of emergency technical situation of some watersheds in Spain, establishing economic aid to some productive sectors.

Given the extreme climatic conditions that the Spanish agrarian sector currently presents in some areas, which threaten the economic viability of many farms and their own life as productive units, the reform starts from the base of the existing Plan of agricultural insurance, subsidized by the Ministry of Agriculture and Fisheries, Food and the Environment, which represents the obligatory reference tool in the fight against climatic adversities. As it only contemplates the meteorological drought and not the hydrological one, it is, the former measures only could be proper to deal with shortage of atmospheric water and not in case of scarcity of water in the hydrological system (Brufao Curiel, 2012, pp. 203-204), some complementary measures have been adopted in the situation of drought of extraordinary incidence. These exceptional measures that are implemented with the legal reform of 2018 are the following:

- Exemption from charges related to water availability.
- Labor and Social Security measures such as suspension of contracts and reductions in working hours and collective dismissals that have their direct origin in the damages caused by the drought.
- Special tax reductions for agricultural activities, especially in relation to personal income tax and value added tax.
- Actions in relation to the Common Agricultural Policy of the European Union and the financing of guarantees. In this sense, it is expected that the authorizations of the advance payment of the aid provided in this framework will be requested up to the maximum allowed for its payment.
- The Government will upgrade the definition of the Combined Agricultural Insurance Plan.
- Exemption from property tax payments corresponding to 2017 and 2018 that affect farms, dwellings, work premises and the like, of a rustic nature, owned by farmers and ranchers affected by the drought, will be granted.
- Mediation loans from the Official Credit Institute.
- Extraordinary fund to fight against drought.
7. Conclusions

The European Flood Directive creates a regulatory framework to harmonize regulations of all the Member States of the European Union regarding the system to cope with the risk of both continental and coastal floods. This action must be interpreted and executed in a coordinated manner with other actions contained in the legislation that includes the same package of other environmental protection policies in this sectorial scope. It is a protection of water resources and a protection against the risks caused by it excess thereof.

In Spain, Royal Decree number 903/2010 is the regulation that has been used to transpose the European Flood Directive in terms of safety against the risk of flooding caused by inland (non-coastal) waters. This norm is inserted in the normative set of the National System of Civil Protection in a similar way to a basic norm (special and sectorial) that allows to design the emergency plans for dams and reservoirs linked to the regulation of self-protection in relation to the regulation contained in the Basic Civil Protection Directive to deal with the risk of flooding (Búrdalo, 2003, p.27), but which may be completed with the rest of the Civil Protection regulations that are subsidiary.

However, at the same time that we are implementing an improvement of the Dam Plans in the face of flood risk, we are also witnessing the adoption of other measures, such as the problem of the adverse effects of droughts, which is the other side of the coin. But both are phenomenon sharped by climate change.

The enacted regulation needs a coordinated public action performed by the State and territorial governments (Comunidades Autónomas) since all of them share competences about Civil Protection and Environment protection (Fanlo Loras, 2010, p.331). The key goal is to adopt measures so that in the phases of exceedance of Water the solution to prevent fracture of the dam or reservoir is implement mechanisms to save water. This Water would be needed in the future to mitigate the effects of the droughts, being at the same time, a measure of prevention of overflow or breakage of dams, and avoiding floods. The basis of this regulatory harmonization is found in the joint interpretation of the Directives, the Water Framework Directive of 2000 and the Floods Directive of 2007, so that the principles in the implementation of flood risk safety measures require that water resources are not squandered and implies to be preserved. For this reason, some system should be planned to save excess water in a case of torrential rain that threatens the rupture as a consequence of the pressure. To save Water for the future building backups in the dams and reservoir is the better choice to prevent
Water, regulation of its shortage and its exce

a foreseeable drought and is a measure that prevents the scarcity of this valuable resource and at the same time is a measure that avoids the possibility of a fracture of the dam or the reservoir.

These measures have not been foreseen in Spain: nor in the reform of the Regulation of the Hydraulic Public Domain nor in the adaptation of the Flood Directive made by the Royal Decree of 2010. The European flood legislation does not contemplate this relationship between these two scenarios either. It can be said that there has been a missed opportunity to solve with a single preventive measure some problems of floods and drought as effects exacerbated by climate change.

As a normative proposal for the future, it could be recommended that the next reforms of this matter in the regulatory context of the European Union, provide that Member States are due to introduce mechanisms for coordinating security measures against flood risk, through savings systems and preservation of surplus water resources, with measures to mitigate the effects of drought, considering adequate, the regulation of a state water reserve.

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Human rights in business

Abstract
On the international forum, the subject of business and human rights is increasingly being taken. It is in the scope of interest of such organizations as: the European Union, the Council of Europe, the United Nations and the Organization for Economic Cooperation and Development. The international community has developed numerous initiatives and taken practical measures to precisely define the role and responsibility of individual entities in the field of protection and respect for human rights. Poland is also actively involved in the process of creating a new approach to this issue.
States have the obligation to respect and implement the provisions relating to human rights. It is a lasting process because human rights are changing. Their scope of protection increases in response to changing political, social and technological conditions. United Nation Human Rights Council, in 2011, adopted guidelines on business and human rights. Their goal is to reduce the risk of infringing these rights in connection with business operations.

Keywords: human rights, corporate social responsibility, human resource management strategy.

1. Introduction
The European Union pays special attention to issues concerning business and human rights in external policy. In the document “EU Action Plan on Human Rights and Democracy in 2015-2019”, adopted by the Foreign Affairs Council on 20th June 2015. The Union has identified activities in this area. The goal of the plan is to take into account the principles of corporate social responsibility.

Issues regarding business and human rights were also included in the documents adopted by the Council of Europe.
Poland as a member state of the Council of Europe should:
1) review the law and national practice to ensure compliance with the recommendations, principles and further guidance set out in the Recommendation,
2) ensure broad popularization of the Recommendation to raise awareness of corporate responsibility and human rights,
3) share examples of good practices related to the implementation of the Recommendation with a view to their subsequent inclusion in the public information exchange system,
4) prepare and to make known the National Action Plan on the UN Guiding Principles on Business and Human Rights,
5) check the implementation status of the Recommendation no later than five years after its adoption.

2. Business activities and human rights

Acting in accordance with applicable civil, criminal and administrative law is the basis for running a business. It means the business activity should be done in accordance with the Labour Code, environmental standards and industry regulations.

The United Nation guiding principles about the business and about human rights refer to the responsibility of companies for respect for these rights. It is the responsibility of enterprises for their impact on society. It manifests itself in the care of companies for the natural environment, employees and working conditions. It is also about recognition of people in the processes of production, distribution and consumption as well as about implementing the principles of social responsibility in all areas of the company’s operation.

A wider approach to responsible conducted business is applied by the Organization of Economic Community and Development (OECD).

It draws the attention to respect for human rights and to due diligence in its activities based on risk assessment. There is specified that organizations should respect human rights, avoid breaking them, and respond to such events. The organization must have a policy that respects human rights. It must make company analysis in the context of human rights as well as cooperate in the field of processes aimed at eliminating the occurrence of a negative impact on respect for human rights.

The OECD guidelines for multinational enterprises cover issues related to employment and employment relationships. It draws the attention to the fact
that the organization respects the laws regarding establishing or joining trade unions and the effective elimination of child labour. Also, it draws the attention to elimination of forced forms of work. The organization should use the principle of equal opportunities and equal treatment and avoiding discrimination against employees due to their race, colour, pays, religion and political views.

The issues of a responsible approach to running the business were developed in the strategic vision of the development of our country – it means in the Plan for Responsible Development. It assumes support for the development of companies, their productivity and foreign policy. The National Action Plan for the implementation of the UN Guiding Principles on Business and Human Rights has been developed on the basis of three pillars:

I  State obligations to protect human rights,
II Corporate responsibility for respect for human rights,
III Access to remedies.

It is related to the conscious policy of the state supporting enterprises while emphasizing the need to respect human rights. The state has a duty to protect human rights as a standard of conduct. It is the duty of the state to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, as well as procedural and legal transparency.

The state’s obligation regarding the protection of human rights results from the Constitution of the Republic of Poland and from ratified international agreements. Those documents command the respect, the protection and the implementation of human rights.

Respect for labour and employee rights standards results from international commitments adopted by Poland, in particular from the International Covenant on Economic, Social and Cultural Rights of the United Nations and from the European Social Charter. The implementation of the basic principles of labour law is possible on the basis of the provisions of the Labour Code and other acts. Among other things, you should indicate here:

- The rules of freedom of work (article 10)
- The principle of freedom of employment (article 11)
- The principle of respecting the employee’s personal rights (art.11¹)
- The principle of equal treatment in employment (article 11²)
- The right to fair remuneration for work (article 13)
- The principle of ensuring by the employer the safe and hygienic conditions (article 15)
In the national law, four areas of fundamental human rights related to the work and job issue deserve special attention. There are:

1. The prohibition of forced labour. Although the Labour Code does not define forced labour, according to article 65 of the Constitution of the Republic of Poland, everyone has the freedom to choose and practice the particular profession and to choose a job place.

2. The equal rights in the field of employment and occupation. This principle is reflected in further provisions of the Code, in particular in Chapter IIa „Equal treatment in employment” (articles 183a -183e). The employer is obliged to provide the employees with the text of provisions on equal treatment in employment in the form of written information.

Ensuring equal treatment, inter alia, in the field of taking up and pursuing a business or professional activity is regulated by the Act on the implementation of certain European Union provisions in the field of equal treatment. The Act has implemented six European Union directives, including: the Directive of the European Parliament and of the Council 2014/54/EU of 16th April 2014. on measures to facilitate the exercise of rights granted to employees in the context of the free movement of workers (Official Journal of the European Union I 128 of 30/04/2014)

Every employer is obliged to counteract mobbing, which means actions directed against an employee (article 943 of the Labour Code). They consist in persistent and long-lasting harassment or intimidation of an employee. The result of mobbing may be negative health effects.

The reason to create the regulation is to guarantee the safe and fair treatment of people – workers in the workplace.

3. Corporate responsibility for respect for human rights

The workers are protected against the human rights violation by enterprises by the United Nation guidelines which recommend that the enterprises should:

- make it clear that companies have an obligation to respect human rights at every stage of their activity,
- introduce and monitor the law imposing an obligation on enterprises to respect human rights,
- ensure that all legal regulations relating to the activities of enterprises enable and do not hinder the observance of human rights,
• encourage and to require that enterprises promote the idea of respect for human rights among their business partners,
• take steps towards particularly careful respect for human rights by state-owned enterprises,
• develop the appropriate policy of government and state institutions by providing training and providing relevant information and support in this area.

Professor John Ruggie points out that the promotion of business and the observance of human rights remain inseparable. The responsible activities of private and state business take into account the importance of human rights and they should believe that it will bring the benefits to both – businesses and the entire community of citizens. It helps create jobs. It enlarges the group of consumers and develops a sense of integrity, contributes to the stabilization of the market and thus to economic growth.


The possibilities of development are the effect of maintaining appropriate guarantees of human rights, such as: democratic freedom, the rule of law, good governance, and property rights.

The entrepreneurs should recognize and understand the benefits of respecting human rights, which may:
• help to protect and increase the reputation and positive image of the company,
• keep and expand the circle of clients,
• enable companies to attract and retain good staff,
• build and develop sustainable relationships with employees and stakeholders,
• reduce threats to business continuity that could arise within the company or in the company’s relationship with the local community or with other external partners,
• attract investors who are increasingly taking into account ethical issues, including the observance of human rights,
• become an investor – partner for other companies or governments taking into account the issue of human rights in their policy,
• reduce threats of lawsuits for violations of human rights,
• support ethics in the company.
The company’s activities are highly attuned to the social issues, as well as to open reporting and transparency of activities. These behaviours are designed to protect the image and reputation of the company. It helps to protect the interests of both clients and investors.

United Nation guidelines are the best way to promote a responsible approach to run the business and to implement international standards including OECD guidelines for multinational enterprises.

Through the tasks included in the National Action Plan, the public administration:
- formulates expectations towards entrepreneurs,
- supports access to effective remedies for victims of human rights violations,
- promotes understanding for the need of countering against emerging threats,
- conducts coherent policy and informs about planned activities in the field of respect for human rights in business.

5. Implementation of the UN’s sustainable development goals

Both, the concept of responsible development and the strategy for responsible development, implement the goals of the UN’s Sustainable Development adopted by Agenda 2030 in September 2015. The main challenges for the world are widespread poverty, growing inequalities, unemployment, disproportions in terms of opportunities, living standards, and threats related to climate change.

The Agenda includes a framework development plan and it indicates to seventeen goals of the Sustainable Development. The development which guarantees a dignified life for all is the basis of this document.

The goals of Agenda 2030 are relevant to all social groups, organizations, business, science as well as to local and national authorities. The sustainable business models and active involvement of companies from the SME sector with limited operational capacity should also be promoted.

6. Exchange of knowledge and experience in the implementation of CSR

The activities carried out in the area of exchanging the knowledge and experience in the implementation of corporate social responsibility may include:
- shaping the ethical organizational culture,
- dialogue with employees, care for safety at the workplace,
human rights in business

- responsible management of natural resources,
- to the supply chain, including the extraction and transportation of raw material

7. Investment strategy

An important element of the investment strategy is defining the criteria for government support for selected investors (Catalogue of good practices). They are part of the concept of a responsible attitude of enterprises. The appropriate level of remuneration for employees is also important. The entrepreneurs – investors who declare supporting employees in raising their qualifications play an extremely important role in this area. They influence economic development in the social area, environmental protection and work culture.

The special attention is deserved to the investors who aim to create specialized jobs under employment contracts. These activities are in line with the Declaration of the International Labour Organization and the Philadelphia Declaration. Signatories of these declarations undertake to implement the programs which take care of the best working conditions. They will contribute to personal development and full use of employees’ potential.

It needs to be emphasized that the dignified work means, above all, an appropriate level of remuneration for employees, as well as proper motivation of the employees.

The organizations are set up to achieve the goals and effectively fulfil the adopted strategy. To implement these assumptions, they must employ the right people with the resources to perform the right functions in the organization. The most important component of the human resource is knowledge, abilities, skills, health, attitudes and motivation. The goal of human resources management is to use and provide value to stakeholders through high work activity. In addition, it is extremely important to raise the value of human capital, which corresponds to the superior objectives of the organization.

8. The concept and goals of strategic human resource management

In modern organizations, the human resources management gains strategic importance. It results from a combination of business management and people management. The planning of human resources of an enterprise is the effect of a personnel strategy. There are three strategic phases of Human Resources
Management in the company (Zając, 2007, p. 35):

- formulating a personnel strategy,
- and promotion of the personnel strategy,
- control and evaluation of the strategy.

The personnel strategy is an indispensable element of the overall strategy, which should include comprehensive and long-term activities aimed at achieving the objectives (Rostkowski, 2004, p.27).

It needs to be emphasized that the personnel strategy is one of the elements of the business strategy of the entire organization. Unfortunately, it must overcome many difficulties that may be caused by (Armstrong, 2000, pp. 64-66):

- the variety of strategic processes, levels and styles,
- the evolutionary nature of creating a company’s strategy,
- the unwritten nature of the company’s overall strategy (treated as a way to achieve its most important business goals),
- the qualitative nature of human resources management principles.

It is up to the top management to overcome the barriers that exist at every organizational level of the company. Their task is to create an organizational culture by promoting among the employees the missions, values and standards as well as principles of human resources management. It naturally forces the change in the organizations. The effectiveness of changes depends primarily on the competence of managers and on the knowledge of the principles of social and psychological actions are the bases for those changes. It enforces their perception both in the organization and in its surroundings, as well as proper management, so that the human capital can co-create the image of the enterprise. A well-designed organization strategy is needed to allow the products and services to be tailored to the customer’s needs.

9. Protection of employees’ interests

The guidelines on human rights and human work emphasize the importance of employees’ interests in the organization. This applies first of all to the rules of conduct and terms of the agreement in the employer-employee system.

The European Union formulates the provisions of the state’s legislation in shaping standards for the protection of employees’ interests in the European area.

The European Union guidelines related to the human rights and to work rights are defined by the employment policy, which is an integral part of the planning process and the human resources management. It is a permanent process which
determines personal needs. The employment policy analyzes the status and structure and well as it monitors the implementation of employment plans in the organization. The increasing importance of the human factor requires anticipation in the following issues (Armstrong, 2002, p. 278):

- many and what employees will be needed in the future,
- what forms of employment will be the most adequate for the needs of the company,
- how the employment status (the number of workers) may be increased or decreased,
- how the best investments in the development of human capital may be done,
- how to minimize costs and maximize work productivity.

Figure 1: Protection of employees’ interests in the context of the Community (European Union) and Polish legislation.

It should be emphasized that planning of the employment is an integral part of the personnel function. It is necessary in the activities undertaken as part of the employment process. Its scope includes (Pocztowski, 2008, p. 103):
- planning of personal needs,
- planning of personal equipment,
- planning staffing.

In the employment planning process, it is necessary to define personal needs for a given organization, including competence profiles.

**Table 1: Example of the competence of the manager – the creator of human capital**

<table>
<thead>
<tr>
<th>Basic competences</th>
<th>Distinctive competences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expertise</td>
<td>Leadership</td>
</tr>
<tr>
<td>Troubleshooting</td>
<td>Empathy</td>
</tr>
<tr>
<td>Communication</td>
<td>Readiness to learn</td>
</tr>
<tr>
<td>Shaping the relationship</td>
<td>Tolerance for ambiguity</td>
</tr>
<tr>
<td>Use of advisors' services</td>
<td>Creativity</td>
</tr>
<tr>
<td></td>
<td>Orientation for the future</td>
</tr>
<tr>
<td></td>
<td>Awareness of values</td>
</tr>
</tbody>
</table>


**Figure 2: The dimension of the employment relationship**

In the process of personnel selection, the listed competences can be used as one of the categories of their selection. The professional activity of people in the meaning of employment determines the skills and abilities to provide work, as well
as the knowledge they have. The social dimension of the employment relationship concerns the style of management, types and methods of communication, as well as motivating.

The employment relationship that results from the organizational culture of the company and the personnel strategy is the human resources management instrument. The task of the HR manager is to guarantee fair remuneration. In addition, it is to create the training programs for professional development. It is extremely important to create psychological contracts between an employee and an organization based on mutual, mostly unwritten, expectations changing in time (Kożusznik, 2002, pp. 43-44). This is a certain interpretation of the employment relationship.

**Figure 3: The psychological contract model**

<table>
<thead>
<tr>
<th>Causes</th>
<th>Contents</th>
</tr>
</thead>
<tbody>
<tr>
<td>organizational culture</td>
<td>justice</td>
</tr>
<tr>
<td>HR management practice</td>
<td>trust</td>
</tr>
<tr>
<td>experience, expectations, alternatives</td>
<td>fulfilling the terms of the transaction</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Consequences</th>
</tr>
</thead>
<tbody>
<tr>
<td>affiliation to the organization</td>
</tr>
<tr>
<td>involvement</td>
</tr>
<tr>
<td>motivation to work</td>
</tr>
<tr>
<td>satisfaction and prosperity</td>
</tr>
</tbody>
</table>

Source: own study based on Guest and others, 1996, p. 3.

The use of the mentioned psychological contract promotes a proper and harmonious relationship between the employee and the organization. Its shaping should be a continuous process due to the changing of internal and external conditions of enterprises. Therefore, it is necessary to continually educate and improve staff in this field (Szejniuk, 2014, p.396).

The psychological contract is a kind of reflection of the employment relationship. From the point of view of employees, the elements of the employment relationship given in the psychological contract include (Armstrong, 2000, pp. 1881-182):
- the way they are treated by the employer,
- the employment stability,
- the ability to demonstrate skills,
- the expectations related to a career,
- the commitment and influence,
- the trust in the management of the company.

From the point of view of the employer, the psychological contract includes the following elements of the employment relationship (Armstrong, 2000, pp. 1881-182):
- competences,
- effort,
- compatibility,
- observing the rules,
- involvement,
- loyalty.

The basic issue of human resources management is to create an appropriate work climate, which is based on the right relationship between the employee and the employer. The effective use of human resources tools guarantees the organization’s success on the market. Employees’ involvement, their knowledge and skills contribute to increase the competitiveness of the organization. In the enterprise, it is important to improve both working staff as well as managerial staff, and above all, to develop and to improve a fair assessment and evaluation system (Szejniuk, 2015, p. 34).

10. Conclusion

The issues of business and human rights are currently more often being undertaken not only by international organizations, but above all by enterprises in our country.

It should be emphasized that every business activity must comply with the applicable civil and administrative law. The responsibility for respecting human rights, irrespective of the title of ownership, is borne by all enterprises. They should propagate a modern model of functioning based on social responsibility and sustainable development which comprehensively covers ethical and pro-social principles. One of the fundamental human rights resulting from the applicable law is the obligation to treat all employees equally. Therefore,
one of the main obligations coming from human rights is to counteract the discrimination.

Those actions taken against the discrimination in work place may include the maintaining equal access for men and women to promotion and training, the diversity management in the field of recruitment and selection of employees, as well as in the sphere of organizational culture of the company.

References

Law
Kodeks – rozdział IIa: równe traktowanie (The Code – chapter IIa: equal treatment articles 18³a-18³e)
Abstract
In this article, particular attention is paid to the right to life in a clean natural environment, which is an essential component of the safe existence of every human being. The problem of the deteriorating condition of the natural environment and its impact on changing the conditions of human life and its security is a current problem, the solution of which will require effective cooperation of the international community.

Keywords: environment, human rights, Europe 2020 Strategy, safe existence

1. III generation right
The right to a clean environment belongs to the third generation of human rights, in which the entire humanity is the authorized entity, which determines the care for the common good, which is the natural environment. Not without significance is the fact that a healthy and clean environment is an element necessary to benefit from other human rights.

It is a solidarity law, collective. It manifests itself in both the power, the purpose of which is to provide to the individual and the entire humanity of life in a healthy, clean environment, but also providing legal instruments that will enable everyone to be active actor while ensuring environmental protection by participating in environmental decisions and the possibilities of suing them, as well as the conscious and sustainable use of his resources. The right is inextricably linked to the burden of responsibility that held by whole humanity, whose duty is to take care of the environment for the sake of its current and future generations. The right to live in
a clean environment can be embodied only by the joint effort of the international community, in a progressive way, while ensuring a balance between the development of societies, economy and environment. At the same time, it is both an individual right and collective – the responsibility of each person for the use of his due the power to stand on guard for the environment translates into the effect of a shared existence all people in one ecosystem, caring for the common good – the environment.¹

The human right to live in a clean environment should also be read as a right directly enabling the use of other human rights belonging to the other two categories of human rights, such as the right to life and health.²

Looking from a philosophical point of view, a human rights-based approach to ecological issues brings nature and its elements into the exclusive field of human rights. Through the history, the idea of human rights has extended to cover an expansive range of interests and a wide spectrum of beneficiaries, so it is possible that it could extend further to non-humans. People have a tendency to stretch out rights and benefits to anything they esteem or love, for example, pets, trees and even cultural or religious beliefs. Similarly, the rights of nature, which reflect the ecocentric approach of the ‘Right to Environment’, fall into this rights-based rhetoric. Notwithstanding, conflicting as it might appear, ecocentrism as an idea is not innately far from anthropocentric interests. Profound eco-scientists, who state that non-human beings and ecosystems must be protected for their own value, see nature and protection of flora and fauna as a feature of what they call ‘self-acknowledgment’ or ‘self-identification’ with nature. The idea of self-fulfilment regarding higher natural values is human-centric in itself; regardless of whether we ensure nature for our biological/financial survival or for our spiritual or mental prosperity, the human factor cannot be isolated from the rights-based examination.³

² Indian judiciary is known for proactive role in defending environment. Decisions of an anthropocentric nature have linked environmental violation to human life, health and safety. For example, in Chinnappa and Godavarman, the Indian Supreme Court found that a “hygienic environment is an integral facet of the right to the healthy life and it would be impossible to live with human dignity without a humane and healthy environment” (K.M. Chinnappa and T.N. Godavarman Thiruma:pad v. Union of India and Others, 10 SCC 606 (2002). In the Subash Kumar case, the Supreme Court stated that the right to life “includes the right to enjoyment of pollution-free water and air for full enjoyment of life” (Subash Kumar v. State of Bihar, AIR 1991 SC 420 (1991).
2. Aarhus convention

In Europe, the right to the environment is based mainly on the right to information based on the Aarhus convention (The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters), signed on 25 June 1998. Former UN-Secretary Kofi Annan called it “the most impressive elaboration of Principle 10 of the Rio Declaration and (...) the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations.”4 It is the first international environmental agreement whose main objective is to determine states’ obligations towards their citizens and NGOs. By establishing these obligations, the Convention demonstrates a ‘close affinity’ with the international human rights system.5

The environmental procedural rights embedded in the Convention, the so called ‘three pillars’ are the reflection of rights-based approach: the public, both in the present and in future generations, have the right to know and to live in a healthy environment.

The right to access to environmental information – all citizens should have easy access to environmental information. Public authorities, also including regional bodies, must provide all the information required and collect and disseminate them and in a timely and transparent manner. The limitation to this provision can occur only under certain circumstances, ex. national defense need.

The right to participate in environmental decision-making procedures – the public must be informed over all the relevant activities and it needs to have the opportunity to take part during the decision-making and legislative process. Leaders can take advantage from people’s knowledge and expertise; this contribution is a strong opportunity to improve the quality of the ecological choices, results and to ensure procedural authenticity.

The right to access to justice – people has the privilege to judicial or administrative recourse procedures in case a Party abuses or neglect to adhere to environmental law and the convention’s principles.

The Aarhus Convention is a reflection of the environmental democracy theory, an inventive method for assembling procedural and democratic rights on environmental issues, basic to the reasonable connection between ecological

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protection and democracy based on values and practices. Although the environmental democracy theory claim to protect the environment without the need for a substantive right to environment, it prepares the legal and philosophical ground for the future acknowledgment of natural rights by greening the idea of human rights and reshaping our beliefs and mentalities towards nature⁶.

The Convention had an undoubted impact on the establishment and implementation of the principle of sustainable development, as well as intensified by the European Union for last several years environmental policy, that forced changes aimed at improving the fight against crimes against the environment. The changes introduced by the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law had also an impact on crime policy in Poland and other member states⁷.

The principles of environmental protection obviously derive from the right to the environment, which are part of a wider context of the rights of the human being, offering a new model of subjective rights, in which individual rights are closely connected with social and collective rights. The right to environment is also a proposal to strengthen mutual relations in the mock conflict of interests between the individual and the community. These relations are also expressed in the spiritual and material development of this society, creating a new bond between the individual and society. It should be emphasized, however, that the basic characteristic of the right to the environment is its complexity and the need to balance between the rights of the individual (individual property) and the rights of all people (common property). Perhaps that is why all legal regulations in this respect turn out to be extremely difficult and still insufficient⁸.

Ensuring the right to (healthy, clean) environment is the duty mainly of the state, as the state is the main guarantor of the rights of their citizens. Firstly, it is the state that has inherent responsibility for certain institutions, like the legal system. Secondly, states have a degree of control over other institutions and structures that influence the environment. Thirdly, states have power of enforcement against ecological criminals than any other entity in society⁹.

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⁶ Ibidem, 159.
3. Limited resources as a challenge for the future

According to the 2006 Living Planet Report, “the Earth’s regenerative capacity can no longer keep up with demand—people are turning resources into waste faster than nature can turn waste back into resources. Humanity is no longer living off nature’s interest but drawing down its capital.”

With up to three billion people likely to join the global middle class by 2050\(^{10}\), competition for resources will inevitably grow. Improving the productivity of resources such as water and land by around a factor of two, and energy by a far higher factor, would make a substantial contribution to reducing resource depletion and the threat of climate change. The European Union (EU) has therefore designated resource-efficiency as one of the flagships of its Europe 2020 strategy. For the reasons given above, influential authors from civil society and policy makers see PSS-like business models as one of the most important means of creating a ‘lease society’ a term coined by Member of the European Parliament Judith Merkies, a circular economy or simply a ‘resource revolution’\(^{11}\).

Resources are important for the economy and condition to work. However, the times of bulk supply of cheap raw materials – a key factor in the major financial development in the last two centuries – are over. A substantive increase in the number of population and rising expectations for everyday comforts are expanding interest and raising the cost and shortage of common assets like the metals, minerals and food we rely on. Consistently, the worldwide population increases by 200,000 daily. By the end of the following decade, an extra 2 billion people may have joined the high-consumption middle classes in developing states.

Demand and supply are do not go in the same direction. If resource use continues at the present rate, mankind will require the equivalent of more than two planets by 2050 to satisfy its needs and the hopes of millions for a better quality of life will be dashed\(^{12}\).


   Available from: www.mckinsey.com/mgi

4. The resource-efficient Europe flagship initiative as a part of the Europe 2020 Strategy

To address the difficulties, the European Commission has made resource efficiency one of the lead activities of its 2020 strategy.

The main aim of 2020 Strategy is to ensure growth by offering job while implementing principles of sustainable development and taking into consideration challenges. “The Europe 2020 strategy Europe 2020 is the EU’s agenda for jobs and growth for the current decade. It emphasises smart, sustainable and inclusive growth as a way to strengthen the EU economy and prepare its structure for the challenges of the next decade. As its main objectives, the strategy strives to deliver high levels of employment, productivity and social cohesion in the Member States, while reducing the impact on the natural environment.”

Among the challenges the strategy lists limited resources. This implies producing more value with less input, utilizing assets economically and managing them more effectively during their life-cycle. It requires development, changes underway and consumption patterns and the correct motivations and price signals.

One of seven flagship initiatives included in Europe 2020 to catalyse progress is: “Resource efficient Europe” to help decouple economic growth from the use of resources, support the shift towards a low carbon economy, increase the use of renewable energy sources, modernise our transport sector and promote energy efficiency.

In late 2011, EU governments received the Roadmap to a Resource-Efficient Europe. This implied a vague change in monetary, political and individual behavior. It contains milestones across different policy areas to arrive at a European economy within 40 years that furnishes an high-class living conditions with a much lower effect on the ecosystems. This Roadmap sets the milestones, which illustrate what will be needed to put us on a path to resource efficient and sustainable growth. Each section then describes the actions that are needed in the short term to start off this process.

The purpose of the Roadmap is: by 2050 the European economy should grow in a way that respects resource challenges and planetary boundaries, and therefore contributing to global economic change. European economy is competitive,

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comprehensive and furnishes an exclusive expectation of living with much lower natural effects. All resources are sustainably managed, from raw materials to energy, water, air, land and soil. Climate change milestones have been reached, while biodiversity and the ecosystem services it underpins have been ensured, esteemed and considerably reestablished.\textsuperscript{15} There are a few measures and ideas that encourage or help obtain the established goal like: changing the consumption patterns of private and public purchasers by benchmarking the product’s lifecycle, providing accurate information about way of manufacturing product, voluntary and mandatory measures such as the EU’s Lead Market Initiatives and the Ecodesign Directive, eco-innovations, avoiding the use of dangerous chemicals and promoting green chemistry.

Past examples of development have brought expanded success, however through concentrated and regularly wasteful utilization of assets. The part of biodiversity, biological systems and their services is generally underestimated, the expenses of waste are frequently not reflected in costs current markets and public policies cannot completely manage contending requests on vital assets, for example, minerals, land, water and biomass. This requires a cognizant and incorporated reaction over an extensive variety of strategies keeping in mind the end goal to manage anticipated that asset limitations and would maintain our flourishing over the long run.\textsuperscript{16}

Resource efficient development is the route to this vision. It allows the economy to create more with less, delivering greater value with less input, using resources in a sustainable way and minimising their impacts on the environment. In practice, this requires that the stocks of all environmental assets from which the EU benefits or sources its global supplies are secure and managed within their maximum sustainable yields. It will also require that residual waste is close to zero and that ecosystems have been restored, and systemic risks to the economy from the environment have been understood and avoided. A new wave of innovation will be required.

One of the measures to achieve the goal set up in Europe 2020 and Roadmap to a Resource-Efficient Europe is through eco-innovations. “Eco-innovation is any innovation that reduces the use of natural resources and decreases the release

\textsuperscript{15} Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions Roadmap to a Resource Efficient Europe /* COM/2011/0571 final */

\textsuperscript{16} Ibidem.
of harmful substances across the whole life-cycle”. Recently, the understanding of eco-innovation has evolved more and more from a customary understanding of innovating to reduce environmental impacts towards a renewed understanding of innovating to minimise the use of natural resources and the release of harmful substances over the whole life cycle, i.e. in the design, use, re-use and recycling phases of products, materials and services related to them.

There are manifold approaches to reduce the resource use of the economy and increase resource efficiency and circularity. In the context of circular economy the 3 R’s are most widely known: reduce, reuse and recycle. But – considering the fact that the 3 R’s are mainly focused on the end of the life-cycle, i.e. waste options – further concepts have been brought onto the agenda: waste prevention, sharing/leasing, repair, remanufacturing, and – finally – recovery. These concepts also include other stages of the life-cycle, including the design and use phase. The vision is to deploy eco-innovation as a means to move towards a resource-efficient circular economy in Europe by intelligently applying all those concepts at those levels where they contribute best, e.g. sharing and reusing electronic goods and clothes, prevention of food and packaging waste, or recovery of critical materials and fertilizers, etc.

In the Seventh Framework Program, a part of the 2020 Strategy, the concept of the process of implementing sustainable consumption has been created. The creators of the 7th Action Program drew attention to the necessity of linking consumption with production, i.e. with the processes of manufacturing products and providing services. It is necessary to create a new model of consumption related to the activities of producers and consumers themselves, no matter private or public.

It is necessary to implement procedures to make consumers and producers aware of the effective use of products throughout their lifetime, manufacture and purchase of energy-efficient products, sustainable use of natural resources, and moderate use of packaging. For this it is necessary to use various incentives for producers and consumers to get involved in the implementation of sustainable consumption principles.

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References


Legal acts


**Websites**


Abstract
Advances in medicine, biotechnological inventions, cybernetic, cellular and genetic experimentation and the subrogation of certain human functions through robotics arouse in man hope to heal diseases and increase the length of life; at the same time, care about how many come through the application of research results the risk of transforming the body into a component assembly substitutable. Hence, the need to identify new ethical and legal rules to protect biomedical research and align the contexts to parameters that are not harmful to the integrity and dignity of the human individual.

Keywords: biotechnology; scientific research; cybernetic experimentation; artificial intelligence; essential rights.

1. Biotechnological knowledge and scientific research: nanotechnology; nanomedicine; neuroethics; roboethics

Today, the technology applied to the living world has taught us that, compared to the past, man can do “something new”: means perpetuating the life with organs and portions of artificial organs or sometimes even clone her (Putti, 2014).

Integral systems current, therefore, biotechnology has assumed a fundamental role so much to affect not only human life, but even the lexicon of communicative relations.

The new knowledge, in fact, are implementing increasingly headwords and kit lexemes: we talk about nanotechnology, nanomedicine, neuroethics, roboethics, bionics, cybernetic intelligence, artificial intelligence, and more.
In the frenetic succession of biotechnological knowledge and of activity of the scientific research, nanotechnology, or technology of super-small, combining applied sciences and modern technologies, is experimenting with the control of living matter, the his manipulation at the level of atoms and molecules, dimensional scale below the micrometer (between one and one hundred nanometers), and the design and construction of biomedical devices within this scale (Parente, 2018, p. 69).

The integrated research in nanotechnology and medicine has already led to the birth of nanomedicine, which deals with the biological machine operating lines within cells and uses the information to “engineer” nano-materials and biosensors, to develop increasingly sophisticated medical treatments (Gammella, 2013).

In the biomedical experimentation, a significant example of this development is given by the use of nano-particles or nano-bots to perform treatments and repairs at cellular and molecular level or to transport drugs, heat or other substances to the cells other specific types of cancer cells, allowing an early diagnosis of the disease or a direct treatment of diseased cells and reducing the damage to healthy cells (Gammella, 2013).

In the world of global research, in turn, the neuroethics (the term neuroethics was used for the first time in 2002, during the Conference “Neuroethics: Mapping the Field”) identified two different fields of research: “the ethics of neuroscience”, which deals with the ethical profile of the design and execution of neurosciences and studies of the ethical and social impact assessment of their results; “the neuroscience of ethics”, which, through scientific studies and neuroscientific approaches on the brain tends to investigate traditional issues of ethics and moral psychology.

According to the new statements of knowledge and research, robotics, which branch of engineering (robotics is a branch of engineering, more precisely of mechatronics, where segments of many disciplines, both humanities, such as linguistics, both scientific and, like biology, physiology, psychology, automation, electronics, physics, computer science, mathematics and mechanics), in order to implement the global instances of technological innovation, has developed methods that make a robot-car of anthropomorphic form-to perform specific tasks, reproducing the human work.

Finally, under the urging of scientific renovation, roboethics is experimenting with ethics applied to robotics, namely human ethics – and not robots – that design, build and use robots.
2. The relevance of the phenomenon of post-humanity and urgency of redesigning the ethical and legal rules.

Following the new development models, they do feel the urgency of redesigning the ethical and legal rules, even the bionics (bionic word, as a rule, is used to denote the branch of biomedical engineering that apply cybernetics to reproduction of the functions of living organisms described by physiology, neurophysiology and electrophysiology to create artificial organs that are part of the nervous system or controlled by it) – known as biomimicry, biological camouflage or biognosi – refashioning the structure and functions of living organisms in order to draw useful elements to create automata, automatic devices, or other apparatus technology, through the application of methods and biological parameters – namely, found in nature – the study and design of engineering systems of modern technology; while the cybernetics (cybernetics was coined in 1947 by the american mathematician Norbert Wiener to describe the study of communication and control processes in the BIOS and in the machine) deepening the study of the phenomena of self-regulation and communication in living organisms, natural and artificial devices in other bodies, thought of an analogy between the different strategies of adjustment.

In light of this insight, scholars of cybernetics compare daily adjustment processes of man, animal, and machine to create mechanical devices (known as automata), with characters of stability, adaptation and learning similar to those of the living being.

In a context characterized by the complexity and sometimes from lack of sources, then, the legal significance of post-humanity concerns situations in which “artificial surrogates” of man, that is natural, not abstractly due to “things”, that is to say legal interests (article 810 civil code), are inspired by the human individuality and tend to develop similar to it (Stanzione, 2012, p. 3).

3. Artificial intelligence and development of systems cybernetichs and cyberfisichs

In the age of artificial intelligence and cognitive systems – representing the digital dimensions of life –, the evolution of the borders of processing big data reveals more and more that the research pushes the boundaries of science and technology to create machines capable of thinking and interacting with man in
the various fields of research, in new ways: the development of learning systems; the design of cognitive cities; computational physics; nuclear medicine; computed tomography; magnetic resonance imaging.

In the latter context, in particular, new sophisticated machines are able to assist the practitioner in identifying clues of diseases in the human body, facilitating the identification and treatment of any disease (Kelly – Hamm, 2016).


Indeed, the increasing interaction between man, robot, bot, the android and the humanoid and sophisticated and intelligent machines, capable of independent learning (self-learning) and independent decisions, make it increasingly impelling the legal regulation of various social and economic manifestations of artificial intelligence and perhaps the development of an electronic legal status and a personality of the robot (European Parliament resolution of 16 February 2017, cit, p. 1-3; in favour of the recognition of a “legal status” and an “electronic tv personality robots who take decisions independently or interact with third parties”, comp. Iaselli 2017, p. 1 ff.; Magni 2017, p. 2).

Actually, the robot or android, though it may be a highly sophisticated thinking machine, cannot be approved to humans, given that, in processing the thought, following “logical paths etched in the positronic brain according to a street still outlined by others (who planned or who gave the order)” (Iaselli, 2017, p. 7).

In other words, any thinking machine, however clever, can not be considered a person, but always remains an artifact mechanical and electronic, because it lacks of free will, that is, the process of education of “underwear will”, that freedom of choice – marked by unpredictability and originality – that is typical and exclusive of man and which goes beyond the mere reproduction of the human “logical paths” (Iaselli, 2017, p. 7-8).

Therefore, despite the visual biotechnological and post-modern, the person cybernetich or the electronics person or the thinking robots cannot be ethically assimilated to man, nor, in point of law, may be held liable as human beings (Iaselli, 2017, p. 7-8).
4. The body show the ways and new legal forms of protection of the essential rights of man

In the face of change and emergence of new biotech legal forms of protection of the rights of man, the identification of advanced research tools that affect the existence of the person (Perlingieri, 2009, p. 131 ff.; Parente, 2012, p. 53; Pizzorusso, 1988, p. 111-112), preimplantation genetic investigations (Nardocci, 2016, p. 99 ff.; Iadicicco, 2015, p. 325 ff.; Pellizzone, 2016, p. 121 ff.; Liberali, 2014, p. 1 ff.; Scia, 2012, p. 9 ff.; in case law, among other decisions, see Constitutional Court 5 June 2015, n. 96. www.cortecostituzionale.it; Constitutional Court 11 November 2015, n. 229. www.cortecostituzionale.it; European European Court of Human Rights, 28 August 2012, n. 54270/10. www.altalex.com), robotization of the human, the post mechanical humanism (Stanzione, 2012, p. 5 ff.; Perlingieri C., 2015, p. 1239 ff.), studies to produce in the laboratory synthetic genome of man are current issues involving much biomedical research (on the matter, comp. Magni, 2012) and neuroscience, as robotics (Robotics, in https://it.m.wikipedia.org), bio-ethics and the biolaw. Despite these new scenarios, the body show the ways and the unity of knowledge (Rodotà, 2007, p. 477) cannot escape a renewed vision of the person (Perlingieri, 2006, p. 730), built on the fundamental principles of sorting (articles 2 ff. of Constitution), on the right to life and dignity, on solidarity, on the incommersability of body parts (Rodotà, 2007, p. 478) on the development of the bionics (Bionics, in https://it.m.wikipedia.org; on the verge, v. sub §2) and cybernetics intelligence (Cybernetics, in www.treccani.it/enciclopedia; on this point, v. sub § 2) and on the idea of post-humanity (Stanzione, 2012, p. 3), concerning the phenomenon of the emergence – in the scientific community, in the social and legal order – of “artificial surrogate2 of person and require “careful reconsider of the comparison between law and human nature, between ius and individual” (Stanzione, 2012, p. 3).

Tracing lets you confirm that, in the intense debate on the relationship between traditional legal categories (on the legal categories, such as classification parameters of phenomenal reality, comp. Pennasilico 2016, p. 1246 ff.; Minervini 2015, p. 712 ff.; Parente 2015, p. 330; Lipari 2013, p. 11-12; Perlingieri 2005, p. 543 ff.) and future prospects of protection of persons, each individual human being continues to play a central role in the assiologie of the regulatory system (the centrality of the human person is acquired in modern philosophical inquiry (Scarpelli, 2017, p. 6), in modern legal science (Lipari, 2013, p. 11-12; Perlingieri,
and positive law: for example, the French Code civil, resuming a formula exists in the law Veil (law 17 January 1975, n. 75-17), codifies the primacy of the person and protection of the human being from the beginning of life (article 16); the Peruvian civil code assigns centrality to person, giving even the designated capacity of sujeto de derecho.

Finally, in the overcoming of the paradigms of subjectivity, abstract the new frontiers of scientific knowledge and biotechnology raise legal issues in the past and launch the daring and reckless challenges jurist, which, however, are a limit worth of the human person and in the category of dignity, which remain the “garrison fort” the naturalness of the processes of human life (D’Addino Serravalle, 2003, p. 30 ff.; Stanzione, 2012, p. 2 ff.).

References


