

**International and Comparative Law Review**  
*Mezinárodní a srovnávací právní revue*

2016 | Vol. 16 | No. 2

**Palacký University Olomouc**  
**Faculty of Law**  
**Czech Republic**

\* \* \*

**Univerzita Palackého v Olomouci**  
**Právnícká fakulta**

In cooperation with:

**Johannes Kepler Universität Linz (Austria)**

**&**

**Karl-Franzens Universität Graz (Austria)**

**Publisher**

Palacký University Olomouc, Křížkovského 8, Olomouc, Czech Republic

**Journal**

ISSN (print): 1213-8770

ISSN (online): 2464-6601

Evidence number of periodicals: MK CR E 13695.

This number was issued in Olomouc in December 2016.

**Subscriptions**

Subscription fee for 2 issues (one volume) is 300 CZK. Subscription fee for 4 issues (two volumes) is 600 CZK. Postal charges included.

**Subscription orders should be sent to the address of editor's office.**

**Address of editor's office**

Univerzita Palackého v Olomouci, Právnická fakulta, redakce ICLR, tř. 17. listopadu 8, 771 11 Olomouc, Česká republika.

Email: [iclr@upol.cz](mailto:iclr@upol.cz); tel.: +420 585 637 635, fax: +420 585 637 506.

## **Editor-in-chief**

Ondrej Hamulák, Ph.D. (*Palacký University Olomouc, Czech Republic*)

## **Members of editorial board**

prof. Marie-Elisabeth Baudoin (*University of Auvergne, France*)

prof. Dr. Michael Bogdan (*Lund University, Sweden*)

Martin Faix, Ph.D., MJI (*Palacký University Olomouc, Czech Republic*)

assoc. prof. PhDr. Vlastimil Fiala, CSc. (*Palacký University Olomouc, Czech Republic*)

Miluše Hrnčířiková, Ph.D. (*Palacký University Olomouc, Czech Republic*)

prof. Massimo Iovane (*University of Naples Federico II, Italy*)

prof. Tanel Kerikmäe, Ph.D. (*Tallinn University of Technology, Estonia*)

mag. iur. Michal Malacka, Ph.D. (*Palacký University Olomouc, Czech Republic*)

univ. prof. dr. Joseph Marko (*University of Graz, Austria*)

prof. Fabrizio Marrella (*Ca' Foscari University of Venice, Italy*)

prof. James E. Moliterno (*Washington & Lee University, USA*)

prof. dr. iur. Willibald Posch (*University of Graz, Austria*)

univ. prof. DDr. Thomas Ratka, LL.M. (*Danube University Krems, Austria*)

assoc. prof. JUDr. Václav Stehlík, Ph.D., LL. M. (*Palacký University Olomouc, Czech Republic*)

assoc. prof. Dr. iur. Armin Stolz (*University of Graz, Austria*)

prof. Hennie Strydom (*University of Johannesburg, Republic of South Africa*)

assoc. prof. JUDr. Naděžda Šišková, Ph.D. (*Palacký University Olomouc, Czech Republic*)

assoc. prof. JUDr. Marek Števček, Ph.D. (*Comenius University in Bratislava, Slovakia*)

univ. prof. Mag. Dr. Erika M. Wagner (*Johannes Kepler University Linz, Austria*)

prof. DDr. iur. Bernd Wieser (*University of Graz, Austria*)

## ABOUT JOURNAL

International and Comparative Law Review is a peer-reviewed legal journal published by the Faculty of Law, Palacky University Olomouc (Czech Republic) in cooperation with Johannes Kepler Universität in Linz (Austria) and Karl-Franzens Universität in Graz (Austria). The articles are published mostly in English; occasionally contributions in German or French may be also accepted.

The journal has been published since 2001, peer-reviewed is since 2005. It is issued twice a year.

The aim of ICLR is to reflect expert research in the field of International law and EU Law as well as in legal orders both of the Czech Republic and other Member States of the European Union. Here the special emphasis is given to the legal systems of Central European Countries. The journal is comparative by its focus and with respect to this perspective it deals with all areas of law.

ICLR is licenced as peer-reviewed journal by the Research and Development Council of the Government of the Czech Republic and indexed in the Czech index of scholarly peer-reviewed journals and in the ERIH Plus database.

ICLR is an open access journal which means that all content published on official website of ICLR is freely available without charge to the user or his/her institution. Users are allowed to read, download, print, search or link to the full texts of the articles in this journal without asking prior permission from the publisher or the author.

Publication Ethics rules of the ICLR are based on the Best Practice Guidelines for Journal Editors and Principles of Transparency and Best Practice in Scholarly Publishing developed by the Committee on Publication Ethics (COPE).

Further information and archive since 2011 is available at: <http://iclr.upol.cz/>

## CONTENTS

Democracy and Financial Crisis Between the Five Presidents Report and the Brexit: In Search for a New Way? .....	7
Nellie Munin	
Politically Palatable Parity: What the United States Can Learn From France in Achieving a More Representative Democracy .....	29
Nicholas J. D'Angelo	
The Need for Unified Understanding of 'Military Objective' in the Context of Human Shields and Passive Precautions Concepts .....	49
Tuomas Heikkinen & Martin Faix	
Contractual restrictions on right of beneficiary to draw on a Letter of Credit; possible exception to principle of autonomy .....	67
Hamed Alavi	
International Human Rights in Czech Legal Education .....	87
Petr Kilian; Ivo Pospíšil; Hubert Smekal	
Responsibility of a Juvenile for a Prohibited Act under Polish Law .....	99
Paweł Daniluk & Joanna Mierzwińska-Lorencka	
Limitations of Comparative Advertising Permissibility: Denigration/Disparagement .....	117
Jozef Andraško & Soňa Ralbovská Sopúchová	
Funding of Collective Actions .....	127
Klára Hamuláková	
Brexit, EEA and the free movement of workers: structural considerations on flexibility .....	145
Václav Stehlík	
The Legal Problems of Occupational and Health Safety in Estonia .....	157
Kristi Joamets & Liina Luukas	
Residential co-ownership within the superficies right of building – theoretical hotch-potch or practical reality? .....	173
Pavel Petr	
Information and Communication in Public Administration in the Context of Management Control Functioning in the Public Finance Sector in Poland.....	181
Ambroży Mituś	
Misrepresentation under English Contract Law and Its Comparison to Slovak Contract Law .....	197
Lucia Šírová	

Group Insurance and Reinsurance Business in the Legal Relations  
with an International Element..... 209  
Petr Dobiáš

Property Regimes of Spouses and Partners in New EU Regulations  
– Jurisdiction, Prorogation and Choice of Law ..... 221  
Lucia Valentová

INSTRUCTIONS FOR THE AUTHORS  
AND PUBLISHING CONDITIONS .....241

# DEMOCRACY AND FINANCIAL CRISIS BETWEEN THE FIVE PRESIDENTS REPORT AND THE BREXIT: IN SEARCH FOR A NEW WAY?<sup>1</sup>

Nellie Munin

Masaryk University, Brno, Faculty of Law,  
Czech Republic, visiting professor

*gmun@netvision.net.il*

MUNIN, Nellie. Democracy and Financial Crisis Between the Five Presidents Report and the Brexit: In Search for a New Way? *International and Comparative Law Review*, 2016, vol. 16, no. 2, pp. 7–28. DOI: 10.1515/iclr-2016-0012.

---

**Summary:** In the aftermath of the Brexit, the EU is swinging between a vision of enhanced integration, depicted by the Five Presidents Report, and a decision by the people of one of its leading member states – the UK – to withdraw this alliance, that may be interpreted as a non-confidence vote in the enhanced integration process underlying the EU. This article assumes that non-democratic elements embodied in the measures taken to pull out of the financial crisis and stabilize EU/EMU economies may enhance non-confidence among EU/EMU citizens, serving as incentives for more member states to opt out of this alliance, inspired by the Brexit. While it might have been expected that as the peak of the crisis passed, decision makers would pay more attention to ensure the democratic nature of such measures, comparison of the regulation enacted during the emergency phase and shortly thereafter with later regulation reveals that, despite certain improvements, many non-democratic elements still characterize both the nature of the measures devised and the decision-making processes leading to them. The article suggests that the Brexit should serve as a red light, reinforcing previous criticism calling for improving the democratic nature of such measures and of the decision-making processes involved, to prevent a further drift.

**Keywords:** European union, financial services, single banking supervision, financial crisis.

---

---

1 This work was supported by Masaryk University, Brno, the Czech Republic under the Distinguished Theodor Herzl Chair Grant. The author wishes to thank the Constitutional Law Department at the faculty of law, Masaryk University, Brno, the Czech Republic for the cooperation and academic collaboration on this project. Special thanks to Dr. David Kosař, former head of the department, to Dr. Jaroslav Benak, member of the department, to the students of my course ‘Financial Deficit or Democratic Deficit?’ and to Dr. Jan Grinc from Charles University in Prague, for their enriching comments and contributions to this article.

## 1 Introduction

In June 2015 the Five Presidents Report<sup>2</sup> was published, suggesting that the way out of the financial crisis the EU/EMU has been experiencing since 2008 involves enhanced integration<sup>3</sup> leading, by 2025, to full economic, financial and fiscal unions, followed by a political union. Turning this vision into reality started a month later – in July 2015, without leaving much room for public discourse regarding this far-reaching plan.

A year later, in June 2016, UK citizens voted by referendum for withdrawing the EU. UK leaders decided to respect the majority's will. Thus, the UK is expected to be the first member state withdrawing the EU since its establishment. At this stage, it is unclear whether it will be the only withdrawing member state, or rather the Brexit may inspire other EU member states to follow.

The Brexit decision took place while the EU has been experiencing four simultaneous crises: the financial crisis, a refugees' crisis, a security crisis and a political crisis. These crises seem to turn the EU into a less attractive alliance than it used to be perceived by its population, bearing their costs. These crises reinforce former seeds of frustration, emanating, for a long time, from the 'democratic deficit' – the feeling that many relevant decisions accepted by EU institutions lack democratic legitimation, as the vast majority of EU citizens, and to a certain extent even their democratically elected representatives, are detached from EU decision-making processes.<sup>4</sup>

One dilemma underlying this issue is that since the process of enhancing financial markets integration in the EU/EMU is highly technical, it is very difficult for most EU citizens to follow it closely. Moreover, the public is generally considered professionally unequipped to contribute to it. Consequently, by and large, decisions regarding this issue are taken by politicians, informed and guided by professional experts. At the same time, the decisions so taken substantially affect the daily lives of EU citizens. During the financial crisis, the Greek and Cypriot cases in particular seem to have highly raised the awareness of EU citizens to this fact, deterring countries like the Czech Republic and Poland<sup>5</sup> from joining the EMU.

---

2 JUNCKER, Jean Claude. *Completing Europe's Economic and Monetary Union*, 2015. [Online]. Available at: [http://ec.europa.eu/priorities/economic-monetary-union/docs/5-presidents-report\\_en.pdf](http://ec.europa.eu/priorities/economic-monetary-union/docs/5-presidents-report_en.pdf)

3 The necessity for enhanced integration is further justified on grounds of global competitiveness, implying enhanced growth: PORTO, Manuel. The Path Towards European Integration: the Challenge of Globalization. *European Studies*, 2014, Vol. 1, pp. 41–55.

4 OHANA, Steve. *Désobéir pour sauver l'Europe*. Paris: Max Milo Editions, Collection Essai, 2013.

5 KUNDERA, Jaroslav. Poland in the EU: How to Deal with Economic Crisis. *European Studies*, 2016, Vol. 2, pp. 142–170.

The financial crisis highlighted yet another dilemma EU decision makers face with regard to the regulation of financial issues: flexible and more liberal financial and economic disciplines that existed before the crisis, which allowed more room for political maneuvering and sovereign governments choices, did not prove effective to prevent the crisis. Pursuing a more strictly disciplined regime that seems to be necessary to pull out of the current financial crisis and to prevent future ones involves further erosion of national discretion, in favor of enhanced EU intervention.<sup>6</sup>

Non-satisfaction of the 'democratic deficit' underlying EU regime seems to have been one of the motivations behind the Brexit vote.<sup>7</sup> The UK was never an EMU member. Nevertheless, due to EU's high level of market integration, its economy was indirectly affected by the Euro crisis and by the decisions taken with regard to it. It is a well-known fact that the UK consistently fought for taking into consideration the implications any decision regarding financial regulation of the EMU may have on EU, non-EMU member states.<sup>8</sup> It is further assessed, that austerity served as a major motivation for UK's people voting in the referendum.<sup>9</sup> Other implications of EU financial crisis on the UK economy (e.g. on the banks, on housing prices etc.), and impressions gained from the Greek and Cypriot cases, widely covered by the global media, may have also affected this voting, at least indirectly.<sup>10</sup>

- 
- 6 JUNCKER, Jean Claude. *Supra* note 2, p. 7. National constitutional courts may play a decisive role in slowing down this process through interpretation that balances EU and national interests. See, for example, HAMULAK, Ondrej, KERIKMAE, Tanel. Indirect Effect of the EU Law under Constitutional Scrutiny – the Overview of Approach of the Czech Constitutional Court. *International and Comparative Law Review*, 2016, Vol. 16, No. 1, pp. 69–82; CĂLIN, Dragoș. The Constitutional Court of Romania and European Union Law. *International and Comparative Law Review*, 2015, Vol. 15, No. 1, pp. 59–85. This dilemma, faced by monetary decision-makers, is underlined by the inherent conflict that may occur between price stability and growth. See, for example, POSPISIL, Richard. The Equilibrium on Money Market and the Central Bank Issuing Policy. *International and Comparative Law Review*, 2015, Vol. 15, No. 1, pp. 141–152.
  - 7 See, for example, EVANS-PRITCHARD, Ambrose. Brexit vote is about the supremacy of Parliament and nothing else: why I am voting to leave the EU? *The Telegraph*, 13.6.2016. [Online]. Available at: <http://www.telegraph.co.uk/business/2016/06/12/brexit-vote-is-about-the-supremacy-of-parliament-and-nothing-els/>
  - 8 See, for example . WINNING, Nicolas, DENDRINO, Victoria. British Prime Minister David Cameron Sets Out EU Reform Demands. *The Wall Street Journal*, 10.11.2015. [Online]. Available at: [http://www.wsj.com/articles/british-prime-minister-david-cameron-sets-out-eu-reform-plan-1447156477?mod=fox\\_australian](http://www.wsj.com/articles/british-prime-minister-david-cameron-sets-out-eu-reform-plan-1447156477?mod=fox_australian)
  - 9 FISHER, Israel. A new research reveals that the austerity regime, not the refugees, caused the Brexit. *TheMarker*, 27.10.2016 (Hebrew). [Online]. Available at: <http://www.themarker.com/wallstreet/1.3104548>.
  - 10 Recent behavioral economy approaches recognize the importance of the psychological dimension to traditional economic models, thus taking account of human emotions and even irrationality. See, for example: BELLOVA, Jana. Behavioural Economics and its Implications on Regulatory Law. *International and Comparative Law Review*, 2015, Vol. 15, No.

The Five Presidents Report explicitly admits that ‘at the height of the crisis, far-reaching decisions had often to be taken in a rush, sometimes overnight.’ The report acknowledges that now, as the peak of the crisis is behind, ‘is the time to review and consolidate our political construct.’<sup>11</sup> One would assume that in this spirit, and in light of the growing criticism, EU decision makers would strive now more determinately to ensure the democratic legitimacy of the decision-making process regarding the financial mechanisms devised to pull out of the crisis and stabilize the EMU, and the democratic nature of its fruits.

This article thus examines, through comparison of certain elements shared by the European Stability Mechanism (ESM), and the Single Banking Supervision Mechanism (SSM), in the context of the Five Presidents Report’s vision, whether the democratic nature of the legal instruments decided at EU level, and the decision-making processes leading to them, improved over time in terms of their democratic nature. For this assumption to prove correct, measures enacted later would bear more democratic (or less non-democratic) elements than measures enacted in time-proximity to the height of the crisis. It is acknowledged that the compared mechanisms are different in essence: the ESM is an emergency financial assistance mechanism. The SSM is a surveillance and preventive mechanism, including certain elements of enforcement. Nevertheless, the two mechanisms form parts of a broader system and vision (specified by the Five Presidents Report), thus being underlined by similar perceptions, and sharing certain common characteristics, on which this article would focus.

## **2 The Democratic Deficit and the Financial Crisis**

Democracy is recognized by EU Treaties as a core value, underlying the EU alliance (Article 3(1) Treaty on the European Union (TEU), Article 9 Treaty on the Functioning of the EU (TFEU)).<sup>12</sup>

However, it seems to be widely recognized that due to EU’s non-majoritarian structure, democracy at EU level cannot be obtained by patterns similar to national, majoritarian models.<sup>13</sup> Nicolaidis<sup>14</sup> contends: ‘the EU was not designed with democracy in mind’, thus mentioning a variety of views regarding

---

2, pp. 89–102.

11 JUNCKER, Jean Claude. *Supra*, note 2, p. 17.

12 EUROPEAN UNION. Treaty on the EU (TEU), 2009. [Online]. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>; EUROPEAN UNION. Treaty on the Functioning of the EU (TFEU), 2009. [Online]. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

13 See, for example, MAJONE, Giandomenico. Europe’s ‘democratic deficit’: The question of standards. *European Law Journal*, 1998, Vol. 4 no. 1, pp. 5–28; MORAVCSIK, Andrew. In defence of the democratic deficit: Reassessing legitimacy in the European Union. *Journal of Common Market Studies*, 2002, Vol. 40, no. 4, pp. 603–624.

14 NICOLAIDES, Kalypto. European Democracy and Its Crisis. *Journal of Common Market Studies*, 2013, Vol. 51, no. 2, pp. 351–369, p. 354.

the EU alternatively as ‘not-a-state’, as a ‘multilateral democracy’, ‘transnational democracy’, ‘compound democracy’, ‘directly deliberative polyarchy’, ‘agonistic democracy’, or holding some of the variants of federal or cosmopolitan democracy, or constitutional pluralism. Others see it as a ‘technocracy’ or even as a ‘nomenklatura’.<sup>15</sup> At the same time, certain commentators suggest that representation and democracy are ensured by the EU architecture, only through a different, non-majoritarian model.<sup>16</sup>

Notwithstanding the *formal* explanations, definitions or structure, the literature reflects the constant anticipation of EU citizens towards *substantive* enhancement of EU regime’s democratic nature and legitimacy. Common consent with regard to the development and functioning of this alliance seems to be inevitable to its existence and future.

National regimes considered to be democratic are divided<sup>17</sup> to formal, *electoral democracies*, i.e. political regimes which merely allow political competition and generally fair elections, and substantial, *liberal democracies*, i.e. regimes which in addition to these formal characteristics effectively protect their citizens’ property rights, political rights and civil rights. By analogy, a similar distinction between the *formal* structure, dictating the decision-making process, and the *essence* of the decisions taken by it may apply to the EU. In terms of essence, EU Treaties encompassing EU supranational regime’s obligations to protect citizens’ rights and act to improve their welfare rightly underline EU citizens’ anticipation for these obligations to be fully respected.

Since democracy is broadly perceived as the ‘government of the people, by the people [and] for the people’,<sup>18</sup> the literature explored whether EU citizens form a ‘People’<sup>19</sup> or ‘Peoples’,<sup>20</sup> sharing common values and interests. As the replies given to this question are varied and controversial, it is alternatively suggested that the underlying motivation for EU citizens to act together may be the enhancement of common, ad hoc, interests.<sup>21</sup>

---

15 RODRIK, Dani. Brexit and the globalization trilemma. *Dani Rodrik’s weblog*, 13.6.2016. [Online]. Available at: [http://rodrick.typepad.com/dani\\_rodriks\\_weblog/2016/06/brexit-and-the-globalization-trilemma.html](http://rodrick.typepad.com/dani_rodriks_weblog/2016/06/brexit-and-the-globalization-trilemma.html)

16 See, for example, MAJONE, Giandomenico. *Supra*, note 13; MORAVCSIK, Andrew. *Supra*, note 13.

17 MUKAND, Sharun, RODRIK, Dani. The Political Economy of Liberal Democracy. *Warwick Economic Research Paper Series*, 2015. [Online]. Available at: [https://www2.warwick.ac.uk/fac/soc/economics/research/workingpapers/2015/twerp\\_1074\\_mukand.pdf](https://www2.warwick.ac.uk/fac/soc/economics/research/workingpapers/2015/twerp_1074_mukand.pdf)

18 LINCOLN, Abraham. The Gettysburg Address (Nov. 19, 1863). In: GIENAPP, William (ed). *This Fiery Trial: the Speeches and Writings of Abraham Lincoln*. Oxford: Oxford University Press, 2002, p. 184.

19 WEILER, Joseph. Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision. *European Law Journal*, 1995, Vol. 1, no. 3, pp. 219–258; GRIMM, Dieter. Does Europe Need a Constitution? *European Law Journal*, 1995, Vol. 1, no. 3, pp. 282–302.

20 NICOLAIDES, Kalypto. *Supra*, note 14.

21 SCHARPF, Fritz. Economic Integration, Democracy and the Welfare State. *Journal of Euro-*

Describing the historic evolution of democracies in the 19<sup>th</sup> and 20<sup>th</sup> centuries, Mukand and Rodrik<sup>22</sup> argue that electoral democracy marks a bargain between the propertied elite, interested in protecting its own (property) rights and little else, preferably by autocracy, and the mobilized masses forming the majority. According to this social bargain, the latter were accorded voting rights in return for their acceptance of the limits on their ability to expropriate property holders. By definition, EU supranational regime limits the direct access of the masses to the decision-making process, mainly exercised by elite groups, which, according to some, serve the interests of particular groups.<sup>23</sup> To a great extent, in the context of the financial crisis, the combination of this fact with the inherent conflict of interests and powers between the elite and the masses, reinforced EU citizens' – or 'people(s)' – frustration. In that sense, acts like the Brexit, the first vote of the Wallonian parliament of Belgium against the CETA in October 2016 (shortly later overturned by a political compromise) and even the vote of the Italian citizens in a national referendum that took place in December 2016 with regard to suggested modifications in the Italian constitution may be seen as attempts by the masses, or by their directly elected representatives, to preserve or regain their right to affect decision-making, according to that social, historic bargain, eroded by the gradual delegation of national sovereign powers to a supranational entity: the EU.

Those who see the EU as merely a mutant evolved by states' politicians, based on their notions of state governance, rather than as a unique phenomenon,<sup>24</sup> may perceive the 'democratic deficit' in the EU as only a symptom, reflecting the general failure of the party system, and a process of depoliticization, experienced by domestic politics of Western countries in general, or maybe even as part of a global 'democratic recession'.<sup>25</sup>

Majone<sup>26</sup> roughly classified the arguments about the democratic deficit in the EU into four groups, according to the standards being used: standards based

---

*pean Public Policy*, 1997, Vol. 4, no. 1, pp. 18–36.

22 MUKAND, Sharun, RODRIK, Dani. *Supra*, note 17.

23 RODRIK, Dani. More on the political trilemma of the global economy. *Dani Rodrik's weblog*, 11.3.2016. [Online]. Available at: [http://rodrrik.typepad.com/dani\\_rodriks\\_weblog/2016/03/more-on-the-political-trilemma-of-the-global-economy.html](http://rodrrik.typepad.com/dani_rodriks_weblog/2016/03/more-on-the-political-trilemma-of-the-global-economy.html);

24 MAIR, Peter. Popular Democracy and the European Union Polity. *European Governance Papers*, 2005, no. C-05-03. [Online]. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>; MAIR, Peter. *Ruling the Void: the Hollowing of Western Democracy*. London: Verso, 2013; VAN BIEZEN, Ingrid (ed.) *On Parties, Party Systems and Democracy: Selected Writings of Peter Mair*. Essex: ECPR Press, University of Essex, pp. 459–512.

25 DIAMOND, Larry. The Democratic Rollback: The Resurgence of the Predatory State. *Foreign Affairs*, 2008, Vol. 87, pp. 36–48; DIAMOND, Larry. Democracy's Deepening Recession. *TheAtlantic.com*, 2.5.2014. [Online]. Available at: <http://www.theatlantic.com/international/archive/2014/05/the-deepening-recession-of-democracy/361591/>

26 MAJONE, Giandomenico. *Supra*, note 13.

on the analogy with national institutions; majoritarian standards, concentrating mainly on the European Parliament's involvement in the decision making; standards derived from the democratic legitimacy of the member states, concentrating on the balance of powers in the Council of Ministers; and social standards, concentrating on aspects of equality and social justice of the decisions taken.

The broad literature criticizing the measures taken to pull out of the financial crisis<sup>27</sup> refers to all these aspects. It reveals failures to respect the democratic principles, both in terms of formal representation and in terms of the substance of the measures devised.

### **3 Financial Crisis Enhances Financial Integration**

The financial crisis in the EU started in 2008. In 2010, two temporary assistance mechanisms were established: the EFSM (European Financial Stability Mechanism),<sup>28</sup> and EFSF (European Financial Stability Facility).<sup>29</sup>

In 2011, amendment of Art. 136 TFEU enabled the enactment of permanent regulation, to replace the temporary mechanisms. Consequently, in 2011 the 'Six Pack'<sup>30</sup> regulation came into force, followed by the conclusion, in 2012, of the

27 See partial summary in: MUNIN, Nellie. From Financial Deficit to Democratic Deficit? *Journal of Multidisciplinary Studies*, St. Tomas University, Florida, 2013, Vol. 6, no. 1, pp. 5–29; MUNIN, Nellie. The Five Presidents Report: Dogs Bark but the Caravan Moves On? *European Politics and the Society*, 2016, Vol. 17, no. 3, pp. 401–420; MUNIN, Nellie. European Monetary Union's Single Banking Supervision Mechanism: Another Brick in the Wall? *The IUP Journal of International Relations*, 2016, Vol. X, no. 4, pp. 7–31.

28 EUROPEAN COMMISSION. About EFSF, 2013. [Online]. Available at: <http://www.efsf.europa.eu/about/index.htm>; EUROPEAN COMMISSION. European Financial Stability Facility, 2013. [Online]. Available at: [http://ec.europa.eu/economy\\_finance/european\\_stabilisation\\_actions/efsf/index\\_en.htm](http://ec.europa.eu/economy_finance/european_stabilisation_actions/efsf/index_en.htm)

29 European Commission. European Financial Stabilization Mechanism (EFSM), 2013. Available at [http://ec.europa.eu/economy\\_finance/eu\\_borrower/efsm/index\\_en.htm](http://ec.europa.eu/economy_finance/eu_borrower/efsm/index_en.htm)

30 EUROPEAN UNION. Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, OJ L 306, 1. [Online]. Available at: <http://eurlex.europa.eu/JOHtml.do?uri=OJ%3AL%3A2011%3A306%3ASOM%3AEN%3AHTML>; EUROPEAN UNION. Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area. OJ L 306, 8. [Online]. Available at: <http://eurlex.europa.eu/JOHtml.do?uri=OJ%3AL%3A2011%3A306%3ASOM%3AEN%3AHTML>; EUROPEAN UNION. Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies. OJ L 306, 12. [Online]. Available at: <http://eurlex.europa.eu/JOHtml.do?uri=OJ%3AL%3A2011%3A306%3ASOM%3AEN%3AHTML>; EUROPEAN UNION. Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances. OJ L 306, 25. [Online]. Available at: <http://eurlex.europa.eu/JOHtml.do?uri=OJ%3AL%3A2011%3A306%3ASOM%3AEN%3AHTML>; EUROPEAN UNION. Council Regulation (EU)

European Stability Mechanism (ESM) Treaty<sup>31</sup> and the 'Fiscal Compact' Treaty (FCT).<sup>32</sup> In 2013 the complementary 'Two Pack' regulation came into force.<sup>33</sup>

While the temporary instruments devised were limited to emergency financial assistance, the later, permanent measures replacing them are underlined by a broader vision, according to which enhanced integration would facilitate financial stability. In this spirit, the FCT provides for stricter convergence criteria, the 'Six Pack' regulation provides for stronger surveillance and enforcement mechanisms with regard to these criteria, whereas the 'Two Pack' regulation subjects draft national budgets to surveillance by the EU Commission, prior to national parliaments' voting.

Simultaneously, efforts were made to strengthen supervision and discipline of the EMU banking sector, which is particularly sensitive to financial crises, where uncertainty meets liquidity shortage.<sup>34</sup> Due to this sensitivity, banks played a decisive role in the American sub-prime financial crisis and in the EU/EMU financial crisis it triggered.

Thus, in 2010 the European Supervisory Authority (European Banking Authority – EBA) was established, as one of three financial services Supervisory Authorities replacing three former supervisory committees for financial services. Together with a Joint Committee of the European Supervisory Authorities,

---

No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure. OJ L 306, 33. [Online]. Available at: <http://eurlex.europa.eu/JOHtml.do?uri=OJ%3AL%3A2011%3A306%3ASOM%3AEN%3AHTML>; EUROPEAN UNION. Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the member states. OJ L 306, 41. [Online]. Available at: <http://eurlex.europa.eu/JOHtml.do?uri=OJ%3AL%3A2011%3A306%3ASOM%3AEN%3AHTML>

- 31 EUROPEAN UNION. Treaty Establishing the European Stability Mechanism (ESM), 2012. [Online]. Available at: [http://www.european-council.europa.eu/media/582311/05-tesm2\\_en12.pdf](http://www.european-council.europa.eu/media/582311/05-tesm2_en12.pdf) European Union. Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), 2012. [Online]. Available at: [http://european-council.europa.eu/media/639235/st00tscg26\\_en12.pdf](http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf)
- 32 EUROPEAN UNION. Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 2012. [Online]. Available at: [file:///C:/Users/NELLIE/Downloads/st00tscg26\\_en12.pdf](file:///C:/Users/NELLIE/Downloads/st00tscg26_en12.pdf)
- 33 EUROPEAN UNION. Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of member states in the euro area experiencing or threatened with serious difficulties with respect to their financial stability. OJ L 140, 1. [Online]. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:140:0001:0010:EN:PDF>; EUROPEAN UNION. Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the member states in the euro area. OJ L 140, 11. [Online]. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0473&from=EN>
- 34 PISTOR, Katharina. A Legal Theory of Finance. *Journal of Comparative Economics*, 2013, Vol. 41, pp. 315–330.

the supervisory authorities in the member states and a European Systemic Risk Board (ESRB) responsible for macro-prudential supervision of the EU financial system as a whole, including non-bank sectors and cross-sectoral concerns, they form the European System of Financial Supervision (ESFS).<sup>35</sup> All aim at tightening up the discipline on financial services in EU markets, supervising them at EU level. In performing its supervisory function, the ECB now closely cooperates with these authorities.<sup>36</sup>

In 2013, a Single Rule Book was initiated for all 28 EU member states, aiming at preventing future bank crises; ensuring improved depositor protection by ensuring guarantee for deposits of up to € 100,000; and determining rules for managing failing banks. Its purpose is to decrease the scope of national discretion, to prevent maneuvering during national transposition.

A Single Supervisory Mechanism (SSM) became operational in 2014. The SSM marks a higher degree of market integration than its predecessor. For SSM members it implies far reaching interference of EU/EMU authorities, headed by the ECB, in the national decision making process, and broad delegation of powers from national to supranational authorities, compared to the previous arrangement that implied only coordination and cooperation between national authorities.

A complementary Single Resolution Mechanism (SRM) was established, consisting of a Single Resolution Board (SRB) and a fund (SRF) amounting to € 55 billion within eight years, to be financed by the banks in the Banking Union countries. It aims at facilitating the treatment of banks in difficulties. Deposit guarantee at the EMU, the third pillar of financial stabilization envisioned by the Five Presidents Report, is administered by national deposit guarantee schemes. By 2019 the Commission is to review the current arrangement, to see whether a single, pan European, Deposit Guarantee Scheme (EDIS) should be set up.

#### **4 Did the Democratic Nature of the Decision Making Process Improve Over Time?**

Critics pointed out non-democratic elements in the decision-making processes leading to the regulation described above. The lessons of this criticism

---

35 EUROPEAN UNION. Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority). OJ L 331/12, dated 15.12.2010, para. 9, Art. 2. [Online]. Available at: <http://www.esrb.europa.eu/shared/pdf/EBAen.pdf?7f9ce4801b210d0dad7e8ad3a41fa95>

36 EUROPEAN UNION. Council Regulation of 15 October 2013 (EU) No. 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions. OJ L 287/63 dated 29.10.2013, art. 3. [Online]. Available at: <http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32013R1024&from=EN>

were studied and implemented in certain later decision making processes, but not in all of them.

*4.1 Re EU institutions:*

*-Towards formal meritocracy and substantial tyranny of executive institutions?*

More than twenty years ago, Grimm<sup>37</sup> warned that the EU's supranational decision making process would become increasingly independent of nationally organized opinion and will-formation processes.

The context of the financial crisis presented some examples for the growing power and independence of EU institutions. Critiques argued<sup>38</sup> that monetary policies of the European Central Bank (ECB) are completely immunized against political intervention, and that the Commission and standard setting agencies acting as regulators obtain a high level of political independence.

Furthermore, commentators claimed<sup>39</sup> that the evolving EU system of executive federalism produces increasing imbalances in the relationship between the member states, which were reflected in the Euro crisis, and might only be solved by further revision of EU Treaties.

This reality seems to persist, even after the height of the crisis has passed.

*- EU intervention in national priorities and affairs gradually grows*

This criticism was invoked at all stages of the crisis. At the beginning of the crisis, high level of EU intervention in national economies was justified on grounds of emergency. National supreme and constitutional courts approached in different member states, asked whether such intervention would not undermine national sovereignty answered negatively, thus justifying EU intervention to recover the crisis.<sup>40</sup>

37 GRIMM, Dieter. *Supra*, note 19.

38 E.g. SCHARPF, Fritz. *Community and Autonomy*. Frankfurt: Max Planck Institute, 2010, pp. 321–322.

39 E.g. FABBRINI, Federico. From Executive Federalism to Executive Government: Current Problems and Future Prospects in the Governance of the EMU. In: FABBRINI, Federico, BALLIN, Ernst Hirsch, SOMSEN, Han (eds). *What form of Government for the European Government and the Eurozone?* Oxford: Hart Publishing, 2015, pp. 289–306.

40 See, for example, Irish Court: VAN MALLEGHEM, Pieter Augustijn. Pringle: A paradigm shift in the European Union's monetary constitution. 2012. [Online]. Available at: <http://connection.ebscohost.com/c/articles/88010353/pringle-paradigm-shift-european-unions-monetary-constitution>; Estonian Court: TOMKIN, Jonathan. Contradiction, circumvention, and conceptual gymnastics: The impact of the adoption of the ESM Treaty on the state of European democracy. 2012. [Online]. Available at: [http://www.germanlawjournal.com/pdfs/Vol14-No1/PDF\\_Vol\\_14\\_No\\_1\\_169-190\\_ESM%20Special\\_Tomkin.pdf](http://www.germanlawjournal.com/pdfs/Vol14-No1/PDF_Vol_14_No_1_169-190_ESM%20Special_Tomkin.pdf); German Court: VRANES, Erich. German constitutional foundations of, and limitations to, EU integration: A systematic analysis. 2012. [Online]. Available at: <http://www.german->

The Two Pack' legislation, providing for pre-examination of national draft budgets by the EU Commission, to ensure economic stability at the EU/EMU area, was criticized on these grounds.<sup>41</sup> The EU Commission argued that it would only focus on ensuring economic stability, without interfering in national priorities, albeit it is clear that any such intervention would have implications on such priorities. It further noted that its intervention does not imply compulsory directions. Nevertheless, it is clear that under the circumstances, ignoring Commission recommendations would not be advisable, although in this case, unlike in the case of country-specific recommendations resulting from EU Commission's surveillance regarding the macroeconomic imbalance procedure in the European Semester, aimed at coordination of macroeconomic policies (as part of the Six Pack' regulation), no clear link was drawn between recommendations implementation and entitlement of the member state at stake to EU funds.<sup>42</sup>

The SSM implies a high level of intervention by the ECB – the supreme banking supervisor – in national affairs, to ensure the stability of national financial institutions. Recently, a member of ECB's executive board and vice-chair of the ECB's Supervisory Board suggested considering, in cases where a member state does not apply national legislation assimilating EU law into the national legal system, to render the ECB directly competent to apply such national legislation.<sup>43</sup> This is an even farther-reaching perception of intervention in national affairs, unprecedented at EU/EMU context. Being suggested by a senior ECB official, it may serve as an evidence to the spirit of future prospects foreseen by this institution.

All in all, it seems that EU intervention at the national level is, indeed, gradually growing, and the Five Presidents Report suggests expanding it even further, as an inevitable consequence of envisioned higher degrees of market integra-

---

lawjournal.org/pdfs/Vol14- No1/PDF\_Vol\_14\_No\_1\_75-112\_ESM%20Special\_Vranes.pdf; WINNING, Nicolas, DENDRINO, Victoria. *Supra*, note 7.

41 SCHMIDT, Vivien. The Forgotten Problem of Democratic Legitimacy: "Governing by the Rules" and "Ruling by the Numbers". In: MATTHIJS, M Matthias, BLYTH, Mark (eds). *The Future of the Euro*. New York: Oxford University Press, 2015, pp. 90–116; BARATTA, Roberto. Legal issues of the 'Fiscal Compact' – Searching for a mature democratic governance of the Euro. EUDO, European University Institute, Florence, Italy, 2012. [Online]. Available at: <http://ssrn.com/abstract=2196998>.

42 See Regulation (EU) No. 1303/2013 of the European Parliament and of the Council of 17 December 2013, laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, Articles 23–25.

43 EUROPEAN CENTRAL BANK. Single Supervisory Mechanism – Single Supervisory Law? 2016. [Online]. Available at: [https://www.ecb.europa.eu/press/key/date/2016/html/sp160127\\_2.en.html](https://www.ecb.europa.eu/press/key/date/2016/html/sp160127_2.en.html)

tion.<sup>44</sup> Evaluating the meaning of this fact depends on one's perception of the desired level of markets' integration.

Theoretically, globalization does not necessarily undermine national democracy. In certain cases, it may even enhance it.<sup>45</sup> Unfortunately, this is not always the case. Rodrik's globalization trilemma suggests that out of three aims: national sovereignty, democratic politics and hyper-globalization (namely: enhanced stage of market integration), always, two can thrive at the cost of giving up the third one.<sup>46</sup> According to this trilemma, in EU/EMU context, some would opt for keeping the globalized structure of the EU and striving towards further democratizing it (at the cost of compromising national sovereignty),<sup>47</sup> while others, maybe out of disappointment of EU's functioning hitherto, including its functioning with regard to the financial crisis, would rather prefer to strengthen national sovereignty and democracy at the cost of giving up further globalization, or integration.<sup>48</sup>

– *The European Parliament (EP), which is considered to represent EU people(s) more than any other EU institution, is not sufficiently involved in the decision-making process*

This criticism was particularly strong regarding the emergency measures taken when the financial crisis burst.<sup>49</sup> It was seriously taken into consideration in later stages. Thus, for example, the EP President signed the Five Presidents Report while being excluded from the previous, Four Presidents Report.<sup>50</sup>

---

44 See, for example, JUNCKER, Jean Claude. *Supra*, note 2, pp. 8, 9, 11.

45 Thus, according to KEOHANE, Robert., MACEDO, Stephen, MORAVCSIK, Andrew. Democracy-enhancing multilateralism. *International Organization*, 2009, Vol. 63, pp. 1–31. [Online]. Available at: <http://www.princeton.edu/~macedo/Papers/Keohane%20Macedo%20Moravcsik%20Democ%20Multilat%20IO%2009.pdf>, multilateralism may enhance democracy by offsetting factions, protecting minority rights, or by enhancing the quality of democratic deliberation.

46 RODRIK, Dani. The inescapable trilemma of world economy. *Dani Rodrik's Weblog*, 27.6.2007. [Online]. Available at: [http://rodrik.typepad.com/dani\\_rodriks\\_weblog/2007/06/the-inescapable.html](http://rodrik.typepad.com/dani_rodriks_weblog/2007/06/the-inescapable.html)

47 VAROUFAKIS, Yanis. Brexit won't shield Britain from the horror of disintegrating EU. *Yanis Varoufakis, thoughts for the post-2008 world*, 25.6.2016. [Online]. Available at: <https://yanisvaroufakis.eu/2016/06/25/brexit-wont-shield-britain-from-the-horror-of-a-disintegrating-eu/>

48 EVANS-PRITCHARD, Ambrose. *Supra*, note 7.

49 See, for example, MADURO, Miguel, DE WITTE, Bruno, KUMM, Mattias. The democratic governance of the Euro. *Policy Paper 2012/08*. Florence: Robert Schuman Centre for Advanced Studies (RSCAS). [Online]. Available at: [http://cadmus.eui.eu/bitstream/handle/1814/23981/RSCAS\\_PP\\_2012\\_08.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/23981/RSCAS_PP_2012_08.pdf?sequence=1); OHANA, Steve. *Supra*, note 4.

50 VAN RUMPOY, Herman. Towards a Genuine Economic and Monetary Union, 2012. [Online]. Available at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/134069.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134069.pdf). Critics note, though, that while that report was written by President of

The Five Presidents Report explicitly addresses the importance of enhanced participation of the EP in the decision-making process.<sup>51</sup> As a result of strong political pressure, SSM regulation provides for full accountability of decision makers to the EP.

On this issue, thus, some improvement of the democratic process occurred over time. Nevertheless, both the Five Presidents Report and the explanatory notes to SSM regulation admit that there is still room – and necessity – for further enhancing EP's involvement in these processes.

To complement the picture, it should be noted, though, that the perception of the EP as best representing the interests of EU citizens is not clean of doubts. Common arguments suggest, among other things, that the rate of voting to EP members in many EU member states is relatively low; that many times, candidates are nationally elected as MEPs based on a national agenda, which is irrelevant to their functioning in the EP; and that in the EP, MEPs function and vote according to the agenda associated with their political affiliation at EU, rather than national, sphere.

#### *4.2 Re the member states:*

*– Economic elites strive to regain autocracy? The economically strong countries, or contributors, dictate decisions. Other voices are heard, but ignored*

The legal theory of finance<sup>52</sup> depicts finance as a hierarchical system, dominated by financially strong countries (and players within these countries) which, in times of crisis, when elasticity and discretion in the application of law are necessary to regain stability, direct the decision-making process in favor of their interests.

In EU context, right from the start of the crisis it was broadly argued that the contributing countries – headed by Germany – led the decision-making process, directing it towards solutions that best served their interests. This argument was invoked regarding decision making processes taken mainly, but not only, by the European Council (EU leaders) and the Council of the EU (ministers of the member states). It refers, among other things, to the definition of the crisis as a 'debt crisis' rather than a financial imbalances crisis;<sup>53</sup> the demand that the assisted countries adopt austerity measures,<sup>54</sup> leading to wage compression and

---

the Council, the Five Presidents Report was written by the President of the Commission (an executive authority considered the least 'democratic' authority among EU institutions).

51 JUNCKER, Jean Claude. *Supra*, note 2, p. 17, para. 7.

52 PISTOR, Katharina. *Supra*, note 34.

53 KRUGMANN, Paul. *End this depression now*. New York, NY, and London: W. W. Norton and Company, 2012.

54 HABERMAS, Jürgen. Democracy, Solidarity and the European Crisis. In: GROZELIER, Anne-Marie, HACKER, Bjorn, KOWALSKY, Wolfgang, MACHNIG, Jan, MEYER, Henning, UNGER, Brigitte (eds). *Roadmap to a Social Europe*. Social Europe Report, 2013. pp.

a drive for exports; the standards applied by the ECB<sup>55</sup> and the strong discipline assisted countries were required to meet as pre-condition for financial assistance; the avoidance of adjustments in all EU countries, to close gaps in fields such as prices and lending policies; the establishment of the SSM, and its essence.<sup>56</sup>

It seems that hitherto, the contributing countries did not give up their dominance of the decision-making process regarding the financial crisis. Other EU/EMU member states feel that despite their alleged political equality – e.g. in terms of voting rights – in essence their ability to affect the process is marginal and the solutions chosen do not duly serve their interests. This may well be a case where the fact that an international rule is negotiated and accepted by a democratically elected government does not inherently make that rule democratically legitimate.<sup>57</sup> This gap exacerbates long standing problems with regard to EU's democratic legitimacy and solidarity, turning the financial crisis into a political crisis.<sup>58</sup>

*– EU, non-EMU member states have less access to the decision-making process, although it affects their interests*

To the extent that the financial crisis is addressed as a Euro-crisis, decision making takes place in EMU institutions in which EU, non-EMU member states have no voting rights. This group of countries, which is nevertheless affected by decisions so taken, due to the high level of market integration among EU members, can only affect the decisions taken by consultation. This situation exists with regard to financial assistance by the ESM (to which EU, non-EMU countries are not entitled if they encounter financial difficulties) as well as to the decision-making process in the ECB, regarding the SSM (due to legal constraints dictated by Art. 127(6) TFEU, chosen as the legal basis for this mechanism in order to avoid Treaty changes). This exclusion applies even to EU, non-EMU member states choosing to act in 'close cooperation', namely to apply the SSM voluntarily, thus bearing the same obligations as EMU member states regarding the SSM.

---

4–13.

55 MORAVCSIK, Andrew. Europe after the crisis: How to sustain the common currency. *Foreign Affairs*, 2012, Vol. 91, no. 3, pp. 54–68, p. 56. [Online]. Available at: [http://www.princeton.edu/~amoravcs/library/after\\_crisis.pdf](http://www.princeton.edu/~amoravcs/library/after_crisis.pdf); SANDBU, Martin. Europe's Orphan: the Future of the Euro and the Politics of Debt. Princeton University Press, Princeton and Oxford, 2015, p. 2.

56 HOWARTH, David, QUAGLIA, Lucia. Banking Union as Holy Grail: Rebuilding the Single Market in Financial Services, Stabilizing Europe's Banks and 'Completing' Economic and Monetary Union. *Journal of Common Market Studies*, 2013, Vol. 51 (Annual Review), pp. 103–123; FERRAN, Eilis, BABIS, Valia. The European Single Supervisory Mechanism. *Journal of Corporate Law Studies*, 2013, Vol. 13, no. 2, pp. 255–285.

57 RODRIK, Dani. *Supra*, note 23.

58 SCHMIDT, Vivien. *Supra*, note 41.

This exclusion is undoubtedly a source of great frustration for EU, non-EMU countries. Both the Five Presidents Report (anticipating that all of them finally join the EMU) and the SSM explanatory notes recognize the necessity to change this situation. Nevertheless, obtainment of this goal necessitates a long (and maybe currently politically unfeasible) process of Treaties modification.

EU, non-EMU member states are represented in EBA. However, despite the change of voting formula in EBA regarding standards, in other contexts SSM Members may coordinate their voting, making it very difficult for non-SSM Members to oppose their positions.<sup>59</sup>

#### *4.3 Re the European people(s)*

*– National parliaments are hardly involved in the decision-making process<sup>60</sup>*

By and large, the involvement of EU members' national parliaments in EU decision making processes is rather limited. This reality seems to change gradually, as EU leaders realize the adverse effects of the growing 'democratic deficit' frustration among EU citizens. Thus, the Five Presidents Report explicitly calls for enhanced involvement of the national parliaments, asking EU Commission to work out the details.<sup>61</sup>

The SSM takes one step further, providing that in certain matters, decision makers at EU level (e.g. the ECB and its Supervisory Board) would be accountable to the national parliaments.

In this sense the democratic process has thus allegedly improved, but the details and full implementation are still to be worked out, to ensure not only formal, but effective national parliaments involvement.

*– Direct involvement of EU people(s) is marginal*

This argument provides that the structure of EU decision making processes does scarcely allow for direct citizens' involvement.

---

59 VERON, N. Europe's Single Supervisory Mechanism and the Long Journey Towards Banking Union. Bruegel Policy Contribution, issue 2012/16. Available at: <https://www.econstor.eu/dspace/bitstream/10419/72130/1/72687230X.pdf>; BELLING, Vojtěch. Bankovní unie v kontextu krizového vládnutí v EU: právní limity a rizika (Banking Union in the context of crisis governance in the EU: legal limitations and risks, translation: GRINC, Jan.). *Právní rozhledy* 2016, Vol. 6, p. 201.

60 GRATHWOHL, Daphne. German top court may seek readjustment of ESM. DW website, 11.9.2012. [Online]. Available at: <http://www.dw.de/german-top-court-may-see-readjustment-to-esm/a-16229513>.

61 JUNCKER, Jean Claude. *Supra*, note 2, p. 17.

Rare opportunities for such direct involvement occur,<sup>62</sup> for example, in cases of national referenda (e.g. to nationally ratify an EU Treaty). Such referenda do not take place often, due to the high administrative and financial burden they bear as well as due to political concerns about their unpredictable results.

Deliberate avoidance from Treaty amendments is explicitly declared by the Five Presidents Report, justified in terms of efficiency and emergency. However, the report explicitly admits, with regard to decisions taken at the height of the crisis, that '[i]n several cases, intergovernmental solutions were chosen to... overcome opposition,'<sup>63</sup> probably referring to the ESMT and the FCT, concluded as public international law treaties rather than as new EU Treaties or amendments to existing EU Treaties.

Allegedly, existing EU Treaties already represent the will of EU citizens, rendering constant amendments unnecessary. Furthermore, the results of the 2015 Greek elections and the Brexit referendum reflect the shortcomings of this form of direct democracy.

At the same time, avoiding necessary Treaty modifications despite substantial change of circumstances, thus compromising regulation quality (as in the case of non-EMU member states voting exclusion), may be suspected as an attempt to prevent the undermining of measures enhancing integration, desired by EU institutions, by negative national referenda votes.

Due to its technical nature, the SSM suggests only limited opportunities for direct EU/EMU citizens' intervention, confined to initiating certain judicial or semi-judicial procedures this mechanism allows (e.g. approaching the joint Board of Appeal of the European Supervisory Authorities, regarding EBA).<sup>64</sup> These possibilities mark an advancement compared to the lack of semi-judicial, and existence of limited judicial options with regard to the earlier ESM.

## **5 Did the Democratic Nature of the Measures Taken Improve Over Time?**

In all decision-making processes that took place regarding the financial crisis treatment, decision makers were aware of the necessity for democratic legitimacy of regulation and the decision making processes leading to it. While it seems to be attributed a lesser weight at the emergency stage, in later stages serious efforts were made to establish a system that balances the different interests involved. Nevertheless, there is still a great room for improvement.

---

62 SCHARPE, Fritz. *Supra*, note 38, pp. 321–322.

63 JUNCKER, Jean Claude. *Supra*, note 2, p. 17.

64 Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority). OJ L 331/12, dated 15.12.2010, art. 60. [Online]. Available at: <http://www.esrb.europa.eu/shared/pdf/EBA-en.pdf?7f9ce4801b210d0dad7e8ad3a41fa95>

## **6 Aspects in Which the Democratic Nature of the Measures Devised Improved**

### *6.1 Form of enactment*

The enactment of the ESMT and the FCT as international treaties rather than as EU legislation was criticized on grounds that this form of enactment enables only limited judicial review by the CJEU.<sup>65</sup> The Five Presidents Report recognized the shortcomings of this form of enactment, calling for integrating the ESMT into EU law framework in the second stage of the program.<sup>66</sup>

All later relevant measures were enacted as parts of EU law, thus being fully subject to CJEU judicial review.

### *6.2 Decision making processes in the mechanisms established*

Different elements in the decision-making process the ESMT provides for were criticized. For example: the full discretion accorded to the Board of Governors and to the Board of Directors of the ESM, whether to invite other players to participate in their discussions. The lack of legal obligation to consult with the President of EP, and the lack of obligatory consultation procedures and transparency rules were particularly mentioned. Additionally, the lack of procedure for assessing ESM's operations was criticized.<sup>67</sup>

The Five Presidents Report explicitly acknowledged the deficiencies of the current system, calling for enhanced involvement of the EP and the national parliaments, as representatives of EU/EMU citizens, in the decision-making process.

The SSM encompasses an elaborated mechanism of decision making, consisting of many layers. In each, efforts were made to ensure balanced representation of the relevant stake holders' interests, alas not always with full success. However, accountability of the institutions involved in the process to the EP and in certain cases to the national parliaments is explicitly guaranteed.<sup>68</sup>

### *6.3 Voting and formal equality*

ESM bodies decide according to the following formulas: except for emergency voting, decisions are subject to mutual agreement (in circumstances speci-

---

65 Although scholars suggested that these treaties may be subjected to EU law standards, imposing constitutional constraints, by interpretation. E.g. BARATTA, Roberto. *Supra*, note 41. It was noted that paradoxically, due to national constitutional laws, national parliaments are usually involved in ratification processes of international agreements more than in EU implementing legislation.

66 JUNCKER, Jean Claude. *Supra*, note 2, p. 21.

67 MUNIN, Nellie. From Financial Deficit...*Supra*, note 27.

68 MUNIN, Nellie. European Monetary Union's ... *Supra*, note 27.

fied in Article 5(6) ESMT), to qualified majority (80% of the votes cast, in circumstances specified in Article 5(7) ESMT), or to simple majority in all other cases. However, “[i]n respect of all decisions, a quorum of 2/3 of the members with voting rights representing at least 2/3 of the voting rights must be present.” (Article 4(2) ESMT). This provision ensures that a minority of Members would not enforce any decision.

The voting formulas in the SSM differ for each body, and may be much more elaborated. Their detailed analysis is beyond the scope of this article. The varied formulas mark an effort to fine-tune this system as much as possible, devising a different decision making mechanism for each institution, according to its specificities. Two rules are shared by all these formulas: one vote per one member, and decision by majority. In cases involving non-SSM EU member states with voting rights, majority definition necessitates their voting.

#### *6.4 Material equality*

In both the ESM and the SSM, material equality is obtained by taking into account the special circumstances of each Member State for any relevant decision on it.

#### *6.5 Decision review*

The ESM consists of three layers of decision making: a Board of Governors, consisting of finance ministers of the member states, a Board of Directors, consisting of professionals, and a Managing Director, with an inherent review mechanism. There is no external specific review mechanism for its final decisions, beyond the general EU mechanisms (e.g. CJEU, which in the case of the ESMT seems to have limited powers).

The SSM includes a broad network of review mechanisms, including self-review, review by executive authorities, review by semi-judicial and by judicial forums. These forums allow for broader participation in the decision-making, facilitating lesson-learning processes.<sup>69</sup>

#### *6.6 Obligatory recovery*

The lack of ESM procedure to force a process of recovery on a member state that does not request for assistance, although its vulnerable financial situation might risk the other partners, was criticized.<sup>70</sup>

The SSM (which may be perceived mainly as a preventive mechanism, although it may recommend financial assistance in cases of crisis) is obligatory

---

<sup>69</sup> MUNIN, Nellie. European Monetary Union’s... *Supra*, note 27.

<sup>70</sup> MADURO, Miguel, DE WITTE, Bruno, KUMM, Mattias. *Supra*, note 49; OHANA, Steve. *Supra*, note 4.

for all EMU members. It is optional only for EU, non-EMU members (none of which decided to join it yet).

This choice seems to mark a preference of EMU member states' general benefit on the account of national sovereign discretion, emanating from the lesson learned through the crisis.

### *6.7 Sanctions*

The following sanctions, potentially imposed by EU regulation on member states in crisis (justified on grounds of deterrence) were criticized for being counter-productive, potentially contributing to further escalation in the situation of these countries:

A member failing to respect its obligations in relation to paid-in shares or calls of capital, or in relation to the reimbursement of the financial assistance, may lose its voting rights (Article 4(8) ESMT), thus losing its ability to affect the decision-making process which might affect it directly.

Severe fines may be imposed, according to the 'Six Pack' mechanism, that would put an extra burden on economies already in severe difficulties.

Heavy fines are imposed by the SSM on member states breaching the financial discipline standards it dictates. Nevertheless, possibly following the criticism on these former provisions, SSM regulation obliges the ECB to ensure the fines are effective, proportionate and dissuasive.<sup>71</sup> These conditions may serve as legal protection, and grounds for a harmed country to challenge controversial ECB decisions at the CJEU.

## **7 Fields Where Further Improvement of the Democratic Nature of the Measures Taken is Necessary**

These aspects are specified in addition to the aspects still necessitating improvement, mentioned before:

### *7.1 Representation*

All EMU member states are represented at ESM Board of Governors and Board of Directors.

All EMU member states are represented in SSM's two major institutions: the ECB's Governing Council and EBA.

---

71 EUROPEAN UNION. Council Regulation of 15 October 2013 (EU) No. 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, art. 18(3). OJ L 287/63 dated 29.10.2013. [Online]. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1024&from=EN>

Nevertheless, in some of the SSM forums, (e.g. such as the ECB's Administrative Board of Review, the Mediation Panel, the Steering Committee, EBA's Management Board, the Joint Committee of Supervisory Authorities, the Joint Board of Appeal) there is no direct representation of all EMU member states at all times. This practice is justified in terms of efficiency. Decision makers in these authorities are obliged to be impartial and committed to the best interests of the Union. However, this approach substantially differs from the one characterizing most EU institutions.

### *7.2 Voting and equality*

All ESM and SSM voting models rely on majority voting, where each member state has one vote. Some believe that replacement of this system with a system reflecting financial market size would be more democratic.

It has also been argued that where SSM legislation requires a double majority voting – of SSM and non-SSM Members – the latter may be given powers to block rule-making which is relevant for the entire Union.<sup>72</sup>

### *7.3 Broad discretion*

The broad discretion of the ESM Board of Governors to decide how to assist a country that asks for it was criticized for lack of criteria, or set of goals limiting it, and for lack of accountability standards similar to those applying to EU agencies. The only way for a Member State to challenge such a decision is thus to refer the dispute to the CJEU.

By and large, the same criticism applies to the SSM, where the ECB enjoys very broad discretion.

### *7.4 Too high standards*

The ESM may impose on a member state suffering a financial crisis standards that may be too high for it to meet, thus being counter-productive.

SSM standards that may impose a too high threshold for small banks, particularly in economically weak countries. If small banks would not survive this arrangement, market competitiveness may be undermined, leaving only the strong, large banks in the game. Consumers may bear the price.

### *7.5 ECB's status*

In the ESMT context, critiques mentioned the lack of mechanisms for restraining the ECB by governments.<sup>73</sup>

---

<sup>72</sup> FERRAN, Eilis, BABIS, Valia. *Supra*, note 56.

<sup>73</sup> MAJONE, Giandomenico. Rethinking European integration after the debt crisis. *Working Paper No. 3/2012*. London: The European Institute, UCL. [Online]. Available at: <http://>

Due to the SSM, the ECB now fulfills two functions, acting both as the liquidity supplier, in charge of monetary policy, and as supreme supervisor, thus enjoying substantive power of decision, bearing distributive implications for the economies of the member states. This fact empowers the ECB even beyond its former status, reinforcing this criticism. Moreover, despite formal denial,<sup>74</sup> in certain cases these two functions may bear conflicts of interests.<sup>75</sup>

### *7.6 Transparency*

EU authorities are subject to general rules on due process and transparency. Nevertheless, in the context of the ESMT and SSM commentators suggested that the general public accountability could have improved by assuming specific, extended transparency obligations on the institutions involved.<sup>76</sup>

## **8 Conclusion**

Comparison of major elements in the structure and functioning of the ESM, enacted as an emergency instrument, and the SSM, enacted after the peak of the financial crisis seems to have subsided, reflects that despite some improvements in the ‘democratic’ nature of the latter, compared to the former, both still share many non-democratic elements.

Already back in 1997 Scharpf<sup>77</sup> foresaw a potential conflict of interests between the strive for economic integration at EU level on the one hand, and national economic interests which do not correlate to it, on the other hand. He further noted that while the process of European integration imposes growing challenges on the economies of EU member states, it drastically and unnecessarily reduces the effectiveness of democratic self-determination at the national level, while at the higher, European level where action might be effective, demo-

---

[www.ucl.ac.uk/european-institute/analysispublications/publications/WP3.pdf](http://www.ucl.ac.uk/european-institute/analysispublications/publications/WP3.pdf). On the other hand, the problems emanating from the necessity of ECB's President to work with nineteen governments instead of one (as is the case in the US) were mentioned

74 EUROPEAN CENTRAL BANK. *Establishing the Single Supervisory Mechanism*. 2013. [Online]. Available at: [http://www.ecb.europa.eu/press/key/date/2013/html/sp130129\\_1.en.html](http://www.ecb.europa.eu/press/key/date/2013/html/sp130129_1.en.html)

75 SPEYER, Bernhard. EU Banking Union: Right Idea, Poor Execution. *EU Monitor*, Deutsche Bank, DB Research, 4.9.2013. [Online]. Available at: [http://129.35.230.61/PROD/DBR\\_INTERNET\\_DEPROD/PROD0000000000319670/EU+Banking+Union%3A+Right+idea,+poor+execution.PDF](http://129.35.230.61/PROD/DBR_INTERNET_DEPROD/PROD0000000000319670/EU+Banking+Union%3A+Right+idea,+poor+execution.PDF)

76 See, for example, EVERSON, Michelle., & RODRIGUES, Frank. Crisis of governance: Can comitology theory help legitimise ECB/ESCB operations pp. 193–228; SCOTTO, Nicola. How does the financial crisis affect the independence of the European Central Bank? p. 347–390, both in: CHITI, Edoardo, MENENDEZ, Augustin Jose, TEIXEIRA, Gustavo (eds). *The European rescue of the European Union? ARENA report No. 3/12*. Oslo: University of Oslo, 2012. [Online]. Available at: <http://pure.au.dk/portal/files/69770796/RECON-report1912.pdf>

77 SCHARPF, Fritz. *Supra*, note 21.

cratic legitimacy is weaker or non-existent. Realizing the potential threat created by the combination of these two facts, he stressed the need to defend and protect the national regimes of social market economies against the legal compulsions of negative integration.<sup>78</sup>

At this time of crisis, the EU/EMU seems to be caught between EU institutions' pressure on decision makers to enhance market integration, and a growing political pressure by EU/EMU citizens to gain access to this decision-making process. While public's pressure for enhancing the democratic nature of the measures devised to pull out of the financial crisis seems to have borne some fruit by now, examination of recent regulation reflects that there is still a long way to go.

The Brexit may serve as a red light signaling that in the current unstable political atmosphere it might be better to stop, or slow down, the enhanced integration process for re-evaluation and start an intensified, open dialogue with EU citizens, further facilitating their involvement, or at least the involvement of their directly elected representatives: the EP and national parliaments, in the decision-making processes, to strengthen the sense of democratic legitimacy and the democratic characteristics of the mechanisms established. National sovereigns' effect on the process may be strengthened, for example, by enhancing mediation exercised by states' democratic systems between EU rules and peoples-as-citizens'.<sup>79</sup> Such mediation may reduce the sense of remoteness underlying the democratic deficit' feeling of EU citizens.

Otherwise, the seeds of non-satisfaction may continue to grow, further risking the EU/EMU alliance.

---

78 SCHARPF, Fritz. *Supra*, note 38.

79 NICOLAIDES, Kalypso. *Supra*, note 14, p. 355.

# POLITICALLY PALATABLE PARITY: WHAT THE UNITED STATES CAN LEARN FROM FRANCE IN ACHIEVING A MORE REPRESENTATIVE DEMOCRACY

Nicholas J. D'Angelo

St. John's University School of Law, New York, USA

*njd0815@gmail.com*

D'ANGELO, Nicholas J. Politically Palatable Parity: What the United States Can Learn From France in Achieving a More Representative Democracy. *International and Comparative Law Review*, 2016, vol. 16, no. 2, pp. 29–47. DOI: 10.1515/iclr-2016-0013.

---

**Summary:** The United States considers itself a world superpower in many realms, but equality in political representation is not one of them. Currently, female representation in the United States Congress hovers around nineteen-percent, placing the United States in league with nations that have historically oppressed women, including Kenya and Tajikistan. While other, more infant, democracies have utilized political quotas as a means to increase female political involvement, the United States' maintains a tradition of formal equality and neutralism. Long-standing precedent remains suspicious of anything resembling a quota. However, France faced a similar dilemma, unable to increase female representation due to a tradition of universalism. Working within its constitutional confines, France adopted parity in an attempt to achieve "perfect equality." This paper argues that the United States may be able to use France as an example, thus potentially increasing female representation through a parity system that respects the traditions of our Constitution.

**Keywords:** parity, France, equal representation, representative government, laicite, feminism, female representation in government, equal rights.

---

## Introduction

In November 2016, Governor Maggie Hassan, New Hampshire's top Democrat, challenged Senator Kelly Ayotte, the state's top Republican, in an historic female-versus-female contest.<sup>1</sup> In fact, it was only the fifteenth time in American history that such a contest has happened.<sup>2</sup> Still, 2016 was not a record setting

- 
- 1 ROSS, Janell. *Women are Stepping Up in Most Major 2016 Senate Races*. Available at: <https://www.washingtonpost.com/news/the-fix/wp/2015/05/28/women-are-stepping-up-in-most-major-2016-senate-races/>.
  - 2 OSTERMEIER, Eric. *Hassan vs. Ayotte Sets Up 15<sup>th</sup> U.S. Senate Matchup Between Female Nominees*. Available at: <http://editions.lib.umn.edu/smartpolitics/2015/10/07/hassan-vs-ayotte-sets-up-15th-us-senate-matchup-between-female-nominees/>.

year for women in government.<sup>3</sup> Despite women serving in Congress for nearly a century, and a major party nominating a woman for president, female political representation in the United States remains stagnant.<sup>4</sup> This places the United States at an awkward crossroads.

More infant governments, such as Afghanistan and Pakistan, have instituted political quotas in order to ensure greater female representation.<sup>5</sup> In fact, countries as diverse as those in Europe and Africa have instituted similar policies as the most efficient way to increase women participating in national governments.<sup>6</sup> However, the United States is not an infant nation and our country maintains a lingering suspicion of raw number quotas, specifically in the realm of racial affirmative action.<sup>7</sup> Still, the United States can learn from similarly situated nations, such as France, in addressing political parity through more palatable means. French universalism, which stresses formal equality, is similar in many ways to American neutralism.<sup>8</sup> Despite this constitutional structure, France has still been able to institute parity measures through constitutional amendments.

This paper argues that the United States may be able to use France as a model, adopting a similar constitutional mandate in order to ensure greater female representation without violating decades of judicial precedent. Part I outlines the different quota systems, the supporting and critical arguments of such programs, and the necessity of increasing female political participation globally. Next, Part II discusses France's history of adopting political parity through a constitutional

3 CLEARFIELD, Alex. *2016 Won't Beat Many Records for Women in the Senate*. Available at: <http://www.rollcall.com/news/politics/senate-women>.

4 COHN, Laura. *The U.S. Made Zero Progress in Adding Women to Congress*. Available at: <http://fortune.com/2016/11/10/election-results-women-in-congress/>.

5 BEYDOUN, Khaled A. Fast Tracking Women into Parliamentary Seats in the Arab World. *The Southwestern Journal of International Law*, 2011, vol. 75, iss. 63, p. 67 (arguing “the (generally) autocratic and hyper-patriarchal contexts in the Arab world require a fast track quota approach to speedily integrate women into parliament and expedite regional consciousness around gender equality”); BUSH, Sarah Sunn. International Politics and the Spread of Quotas for Women in Legislatures. *International Organization*, 2011, vol. 65, iss. 103, pp. 126–27 (explaining that Afghanistan, in particular, was influenced by international actors. When the new constitution was formed in 2004, it reserved 27 percent of seats in the lower house, and 17 percent of seats in the upper house, for women); KROOK, Mona Lena. *Quotas for Women in Politics: Gender and Candidate Selection Reform Worldwide*. Oxford: Oxford University Press, 2010, p. 57 (recounting that Pakistan has a long history of reserving seats for female representation dating back to British colonial rule in the 1930s and Pakistan's own constitutional reforms after independence in the 1950s).

6 *Proportion of seats held by women in national parliaments (%)*, *World Bank (2011–2015)*. Available at: <http://data.worldbank.org/indicator/SG.GEN.PARL.ZS>.

7 MCDONAGH, Eileen. *The Motherless State: Women's Political Leadership and American Democracy*. University of Chicago Press, 2009, p. 215 (describing America's troubled history with quotas).

8 MARIN, Ruth Rubio. A New European Parity-Democracy Sex Equality Modern and Why It Won't Fly in the United States. *The American Journal of Comparative Law*, 2012, vol. 60, iss. 99, p. 122.

amendment and the justifications for instituting the policy. Then, Part III analyzes the constitutional challenges within the United States, including Equal Protection Clause<sup>9</sup> challenges and First Amendment<sup>10</sup> protections. Finally, Part IV suggests different approaches the United States may use in achieving parity, such as setting long-term goals or ratifying a constitutional amendment.

## **2 Political Quotas Generally**

### *2.1 Different Models for Political Quotas*

Over one hundred countries around the world have either instituted gender quotas or debated it over the last several decades.<sup>11</sup> When female membership in representative bodies does not increase organically, quotas help to ensure that result at varying rates. The rate depends on the choice of quota system. Traditionally, three quota systems exist. First, “reserved seats” set aside a certain number of parliamentary seats for women through constitutional reform.<sup>12</sup> Second, “party quotas” increase female candidates within a particular party through voluntary party reforms.<sup>13</sup> Finally, “legislative quotas” require parties to field a certain number of female candidates through constitutional or legal reforms.<sup>14</sup> These quota systems usually work to ensure that women represent a “critical minority,” equal to 30 to 40 percent of the seats.<sup>15</sup>

Still, other potential systems are not satisfied with achieving a “critical minority,” instead working towards “perfect equality.”<sup>16</sup> Political parity, an alternative from quotas that shares a similar goal, is based on the theoretical equality that has bogged down the progress of such nations as France and the United States. Unlike quotas, which institute rigid percentages as the gauge for equality, parity requires an equal number of male and female candidates as a move towards equal opportunity.<sup>17</sup>

9 U.S. Const. amend XIV.

10 U.S. Const. amend. I.

11 KROOK, Mona Lena. Candidate Gender Quotas: A Framework Analysis. *The European Journal of Political Research*, 2007, vol. 46, iss. 367, p. 367.

12 *Id.*

13 *Id.*

14 *Id.*

15 DAHLERUP, Drude. Increasing Women’s Political Representation: New Trends in Gender Quotas. In BALLINGTON, Julie, and KARMAN, Azza (eds.) *Women in Parliament: Beyond Numbers*. International Idea, 2006, p. 142. “Critical minority” was defined by a United Nations Development Programme report in 1995, which viewed the 30 percent mark as the minimum “that enables women to exert meaningful influence on policies.” *Human Development Report*, 1995. Available at: [http://hdr.undp.org/sites/default/files/reports/256/hdr\\_1995\\_en\\_complete\\_nostats.pdf](http://hdr.undp.org/sites/default/files/reports/256/hdr_1995_en_complete_nostats.pdf).

16 Commentators disagree over whether to refer to this as “fifty-fifty” equality. Vogel-Polsky, Eliane. Les impasses de l’égalité ou pourquoi les outils juridiques visant à l’égalité des femmes et des hommes doivent être repensés en terme de parité. 1 Parité-Infos 9, 1994.

17 Opello, Katherine A. R. *Gender Quotas, Parity Reform, and Political Parties in France*.

Overall, because any implementation of gender quotas has been a relatively recent phenomenon, it is difficult to judge success.<sup>18</sup> However, the focus of the United Nations and other global organizations has been on post-conflict countries.<sup>19</sup> While it is true that those nations represent easier tasks in instituting quotas or parity because of the novelty of their constitutions, they are not the only nations in need of international pressure to act. Interestingly, many post-conflict nations actually have the greatest numbers of female representation in government, including Rwanda (63.8%), South Africa (42%), and Afghanistan (27.7%).<sup>20</sup> Therefore, increased international pressure should be applied to developed nations and world powers alike in order to ensure greater progress.

## 2.2 Support and Criticism for Gender Quotas

Quotas, as well as other strategies to achieve equality, have sparked an impassioned debate across the world. Proponents point to the benefits of encouraging and expanding female political representation. Meanwhile, critics condemn gender quotas, and their cousin “parity,”<sup>21</sup> for violating formal equality and representing a slippery slope towards quotas for all interest groups.

First, proponents argue there is a need to increase female representation across the world. After all, parliamentary bodies are meant to *represent* the societies that elect them and by increasing female membership in representative bodies, a different perspective is provided.<sup>22</sup> Moreover, the debate is diversified, channeling interests and experiences that may never have had a seat at the table. This diversified debate and unique perspective leads to new policies, which help to benefit interested groups that might have previously been ignored.<sup>23</sup> In addi-

---

Oxford: Lexington Books, 2006, p. 1.

- 18 Davidson-Schmich, Louise K. Implementation of Political Party Gender Quotas: Evidence from the German Lander 1990–2000. *Party Politics*, 2006, vol. 12, iss. 212.
- 19 *Gender and Post-Conflict Reconstruction: Lessons Learned from Afghanistan*. Available at: [http://www.un.org/womenwatch/ianwge/taskforces/ParisJoint\\_Workshop\\_Report\\_final.pdf](http://www.un.org/womenwatch/ianwge/taskforces/ParisJoint_Workshop_Report_final.pdf); KLOT, Jennifer F. *Women and Peacebuilding*. Available at: [http://www.un.org/en/peacebuilding/pdf/doc\\_wgll/wgll\\_backgroundpaper\\_29\\_01\\_08.pdf](http://www.un.org/en/peacebuilding/pdf/doc_wgll/wgll_backgroundpaper_29_01_08.pdf).
- 20 *Women in National Parliaments: World Classification*. Available at: <http://www.ipu.org/wmn-e/classif.htm>.
- 21 Parity is difficult to define, but is best thought of as “perfect equality,” distinct from quotas, which focus instead on reaching a “critical minority.” Vogel-Polsky, Eliane. Les impasses de l'égalité ou pourquoi les outils juridiques visant à l'égalité des femmes et des hommes doivent être repensés en terme de parité. *Parité-Infos*, 1994, vol. 1, p. 9 (“Parity does not mean 50–50. Parity is demanded in the name of equal status, and not in the name of representing a minority.”).
- 22 PANDE, Rohini and FORD, Deanna. *Gender Quotas and Female Leadership: A Review*. Available at: [http://scholar.harvard.edu/files/rpande/files/gender\\_quotas\\_-\\_april\\_2011.pdf](http://scholar.harvard.edu/files/rpande/files/gender_quotas_-_april_2011.pdf) (“[A] lack of female leadership translates directly into an underrepresentation of women’s interests in policy decisions. Increasing the proportion of female leaders through quotas can improve representation of women’s policy interests.”).
- 23 RHODE, Deborah L. and PACKEL, Amanda K. Diversity on Corporate Boards: How Much

tion to the positive results that may occur, many argue that increasing female representation is necessary through a social rationale and progressive theory.<sup>24</sup>

Further, without quota-style reforms in place, women are less likely to seek elected office in the first place, thus depriving society of their valuable input. According to the Brookings Institution, women are less likely than men to consider running for office, to think they are qualified to run, to actually run, or to run if asked.<sup>25</sup> Even more critical, women who do run, win, and serve are less likely to stay, making their presence temporary.<sup>26</sup> Additionally, in the realm of voluntary party quotas, political parties are more likely to implement their own quotas if opposing parties have already done so.<sup>27</sup> This represents a “race to the top” model of achieving the desired result. Therefore, proponents argue, reforms to force the increase of female representation become necessary.

Alternatively, opponents counter that anything resembling a quota is superficial, violates the ideals of equal opportunity, and will lead to more quotas for more interest groups. In the United States and Europe, resistance to quotas has been mostly defined in terms of formal equality.<sup>28</sup> In this sense, quotas violate gender neutrality, which has been at the focus of numerous democratic documents in the Western hemisphere.<sup>29</sup> As Rubio-Marin writes, resistance is “relat-

- 
- Difference Does Difference Make? *The Delaware Journal of Corporate Law*, 2014, vol. 39, iss. 377, p. 384 (citing recent studies showing a positive correlation between female membership on corporate boards and overall performance due to the diverse views). NELSON, Eboni S. Examining the Costs of Diversity. *The University of Miami Law Review*, 2009, vol. 63, iss. 577, p. 593 (“In *Sweatt v. Painter*, 339 U.S. 629 (1950) and *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950)] . . . we see the Court’s allusion to the democratic and social benefits flowing from a racially diverse student body.”).
- 24 BUTLER, Seletha R. Butler. All on Board! Strategies for Constructing Diverse Boards of Directors. *The Virginia Law and Business Review*, 2012, vol. 7, iss. 61, p. 75 (arguing “upper echelons” of organizations “should reflect the base”).
- 25 LAWLESS, Jennifer and FOX, Richard. *Why Are Women Still Not Running for Public Office?* Available at: [http://www.brookings.edu/~media/research/files/papers/2008/5/women-lawless-fox/05\\_women\\_lowless\\_fox.pdf](http://www.brookings.edu/~media/research/files/papers/2008/5/women-lawless-fox/05_women_lowless_fox.pdf).
- 26 *Id.* FOX, Richard L. and LAWLESS, Jennifer L. Entering the Arena? Gender and the Decision to Run for Office. *The American Journal of Political Science*, 2004, vol. 48, p. 264 (arguing that “vestiges of traditional sex-role socialization” explains why women either do not run or do not remain in elective office).
- 27 KROOK, *supra* note 11, at 372.
- 28 Opponents of parity encompass a diverse array of actors, encompassing everyone from conservatives and neoclassical liberals to constitutional originalists and incumbent male elected officials. Pöim, Maari. *Out of the Deadlock: Tackling the Backlash of Gender Equality with Progressive Tools*. Available at: <http://www.feps-europe.eu/assets/55a1805a-f81a-4b77-9249-f945dde0cc3c/policy-brief-genderpdf.pdf>.
- 29 NATELSON, Robert. *A Woman as President? The Gender-Neutral Constitution*. Available at: <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/28/a-woman-as-president-the-gender-neutral-constitution/>. SAPHIRE, Richard B. Judicial Review in the Name of the Constitution. *The Dayton University Law Review*, 1983, vol. 8, iss. 745, pp. 796–97.

ed to the stronger U.S. individualist tradition and its faith in both autonomy and meritocracy as expressed through the free functioning of the market and of social forces.<sup>30</sup>

Moreover, opening up a certain number of seats for women means that other interest groups are likely to demand reserved seats as well, and will have precedent to rely on. Among the most prominent candidates for these additional special classifications would be religious groups.<sup>31</sup> Other scholars have argued that viewpoint would satisfy the political and social diversity goals expressed by quota rationales.<sup>32</sup> While such thinking seems to violate a reasonable understanding of the purpose and scope of quotas, the arguments demonstrate the theoretical conclusions that may ultimately be drawn.

Finally, the United States has a long history of suspicion with quotas. Even policies merely resembling a quota are likely unconstitutional.<sup>33</sup> Furthermore, scholars have argued that even if a quota were constitutional, affirmative action simply does not work.<sup>34</sup> Instead, affirmative action programs, like quota systems, represent an inorganic and superficial attempt at equality. These critical arguments leave the United States with one last possibility: political parity.

### *2.3 By the Numbers: Why the United States Must Do Something*

The United States must do *something* to increase female representation in government. Women represent 50.4 percent of the U.S. population,<sup>35</sup> women comprise 47 percent of the U.S. workforce,<sup>36</sup> and 10 million more women voted in the 2008 presidential election than men.<sup>37</sup> Despite these figures, the United States shares company with Saudi Arabia, Kenya, and Tajikistan, all with female

---

30 Marin, Ruth Rubio. A New European Parity-Democracy Sex Equality Modern and Why it Won't Fly in the United States. *The American Journal of Comparative Law*, 2012, vol. 60, iss. 99, p. 121.

31 CHEN, Jim. Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny. *The Ohio State Law Journal*, 1998, vol. 59, iss. 811, p. 862 ("It is hard to imagine why religious diversity should warrant less solicitude than racial diversity. Free exercise is as much a part of the Constitution as equal protection.").

32 LINDGREN, James. Conceptualizing Diversity in Empirical Terms. *The Yale Law and Policy Review*, 2005, vol. 23, iss. 5, p. 6.

33 *Gratz v. Bollinger*, 539 U.S. 244, 269 (2003) (invalidating a diversity plan that assigned applicants points for particular characteristics because it too closely resembled a "quota").

34 DELGADO, Richard Delgado. Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model? *The Michigan Law Review*, 1991, vol. 89, iss. 1222, p. 1224.

35 *Table: Population, Female (% of total), 2011–2015*. Available at: <http://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS>.

36 *Women in the Labor Force in 2010, U.S. Department of Labor*. Available at: <http://www.dol.gov/wb/factsheets/qf-laborforce-10.htm>.

37 STARK, Caitlin. *By the Numbers: Women Voters*. Available at: <http://www.cnn.com/2012/10/25/politics/btn-women-voters/>.

political representation hovering around 19 percent.<sup>38</sup> The numbers speak for themselves. Therefore, something must be done to address the imbalance.

### 3 French Political Parity

#### 3.1 French Universalism and American Neutralism

Similar to the United States, France has a historical political philosophy focused on formal equality before the law that seems at odds with the rigidity of quotas. From the earliest expressions of French democracy, political thinkers rejected female participation outright. For example, while scholars quibble over the philosophy of Jean-Jacques Rousseau,<sup>39</sup> most at least agree that his ideals for the freedom of men rested on an insubordinate status for women.<sup>40</sup> The philosophy of Rousseau and other similar French intellectuals served as an inspiration for the political currents of the French Revolution.

The Declaration of the Rights of Man and of the Citizen of 1789 addressed only the male population, granting them equal rights under Article 1 and the right to engage in government under Article 6.<sup>41</sup> Even far-left socialist thinkers, such as Proudhon,<sup>42</sup> felt strongly about feminine exclusion from public life.<sup>43</sup> Moreover, unlike other global democracies, such as the United States and the United Kingdom, France refused to give women the right to vote until 1944.<sup>44</sup>

38 *Women in National Parliaments: World Classification*. Available at: <http://www.ipu.org/wmn-e/classif.htm>.

39 One of the most renowned political theorists, Rousseau influenced the Enlightenment in France and across Europe. His philosophy also affected the overall development of modern political and educational thought. SCOTT, John T. (ed.). *The Major Political Writings of Jean-Jacques Rousseau*. Chicago: The University of Chicago Press, 2012.

40 WEISS, Penny. *A Gendered Community: Rousseau, Sex, and Politics*. New York: New York University Press, 1993 (arguing Rousseau's philosophy rests on a hierarchical political theory); PATEMAN, Carole. *The Disorder of Women: Democracy, Feminism and Political Thought*. Stanford: Stanford University Press, 1989 (claiming Rousseau's philosophy of freedom for men depends on the servitude of women); ICE, Tamela. *Resolving the Paradox of Jean-Jacques Rousseau's Sexual Politics*. New York: University Press of America, 2009 (arguing that, to Rousseau, women are a means to the equality of men).

41 Declaration of the Rights of Man 1789, Art. 1, 6. This can be compared to America's Declaration of Independence, which stated, "All *men* are created equal." Declaration of Independence (emphasis added).

42 Pierre-Joseph Proudhon was a French politician and philosopher. He is regarded as the first person to declare himself an anarchist and is considered one of the ideology's most influential theorists. WOODCOCK, George. *Pierre-Joseph Proudhon: A Biography*. Black Rose Books, 1987.

43 MOSS, Claire Goldberg. *French Feminism in the Nineteenth Century*. Albany: State University of New York Press, 1984, p. 156.

44 SEPPALA, Nina. *Women and the Vote in Western Europe*. Available at: [http://www.idea.int/publications/voter\\_turnout\\_weurope/upload/chapter%204.pdf](http://www.idea.int/publications/voter_turnout_weurope/upload/chapter%204.pdf). It seems to have taken much longer to gain the right to vote in France than in other Western European countries. For example, Finland granted women the right to vote in 1906. Still, Liechtenstein did not

Perhaps even more puzzling was “the relative lack of awareness of French women of questions concerning their civil rights” during this critical period.<sup>45</sup> Unlike in the United States or the United Kingdom, there was no great suffrage movement in France.<sup>46</sup>

Moreover, France has had a longstanding adherence to national sovereignty. For example, the Constitution of 1958 embraces the indivisibility of the republic, thus limiting separate social categories.<sup>47</sup> This formal equality is also related to the French political theory of *laïcité*, which embraces formal secularism by disallowing other forms of identification.<sup>48</sup> In other words, “French citizen” becomes the penultimate classification.<sup>49</sup> The problem, of course, is that while national sovereignty intends formal equality, it lacks the means to fully ensure that result. This may explain why female empowerment in France has been so slow, and why parity reforms were deemed necessary in the late twentieth century.

### 3.2 The French Adoption of Parity

By the beginning of the Fifth Republic, France realized it had an equality problem. Like other nations, France began to more fully recognize particular women’s rights, including access to contraception in 1967<sup>50</sup> and abortion in 1975.<sup>51</sup> Based on this newfound recognition, the French parliament began adopting affirmative action quotas to ensure equal representation for women in 1982.<sup>52</sup> The new provisions, passed by a National Assembly vote of 476 to 4,<sup>53</sup> prohibited candidate lists for local elections from including more than 75 percent of candidates of the same sex.<sup>54</sup>

---

provide women suffrage until 1984. *Id.*

45 LENOIR, Noelle. The Representation of Women in Politics: From Quotas to Parity in Elections. *International and Comparative Law Quarterly*, 2001, vol. 50, iss. 217, pp. 223–24. The basis for the author, a member of the Conseil Constitutionnel, is an empirical evaluation of the French suffrage movement compared to that of the United States and Great Britain. *Id.*

46 *Id.* at 224.

47 Constitution of 1958, § 2.

48 DALY, Eoin. *Laïcité, Gender Equality and the Politics of Non-Domination*. *The European Journal of Political Theory*, 2012, vol. 11, p. 292.

49 *Id.*

50 MILLARD, Eric. Paritary Rights for Women and Universal Human Rights in France. *IUS Gentium*, 2001, vol. 7, iss. 1, p. 11.

51 *Id.*

52 *Id.* at 13.

53 LENOIR, *supra* note 45, at 236.

54 MILLARD, *supra* note 50, at 14.

However, by November of that year, the Conseil Constitutionnel<sup>55</sup> held the parity reforms unconstitutional.<sup>56</sup> The court reasoned that quotas violated principles of French universalism: “[A]ny division or categorization of the electorate, or of eligible persons, would be against these principles, which have a constitutional force.”<sup>57</sup> The court relied on Article 3 of the Constitution of 1958 and Article 6 of the Declaration of the Rights of Man, which both made clear that equality precluded “any division by categories of voters and candidates.”<sup>58</sup> With it becoming increasingly difficult to fit increased female representation within the rigid confines of theoretical principle, hope for increasing female representation languished.

It was not until the 1990s that renewed interest in female representation reseeded national politics. Since the 1982 decision, the debate had been reframed. Proponents no longer argued for increasing female representation by *percentages*, unequally applied, but by full and equal measure:

Parity could be viewed as true equality, or “concrete” equality, that would not discriminate, but simply realize the duality of the human race. Understood in this way, parity would not contravene the principle of universalism or the universality of rights.<sup>59</sup>

Quite simply, according to some advocates, a democracy without women is not a democracy at all.<sup>60</sup>

Parity would represent “perfect equality,” not some random “critical minority” defined by committee and imposed by government. In 1999, the Constitution of 1958 was amended to provide: “The law shall promote the equal access of men and women to electoral power and elected position.”<sup>61</sup> The goal was no longer to advance women, which had been the strategy in 1982. Instead, the

---

55 The “Constitutional Council” is France’s highest authority on constitutional issues. However, its powers and scope differ greatly from its American counterpart, the U.S. Supreme Court. DAVIS, Michael H. *The Law/Politics Distinction, the French Conseil Constitutionnel, and the U.S. Supreme Court. The American Journal of Comparative Law*, 1986, vol. 34, p. 45. MORTON, F.L. *Judicial Review in France: A Comparative Analysis. The American Journal of Comparative Law*, 1988, vol. 36, p. 89.

56 LENOIR, *supra* note 45, at 236. It is interesting to note that the term “parity” was never used in the legislation, but was commonly used by the French press. However, the specificity of the legislation, focused on a ceiling percentage, seems too specific to truly be considered parity. *Id.*

57 CC Decision 82-146 DC Nov. 18, 1982.

58 *Id.* Article 3 of the 1958 Constitution stated: “National sovereignty belongs to the people. No section of the people nor any individual may arrogate its exercise to itself.” Constitution of 1958, Art. 3.

59 MILLARD, *supra* note 50, at 15.

60 GASPARD, Françoise, et. al. *Au Pouvoir Citoyennes! Liberté, Egalité, Parité*. Editions du Seuil, 1992, p. 129.

61 SUK, Julie. *Gender Parity and State Legitimacy: From Public Office to Corporate Boards. The International Journal of Constitutional Law*, 2012, vol. 10, iss. 449, p. 455.

purpose became advancing the nation through diversity as a social good. As Suk writes, “The imagined beneficiary of gender parity was no longer the new elected female legislator, but the republic itself.”<sup>62</sup> Therefore, through renewed activism by interested parties, France was able to amend its Constitution in order to provide for parity as a means to truly increase female representation at the municipal and national levels.

### *3.3 The Results of French Parity*

The results of the constitutional amendment have been mixed. French election practices, which range from proportional systems for municipal and regional elections to single candidate systems for National Assembly elections, make the implementation of parity difficult to measure.<sup>63</sup> Still, in 2001, the first election year in which the parity law was effective, female representation in the Senate tripled to 21.5 percent.<sup>64</sup> Municipal improvements were even greater.<sup>65</sup> During that election, 38,000 women were elected to local councils, representing 47.5 percent of the nation’s municipal council members.<sup>66</sup>

However, in other areas, the numbers tell a different story. For example, in head-to-head national elections in 2002, women fared much worse. In the first round of voting for the National Assembly, women represented 38.5 percent of the candidates, but that fell to 23.9 percent by the second round, and only 71 women were ultimately elected.<sup>67</sup> Moreover, those elected accounted for only 12.3 percent of the legislature, a modest gain for such a revolutionary reform.<sup>68</sup> Perhaps even more concerning, in the elections since the first tests in 2001 and 2002, the progress stagnated.<sup>69</sup> After the 2008 Senate elections, the percentage of female representation actually decreased.<sup>70</sup> Of course, this disconnect causes concerns and raises questions. Why isn’t parity working?

Observers note several possible explanations for the trend. First, in the National Assembly elections, less experienced women were placed against male

---

62 *Id.*

63 ROSENBLUM, Darren. Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions. *The U.C. Davis Law Review*, 2006, vol. 39, iss. 1119, p. 1145.

64 *Id.* at 1147.

65 *Id.*

66 SINEAU, Mariette. *Institutionalizing Parity: The French Experience*. Available at: <http://docplayer.net/17700607-Institutionalizing-parity-the-french-experience.html>.

67 ROSENBLUM, *supra* note 63, at 1148.

68 FRECHETTE, Guillaume R., MANIQUET, Francois & MORELLI, Massimo. Incumbent’s Interest and Gender Quotas. *The American Journal of Political Science*, 2008, vol. 52, p. 891.

69 LEWIS, Priscilla. *Gender Parity Laws in France Have Been Undermined by Electoral Reforms which Work Against Female Candidates*. Available at: <http://blogs.lse.ac.uk/europpblog/2013/09/13/gender-parity-laws-in-...erminded-by-electoral-reforms-which-work-against-female-candidates/>.

70 *Id.*

candidates with greater resources, thus resulting in high losses.<sup>71</sup> Even if women are on the ballot in an equal proportion to men, they must still be given the resources to effectively compete.<sup>72</sup> Other commentators have blamed more sinister motives. For example, subsequent reforms have made it more difficult for parity to fully take effect. In 2003, the Raffarin reforms changed the method of Senate and European Parliament elections from a national constituency to eight regional constituencies.<sup>73</sup> Because parity relies on candidate lists, this indirectly impacts the system's progress:

In [the] situations where a party receives only one or an uneven number of seats in a district, an imbalance occurs in the number of male and female candidates who actually fill those seats within their party. Although this imbalance is slight with one national constituency, as was the case in the 1999 elections to the EP, the potential for such bias against female candidates increases as the number of districts increases.<sup>74</sup>

Therefore, even if parity is written into the constitution, it is ineffective unless the system in which it operates is also fair.

Alternatively, scholars have suggested that male politicians never actually intended parity to occur, instead crafting a political illusion.<sup>75</sup> Male incumbents overwhelmingly voted for candidate lists, the arguments goes, because it was more desirable than true parity, which required women to actually hold office.<sup>76</sup> In this way, male politicians can appear progressive, but still maintain their seats through the next election.<sup>77</sup>

In the end, it may take time for women elected at the municipal level to gain greater experience before being elevated to national offices. At first glance, parity seems to have had a promising start in France, laying the foundation for greater female representation in the future. However, it is important to remember that

---

71 ROSENBLUM, *supra* note 63, at 1148.

72 This should echo President Lyndon Johnson's famous commencement address at Howard University in 1965, where he spoke on civil rights: "But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please." JOHNSON, Lyndon. Commencement Address at Howard University: To Fulfill These Rights. In 2 *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965*. Washington, D.C.: Government Printing Office 1966, pp. 635–40.

73 SOUTHWELL, Priscilla. Gender parity thwarted? The effect of electoral reform on Senate and European Parliamentary Elections in France, 1999–2011. 11 *French Politics* 169, 172, 2013.

74 *Id.*

75 FRECHETTE, *supra* note 68, at 892. MURRAY, Rainbow, KROOK, Mona Lena & OPELLO, Katherine A. R. Why Are Gender Quotas Adopted?: Party Pragmatism and Parity in France. *Political Research Quarterly*, 2013, vol. 65, iss. 529, p. 530 (arguing that parity adoption is self-interested because political parties benefit from bias against female candidates).

76 FRECHETTE, *supra* note 68, at 892–93.

77 *Id.*

opponents to parity have developed creative methods to avoid its successful implementation.<sup>78</sup>

#### **4 Constitutional Challenges to Parity in the United States**

Parity may be a worthy endeavor that provides true progress for female representation in government. However, it is not without its challenges. Most notably, the U.S. Supreme Court has long articulated a suspicion of anything resembling a quota. Assumedly, this would include gender quotas for women in government.

Even without resorting to the rigidity of a quota system, parity would encounter demanding constitutional inquiry. First, parity would be challenged for violating the Equal Protection Clause. Second, parity would be challenged for violating the First Amendment right of political association. In facing these challenges, courts will have to rely on analogies to previously decided issues of affirmative action and free speech in determining the constitutionality of parity.

##### *4.1 Equal Protection Clause Challenges*

The Supreme Court has never ruled on an affirmative action case for gender, but it is appropriate to analogize gender with affirmative action cases for race because both are immutable characteristics subjected to discrimination.<sup>79</sup> Additionally, there is a wealth of case law addressing gender affirmative action programs from circuit courts and state courts that provide fruitful illustrations.

Any discussion on affirmative action must necessarily begin with *Regents of the University of California v. Bakke*.<sup>80</sup> In that case, the Court struck down a medical school's admissions policy reserving sixteen of 100 seats for "disadvantaged" applicants, specifically racial minorities.<sup>81</sup> The court rejected the University's purpose to provide preferential treatment, to aid victimized groups, and to improve healthcare services to underserved communities.<sup>82</sup> However, the court stated that the attainment of diversity was a constitutionally permissible state interest.<sup>83</sup> Citing a wide array of Supreme Court and lower court decisions, the

---

78 Again, a comparison to civil rights is appropriate. Despite the Fourteenth and Fifteenth Amendments being ratified between 1865 and 1870, it took almost a century for them to be fully enforced through the Civil Rights Act of 1964 and the Voting Rights Act of 1965. ROSENBERG, Gerald N. The 1964 Civil Rights Act: The Crucial Role of Social Movements in the Enactment and Implementation of Anti-discrimination Law. *St. Louis University Law Journal*, 2004, vol. 49, p. 1147.

79 MAYERI, Serena. Reconstructing the Race-Sex Analogy. *The William & Mary Law Review*, 2008, vol. 49, iss. 1789, p. 1796.

80 438 U.S. 265 (1978).

81 *Id.* at 279.

82 *Id.* at 307-09.

83 *Id.* at 311.

Court emphasized the societal benefit of the “multitude of tongues.”<sup>84</sup> Still, the University’s sole reliance on race did not fit this criterion.<sup>85</sup>

In 2003, the Supreme Court maintained that diversity was a compelling government interest that justified racial affirmative action programs. In *Grutter v. Bollinger*,<sup>86</sup> the court upheld a law school admissions program that used race as a factor to achieve a “critical mass”<sup>87</sup> of minority students.<sup>88</sup> In so deciding, the court noted that the state had a compelling interest in providing a more diverse student body<sup>89</sup> and that race was merely a “potential ‘plus’ factor” in the overall admission evaluation.<sup>90</sup> Therefore, societal diversity justified narrowly tailored affirmative action programs.<sup>91</sup>

While the Court has never ruled on gender-based affirmative action, some have speculated that because gender is held to only “intermediate scrutiny,”<sup>92</sup> instead of the more exacting “strict scrutiny” for race, government programs directed towards gender may be easier to uphold.<sup>93</sup> Justice Stevens, in his dissenting opinion in *Adarand Constructors, Inc. v. Peña*,<sup>94</sup> predicted such a situation. “[T]he government can more easily enact affirmative action programs to rem-

---

84 *Id.* at 312. *U.S. v. Associated Press*, 52 F. Supp. 362, 371 (S.D.N.Y. 1943) (“[The First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.”).

85 *Bakke*, 438 U.S. at 315. “It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.” *Id.*

86 539 U.S. 306 (2003).

87 *Id.* at 329.

88 *Id.* at 343.

89 *Id.* at 330–32 (“In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals . . .”).

90 *Id.* at 334.

91 *Id.*

92 While strict scrutiny review for gender discrimination was originally adopted by the plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973), subsequent cases did not adopt such a standard. In *Craig v. Boren*, 429 U.S. 190 (1976), the court outlined “intermediate scrutiny” as the proper review for sex classifications. This was more fully discussed by Justice Ginsburg in *U.S. v. Virginia*, 518 U.S. 515 (1996), and defined as an “exceedingly persuasive justification.”

93 For example, in *Califano v. Webster*, the court applied intermediate scrutiny and upheld a section of the Social Security Act that gave preferential treatment to female retirees. See 430 U.S. 313, 317 (1977) (“Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as . . . an important governmental objective.”).

94 515 U.S. 200 (1995) (Stevens, J., dissenting).

edy discrimination against women than it can enact affirmative action programs to remedy discrimination against African Americans,” he wrote, “even though the primary purpose of the Equal Protection Clause was to end discrimination against former slaves.”<sup>95</sup> Still, whether or not the court would uphold affirmative action provisions for women in politics under an intermediate scrutiny standard is an open question.

Several circuit courts have already wrestled with the affirmative action provisions for gender. Most courts have applied intermediate scrutiny review<sup>96</sup> and most have upheld government intervention to limit discrimination based on gender. In *Danskine v. Miami Dade Fire Department*,<sup>97</sup> the Eleventh Circuit addressed whether a county government could establish a quota to increase the number of female firefighters.<sup>98</sup> The court held that the preferential program did not violate the Equal Protection Clause.<sup>99</sup>

In so holding, the court applied intermediate scrutiny because “gender-based governmental discrimination is reviewed less intensively than race-based discrimination.”<sup>100</sup> Applying this standard, the court reasoned that gender preference is allowed so long as it is “substantially related to an important governmental objective.”<sup>101</sup> Because less evidence is required for gender classifications than racial classifications, the government faced a significantly lower burden and exercised greater flexibility in enacting such programs.<sup>102</sup> Consequently, while the court stressed that “an affirmative action plan may not go on forever,”<sup>103</sup> the

95 *Id.* at 247.

96 *Eng’g Contractors Ass’n v. Metro. Dade Cnty.*, 122 F.3d 895, 929 (11th Cir. 1997) (applying intermediate scrutiny to a Florida “gender-conscious” affirmative action plan); *Contractors Ass’n v. City of Phila.*, 6 F.3d 990, 1000–01 (3d Cir. 1993) (applying intermediate scrutiny to a gender-based government affirmative action program); *Coral Constr. Co. v. King Cnty.*, 941 F.2d 910, 931 (9th Cir. 1991) (applying intermediate scrutiny to a government gender-based affirmative action program); *Concrete Works of Colorado, Inc. v. City of Denver*, 36 F.3d 1513, 1519 (10th Cir. 1994) (holding that intermediate scrutiny should apply to the gender classifications in a government affirmative action program). *But see* *Conlin v. Blanchard*, 890 F.2d 811, 816 (6th Cir. 1989) (finding that both race and sex-based classifications must be narrowly tailored to survive strict scrutiny review).

97 253 F.3d 1288 (11th Cir. 2001).

98 *Id.* at 1289. The county instituted a “long-term” hiring goal of 36 percent women, which was challenged for violating Title VII and the Equal Protection Clause. *Id.*

99 *Id.*

100 *Id.* at 1291.

101 *Id.* at 1294 (quoting *Eng’g Contractors Ass’n of S. Fla., Inc. v. Metro. Dade Cnty.*, 122 F.3d 895, 908 (11th Cir. 1997)).

102 *Id.*

103 *Id.* at 1300. “Simply because discrimination in the form of affirmative action may be lawful at one point in time does not mean that such discrimination may be countenanced in the future.” *Id.* See also *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1570 (11th Cir. 1994) (“The goal of eliminating discrimination may justify some interim use of affirmative action, but affirmative action selection provisions are themselves a form of discrimination that cannot continue forever.”).

plan in this case was justified.<sup>104</sup> Therefore, the Equal Protection Clause may not be violated.

#### 4.2 First Amendment Political Association Challenges

Affirmative programs that increase the representation of women have also been challenged on First Amendment grounds, but these programs have still largely been upheld.<sup>105</sup> For example, both the Republican and Democrat parties have long required that representatives of individual state parties to the national committees be equally divided between genders.<sup>106</sup> However, unlike programs implemented by legislatures, the individual parties voluntarily adopt these rules. Therefore, when rules are promulgated governing party membership or delegate allocation, they generally have been determined to be within the parameters of the First Amendment.<sup>107</sup>

One of the clearest examples remains *Marchiaro v. Chaney*.<sup>108</sup> In that case, members of the Democratic Party of Washington state sought injunctive relief against a state party rule that each county should have two delegates to the state convention, one delegate of each sex.<sup>109</sup> Plaintiffs argued this rule violated the First Amendment.<sup>110</sup> The court asserted that the proper test to determine a violation was whether the new rule placed a “substantial burden” on plaintiffs as they sought to achieve the “stated purpose and objectives” of the party.<sup>111</sup> The court held that such a rule did not present that burden because the party itself had declared the purpose or objective to be equality among the genders.<sup>112</sup>

Through this reasoning, it seems logical that national and state parties could adopt similar rules that require slates of candidates for office to be proportionate between men and women. For example, if the party was nominating four

104 See *Danskine*, 253 F.3d at 1300.

105 See *Bachur v. Democratic Nat’l Party* 836 F.2d 837, 842–43 (4th Cir. 1987); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 210–11 (1986).

106 SCHENKEN, Suzanne O’Dea. *From Suffrage to the Senate: An Encyclopedia of American Women in Politics*. ABL-CLIO, Inc., 2009, p. 189–91. The Democratic Party follows an “Equal Division Rule,” mandating that delegations to the national convention be composed of an equal number of men and women. While the Republican Party does not have such a rule, it does have Rule 14(d), which encourages state parties to implement similar rules. *Republican National Committee Rule 14(d)*, 2012. Available at: [https://cdn.gop.com/docs/2012\\_RULES\\_Adopted.pdf](https://cdn.gop.com/docs/2012_RULES_Adopted.pdf).

107 *Ripon Soc., Inc. v. Nat’l Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (holding that an allocation formula awarding a greater number of delegates to the 1976 Republican Convention to states that previously voted for the Republican candidate in 1972 did not violate the First Amendment).

108 90 Wash.2d 298 (1978).

109 *Id.* at 301.

110 *Id.* Plaintiffs also argued it violated Washington state’s constitution, as well as the Equal Rights Amendment. *Id.* at 300.

111 *Id.* at 310.

112 *Id.* at 311.

candidates for a village board election, two candidates would be required to be men and two would be women. Additionally, while it may be difficult to have *both* major parties adopt such rules, scholars argue that once one party adopts a proportionality rule, other competitor parties follow suit.<sup>113</sup> This creates a “race to the top” for political parties, with each trying to become more competitive by achieving parity.<sup>114</sup> Therefore, parity systems, if implemented properly, likely do not violate the First Amendment.

## **5 Potential Solutions for the United States**

Parity remains a controversial topic, but it is necessary for the United States to begin the dialogue. There are a variety of avenues that could be used in order to achieve parity. Some are more constitutionally arduous, while others may be safer, but present more limited gains.

### *5.1 Long-Term Target Goals*

A less aggressive strategy to increase female representation in politics is to set long-term goals. In order to achieve that goal, various programs would be implemented by outside groups in order to encourage women to become more involved in politics. For the strategy to be successful, organizers would need to raise money not only to publicize the issue and gain voter support, but also to fund female candidates who would likely face more entrenched male candidates.<sup>115</sup>

In terms of constitutional scrutiny, this strategy is safer than more robust strategies because it faces little legal opposition.<sup>116</sup> Independent groups can advocate as much as they want for greater numbers of women in politics, including recruiting candidates, funneling money, and raising awareness. However, the downside to the strategy is substantial. Quite simply, it takes time. According to the Institute for Women’s Policy Research, political parity will not be reached in Congress until 2121.<sup>117</sup> These projections are based on a decades-long trend,

113 KROOK, *supra* note 11, at 372.

114 *Id.*

115 After all, this was the greatest weakness of the French parity system. Female candidates were propped up, but they simply did not have the resources to compete against more experienced, and better funded, male competitors. The challenge of funding also applies to men, but there are several reasons why obtaining financial resources is especially problematic for women, including: psychological barriers; networks; early money; family responsibilities; and scarcity of resources. BALLINGTON, Julie and MATLAND, Richard E. *Political Parties and Special Measures: Enhancing Women’s Participation in Electoral Processes*. Available at: <http://www.un.org/womenwatch/osagi/meetings/2004/EGMelectoral/EP8-BallingtonMatland.PDF>.

116 PETERS, Mary Ann and LAGON, Mark P. *Gender Equality in Politics Still Far Away*. Available at: <http://www.baltimoresun.com/news/opinion/oped/bs-ed-women-political-participation-20150916-story.html>.

117 *Women’s Share of Seats in Congress, 1960–2013 with Projection for Political Parity in 2121*.

which includes a period when women were largely shunned from public life. For that reason, it is easy to argue that this is an overestimate and that modern trends would increase that rate substantially. However, 2121 is still a long time to wait and the projection provides little motivation for a softer approach.<sup>118</sup>

## *5.2 Constitutional Amendments*

A more aggressive tactic is to follow France's lead. Through this method, the United States would pass a constitutional amendment to overcome American neutrality in the same way France overcame universalism. Of course, this is a goliath task. However, it is, perhaps, the only way to ensure true change within a reasonable period of time.

There are comparisons that can be drawn from other constitutional reforms that have addressed women specifically. The first eventually became the Nineteenth Amendment, which provided women the right to vote.<sup>119</sup> Proposed in 1878, the amendment did not pass until over forty years later<sup>120</sup> and even then it was challenged as unconstitutional, violating the rights of states that had not ratified it.<sup>121</sup> Despite its inclusion in the Constitution, the amendment remains one of the least cited.<sup>122</sup>

A more modern example, but equally discouraging in terms of process, is the Equal Rights Amendment (ERA), proposed and rejected in the 1970s.<sup>123</sup> In language, the ERA was nearly identical to France's amendment because it provided broad power to the legislature to redress disparities between the genders.<sup>124</sup> While

---

Available at: <http://www.iwpr.org/publications/pubs/women2019s-share-of-seats-in-congress-1960-2013-with-projection-for-political-parity-in-2121>.

118 HENDERSON, Nia-Malika. *Women will reach political parity in 2121. Why will it take so long?* Available at: <https://www.washingtonpost.com/blogs/she-the-people/wp/2014/05/22/women-will-reach-political-parity-in-2121-why-will-it-take-so-long/>.

119 BOZONELIS, Helen Koutras. *A Look at the Nineteenth Amendment: Women Win the Right to Vote*. Enslow Publishers, Inc., 2009, p. 60.

120 SARAT, Austin and KEARNS, Thomas R. *History, Memory, and the Law*. Ann Arbor: University of Michigan Press, 2002, p. 152.

121 The Nineteenth Amendment Questioned. *Constitutional Review*, 1921, vol. 5, p. 247. In *Leser v. Garnett*, an opinion authored by Justice Brandeis, the court affirmed the constitutionality of the Nineteenth Amendment by comparing its adoption to that of the Fifteenth Amendment. 258 U.S. 130, 136, (1922) ("This amendment is in character and phraseology precisely similar to the Fifteenth. For each the same method of adoption was pursued. One cannot be valid and the other invalid. That the Fifteenth is valid, although rejected by six states, including Maryland, has been recognized and acted on for half a century.")

122 SIEGEL, Reva B. She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family. *The Harvard Law Review*, 2002, vol. 115, iss. 947, p. 950 (arguing that the Nineteenth Amendment has been "utterly excluded from the constitutional canon").

123 SOULE, Sarah A. and KING, Brayden G. The Stages of the Policy Process and the Equal Rights Amendment, 1972–1982. *The American Journal of Sociology*, 2006, vol. 111, iss. 1871, p. 1872.

124 The amendment only included three clauses, but the first two were the relevant parts: Sec-

the ERA was passed by Congress, and gained the approval of thirty-five states, it fell short of the thirty-eight needed for ratification.<sup>125</sup> Critics contend that an amendment similar to the ERA would be unnecessary because Title VII of the Civil Rights Act of 1964 has addressed many of the same issues with regards to discrimination.<sup>126</sup> But what these observers miss are the issues that fall outside the scope of Title VII, but which Congress would be authorized to address with the power granted by a new constitutional amendment, such as parity rights. Therefore, a constitutional amendment would not be a “belts and suspenders” strategy of achieving equality, but a necessary and complete approach to overcome inequality in political representation.

Obviously, there are immense hurdles to overcome in providing a constitutional amendment, similar to France’s amendment, which would allow political parity. Most interestingly is the lack of public awareness of or criticism towards the current state of affairs. Countries that have been able to increase female representation through similar means have been relatively young democracies<sup>127</sup> that have suffered decades, if not centuries, of female oppression. Additionally, it is questionable whether it is appropriate to adopt a strategy simply because it has been used by other nations with different cultural ideologies than our own.<sup>128</sup> While the United States has stressed neutralism, it also has encouraged an intimate individuality that is distinct from France’s commitment to anonymity through a philosophy of “sameness.”<sup>129</sup> Therefore, while a constitutional amend-

---

tion 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. *Proposed Amendments Not Ratified by the States*. Available at: <https://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-8.pdf>.

125 STEINER, Gilbert. *Constitutional Inequality: The Political Fortunes of the Equal Rights Amendment*. Washington, D.C: The Brookings Institution, 1985, p. 1. Interestingly, Justice Lewis Powell’s concurring opinion in *Frontiero v. Richardson* noted that he would not join Justice Brennan’s insistence on providing strict scrutiny to gender because of his assumption that the ERA would be ratified. 411 U.S. 677, 692 (Powell, J., concurring). Ironically, this may be the only reason gender is not granted more scrutiny as a suspect class, thus providing the flexibility that becomes necessary for greater government action, as acknowledged by Justice Stevens in *Adarand*. 515 U.S. 200 (1995) (Stevens, J., dissenting).

126 MACKINNON, Catharine A. Unthinking ERA Thinking. *The University of Chicago Law Review*, 1987, vol. 54, iss. 759, p. 770 (discussing the comparable results of the Equal Rights Amendment and Title VII).

127 For example, Iraq, Afghanistan, Rwanda, and Burundi, have all passed some sub-national or national law, or included a constitutional provision, for either quotas or parity. *Country Overview, Quota Project: Global Database of Quotas for Women*. Available at: <http://www.quotaproject.org/country.cfm>.

128 CASE, Mary Anne. Reflections on Constitutionalizing Women’s Equality. *The California Law Review*, 2002, vol. 90, iss. 765, p. 774 (2002).

129 See *id.* at n. 106 (“I would not be inclined to have the United States follow the example of France, whose recent commitment to ‘parity’ may, I fear, be too direct a descendant of the French Revolutionary tendency to exclude only women when dissolving the three estates

ment may be the best hope for the achievement of parity at a reasonable pace, it remains an overwhelming challenge that may be unlikely to succeed in the modern political environment.

## **6 Conclusion**

Has the United States tied its own hands when it comes to gender equality? On an international scale, the United States ranks among the worst in terms of female representation in legislative bodies. A commitment to equality as neutralism has prevented the nation from enacting provisions that would remedy this inequality. However, just over a decade ago, France faced similar dilemmas, including a hostile court system and a revered but limited constitution. Therefore, by using France as a model, the United States can achieve parity in government without resorting to the disfavored practice of quotas.

---

into an otherwise undifferentiated citizenry:”).



# THE NEED FOR UNIFIED UNDERSTANDING OF 'MILITARY OBJECTIVE' IN THE CONTEXT OF HUMAN SHIELDS AND PASSIVE PRECAUTIONS CONCEPTS<sup>1</sup>

Tuomas Heikkinen & Martin Faix

Faculty of Law, Palacký University Olomouc, Czech Republic

*tuomas.a.heikkinen@gmail.com; martin.faix@upol.cz*

HEIKKINEN, Tuomas & FAIX, Martin. The Need for Unified Understanding of 'Military Objective' in the Context of Human Shields and Passive Precautions Concepts. *International and Comparative Law Review*, 2016, vol. 16, no. 2, pp. 49–66. DOI: 10.1515/iclr-2016-0014.

---

**Summary:** Belligerent party being the target of military operations is under obligation to protect civilian population under its control by taking passive precautions and avoid using human shields. Prima facie such obligation is bound to the concept of "military objective", since non-military objectives are already "immune" from targeting. However, such approach does not take into account the fact that the states have not been able to agree upon unified interpretation of the military objective. It seems counterproductive to limit the obligations to protect civilians only to military objectives. Furthermore, the law does not necessarily support such approach. While the Additional Protocol I speaks of military objectives in the passive precautions, it also includes an overall clause to protect civilians, and the specific references to military objectives should be taken as examples instead of limiting the overall obligations to protect civilians. There is no real reason to tie the obligations to protect civilians to military objectives and allow targeted party into neglecting its duties to protect civilians.

**Keywords:** International humanitarian law, Military objective, Human shields, Passive precautions, Additional protocol I.

---

## Introduction

Human shields, while prohibited, continue to be an issue in contemporary armed conflicts. Most recently Islamic State of Iraq and Syria (ISIS) started shielding their troops' escape routes by civilian presence to avoid getting targeted.<sup>2</sup> Human shields cause significant harm to the adversary's ability to target legitimate military targets by principle of proportionality, which prohibits attacks if the collateral civilian casualties and damages would be disproportionate when

---

1 This article is the result of the project conducted at the Palacký University Faculty of Law IGA\_PF\_2016\_007.

2 SIDAHMED, Mazin. *Isis appears to use civilians as human shields to flee Syrian town*. The Guardian 19 August 2016. [online]. Available at: <<https://www.theguardian.com/world/2016/aug/19/isis-civilians-syria-manbij-human-shield>>

compared to the military advantage presented.<sup>3</sup> However, civilian casualties can also influence the targeting decisions by other means than legal prohibitions. Increasing civilian suffering, even when caused by the conduct of the party being the object of the attacks, can hurt the war effort of the party employing force against human shielded targets by causing political backlashes and lower the backing from military partners, international community, media or civil societies, and offer new ground for recruitment to their adversaries.<sup>4</sup>

International law, mainly in Additional Protocol 1 and customary international law prohibits the use of civilian population to “render certain points or areas immune from military operations.”<sup>5</sup> Also the Rome Statute of the International Criminal Court (Rome Statute) criminalises the conduct. Closely connected with the prohibition of human shields are the passive precautions, which obligate the belligerent party facing a military strike to take precautions to protect civilians and civilian objects in its control.<sup>6</sup> However, despite the clear prohibition the law is not without questions. The passive precautions<sup>7</sup> and the prohibition of human shields<sup>8</sup> are often related to military targets. That is further confirmed by the Rome Statute, where the delegates during the drafting face of the statute felt that the wording of “render certain points or areas immune” would not make sense unless it the shielding was done to protect military targets from targeting.<sup>9</sup> Similarly the elements of crimes document on use of human shields confirms that use of human shields is prohibited only when they are shielding military targets.<sup>10</sup> Certainly, non-military objects would already be “immune” from attacks in a sense that their targeting is already prohibited by international law. Yet the prohibition of human shields assumes that there is a standardized interpretation of the term “military object”, which is not the case. This paper shows that international law lacks a standardized interpretation of what or who can be legitimately targeted. This is especially present in the so called war on terror, where states are more inclined to target terrorists’ economy by destroying targets of economic significance to hinder terrorists’ abilities to conduct hostilities, despite opposition from academics.<sup>11</sup> The question therefore arises whether the prohibition of

3 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 8 June 1977, Art 57(2)(b)

4 SCHMITT, Michael. Human Shields in International Humanitarian Law. *Columbia Journal of Transnational Law*, 2009, vol. 47, pp. 298

5 Additional Protocol I (n 3) Art 51(7)

6 Ibid. Art 58

7 Ibid. Art 58(1) & (2)

8 TRIFFTERER, Otto, AMBOS, Kai. *The Rome Statute of the International Criminal Court: A Commentary*. Beck/Hart, 2016, pp. 504

9 DÖRMANN, Knut. *Elements of War Crimes under the Rome Statute of the International Criminal Court*. International Committee of the Red Cross, 2004, pp. 345

10 Ibid. pp. 344

11 GOODMAN, Ryan. Targeting ‘War-Sustaining’ Objects in Non-International Armed Conflict *NYU School of Law Public Law Research Paper*, 2016 No. 16–20, pp. 3–4

human shields applies to cases where the targeted party is using human shields to protect targets that it does not deem military targets, when there is possibility that the illegitimate targets could be targeted nevertheless.

The second chapter explains the specifics of the prohibition of human shields while the third chapter opens up the passive precautions under the law of armed conflict. Fourth chapter deals with principle of distinction and brings up the issues regarding the definition of military objectives (A) and combatants (B). Fifth chapter looks into the issues of what the differentiated definitions of legitimate military targets bring to the obligations to protect civilians of the party being the object of the attack. This paper then concludes that the obligations to take passive precautions and prohibition of use of human shields must not be limited to strict definition of legitimate military targets but should include all targets that are in fact liable for attacks despite the legality of such attacks. The paper argues that it would be counterproductive to get tied too tightly to the concept of military targets regarding the passive precautions and human shields, especially when the international community fails to agree upon the exact limits of rules of targeting.

## **2 Prohibition of human shields**

Human shields refer to civilians that are being used to render targets or areas immune from military operations. The need to legislate such behaviour came from the public population's and the states' shock of the use of human shields during the Second World War.<sup>12</sup> While fortunately rare events, it was still felt that there was a need for prohibiting such actions.<sup>13</sup> Therefore the prohibition of human shields was included to third and fourth Geneva Conventions regarding prisoners of war<sup>14</sup> and non-national civilians under party's control.<sup>15</sup> Eventually Additional Protocol 1 widened the scope to all protected persons and civilians, regardless of their nationality, stating that "the presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations."<sup>16</sup> Furthermore, the Rome Statute criminalized the use of human shields.<sup>17</sup>

The prohibition of human shields goes also further than merely forcefully placing civilians at the military targets. Shields do not have to be aware of being

---

12 PICKET, Jean. *IV Geneva Convention Relative to the Protection of Civilian Persons in the Time of War*. International Committee of the Red Cross, 1958, pp. 208

13 *Ibid.* pp. 208

14 Geneva Convention III Relative to the Treatment of Prisoners of War (Geneva Convention III), 12 August 1949, Art 23(1)

15 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), 12 August 1949, Art 28

16 Additional Protocol 1 (n 3) Art 51(7)

17 Rome Statute of the International Criminal Court, 17 July 1998, entered into force 1 July 2002, Art 8(b)(xxiii)

used as shields and as the term “movement” in the AP1 definition tells, it also prohibits military personal from mingle with civilian population for protection.<sup>18</sup> The question of whether civilians are being used as human shields comes down to the intent of the party using them.<sup>19</sup> When the party intends to render objects immune from military operations by human shields, such act constitutes a breach of Article 51(7) of AP1 and a war crime under the Rome Statute. While the specific intent is difficult to verify from afar and without mind-reading abilities,<sup>20</sup> that issue is not solely related to human shields. Similar problem exists with some other international crimes requiring specific intent, which have been successfully applied also in practice.<sup>21</sup> Similarly, the intent to shield military targets can be verified from circumstances, such as continually doing the same action of abusing the presence of human shields when facing enemy combatants.<sup>22</sup>

However, it can be questioned whether the prohibition of human shields covers cases where human shields are acting voluntarily, without the need for being coerced for shielding the targets. Firstly, it comes down to the question of whether voluntary human shields are “directly participating in hostilities”,<sup>23</sup> for which the answer must be negative.<sup>24</sup> While voluntary human shields can indeed be more effective in shielding military targets from attacks,<sup>25</sup> the shields offer nothing as military advantage per se. Their ability to shield is done by merely causing a legal or moral obstacle for the attacker, which hardly qualifies as hostile act and direct participation causing actual harm to the enemy.<sup>26</sup> If the legal obstacle would be then taken away by ignoring their civilian status, they would no longer bring any advantage to the protection of military targets, legal or otherwise.

Some authors argue that since AP1 terminology of “using the presence or movement of civilians” should cover also passive indifference towards voluntary human shields since long-lasting ignorance to voluntary human shields would

---

18 QUEGUINER, Jean-Francois. Precautions Under the Law Governing the Conduct of Hostilities. *International Review of the Red Cross*, 2006, vol. 88(864), pp. 812

19 Ibid. pp. 812

20 SCHMITT, Michael. (n 4) pp. 303

21 Such examples can be found from problems of proving that a perpetrator intended to target civilians instead of mistaking the target’s identity, such as in ICTY Prosecutor v Galic (trial judgment) IT-98-29-T 5 December 2003 para. 595–602. Similarly, specific intent to destroy a group of people as a genocide has been successfully applied in practice in ICJ Case Concerning Application of the Convention on the Prevention and Punishment of Genocide, 26 February 2007 para. 278–297.

22 SCHMITT, Michael. (n 4) pp. 303

23 Ibid. pp. 317

24 TRIFFTERER, Otto, AMBOS, Kai. (n 8) pp. 505–506

25 MICHAEL N SCHMITT. (n 4) pp. 317

26 BOUCHIE DE BELLE, Stephanie. Chained to Cannons or Wearing Targets on Their T-Shirts: Human Shields in International Humanitarian Law. *International Review of the Red Cross*, 2008, vol. 90(872), pp. 884

speak of intent to use them for shielding.<sup>27</sup> However, it is questionable whether passive indifference would be enough to qualify as an intent to shield targets. Seemingly merely opportunistic ignorance is not enough and would be covered by the passive precautions of Article 58 of Additional Protocol 1. However, often even the voluntary human shields receive certain control and support from the authorities. During the Second Gulf War, Iraq directed foreign volunteer human shields to targets of their choice against the volunteers' original plans,<sup>28</sup> and during the First Gulf War gave the volunteer human shields extra food rations and other incentives for shielding.<sup>29</sup> Certainly these cases show intent to the authorities to use voluntary human shields, constitute a breach of Article 51(7) of Additional Protocol 1 and a crime under the Rome Statute. However, cases where voluntary human shields act in more spontaneous way and do not receive support or directions from the state, such as arguably the voluntary human shields that shielded Belgrade bridges during NATO's Yugoslavian air campaign, would not constitute a breach of prohibition of human shields.<sup>30</sup> This approach was also agreed in the Rome Statute's commentary, noting that human shield's motivation is irrelevant but the act of the authorities using the shields is sufficient by itself.<sup>31</sup>

While it is not exactly stated in the legislation that the prohibition of human shields is limited to only military targets, one could argue that it is strongly implied by the term "render certain points immune from military action." Since non-military targets are already immune from military action, it should then follow that only legitimate military targets can be shielded by human shields. Similar approach was chosen in the Rome Statute, where the drafters confirmed the logic in the elements of crime.<sup>32</sup> However, the immunity does not necessarily refer to legal immunity. The only way how the military target could be made (legally) immune is by abusing the principle of proportionality, which prohibits attacks if the collateral civilian casualties and damages would be disproportionate when compared to the military advantage presented.<sup>33</sup> However, the term "immunity" arises from fourth and third Geneva Conventions, while the principle of proportionality was not codified until Additional Protocol I. Certainly the "immune" does not refer only to legal immunity but can be taken as to refer to targets being immune in military sense or forcing attacker to abandon their operations over the moral reasons for not wishing to kill civilians or prisoners of war.<sup>34</sup>

---

27 QUEGUINER, Jean-Francois. (n 18) pp. 815

28 BOUCHIE DE BELLE, Stephanie. (n 26) pp. 884

29 Artz, Margaret. A Chink in the Armor: How a Uniform Approach to Proportionality Analysis Can End the Use of Human Shields. *Vand J Transnl L*, 2012, vol. 45, pp. 1460.

30 *World: Europe: Human Chains Guard NATO Targets*, BBC, April 9 1999, [online] <<http://news.bbc.co.uk/2/hi/europe/314953.stm>>

31 TRIFFTERER, Otto, AMBOS, Kai. (n 8) pp. 505

32 DÖRMANN, Knut. (n 9) pp. 345

33 Additional Protocol 1 (n 3) Art 57(2)(b)

34 SCHMITT, Michael. (n 4) pp. 314

API and the Geneva Conventions' prohibition of human shields only applies to international armed conflicts and Rome Statute criminalization of human shields is applicable to only international armed conflict. However, there are arguments the prohibition of human shields has been crystalized as a customary law also in internal armed conflicts.<sup>35</sup> ICRC study on customary international law quotes numerous military manuals and statements of states and UN condemning use of human shields in internal armed conflicts as a proof of that.<sup>36</sup> Further the prohibition of human shields has been linked to general requirement to protect civilians in Additional Protocol II.<sup>37</sup> ICTY also judged use of human shields to be under inhumane and cruel treatment,<sup>38</sup> which is prohibited by the ICTY statute in both international and internal armed conflict<sup>39</sup> and Common Article 3 of Geneva Conventions applicable to internal armed conflicts.<sup>40</sup> However, since ICTY cases were solely about forced human shields,<sup>41</sup> it is unclear whether the use of voluntary human shields would also be prohibited in internal armed conflicts. Similarly, the inhumane and cruel treatment requires for the victims to be aware of the possible attacks against which they are shielding,<sup>42</sup> which is not the case with prohibition of human shields.

### **3 Passive Precautions**

Closely related to the prohibition of human shields are passive precautions, obligating the party being on the receiving end of an attack to take certain precautions to protect civilian population and objects under its control from the dangers of attacks. The precautions are listed in Additional Protocol Article 58, obligating a party to remove civilians from the vicinity of military objectives,<sup>43</sup> avoid locating military objectives within or near densely populated areas<sup>44</sup> and take all other necessary precautions to protect civilians.<sup>45</sup>

While they are closely related to the prohibition of human shields, there are significant differences between them. The prohibition of human shields is an absolute prohibition that constitutes a war crime.<sup>46</sup> Passive precautions on the

---

35 Ibid. pp. 306–307

36 HENCKAERTS, Jean-Marie, DOSWALD-BECK, Louise. *Customary International Humanitarian Law Volume 1: Rules* International Committee of the Red Cross, 2005, pp. 338

37 Ibid. pp. 338

38 Prosecutor v Blaskic (Trial Judgment) IT-95-14-T 3 March 2000 para. 716

39 Statute of the International Criminal Tribunal for the Former Yugoslavia, as amended on 17 May 2002 Art 5(i)

40 Geneva Convention III (n 14) Art 3

41 SCHMITT, Michael. (n 4) pp. 310

42 Prosecutor v Blaskic. (n 38) para 715

43 Additional Protocol I (n 3) Art 58(a)

44 Ibid. Art 58(b)

45 Ibid. Art 58(c)

46 SCHMITT, Michael. (n 4) pp. 305

other hand are positive obligations requiring a good faith attempt from the party subject to an attack to protect its civilians with the best of its ability, not merely to avoid abusing the civilian population to shield military targets.<sup>47</sup> The passive precautions have been called “distinction enablers”, as they help the adversary party to distinguish between military and civilian targets and carry out attacks only against the military targets.<sup>48</sup>

The passive precautions’ open ended obligation to take “all other necessary precautions” indicates that the list is not exhaustive but the party must pay care to the civilian population and objects under its control.<sup>49</sup> ICRC commentary explains the “all other necessary precautions” as making shelters which offer adequate protection available for civilian population and having well organized and equipped civil defence forces at place.<sup>50</sup> However, ICRC study on customary law includes also precautions such as distribution of information and withdrawing civilian population to safe places.<sup>51</sup> Therefore while the specific examples of Article 58(a) and (b) speaks of military objectives, the open-ended Article 58(c) could include general obligation to evacuate civilians also from non-military targets if they are in danger. This can happen especially if the adversary is inclined to target non-military targets or the parties fail to agree what constitutes a military object.

Thirdly, while the prohibition of human shields is an absolute prohibition, obligations to take passive precautions must be taken only to “maximum extent feasible”.<sup>52</sup> The term “feasible” has been criticized for making the precautions seem more of recommendations than actual obligations<sup>53</sup> and be counterproductive if the humanitarian measures can be ignored when there are overwriting military reasons to do so.<sup>54</sup> However, merely the fact that the obligations to take passive precautions are not absolute does not make them something less than a hard law.<sup>55</sup> The term “feasible” was meant to refer to the idea that states are not obligated to do the impossible to protect civilians.<sup>56</sup> Similarly states cannot be obligated to follow precautions as absolute prohibitions when said prohibi-

---

47 QUEGUINER, Jean-Francois. (n 18) pp. 820

48 CORN, Geoffrey, SCHOETTLER, James, Jr. Targeting and Civilian Risk Mitigation: The Essential Role of Precautionary Measures. *Military Law Review*, 2015, vol. 223, pp. 827

49 Ibid. pp. 827

50 PILLOUD, Claude et al. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* International Committee of Red Cross, 1987, pp. 694–695

51 HENCKAERTS, Jean-Marie, DOSWALD-BECK, Louise. (n 36) pp. 70

52 Additional Protocol I (n 3) Art 58

53 DINSTEIN, Yoram. *The Conduct of Hostilities under the Law of International Armed Conflict*. Cambridge University Press, 2010, pp. 129

54 SCHMITT, Michael. (n 4) pp. 304

55 QUEGUINER, Jean-Francois. (n 18) pp. 820

56 PILLOUD, Claude et al. (n 50) pp. 692

tions would give clear advantage to the attacker.<sup>57</sup> That follows the idea that IHL should not prohibit things that are likely to happen and cannot alter the power relations, as states would not follow too strict rules hindering their efforts to carry military operations.<sup>58</sup> However, that approach cannot be taken to limitless heights and even the “feasible” precautions have effect on states conduct and might influence their ability to carry out operations.

#### **4 Principle of Distinction**

Considering that both passive precautions and prohibition of human shields lean towards the “military objective” term, it appears useful to define the terms. However there are wide gaps between states’ understanding of what constitutes a legitimate military target and also the practice in this regard is far from uniform. This chapter seeks to show some of the differences in the definitions to show that there can be instances where a party would want to use human shields to shield targets that it does not deem military targets, as long as the adversary party still plans to target them.

The principle of distinction is fundamental principle of IHL, differentiating between legitimate military targets that can be attacked and civilian objects and population that are protected from direct attacks.<sup>59</sup> Those groups of people are defined by mutually exclusive standards, i.e. every object or person is either legitimate target or not.<sup>60</sup> Further, some of the protected groups are defined by negative. Civilians, who are protected from direct attacks, are all persons who do not fulfil the criteria of combatants in third Geneva Convention Article 4(a)1,2,3 and 6.<sup>61</sup> However, civilians can lose their protected status when they are directly participating in the hostilities.<sup>62</sup> Similarly, civilian objects are all objects that are not military objectives.<sup>63</sup> The following sub-chapters lays out the definitions of military objectives and combatants and aims to show that the states have not accepted the definitions in practice, but seemingly define the concepts differently from each other.

Since the human shielding can happen in two different ways, it is important to look into both definitions and interpretations. Firstly, states can try to immunize military targets by placing civilians in the vicinity of the military objectives or by placing movable military objectives into the vicinity of civilian population. However, it is also possible for combatants to mingle within civilian popula-

---

57 Ibid. pp. 693

58 NEWTON, Michael. Reconsidering Reprisals. *Duke J Comp Intl L*, 2010, vol. 20, pp. 369

59 MELZER, Nils. *Targeted Killing in International Law*. Oxford University Press, 2008, pp. 300

60 Ibid. pp. 300

61 Additional Protocol I (n 3) Art 50(1)

62 Ibid. Art 51(3)

63 Ibid. Art 52(1)

tion, which has lately been the prevalent method of human shielding in conflict against the ISIS, where combatants have used civilian population to shield their flight from areas they have lost.<sup>64</sup>

#### *4.1 Military objective*

While much of the early IHL stated that states should use force only against military objectives,<sup>65</sup> the law lacked agreed definition of the term.<sup>66</sup> It was finally defined in an agreed manner in Additional Protocol I Article 52,<sup>67</sup> which defines military objectives as “objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>68</sup> However, despite its status as a one of the main principles of IHL,<sup>69</sup> the concept is criticized for being too abstract and unspecific for actual usage.<sup>70</sup>

The obscurity of the definition of military objective is clear from the fact that states keep interpreting the term differently in different conflicts. As an example of this, one can look into the targets of economic value. As a starting point, much of academia and historically most states (although not including US among others) have denied the possibility of using force against economic targets to cripple adversaries war fighting capabilities.<sup>71</sup> However, recent state practice seems to be changing. Firstly, NATO started targeting Afghanistan drug fields as military objectives, reasoning it by the economic support that the illegal drug trade gives to the Taliban and Al-Qaeda.<sup>72</sup> However, the targeting decision did not receive unilateral support and forced NATO to act in caveats as certain members refused the orders over the threat of breaching their obligations under IHL.<sup>73</sup> Yet, such issues are no longer present during the air campaigns against ISIS controlled oil refineries. Most states taking part in the air campaign against ISIS has been targeting the oil refineries and there is a considerable lack of objections from elsewhere.<sup>74</sup>

---

64 SIDAHMED, Mazin. (n 2)

65 ROBERTSON, Horace, Jr. *The Principle of the Military Objective in the Law of Armed Conflict. United States Air Force Academy Journal of Legal Studies*, 1997, vol. 8, pp. 36–39

66 PILLOUD, Claude et al. (n 50), pp. 631

67 SCHMITT, Michael. (n 4) pp. 312

68 Additional Protocol I (n 3) Art 52(2)

69 ROBERTSON, Horace, Jr. (n 65) pp. 35

70 DINSTEIN, Yoram. (n 52) pp. 83, also: PILLOUD, Claude et al. (n 50) pp. 635

71 GOODMAN, Ryan. (n 11) pp. 2; DINSTEIN, Yoram. (n 53) pp. 87; BOOTHBY, William. *The Law of Targeting*. Oxford University Press, 2012, pp. 106

72 GOODMAN, Ryan. (n 11) pp. 12–13

73 *Ibid.* pp. 12

74 *Ibid.* pp. 11

However, originally oil refineries were held as military objectives because they contributed oil to the needs of the military directly, and therefore their destruction offered definite military advantage.<sup>75</sup> But objects are not military objectives merely “by tradition” because they used to be contributing to the military action, but every object must be judged case-by-case basis.<sup>76</sup> Most of the talk about ISIS controlled oil refineries has been around their monetary contributions to the ISIS campaign.<sup>77</sup> Yet one could claim that ISIS military still uses some of the oil for its operations and that the economic reasons are not in any way the basis of the justifications for the air strikes.<sup>78</sup> Definitely the fact that there are secondary advantages or goals arising from destroying the oil refineries it does not make the original legal justification for the attacks invalid as long as the strikes can be justified by it. Yet it is hard to give similar justifications for the operations to destroy so called “ISIS banks”, where the targeted object is literally money.<sup>79</sup> It is difficult to find clearer economic target than that. The air operations against ISIS show a clear pattern of economic warfare.

However, the campaign against ISIS economy has obtained some success. ISIS has been forced the group to cut back salaries and bonuses and find new methods of generating money, which cannot compete with the old oil revenue.<sup>80</sup> This has prompt arguments claiming that the economic targets can be targeted when the military advantage, as in the ISIS’ case the upkeep of the military, is more definite because of its status as an indispensable and principal source of income.<sup>81</sup> That would exclude economic targets that would give hypothetical advantage, but allow the destruction of terrorists’ main source of income. However, it is still unclear how definite the military advantage is from the lack of funds that ISIS suffering from. The militants are still fighting without clearly perceived change. Therefore, it is still questionable to target even significant and indispensable sources of economy under the IHL. Another justification given to the ISIS operations is that it would be more justified to apply the wider definition of military objects as they are using the oil for illegal oil trade and smuggling to

75 DINSTEN, Yoram. (n 53) pp. 96

76 HENDERSON, Ian. *Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack Under Additional Protocol I*. Martinus Nijhoff, 2009, pp. 47–48

77 Pentagon Press Secretary, Navy Rear Adm. KIRBY, John. *Pentagon Press Operations*, 25 September 2015 [online] <<http://www.defense.gov/News/Transcripts/Transcript-View/Article/606932>>

78 WATKIN, Kenneth. Targeting “Islamic State” Oil Facilities. *International Law Studies*. 2014, vol. 90, pp. 512

79 *Millions’ in Isis Cash Destroyed in Airstrike on Storage Site in Mosul*. The Guardian, 12 January 2016, [online]. Available at: <<https://www.theguardian.com/world/2016/jan/12/us-led-coalition-air-strike-destroys-islamic-state-cash-storage-site-in-mosul>>

80 DEARDEN, Lizzie. *Isis Cuts Salaries, Brings in Fines and Releases Prisoners to Make Up Cash Shortage Caused by Air Strikes – Report*. Independent, 16 February 2016, [online]. Available at: <<http://www.independent.co.uk/news/world/middle-east/isis-budget-cuts-iraq-syria-pay-bonuses-air-strikes-oil-militants-food-snickers-a6877226.html>>

81 GOODMAN, Ryan. (n 11) pp. 18–19

finance illegal terrorist activities.<sup>82</sup> However, that would clearly violate the principle of equal application of IHL. The law should be applied equally to all belligerents regardless of their motivations or perceived justifications.<sup>83</sup> Therefore the easy answer of changing the law for terrorist operations should be resisted.

The main player using the wider definition of military objectives is the United States.<sup>84</sup> While AP1 defines the military objectives as objects whose destruction offers definite military advantage, United States uses terminology of objectives that brings “effective contribution to war-fighting or war-sustaining capabilities.”<sup>85</sup> The change in terminology allows the wider targeting practice of United States against economic targets.<sup>86</sup> Since the ISIS bank strikes are conducted by US, one could justify that by arguing that US are following more lenient definition of the military objective arising from customary international law.<sup>87</sup> Certainly there have been cases in Vietnam War and US military operation in Libya in April 1968 where the advantages of the bombings were not necessarily military but psychological and aimed to bring North Vietnam back to the negotiation table and bring a strong message to Libyan telling that US will not tolerate Libya’s foreign policy of state-sponsored terrorism.<sup>88</sup> Some claim that those actions show that customary law indeed differed from AP1 definition of military objective.<sup>89</sup> However, US still targeted arguably military objectives which by their character make an effective contribution to military action and whose destruction offered definite military advantage to US.<sup>90</sup> Even if the “principle” aim of the air strikes would be something else than military, as long as the operations can be justified by the targets’ military character, the other advantages do not make the targets illegitimate.

However, ICRC study on customary law claims that everyone, including United States, agree that the Additional Protocol 1 definition mirrors the customary international law.<sup>91</sup> Similarly, since United States has signed and ratified the Conventions on Certain Conventional Weapons and its additional protocols, which define the term “military objective” mirroring the Additional Protocol 1<sup>92</sup>

---

82 WATKIN, Kenneth. (n 78) pp. 505

83 ROBERTS, Adam. The Equal Application of the Laws of War: A Principle Under Pressure. *International Review of the Red Cross*, 2008, vol. 90(872), pp. 932

84 HENDERSON, Ian. (n 76) pp. 142–143

85 United States Department of Defense, *Law of War Manual*. June 2015, pp. 210

86 ROBERTSON, Horace, Jr. (n 65) pp. 50–51

87 HENDERSON, Ian. (n 76) pp. 142–44

88 PARKS, W, Hays. Air War and Law of War. *Air Force Law Review*, 1990, vol. 32, pp. 142–143

89 Ibid. pp. 143

90 Ibid. pp. 142–143

91 HENCKAERTS, Jean-Marie, DOSWALD-BECK, Louise. (n 36) pp. 31

92 Protocol II to the Convention Prohibiting Certain Conventional Weapons on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 10 October 1980 Art 2(4)

it seems far-fetched to claim that United States would follow different customary law definition.

#### *4.2 Combatants*

Combatants can often abuse the civilian presence for their own advantage by mingling within the civilian population and even forcing civilians to travel in the same group. However, issues similar to the definition of military objective exist within the combatant definitions, and one must ask whether it is similarly illegal to shield personal who are in danger of being targeted even when they are already protected from direct targeting. The term combatants have been defined in Third Geneva Convention Article 4(1), (2), (3) and (6) as members of armed forces, members of militias and irregular resistance groups, members of armed forces who professes allegiance to a government or authority not recognized by the adversary or inhabitants of a non-occupied territory who take arms spontaneously against the invading forces.<sup>93</sup> However, especially the irregular resistance groups and militias causes confusion on the rules of targeting. Firstly, while terrorist groups such as Al-Qaeda or ISIS definitely have militias or organized armed groups, the whole group is not necessarily performing combatant functions. Mere membership to a terrorist group is not enough to make anyone a legitimate military target.<sup>94</sup> They need to perform combatant functions in the group to be considered legitimate targets.

Similarly, to military objectives, recently states have started interpreted the concept of combatant functions more broadly. NATO has been targeting Afghan narcotic personal,<sup>95</sup> and the Western Alliance has been conducting operations against ISIS recruiters and media experts<sup>96</sup> and financiers and oil-smuggling administrators.<sup>97</sup> While it is unclear whether the targeted persons conducted also actual combatant functions on top of their other affairs, the mere support to war-effort did not make them combatants or civilians directly participating in the hostilities.<sup>98</sup> They are merely supporting the war-effort of the terrorist group and therefore indirectly participating in the hostilities.<sup>99</sup> However, if they do also

---

93 Geneva Convention III (n 14) Art 4

94 AKANDE, Dapo. *US/NATO Targeting of Afghan Drug Traffickers: An Illegal and Dangerous Precedent?* *Inter Alia*, 2010, pp. 75

95 *Ibid.* pp. 73

96 DE FREYTAS-TAMURA, Kimiko. *Junaid Hussain, ISIS Recruiter, Reported Killed in Airstrike*. *NY Times*, 27 August 2015, [online]. Available at: <<http://www.nytimes.com/2015/08/28/world/middleeast/junaid-hussain-islamic-state-recruiter-killed.html>>

97 VISSER, Steve. *Coalition Forces Kill Top ISIS Leader in Oil Fight*. *CNN*, 11 August 2016, [online]. Available at: <<http://edition.cnn.com/2016/08/11/middleeast/isis-oil-leader-killed/>>

98 MELZER, Nils. *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*. International Committee of the Red Cross, 2009, pp. 53

99 MELZER, Nils. (n 59) pp. 321

have combatant roles, the fact that there are alternative motivations for their targeting would not make the original justifications illegitimate. Yet at least in some cases it seems that the combatant functions were lacking and they were targeted solely on their responsibilities over task supporting the overall war effort.

In the end it seems that states and academic writers have not been able to agree on the interpretation of, the very least in practice, on what or who can be legitimately targeted under the principle of distinction. Even within close allies such as NATO the member states do not interpret the law in a unified manner. Especially during the “war of terror” and terrorist operations the states have been inclined to wider the definitions to allow more flexibility in their targeting practices. However, such ever-changing definitions cause obscurity to all parties involved in the conflict and as the next chapter shows, could possibly have effect on the obligations of the party which is being the target of the military operations.

### **5 Effect of undefined military objective to prohibition of human shields**

Following with the differentiated definitions and applications of military targets, when are adversaries prohibited from shielding targets by using human shields or obligated to take passive precautions to protect civilian population? Are their obligations limited only to their understanding of what constitutes a military target or should it go further, even beyond the generally accepted limits of Additional Protocol I? Both prohibition of human shields and passive precautions aim to protect civilian population under the control of the party being the object of the attack, although choosing different methods of protection. Certainly since the limitations of military targets causes difficulties to the passive precautions, it would be logical to avoid same issues with human shields in an attempt to widen the prohibition of human shields. Even if the prohibition of human shields would be limited to military targets, targeted party would still breach its obligations under IHL by failing to take passive precautions. This chapter argues that it would be most suitable for passive precautions and prohibition of human shields not to make differentiation between military targets and civilian objects but to obligate states to take care of the civilian population that might be in danger from military operations regardless of their interpretation of legitimate military target.

While the passive precautions speak of removing civilians from the vicinity of military objectives<sup>100</sup> and avoiding locating military objectives within or near to densely populated areas,<sup>101</sup> the list is not exhaustive<sup>102</sup> but includes also the more general obligation to “take all necessary precautions to protect civil-

---

100 Additional Protocol I (n 3) Art 58(a)

101 Ibid. Art 58(b)

102 CORN, Geoffrey, SCHOETTLER, James, Jr. (n 48) pp. 827

ian population...”<sup>103</sup> The last part, with the aim of protecting civilians and sharing the burdens of civilian population speaks against attempts to escape one’s obligations by differentiated interpretations of military object. Similarly, the Geneva Conventions and Additional Protocol 1 all include obligation to communicate the rules of applications to others.<sup>104</sup> These parts are in place especially for adversaries to communicate their understanding of their obligations to their opponents in armed conflict.<sup>105</sup> The very purpose of this is to avoid misunderstandings, reduce errors and evade contradictions.<sup>106</sup> Therefore if such exchange has taken place, the defender could not hide behind its own understanding of the terminology to cover its failure to take passive precautions. However, it is unclear if such actions have been taken in every conflict. In those cases, the party being the target of the attack can still receive notions of which targets are going to be attacked when the party executing the attack fulfils its obligations to give an advance warning to protect civilians.<sup>107</sup> In the end, if the party being the target of the attack has received no notion of possible attacks against targets it does not deem military targets the obligations to take passive precautions would not be breached. The passive precautions must only be taken to the extent of what is “feasible”.<sup>108</sup> In the cases where the adversary failed to give warnings or notions of possible attacks against targets, it is safe to assume that evacuating civilians from such targets would not be deemed feasible.

One example of such case can be found from Yugoslavian war, when NATO bombed the Radio Television of Serbia headquarters.<sup>109</sup> The strike was justified by the TV station’s screening or propaganda and therefore effect on civilian moral and it being part of command and communications network.<sup>110</sup> However, the strike was seriously challenged by non-governmental organizations such

---

103 Additional Protocol I (n 2) Art 58(c)

104 Ibid. Art 84, Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Art48; also Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Art 49; Geneva Convention III (n 13) Art 128, Geneva Convention IV (n 15) Art 145

105 PILLOUD, Claude et al. (n 50) pp. 970

106 Ibid. pp. 970

107 Additional Protocol I (n 3) Art 57(2)(c)

108 Ibid. Art 58

109 ICTY. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia part iii. [Online]. Available at: <<http://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal>>

110 NORTON-TAYLOR, Richard. *Serb TV Station was Legitimate Target, Says Blair*. The Guardian, 24 April 1999 [online] <<https://www.theguardian.com/world/1999/apr/24/balkans3>>

as Huma Rights Watch<sup>111</sup> and Amnesty International.<sup>112</sup> Unsurprisingly, Serbia also claimed that the attack constituted a war crime.<sup>113</sup> However, also France and United Kingdom, NATO states and participants in the conflict, disapproved the attacks over the questions of legality.<sup>114</sup>

The biggest issue at the strike was that while NATO gave a prior warning that the TV station will be targeted, it was given weeks before the actual strikes and the Yugoslavian authorities no longer believed that the attacks were incoming.<sup>115</sup> Arguably the warning was not effective, although NATO justifies that by claiming that a warning could endanger the pilots and would not be feasible to give. Now, whether Yugoslavia breached their obligations to take passive precautions has not been ruled as ICTY focused on individual criminal responsibility, which passive precautions do not bring.

Generally, the obligations to protect civilians, which is the intent of passive precautions and included in Article 58(c) general clause, do not depend on reciprocity.<sup>116</sup> Interestingly Yugoslavian courts sentenced the head of Radio Television Serbia for 10 years over failure to protect the employees at the TV station, with the court stating that the duty to protect was not cancelled by NATO's illegal conduct.<sup>117</sup> While the conviction did not arise from breach of Geneva Conventions or a war crime trials, it can be taken as a relevant factor when thinking about the passive precautions. Similarly, one could use the human rights law's right to life and its obligations to evacuate civilians from danger arising from natural disaster as a complementary to similar principle under IHL in cases where the targets of illegal attacks are known or suspected and the evacuations could be feasible.<sup>118</sup>

The situation for human shields is slightly different. While it is not exactly stated in the legislation that the prohibition of human shields is limited to

---

111 *The Crisis in Kosovo*. Human Rights Watch, [online]. Available at: <<https://web.archive.org/web/20141022190610/http://www.hrw.org/reports/2000/nato/Natbm200-01.htm>>

112 *No Justice for the Victims of NATO Bombings*. Amnesty International, 23 April 2009, [online]. Available at: <<https://www.amnesty.org/en/latest/news/2009/04/no-justicia-victimas-bombardeos-otan-20090423/>>

113 RISTIC, Marija, ANDRIC, Gordona. *Searching for Buried Truth at RTS*. Balkan Insight, 4 May 2012, [online]. Available at: <<http://www.balkaninsight.com/en/article/searching-for-buried-truth-at-rts/1455/2>>

114 *NATO/Federal Republic of Yugoslavia: "Collateral Damages" or Unlawful Killings*. AMNESTY INTERNATIONAL. pp. 54

115 HUMAN RIGHTS WATCH. (n 111)

116 HENCKAERTS, Jean-Marie, DOSWALD-BECK, Louise. (n 36) pp. 498–499

117 ZIMONJIC, Vesna, Peric. *Head of Serb TV Jailed over Deaths in NATO Air Raids*. The Independent, 22 June 2002, [online]. Available at: <<https://www.independent.co.uk/news/world/europe/head-of-serb-tv-jailed-over-deaths-in-nato-air-raids-181123.html>>

118 POPOVSKI, Vesselin. *State Negligence Before and After Natural Disaster as Human Rights Violation*. In HOBSON, Christopher, et al. (eds). *Human Security and Natural Disaster*. Routledge, 2014, pp. 98–101

only military targets, it is strongly implied by the term “render certain points immune from military action.” Since non-military targets are already immune from military action, it should then follow that only legitimate military targets can be shielded by human shields. Similar approach was chosen in ICC Rome Statute, where the drafters confirmed the logic in the elements of crime.<sup>119</sup> However, using human shields in situations where the targets are not military targets would fall within the prohibition of hostages if they are forced to shield the target.<sup>120</sup> The definition of hostages do not include requirement of putting them in military targets, but prohibits any threat of killing or injuring persons in order to compel a third party to do or abstain from doing something.<sup>121</sup> ICTY, lacking jurisdiction over the crime of use of human shields, especially used the prohibition of hostages to cover the use of human shields during the conflict.<sup>122</sup> However, since the prohibition of human shields also include cases where the protected persons are not forced to act as shields, but merely compelled and directed by the authorities for their actions, not all human shields fall within the prohibition of hostages.

Are voluntary human shields, that are being directed by the authorities to the correct places prohibited in cases where there is confusion over the military character of the target? Obvious problem is that there should be no need or use to shield non-military targets. However, as shown earlier, states can still target non-military objects when they either misinterpret the information about those targets or when they wish to use wider definition, arguably outside the scope of the legal definitions. Such examples can be taken from non-military leadership of terrorist organizations, such as ISIS or Al-Qaeda. Especially since ISIS is behaving more like a state authority than cell-structured terrorist organization, not everyone who is connected to it are legitimate targets.

Secondly, similar logic as with passive precautions could be suitable. Since the IHL has the obligation to communicate one’s interpretation and application of the understanding of the law, shielding those targets could then be illegal. Especially since Rome Statutes annexed elements of crimes part, which explicitly lays out the requirement to shield military targets, is not fully legally binding document but just meant to be used as an interpretative guidance.<sup>123</sup> Even if the party executing the attack would be violating principle of distinction, the human shields could still “immunize” the target from attacks over the threat of larger collateral damages. The terminology “render certain points or areas immune from military operations” already existed in Geneva Convention IV<sup>124</sup> while the only method to legally immunize military targets, the principle of proportional-

---

119 DÖRMANN, Knut. (n 9) pp. 345

120 SCHMITT, Michael. (n 4) pp. 306

121 International Convention Against Taking of Hostages, 17 December 1979, Art 1

122 Prosecutor v Karadzic (Trial Judgment) IT-95-5/18-T 24 March 2016 para. 5938–5951

123 DÖRMANN, Knut. (n 9) pp. 70

124 Geneva Convention IV (n 15) Art 28

ity, was codified only in Additional Protocol I, 28 years later than the original Geneva Conventions. Therefore, the immunizing cannot be taken to refer only as legal immunizing but also in military terms to hide behind the shields.<sup>125</sup> But arguably the term of “immunizing” would not be limited to physical immunity. Similarly use of human shields can “immunize” a target by causing the party carrying out the attack to cancel the attacks over the threat of political backlash, moral reasons or over fears of harming party’s own prisoners of war.

It would be advisable to focus more on the intent of the authorities using the shields than the differentiated locations. While there are inherent problems with the issues with ruling based on the intent, they can be overcome. International Criminal Tribunal on Rwanda noticed the problems in Akayesu judgment when discussing the specific intent of committing a genocide, stating that “On the issue of determining the offender’s specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine.”<sup>126</sup> However, the court managed to solve the issue by inferring the intent from “certain number of presumptions of fact” and from the general context, general nature or scale of the atrocities.<sup>127</sup> Similarly, use of human shields can be determined from the scale and general nature of the behaviour. If it is continuing, such as in the case of Iraq soldiers moving within civilian population every time US assault helicopters came visible, that could be inferred as an intent to shield.<sup>128</sup> Furthermore, there can be other trails of evidence as orders or witnesses in cases where civilian population has been ordered to shield military targets. The question of illegal human shielding is a legal question to be determined by the courts and should not have any effect regarding adversaries’ obligations in conducting warfare. Therefore, even if the determination of intent is complicated, it should not cause unbearable difficulties.

In the end using human shields to deter adversary from targeting targets that do not constitute legitimate military targets comes dangerously close to enforcing international humanitarian law by placing protected persons into danger. The object of the provisions prohibiting the use of human shields is to protect civilians and prisoners of war from the dangers of warfare. In cases where illegitimate targets are being targeted, same dangers exist to the civilians as when they are shielding targets that are legitimate military targets.

---

125 SCHMITT, Michael. (n 4) pp. 314

126 ICTR. Prosecutor v Jean-Paul Akayesu Trial Judgment ICTR-96-4-T 2 September 1998 para. 523

127 Ibid. para. 523

128 SCHMITT, Michael. (n 4) pp. 303

## **6 Conclusion**

While passive precautions and prohibition of human shields strongly lean still to the concept of military object, that does not take into account the fact that the terminology and interpretations have not been fully agreed upon and differ greatly between states. Especially in the more recent conflicts against armed non-state actors states have sought for wider and more flexible definitions of legitimate targets, which are not necessarily accepted by the adversaries. On the first look, one could assume that those who breach their obligations not to use human shields and take passive precautions could hide behind their own, narrower definition of military object to escape liability over the violations.

Passive precautions are general protection regime for the civilians under the control of a state party in an armed conflict. While Additional Protocol I specifically points out that the parties must remove civilian population from military objectives<sup>129</sup> and avoid locating military objectives in vicinity of civilian population,<sup>130</sup> those should be taken as examples of passive precautions instead of limiting clauses to state party's obligations to protect civilian population under its control. The party should pay attention to possible victims whether they are in vicinity of military targets or merely in a threat of suffering from other, possibly illegal, military operations targeting objectives that the targeted party does not deem military objectives. This approach finds support from other regimes of law as well, including human rights law.

Similarly, prohibition of human shields should focus on the intent of the party abusing the human shields, not on the specific target that is being shielded. The codification of prohibition of human shields and the terminology of "making certain points immune" came before the proportionality principle, which is the method for legally shielding military targets from targeting. Therefore, the term immunizing should refer to also other methods of influencing targeting decisions than legal obstacles of proportionality principle. Similarly, even if such shields would be voluntary and therefore would not fall within the prohibition of hostages or inhumane treatment (which requires suffering to human shields and holding them against their will) they would still be placed into danger by the targeted party. There is no such possibility of using human shields against targets that a party does not know or believe could be attacked against for the simple reason that there would not be an intent to shield such targets. The highlighting of military targets in both passive precautions and prohibition of human shields serves as a valuable example of the prohibited conduct. But before the exact interpretation of military targets can be found, it would be counterproductive to limit the obligations to protect civilian population, either by prohibition of human shields or passive precautions, to merely military targets.

---

129 Additional Protocol I (n 3) Art 58(a)

130 *Ibid.* Art 58(b)

## CONTRACTUAL RESTRICTIONS ON RIGHT OF BENEFICIARY TO DRAW ON A LETTER OF CREDIT; POSSIBLE EXCEPTION TO PRINCIPLE OF AUTONOMY

Hamed Alavi

Faculty of Law, Autonomous University of Barcelona, Spain

*Hamed.alavi@ttu.ee*

ALAVI, Hamed. Contractual restrictions on right of beneficiary to draw on a Letter of Credit; possible exception to principle of autonomy. *International and Comparative Law Review*, 2016, vol. 16, no. 2, pp. 67–86. DOI: 10.1515/iclr-2016-0015.

---

**Summary:** In some circumstances and despite having right to draw under the Letter of Credit, beneficiary agrees in underlying contract that he would not exercise his right before realization of certain conditions stipulated in the contract or any other agreement with applicant. Despite the fact that the instrument itself (documentary letters of credit and bank guarantees) entitles beneficiary for being paid upon presentation of complying documents, making such commitment will impose restrictions on beneficiary within the framework of underlying contract and creates different scenarios that raises respective questions. First scenario would be that beneficiary fulfills his commitments in underlying contract and receives payment under the credit and there will be no dispute between parties. Second scenario is where beneficiary presents complying documents to bank and demands for being paid the amount stipulated in the credit despite existence of an ongoing dispute with applicant regarding his performance in underlying contract. Here, it will be a valid question if we ask whether or not breach of such restrictions by beneficiary will influence principle of autonomy? Consecutive question would be, shall the court consider beneficiary's violation of his restrictive commitment in underlying contract as a new exception to principle of autonomy? To put it in different way, where beneficiary of documentary letters of credit or demand guarantee regardless of his awareness from independence of underlying contract from the credit commits in underlying contract to condition which restricts his right to draw on the credit; will he be allowed by court to rely on the principle of autonomy to neglect his commitment in underlying contract? In short, should law recognize other exception in addition to fraud which is in accordance with limits imposed by underlying contract on beneficiary's right to draw on the credit? In quest of answering above mentioned questions, this paper will be divided into six main parts. After the introduction, second part will describe nature of documentary letters of credit and principle of autonomy. Third part will analyse the nature of exception while fourth one will look at approach of different jurisdictions to this issue. Fifth part will provide different arguments in favour and against recognition of "underlying contract exception"<sup>1</sup> and finally last part provides concluding remarks on the subject matter.

---

1 ENONCHONG, Nelson.. The Problem of Abusive Drawing on Demand Guarantees.

**Keywords:** Documentary Letters of Credit, Autonomy Principle, Contractual Restrictions on Beneficiary, Exception, Comparative Study.

---

## **1 Introduction**

In the law of letters of credit, fraud is the only exception to the principle of autonomy which has received global recognition. Other exceptions including illegality, nullity, unconscionability and recklessness of beneficiary are all accepted or rejected in different jurisdictions and there is no uniform global position towards their recognition.<sup>2</sup>

In some circumstances and despite having right to draw under the credit, beneficiary agrees in underlying contract that he would not exercise his right before realization of certain conditions stipulated in the contract or any other agreement with applicant. Despite the fact that the instrument itself (documentary letters of credit and bank guarantees) entitles beneficiary for being paid upon presentation of complying documents, making such commitment will impose restrictions on beneficiary within the framework of underlying contract.

Based on the general principles of law, where beneficiary presents complying documents with terms and conditions of the credit, bank is bound to make payment regardless to beneficiary's breach of his commitments within underlying contract. Where there is a dispute between parties to the underlying contract, applicant can claim for damages against beneficiary after reimbursing the bank which has already honoured a complying presentation made by beneficiary. Where applicant considers that collectable damages from beneficiary in a separate action to be insufficient, he might require intervention of court and seek for injunctive relief against beneficiary or bank. Therefore, inclusion of restrictive clauses to beneficiary's right to draw on the credit in underlying contract creates different scenarios and raises respective questions. First scenario would be that beneficiary fulfilled his commitments in underlying contracts, receives payment under the credit and there will be no dispute between parties. Second scenario is where beneficiary presents complying documents to bank and demands for being paid the amount stipulated in the credit despite existence of an ongoing dispute with applicant regarding his performance in underlying contract. In second scenario, it will be valid question if we ask whether or not breach of such restrictions by beneficiary will influence principle of autonomy? Consecutive question would be, shall the court consider beneficiary's violation of his restrictive commitment in underlying contract as a new exception to principle of autonomy? To put it in different way, where beneficiary of documentary letters of credit or demand guarantee regardless of his awareness about independence

---

*Lloyd's Maritime and Commercial Law Quarterly*, 2007, pp. 83–106.

- 2 ALAVI. Hamed. Illegality as an exception to principle of autonomy in Documentary Letters of Credit; A comparative approach, *Korea University Law Review*, 2016, vol. 20, pp. 3–23.

of underlying contract from the credit commits in underlying contract to conditions which restrict his right to draw on the credit; will he be allowed by court to rely on principle of autonomy to neglect his commitment in underlying contract? In short, should law recognize other exception in addition to fraud which is in accordance with limits imposed by underlying contract on beneficiary's right to draw on the credit?

In practice, problem will arise as courts in different jurisdictions have taken different approaches towards granting injunction against beneficiary and preventing him from drawing on the credit.<sup>3</sup> Some consider granting injunctive relief against beneficiary and preventing him to claim payment does not affect the independence principle while others are of the contradictory opinion and consider granting any injunction against right of beneficiary to draw on the credit as violating application of independence principle.<sup>4</sup> The same argument exist among legal scholars where some are of the opinion that granting injunction to prevent beneficiary's demand under the credit dose not affects principle of autonomy while others take the opposite position.<sup>5</sup> However, everyone agrees that granting injunction against bank's right to pay as a result beneficiary's complying presentation affects autonomy principle on the basis of public policy concerns.<sup>6</sup>

In quest of answering above mentioned questions, this paper will be divided into six main parts. After the introduction, second part will describe nature of documentary letters of credit and principle of autonomy. Third part will analyse the nature of exception while fourth will look at approach of different jurisdictions to this issue. Fifth part will provide different arguments in favour and against recognition of "underlying contract exception"<sup>7</sup> and finally last part provides concluding remarks on the subject matter.

## **2 Documentary Letter of Credit and Principle of Autonomy**

At global scale, documentary letters of credit are operating under well recognized set of rules established by International Chamber of Commerce. Uniform Customs and Practices for Documentary Credits (UCP) published in 1933 for the first time and endured many revisions in order to meet requirements of ever evolving nature of international trade . Article 4 and 5 of UCP 600 (current version) define the principle of autonomy as following:

3 ENONCHONG, Nelson. *The Independence Principle of Letters of Credits and Demand Guarantees*. Oxford: Oxford University Press, 2011, p. 212.

4 MUGASHA, Agasha, Enjoining the beneficiary's claim on a letter of credit or bank guarantee. *Journal of business law*, 2004, vol. 5, pp. 515–538.

5 Ibid

6 O'DONOVAN James and PHILLIPS, John. *The Modern Contract of Guarantee*. London: Sweet and Maxwell, 2013, para 13–27.

7 ENONCHONG, Nelson.. The Problem of Abusive Drawing on Demand Guarantees. *Lloyd's Maritime and Commercial Law Quarterly*, 2007, p. 83.

“A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary.”

“A beneficiary can in no case avail itself of the contractual relationships existing between the banks or between the applicant and the issuing bank. An issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, proforma invoice and the like. Finally, banks deal with documents and not with the goods, services or performance to which the document relate.”

In the United States of America, applicable rules for governing the operation of letters of credit are defined in article 5 of Unified Commercial Code. In fact, the USA is only country which enjoys statutory law in place for LC operation. Under Article 5-103(d) of UCC the autonomy principle is recognised as following :

“the rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or non-performance of the contract or arrangement out of which the letter of credit arises or which underlie it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary”

Further, article 5-108(f)(1) confirms :

“[a]n issuer is not responsible for the performance or non-performance of the underlying contract, arrangement or transaction”

In practice, courts in different countries show traditional hesitation with interfering in process of LC transaction and enjoining bank or beneficiary to prevent payment under the credit due to existence of the general understanding in favour of absolute application of principle of autonomy. The decision of court in *Hamzeh Malas and Sons v British Imex Industries Ltd* confirms this position<sup>8</sup>: “[the autonomy principle] imposed upon the banker an absolute obligation to pay, irrespective of any dispute here maybe between the parties as to whether the goods are up to the contract or not”<sup>9</sup>. Together with principle of Strict Compliance, Principle of autonomy (also known as principle of independence) is laying down the foundation for successful operation of documentary letters of credit in international trade.<sup>10</sup> Principle of independence separates obligations of bank to

---

8 *Hamzeh Malas and Sons v British Imex Industries Ltd* [1958] 2 QB

9 *Ibid*, 703

10 ALAVI, Hamed. Mitigating the Risk of Fraud in Documentary Letters of Credit. *Baltic Journal of European Studies*, 2016, vol. 6, no. 1, pp.139–156.

pay under the credit from commitments of parties in underlying contract<sup>11</sup>. As a result, it forms an abstract payment undertaking for issuing bank to pay (upon receiving complying presentation from the beneficiary) which is independent from performance of underlying contracts between parties to it<sup>12</sup>. The main implication of autonomy principle would be as long as beneficiary provides the bank with complying presentation of document stipulated in the credit, his entitlement for being paid by bank will not be affected by failure in fulfilling his obligations within the framework of underlying contract<sup>13</sup>. Therefore, in case of rising any dispute on quality or quantity of goods provided by beneficiary, issuing bank has no other choice rather than honouring complying presentation and leave applicant with sole possibility of looking for remedies in claim for beneficiary's breach of warranty at later stage. However, some scholars are of the opinion that autonomy principle does not exclude buyer's (applicant) interests from being fulfilled.<sup>14</sup>

In contrary with existing image on absolute authority of autonomy principle, courts in different jurisdictions have recognized few conditions which revoke the unconditional payment obligation of bank<sup>15</sup>. Fraud is known as the first recognized exception to principle of autonomy in documentary letters of credit.<sup>16</sup> It is also submitted that illegal nature of underlying contract would be another exception to principle of authority together with nullity of documents presented by beneficiary<sup>17</sup>. Unconscionable conduct of beneficiary in drawing under the

- 
- 11 HOROWITZ, Deborah., *Letters of credit and demand guarantees: defences to payment*. Oxford: Oxford University Press, 2010.
  - 12 ALAVI, Hamed. Autonomy Principle and Fraud Exception in Documentary Letters of Credit, a Comparative Study between United States and England. *International and Comparative Law Review*, 2015, vol. 15, no. 2, p. 45; ALAVI, Hamed. Exceptions to Principle of Autonomy in Documentary Letters of Credit; A Comparative View. *Actual Problems of Economics and Law*, 2016, vol. 10, no. 3, pp. 123–150.
  - 13 FRÍAS GARCÍA, Roberto Luis. The Autonomy Principle of Letters of Credit. *Mexican Law Review*, 2010, vol. 3, no. 1, p. 4.
  - 14 ELLINGER, Peter; NEO, Dora. *The Law and Practice of Documentary Letters of Credit*. Oxford: Hart Publishing, 2010, p. 84; BUCKLEY Ross P.; GAO, Xiang. Development of the Fraud Rule in Letter of Credit Law: The Journey So Far and the Road Ahead. *University of Pennsylvania Journal of International Law*, 2002, vol. 23, no. 4, p. 663.
  - 15 JOHNS, R. J., & BLODGETT, M. S. . Fairness at the Expense of Commercial Certainty: The International Emergence of Unconscionability and Illegality as Exceptions to the Independence Principle of Letters of Credit and Bank Guarantees. *Northern Illinois University Law Review*, 2010, vol. 31, no. 2, p. 297.
  - 16 LIPTON, Jacqueline. D. Documentary Credit Law and Practice in the Global Information Age. *Fordham International Law Journal*, 1998, vol. 22, no. 5, p. 1972.
  - 17 ENONCHONG, Nelson. Effects of Illegality: A Comparative Study in French and English Law. *International & Comparative Law Quarterly*, 1995 vol. 44, no. 1, p. 196, 198–199; REN, John . A nullity exception in letter of credit law? *Journal of business law*, 2015, no. 1, pp. 1–19; ANTONIOU, Anna Mari. Nullities in Letters of Credit: Extending the Fraud Exception. *Journal of International Banking Law and Regulation*, 2014, vol. 29, no. 4, pp. 229–238; HOOLEY, Richard. Fraud and Letters of Credit: Is there a Nullity Exception? *The*

credit where he is not entitled to do so is also recognized as an exception to the principle of autonomy in some jurisdictions<sup>18</sup>. Following chapters will analyse legal potentials imposed by express restrictions on beneficiary to draw on the credit in the framework of underlying contract as a potential exception to principle of autonomy and its effect on LC transaction in different jurisdictions.

### **3 Nature of exception**

As it is already discussed, operation of the letter of credit is based on two fundamental principles of autonomy and strict compliance. Principle of autonomy separates the credit (or bank guarantee) from underlying contract.<sup>19</sup> At the same time principle of strict compliance provides beneficiary with right to draw on the credit (or bank guarantee) by presenting complying documents to bank<sup>20</sup>. In such situation, applicant would be rightly concerned about possibility to face with beneficiary's fraud or unconscionable conduct while it is almost impossible to stop bank from payment against complying presentation. Therefore, he might look for further alternatives to safeguard his economic interests. A practical solution can be including restrictive clause against drawing right of beneficiary in underlying contract. Different reasons might stand behind agreement of beneficiary with such restrictive clauses including: higher bargaining power of buyer, need for building trust with buyer and also applying such negative covenants instead of assuming costs of counter guarantee.

### **4 Approach of different Jurisdictions**

#### *4.1 England*

Review of relevant authorities reviles the fact that English law does not have any clear stance regarding the exception<sup>21</sup>. The fact is that no English case has rejected possibility to grant injunctive relief against beneficiary who has called for drawing on the credit in contrary to his commitment under the contract for not doing so. At the same time, there is no authority which agrees with granting injunction to restrain beneficiary to an instrument (the commercial documentary letter of credit or demand guarantee) on the basis of violation beneficiary's obligations in underlying contract. However, approach of English courts in recent cases show positive tendency towards recognition of the exception.

---

*Cambridge Law Journal*, 2002, vol. 61, no. 2, pp. 239–294.

18 ALAVI, Hamed . Comparative study of Unconscionability exception to the principle of autonomy in law of Letter of Credits. *Acta Universitatis Danubius. Juridica*, 2016, vol. 12, no. 2, pp. 94–121.

19 Article 4 &5 UCP 600

20 ALAVI . Hamed. Illegality as an exception to principle of autonomy in Documentary Letters of Credit; A comparative approach, *Korea University Law Review*, 2016, vol. 20, p. 3.

21 ENONCHONG, Nelson. *The Independence Principle of Letters of Credits and Demand Guarantees*. Oxford: Oxford University Press, 2011, p. 100.

#### 4.1.1 Early Cases

The case of *RD Harbottle (Mercantile) v National Westminster Bank*<sup>22</sup> touched upon possibility of granting injunction against beneficiary who demands payment under the demand guarantee by violating provisions regulating such demand in underlying contract. In that case, dispute arose among parties regarding the quality of goods supplied and buyer (Beneficiary to the guarantee) requested payment under the demand guarantee provided by seller in support of his commitments within the framework of underlying contract. Buyer made the demand by neglecting respective procedural provisions for demand in the underlying contract. Account party to the guarantee applied for an injunction on the ground that demand of beneficiary is qualified to meeting provisions of underlying contract<sup>23</sup>. In the hearing, Kerr J. observed: “the plaintiffs may well be right in contending that the buyers have no contractual right to payment of any part, let alone the whole, of the guarantee... But all these issues turn on contractual disputes”<sup>24</sup>. While rejecting to grant injunction, he argued: in absence of fraud, court will not interfere and let parties to settle relevant dispute either by litigation of arbitration as available to them.<sup>25</sup>

In *Themehelp Ltd v West and Others*<sup>26</sup>, at trial court, injunction was granted against beneficiary on the basis of fraud. However, in The Court of Appeal, Waite J, changed the position as it was claimed that beneficiary’s call to draw on the credit was violating underlying contract. He held: “I do not find it necessary to consider whether the principle extends beyond instances of fraud to cases where the beneficiary under the guarantee is alleged to be in non-fraudulent breach of the main contract”<sup>27</sup>.

#### 4.1.2 Recent approach

In more recent case of *Sirius Insurance International Ltd v FAI General Insurance*<sup>28</sup> issue was discussed again. In this case where a Lloyd’s syndicate (Agnew) intended to reinsure her liabilities, FAI General Insurance was proposed for this purpose. Not being happy with solvency issues of FAI, Agnew searched for more solid reinsurance company. As a result, Sirius International was chosen where it agreed to make payments to Agnew upon requests and then receive the reimbursement from FAI. In fronting FAI’s agreement with Agnew, Sirius asked for a letter of credit to support its payment obligations in underlying contract with FAI and agreed not to draw on the credit until certain conditions are met. Where the problems arose, the Court of Appeal unanimously rejected Sirius’s conten-

22 *RD Harbottle (Mercantile) v National Westminster Bank* [1978] QB 146.

23 *Ibid*

24 *Ibid* 155

25 *Ibid* 156

26 *Themehelp Ltd v West and Others* [1996] QB 84

27 *Ibid* 99

28 *Sirius Insurance International Ltd v FAI General Insurance* [2003] 1 WLR 87.

tion that with reference to autonomy principle he is entitled to draw on the credit upon presentation of confirming documents. The court held that on the facts of the case, it would grant injunction and restrain Sirius from demanding payment under the LC due to its breach of underlying contract with FAI.<sup>29</sup>

However, the House of Lords reversed the judgement by holding Sirius eligible to demand under the LC as conditions in underlying contract were met.<sup>30</sup> Therefore, they did not reach the point whether or not demand of beneficiary under the letter of credit or bank guarantee in breach of his commitment in underlying contract will qualify for granting injunction against him.<sup>31</sup>

In conclusion, English law does not have a clear approach to this problem. However, analysing relevant authorities show development of trend towards recognition of such exception where court will grant injunction against beneficiary whose demand is in breach of contract with third party.

#### 4.1.3 Scope of the Exception.

According to existing authorities in English Law, underlying contract exception might find application in limited number of occasions: Firstly, exception can apply only in case of existence of a negative covenant made by beneficiary in underlying contract. Secondly, it applies only where negative covenant is given in express terms. In contrary with Australian courts which grant injunction in presence of both implied and express negative covenant, English law does not consider implied terms as a ground for granting injunction.<sup>32</sup> Thirdly, exception only applies in cases of granting injunction against beneficiary's demand to draw on letter of credit. It does not prevent bank from effecting payment after receiving complying presentation. Finally, bank cannot use existing negative covenant of beneficiary in underlying contract as a ground to stop payment after receiving the complying presentation.

##### 4.1.3.1 Negative Covenant.

Legal basis for granting injunction in presence of negative covenant under English law is decision of court in *Lumley v Wagner*<sup>33</sup> and *Doherty v Allman*<sup>34</sup> where the court considered existence of negative covenant of beneficiary in contract as a ground for enjoining him. The Court of Appeal in *Sirius Insurance International Ltd v FAI General Insurance* with reference to decision of the House of Lords in *Doherty v Allman* and its well-respected implication in English Law

---

29 Ibid 29

30 [2004] UKHL 54

31 ENONCHONG, Nelson. *The Independence Principle of Letters of Credits and Demand Guarantees*. Oxford: Oxford University Press, 2011, p. 213.

32 Ibid 214

33 *Lumley v Wagner* (1852) 1 De , GM & G 604

34 *Doherty v Allman* (1877-78) LR 3 App Case 709

considered restriction on beneficiary's right to draw on the credit to be grated due to his negative covenant in underlying contract.<sup>35</sup> Therefore, May LJ held: "There is no authority extending this autonomy of documentary credit for the benefit of the beneficiary of letter of credit so as to entitle him as against the applicant to draw the letter of credit when he is expressly not entitled to do so"<sup>36</sup>.

#### 4.1.3.2 Presence of express term.

Under English law, where there is no express term in underlying contract which limits entitlement of beneficiary to draw on letter of credit or demand guarantee, it will be fairly impossible for court to issue injunction and uphold the exception to prevent beneficiary from receiving payment.<sup>37</sup> In case of *Deutsche Ruckversicherung Aktiengesellschaft v Walbrook Insurance Co Ltd*,<sup>38</sup>, Phillips J considered it wrong to "imply a term into the underlying contract that the beneficiary will not draw on the letter of credit unless payment under the underlying contract is due"<sup>39</sup>. In the case of *Sirius*, existence of the express term which was restriction of beneficiaries right to be paid upon realization of particular situation, made the Court of Appeal to consider the contract as "unusual"<sup>40</sup> or "variant of more typical case"<sup>41</sup>. With reference to restriction expressly mentioned in underlying contract, court considered the letter of credit in that case as "less than equivalent of cash" and eligible for granting an injunction to restrain beneficiary.<sup>42</sup> However, as it will be discussed later, Australian courts fully recognize the exception. However, they consider implied restrictions imposed on beneficiary within the framework of underlying contract in addition to express ones as a ground for granting injunction against him.

---

35 in *Doherty v Allman* Lord Cairns, with respect to a negative covenant and the basis of which it could be used to grant an injunction, justified its rationale by stating thus: "if there had been a negative covenant, I apprehend, according to well-settled practice, a Court would have had no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury— it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves".

36 *Sirius International Insurance Corp v FAI General Insurance Co Ltd* [2003] EWCA Civ 470 [2003], 1 WLR 2214, 2224–25.

37 ENONCHONG, Nelson. *The Independence Principle of Letters of Credits and Demand Guarantees*. Oxford: Oxford University Press, 2011, p. 214.

38 *Deutsche Ruckversicherung Aktiengesellschaft v Walbrook Insurance Co Ltd* [1995] IWLR 1017, [1995] 1 Lloyd's Rep 153.

39 *Ibid* at 1030

40 [2003] 1 WLR 87,91. At 30

41 *Ibid* at 27

42 *Ibid*

*4.1.3.3 Non availability of exception against the bank.*

The pool of authorities shows that underlying contract exception would be only applicable to beneficiary who is party to underlying contract and no one else. Therefore, it is impossible to rely on beneficiary's breach of the underlying contract to grant injunction against bank and restrain it from payment under the credit if it wishes to do so. This would be a serious limitation on applicability of the exception as even obtaining injunction against beneficiary might not prevent him from being paid by bank. In *Bolivinter Oil SA v Chase Manhattan Bank*,<sup>43</sup> within the framework of underlying contract of affreightment, Bolivinter agreed to take a certain cargo of oil from Iran to Syria and deliver it to the General Company Homs Refinery. According to the terms of contract, Bolivinter opened a demand guarantee in favour of Homes which issued by Commercial Bank of Syria (CBS) after receiving instructions from Chase Manhattan Bank. In return CBS issues an irrevocable documentary letter of credit in favour of Chase Manhattan. Despite arising disputes between parties to the contract of affreightment, they entered into a second contract based on similar terms but different amount of cargo to be delivered. According to Bolivinter, parties agreed to release the guarantee after reaching the final shipment of cargo from second contract to Syria. Homes claimed such agreement was under duress and claimed for payment of guarantee after receiving final shipment. In an *ex parte* action, Bolivinter managed to get injunction for restraining CBS to pay beneficiary, Chase bank to pay CBS, and beneficiary from receiving payment under the guarantee.<sup>44</sup> During the hearing, Staughton J. lifted injunction against banks but emphasized on continuation of injunction against Homes (the beneficiary). While ruling in favour of plaintiffs, judge concluded that existence of agreement to release the guarantee at the end of second contract is sufficient to prove fraudulent action by Homes. Ruling was upheld by The Court of Appeal.<sup>45</sup>

*4.1.3.4 Bank cannot rely of exception as a defence for payment.*

The exception is only available for parties to the contract under which beneficiary has been restrained from drawing on the instrument. As a result, bank cannot rely on the exception as it is not originally a party to the underlying contract which is reason for issuing the letter of credit. In English law, legal basis to preclude issuing bank from using exception as defence for payment against beneficiary lies in Doctrine of the Privity of Contract<sup>46</sup>.

---

43 *Bolivinter Oil SA v Chase Manhattan Bank* [1984] 1 Lloyd's Rep 251.

44 *Ibid*

45 *Ibid* 257

46 "The doctrine of privity means that a contract cannot, as a general rule, confer rights or impose obligations arising under it on any person except the parties to it." In TREITEL, G. H.. *The law of contract*. London: Sweet & Maxwell, 2003.

#### *4.1.4 Standard of Proof*

In accordance with fraud exception, it seems that standard of proof at trial stage should be establishing the fact that beneficiary's demand is in breach of an express term in underlying contract between parties.<sup>47</sup> With the same analogy, at the interlocutory stage it might be presumed that standard of proof for granting injunction should be in favour of existence of a seriously arguable case.<sup>48</sup> However, The Court of Appeal in *Sirius* granted injunction because in addition to existence of seriously arguable case, applicants established that beneficiary is trying to draw payment on the credit in breach of underlying contract.<sup>49</sup> Later, in case of *Permasteelisa Japan KK v. Bouyguesstroi*<sup>50</sup> which was concerned with a performance bond, decision of *Sirius* was interpreted as requirement for higher standard of "positively established" case.

However, according to Enonchong, there is no possibility to conclude that required standard of "positively established case" was introduced by The Court of Appeal of *Serious*.<sup>51</sup> He further argues that The Court of Appeal in that particular case mentioned applicant has not only met the standard of "seriously arguable" case but also provided evidence which "positively established" non-entitlement of beneficiary to draw under the credit.<sup>52</sup> Therefore, by referencing to standard of "positively established" case, The Court of Appeal was merely making decision about the fact of case in hand rather than laying down a general standard of proof.

Enonchong also introduces two main advantages of his interpretation from statement of The Court of Appeal: first is that in accordance with required standard of proof in fraud, "underlying contract exception" keeps the same lower standard of "seriously arguable case" for interlocutory stage and standard of "positively established" case for trial. Second, such approach will keep the standard of proof in English law synchronized with other jurisdictions (as it will be discussed in next part, Australia has also accepted the "seriously arguable case" as standard of proof for interlocutory stage).<sup>53</sup>

#### *4.2 Australia*

Australian cases show positive approach to establish contractual restrictions on beneficiary for drawing down on credit as an exception to the principle of

---

47 ENONCHONG, Nelson. *The Independence Principle of Letters of Credits and Demand Guarantees*. Oxford: Oxford University Press, 2011, p. 217.

48 Ibid

49 [2003] 1 WLR 87,91. At30

50 *Permasteelisa Japan KK v. Bouyguesstroi* [2007] EWHC 3508

51 ENONCHONG, Nelson. *The Independence Principle of Letters of Credits and Demand Guarantees*. Oxford: Oxford University Press, 2011, p. 217.

52 Ibid

53 Ibid

autonomy. Although most cases are relevant to bank guarantees, but it is possible to say that except High Court of Australia, other courts are of the position that: “there is an exception to the principle of autonomy where there is an underlying contract between the applicant for the guarantee and the beneficiary which restricts the beneficiary’s power to demand payment under the guarantee”<sup>54</sup>.

*Pearson Bridge Pty Ltd v State Rail Authority of New South Wales*<sup>55</sup> is among earliest and most prominent cases in this regard. In *Pearson* case, article 15.5 of underlying contract of construction between parties provided necessary security for performance of contract.<sup>56</sup> Yeldham J, considered the clause as negative covenant which provides definition of circumstances under which beneficiary can demand payment under the guarantee and issued injunction against beneficiary on the ground that demand of beneficiary in presence of negative stipulation in the underlying contract was a serious issue to be tried<sup>57</sup>. While making decision, court referred to other Australian cases in supporting its conclusion<sup>58</sup>.

*Wood Hall Ltd v Pipeline Authority*<sup>59</sup> is often cited Australian case in regard with underlying contract exception. In this case, an unqualified guarantee was issued in favour of beneficiary for the purpose of constructing a pipeline. Upon demand of beneficiary to draw on the guarantee, applicant claimed that beneficiary cannot demand payment under guarantee as they (applicants) were not in breach of underlying contract. The High Court of Australia while ruling in favour of beneficiary held that it was not possible to stop payment claimed under the guarantee in presence of unqualified conditions obliging bank to pay unconditionally against such claim.<sup>60</sup>

There are considerable similarities between ways in which exception is recognized and applied under English and Australian law. First, exception in both jurisdictions will be applicable only in presence of express term in underlying contract to restrict beneficiary from claiming payment under the LC or bank guarantee before realization of certain circumstances.

---

54 *Clough Engineering limited v Oil and Gas Corporation Limited* [2008] FCAFC 136.

55 *Pearson Bridge Pty Ltd v State Rail Authority of New South Wales* (1982) 1 Aust. Construction LR 81.

56 “ if the principles becomes entitled to exercise all or ant of his rights under the contract in respect of the security , the principle may convert into money the security that does not consist of money. The principle shall not be liable for any loss occasioned by such conversions.”

57 ENONCHONG, Nelson. *The Independence Principle of Letters of Credits and Demand Guarantees*. Oxford: Oxford University Press, 2011, p. 219.

58 *Williamson Limited v Lukey and Mulholland* (1931) 45 CLR 282, 299; *Ampol Petroleum Limited v Mutton* (1952) 53 SR1

59 *Wood Hall Ltd v Pipeline Authority* (1979) 141 CLR 443

60 ENONCHONG, Nelson. *The Independence Principle of Letters of Credits and Demand Guarantees*. Oxford: Oxford University Press, 2011, p. 219.

Second, such express term in both jurisdictions is recognized only if it shows the format of negative covenant. Third, exception is only applicable against beneficiary's demand and it cannot be used for stopping bank from payment. In both jurisdictions, restriction cannot be used as a defence by bank to refrain payment under documentary letter of credit or bank guarantee.

Despite similarities between the way in which Australian and English courts apply the exception, there are certain differences between their approaches which are worth of attention: Firstly, in contrary with English practice, many Australian cases consider the scope of exception extended to implied terms in addition to express negative covenants in the underlying contract<sup>61</sup>. Secondly, early cases in Australia adopted the low standard of proof of "a serious issue to be tried" for granting interim injunction against beneficiary whose claim was not in accordance with negative covenant in underlying contract.<sup>62</sup> Recent cases show the trend of among courts for adopting higher standard of "seriously arguable" case under which applicant should be able to show at trial that demand was in breach of conditions stipulated in underlying contract<sup>63</sup>. English courts apply a much higher standard of "positively established case" which creates difficulties for applicant to attain injunction against beneficiary on the basis of underlying contract exception.

Thirdly, in Australia applicant should provide court with evidence of facing loss as a result of beneficiary's demand in contrary to his commitments in underlying contract to be able to obtain interim injunction. Such evidence is provided through application of the balance of convenience mechanism<sup>64</sup>. However, balance of convenience has very limited application under English Law. Therefore, in England applicant may obtain injunction against beneficiary by satisfying the standard of proof and without showing any loss which is in contrary with Australian position in which obtaining injunction after satisfying the standard of proof would be possible only by showing damages endured as result of beneficiary's demand .<sup>65</sup>

---

61 *Australian Winch and Haulage Co Pty Ltd v. Walter Construction Group Ltd* [2002] FCA 1181 ; *Reed Construction Services Pty Ltd v. Kheng Seng (Australia) Pty Ltd* (1999) 15 BCL 158 ; *Fletcher Construction Australia Ltd v. Varnsdorf Pty Ltd* [1998] 3 VR 812

62 *Pearson Bridge Pty Ltd v State Rail Authority of New South Wales* (1982) 1 Aust. Construction LR 81; *Selvas Pty Ltd v Hansen & Yuncken (S.A.) Pty Ltd* (1987) 6 ACLR 36.; *JH Evans Industries (NT) Pty Ltd v Diano Nominees Pty Ltd* (unreported NT Supreme Court, 30 January 1989) ; *Barclay Mowlem Construction Ltd v Simon Engineering (Australia) Pty Ltd* (1991) 23 NSWLR 451.

63 *Rejan Constructions Pty Ltd v. Manningham Medical Center Pty Ltd* ( Supreme Court of Victoria , 20 December 2002 , Byrne J) .

64 ENONCHONG, Nelson. *The Independence Principle of Letters of Credits and Demand Guarantees*. Oxford: Oxford University Press, 2011, p. 221.

65 *Ibid*

In conclusion, more extended scope of exception in Australia which includes implied terms in the contract between applicant and beneficiary and lower standard of proof are adjusted by application of balance of convenience test and requiring applicant to show damages which he will bear in absence of injection. The same adjustment has been achieved by English courts via counterbalancing a higher standard of proof and more limited scope of exception with no application of the balance of convenience test.

#### 4.3 Scotland

In the case of *Peak Well Management Ltd v. Globalsaltafe Drilling UK Ltd*<sup>66</sup> under a contract between parties, beneficiary (Globalsaltafe) agreed to supply a mobile drilling rig to applicant (Peak Well Management) and applicant provided beneficiary with a standby letter of credit. After arising problems between parties, applicant required court to issue an interdict and prevent beneficiary from demanding under the credit based on rational that in the underlying contract parties agreed that demand to draw on the credit will be fulfilled only in respect of unpaid invoices that did not receive notice of payment by account party. In hearing, beneficiary argued that in absence of fraud, account party has no right to interfere with autonomy principle of documentary letters of credit<sup>67</sup>. While rejecting the contention of beneficiary, court held that entitlement of beneficiary to draw on the credit depends on terms of underlying contract. Therefore, the court held that demand is in breach of underlying contract and issued the interdict against beneficiary.<sup>68</sup>

#### 4.4 Malaysia

In similar vein with Australian courts, Malaysia courts to have a settled approach towards contractual restrictions imposed on beneficiary to draw on the credit. In *Daewoo Engineering & Construction Co Ltd v The Titular Roman Catholic Archbishop of Kuala Lumpur*<sup>69</sup> claimant opened a guarantee in favour of defendant for the purpose of getting his consent in order to install ground anchors in his land. Within the underlying contract for opening the guarantee, it was clearly mentioned that defendant's right to draw on the guarantee, among other things, will be subjected to: "must inform Daewoo Corporation by written notice of your intention to claim against the guarantee not later than 14 (fourteen) days before the date of the aforesaid demand"<sup>70</sup>. After expiration of agreement, parties agreed to renew it. However, defendant insisted on removal of the express term in underlying contract which was rejected by plaintiffs.

66 *Peak Well Management Ltd v. Globalsaltafe Drilling UK Ltd*[2006] Scot SC3

67 Ibid 24

68 Ibid

69 *Daewoo Engineering & Construction Co Ltd v The Titular Roman Catholic Archbishop of Kuala Lumpur* [2004] 7 MLJ 136.

70 Ibid 18

Finally, plaintiff failed to renew the agreement due to insisting of the defendant to remove the express restrictions relevant to call on guarantee, defendants made the call for it and argued that bank guarantee is separated from underlying contract and not subjected to any restriction imposed by it. During the hearing, injunction was granted in favour of the plaintiff on the ground of existence of serious issues to be tried.<sup>71</sup>

According to the case of *Daewoo Engineering & Construction Co Ltd v The Titular Roman Catholic Archbishop of Kuala Lumpur* it is possible to conclude that existence of express contractual agreement between beneficiary and account party of letters of credit and independent guarantees which imposes restriction on beneficiary's right of unconditional drawing on the instrument is recognized as an exception to principle of autonomy by Malaysian courts.

#### *4.5 Singapore*

Singaporean courts have not touched upon this problem directly. However, in respective cases of fraud and unconscionable conduct where injunction has been granted against the beneficiary, main claim raised by account party attributed to beneficiary's non-entitlement to draw on the credit as condition precedent for payment mentioned in underlying contract was not fulfilled. In *Kvaerner Singapore Plc Ltd v UDL Shipbuilding (Singapore) Ltd*<sup>72</sup> contract of sales covered sales of equipment and supported by performance bond of beneficiary under the condition in which buyer provides sales price via opening a documentary letter of credit. After failure of buyer in opening the credit, court granted injunction restraining buyer from drawing under performance bond as he could not fulfil the condition precedent stipulated in the underlying contract<sup>73</sup>. Further, court mentioned that buyer's conduct was considered as unconscionable conduct due to lacking good faith.<sup>74</sup>

In conclusion, the underlying contract exception has been touched upon by Singaporean courts. However, it is not clear from the details of the case law whether or not court will grant restraining order against beneficiary in absence of fraud and unconscionable conduct only on the basis of beneficiary's breach of his commitment in underlying contract.

#### *4.6 United States of America*

Under Uniform Commercial Code, there is no injunction available against beneficiary's demand to draw on the credit in breach of his commitments within underlying contract with applicant. According to Article 5-110 (2) of UCC : " if it presentation is honoured , the beneficiary warrants ... to the [account party]

---

71 Ibid 25

72 *Kvaerner Singapore Plc Ltd v UDL Shipbuilding (Singapore) Ltd* [1993] 3 SLR 350

73 Ibid

74 Ibid

that the drawing does not violate any agreement between the [account party] and the beneficiary or any other agreement intended by them to be augmented by the letter of credit". The only caveat to above mentioned passages is that it only works where presentation made by beneficiary is honoured. Paragraph 1 of the official commentary on UCC clarifies that bank cannot rely on beneficiary's breach of warranty with applicant to refuse payment. In the same way, applicant cannot rely on beneficiary's breach of his commitments in underlying contract to refuse reimbursement of bank. Since warranty can be obtained only after honouring the credit or guarantee, such breach can occur only after effectuating the payment. Therefore, under the UCC, instead of grating injunction, remedy for breach of warrantee is in the format of damages.

## **5 Arguments for and against recognition of exception**

Reviewing the exception in different jurisdictions shows diversified approach of courts in different countries to the problem of "underlying contract exception" to principle of autonomy in letter of credit law. While some countries like Australia, Malaysia and Singapore have recognized the exception, English courts are taking unsettled position and UCC in the United States of America rejects recognition of any exception to the principle of autonomy other than Fraud. However, in terms of legal policy, there are some arguments in favour of the recognition of exception which balance the contradicting arguments against recognition of it. In this section arguments in favour and against recognition of the exception will be going to be reviewed.

### *5.1 Arguments in favour of the recognition of exception*

#### *5.1.1 Novelty of exception*

The novelty brought about by exception has been discussed by Australian courts like in case of *Bachmann Pty Ltd v B.H.P Power New Zealand Ltd*<sup>75</sup>. The issue of novelty was restated by Rolf .J in *Barclay Mowlem Construction Ltd v Simon Engineering (Australia) Pty Ltd*<sup>76</sup> when he submitted that :

---

75 (1999) 1 VR 420. In this case the judge observed :

"...so far as I am aware, of the cases which have come before the courts in this country the present may be said to be novel in one respect and unusual in another. It is novel in the sense that the present case raises for the first time the effect of an express, albeit qualified, contractual prohibition (in the underlying contract) on the conversion of a security into cash. The novelty resides in the circumstance that the present contract contains an express, but qualified, prohibition on conversion of a security into cash – express in the sense that it is in form a negative stipulation ('a party shall not convert . . . until the party becomes entitled')."

76 *Barclay Mowlem Construction Ltd v Simon Engineering (Australia) Pty Ltd* (1991) 23 NSWLR 451,457

“In my opinion neither *Wood Hall* nor *Hortico*, nor the various cases to which I was referred stating that there was an obligation on the party giving an unconditional performance bond to pay that bond on demand are determinative of the present case. Indeed in *Wood Hall*, Stephen J expressly leaves open, so it seems to me, this question for determination”<sup>77</sup>

To clarify his comments, Rolf J. referenced statement of Stephen J, in *Wood Hall*: “... Had the construction contract itself contained some qualification upon the Authority’s power to make a demand under a performance guarantee, the position might well have been different.”<sup>78</sup>

In English case of *Sirius Insurance International v FAI General Insurance*<sup>79</sup> also pointed at novelty of cases under which beneficiary is facing retractions by underlying contract for purpose of drawing on the credit<sup>80</sup>.

It is possible to conclude that irreversible and express consent of beneficiary in underlying contract for not drawing on credit before meeting some conditions will create a novel condition which turns the cash principle of documentary letters of credit conditional to fulfilment of stipulated conditions.

#### *5.1.2 Parties expectations from underlying contract*

It can be mentioned with confidence that according to general principles of contract law, enforcement of legitimate expectations of parties in the framework of underlying contract is the main concern of contract. In substantial number of cases, under English law and other jurisdictions court has referred to method agreed by parties in underlying contract and surrounding circumstances of the case as the main factor for determining how to resolve their dispute. Therefore, on the occasion where underlying contract gives right to draw on credit to beneficiary after meeting special conditions, the court will look upon the contract and circumstances of the case to define whether or not bank is entitled to effectuate the payment. In the leading English case of *Sirius May LJ* implied the legiti-

---

77 Ibid 457

78 *Wood Hall Ltd v Pipeline Authority* (1979) 141 CLR 443,459 restated in *Barclay Mowlem Construction Ltd v Simon Engineering (Australia) Pty Ltd* (1991) 23 NSWLR 451,457.

79 *Sirius International Insurance Co v FAI General Insurance Ltd and others* [2002] EWHC 1611 (Ch) [2003] 1 WLR 87,.

80 Ibid 92-93, Jacob J. :

“...whilst I accept the submission that the principle of autonomy is of vital importance, I cannot see that it is undermined in the very special case where a party expressly agrees not to draw down unless certain conditions are met. Suppose instead of a letter of credit an account had been opened in the name of *Sirius* with *Westpac* and credited with the US\$5m. Suppose *Sirius* had agreed with *FAI* not to touch the account unless the conditions were satisfied. I can see no reason why a contract to that effect should not be enforced. Cash, like a letter of credit, is autonomous, perhaps even more so, but people can agree not to touch identified pots of it, if that is what they want to do. If such an agreement is made, there is no reason why the law should not enforce it’.

mate expectations of parties from the underlying contract when he refused the augment of the council of defendants. In *Sirius International Insurance Co v FAI General Insurance Ltd and others*, the council of *Sirius* was of the opinion that with reference to autonomy principle, he is entitled to draw on the credit even in presence of negative covenant in underlying contract which clearly defines situation to draw down on the credit.

### *5.1.3 Existence of the negative covenant and its restrictive nature*

According to the Court of First Instance and the Court of Appeal of *Sirius*, negative covenant by beneficiary in underling contract is the main reason to restrain his right to draw down on the credit. As it was discussed before, the court of *Doherty v Allman*<sup>81</sup>, as a leading authority in negative covenant explains that court has almost no discretion over the negative covenant which expressly restricts rights of the party under the contract.

### *5.1.4 Lack of authority against the recognition of exception*

In the case of the *Sirius*, The Court of Appeal as well as the Supreme Court admitted that there is no authority against accepting the “underlying contract exception”. The court admitted that none of the cases referred to are against accepting the exception. Further the court observed: “express provision in the underlying contract saying that the beneficiary will not draw down unless conditions have been fulfilled. In those circumstances, you do not have the normal case of ‘pay first, argues later’, which is the main point of providing letters of credit in normal circumstances”<sup>82</sup>. To state it differently, with reference to absence of authority against recognition of underling contract exception, the court did not observe any problem in recognizing capability of express contractual restriction in the underlying contract to be a defence against principle of autonomy.

## *5.2 Arguments against recognition of the exception*

### *5.2.1 Acting against the age long principle of autonomy*

The often cited argument against recognition of “underlying contract exception” is alleged contradiction of the exception with principle of autonomy in documentary letters of credit. As it was argued in the Court of First Instance in case of *Sirius*, letters of credit are independent undertakings of bank not affected by the conditions stipulated in the underlying contract. Since the remedy for breach of underling contract is determined in terms of damages, therefore, beneficiary cannot be prevented from drawing down on credit on credit based on terms of underlying contract. While responding to appellant’s contention, Jacob J, started his argument with reference to importance of the autonomy principle. However,

---

81 (1877–78) LR 3 App Cas 709.

82 [2002] EWHC 1611 (Ch) [2003] 1 WLR 87,92 [18]

he continued, it is not clear to him that principle of autonomy would be undermined where beneficiary expressly agrees that before realization of certain circumstances; he would not draw on the credit.<sup>83</sup>

### *5.2.2 Creation of uncertainty*

The argument of promoting uncertainty by recognition of exception has been favoured in Australian cases.<sup>84</sup> Argument raises the question that meaning to expressed terms in the underlying contract might be construed in different ways resulting in different outcomes and creating uncertainty over situation under which injunction should be granted or not.<sup>85</sup> Such uncertainty might result in reducing the popularity of documentary letters of credits in international trade and create policy concerns.<sup>86</sup> However, according to Enonchong, problem of uncertainty shall overcome by applying the exception only in presence of express contractual terms which agreed upon openly by consent of both parties. Under such express term, parties agree that beneficiary's right to draw on the credit is qualified to meeting condition of restrictive conditions mentions in the contract.<sup>87</sup>

## **6 Conclusion**

This paper tried to study of legal issues surrounding effects of including a restrictive clause on beneficiary's right to draw down on the documentary letter of credit in the underlying contract between buyer and seller in the course of international trade. Despite the fact that it might seem against application of autonomy principle, recognition "underlying contract exception" in Australasia, Scotland and Malaysia plus positive approach of English courts towards it seems to be a signal for readiness of global society to set aside traditional restrictive approach to principle of autonomy in documentary letters of credit. However, regarding the underlying contract exception, there are significant issues which should be resolved, namely, lack of certainty which exist in diversified approach of different jurisdictions to standard of proof. Particularly, acceptance of implied consent of beneficiary as a negative covenant in Australia might result is subjective approach of the court and promotion of uncertainty which in turn can reduce turnout of international trade society to documentary letters of credit at global stage.

However, courage of courts to consider restrictive conditions on beneficiary within the framework of under lying contract to be paid under the credit a signif-

83 Ibid , 19

84 *Bachmann Pty Ltd v BHP Power New Zealand Ltd* [1999] 1 V R 420, *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd* [1998] 3 VR 812.

85 [1999] 1 V R 420

86 ENONCHONG, Nelson. *The Independence Principle of Letters of Credits and Demand Guarantees*. Oxford: Oxford University Press, 2011, p. 266.

87 ENONCHONG, Nelson.. *The Problem of Abusive Drawing on Demand Guarantees. Lloyd's Maritime and Commercial Law Quarterly*, 2007, p. 96.

icant issue to be tried is an important development in international commercial law. Such development will be more considerable as recognition of such exception will turn cash nature of documentary letters of credit and bank guarantees in to a conditional instrument under which receiving the payment by beneficiary will depend on fulfilment of his obligations in the underling contract. Therefore, it is not clearly possible for a beneficiary to a documentary letter of credit or bank guarantee to rely on freedom of contract to commit whatever possible obligation in the contract with applicant and then neglect fulfilment of those obligations with reference to autonomy principle and separation of the credit form underlying contract.

# INTERNATIONAL HUMAN RIGHTS IN CZECH LEGAL EDUCATION<sup>1</sup>

**Petr Kilian; Ivo Pospíšil; Hubert Smekal**

Masaryk University, Faculty of Law, Brno, Czech Republic

*254699@mail.muni.cz; fandhir@mail.muni.cz;*  
*hubert.smekal@law.muni.cz*

KILIAN, Petr; POSPÍŠIL, Ivo; SMEKAL, Hubert. International Human Rights in Czech Legal Education. *International and Comparative Law Review*, 2016, vol. 16, no. 2, pp. 87–98. DOI: 10.1515/iclr-2016-0016.

---

**Summary:** The paper presents novel data on international human rights in the Czech legal education. The importance of international human rights treaties and case-law of human rights bodies in the domestic practice gradually increases, therefore the students of Czech law schools should be familiar with the grounds of the sub-discipline, especially with the interpretative techniques used by international human rights bodies. The paper categorizes the approaches which the Czech law faculties employ as regards educating students in international human rights field and evaluates advantages and disadvantages of the approaches implemented by individual law schools. Finally, the paper identifies weak spots in Czech legal curricula and proposes some ideas for improvement.

**Keywords:** Human rights; legal education; Czech Republic; the European Convention on Human Rights; the European Court of Human Rights; international law; constitutional law; clinics; moot courts.

---

## 1 Introduction

The Western liberal order to which Czechoslovakia sought to belong after the November 1989 “Velvet Revolution” counts among its building blocks the concepts of human rights, rule of law and democracy. International organizations both on the universal (the United Nations) and regional level (e.g. the Council of Europe) have produced a number of human rights treaties and established mechanisms which should oversee the State’s compliance with the ratified treaties. Even pre-1989 Czechoslovakia joined many international treaties, but similarly as other non-democratic illiberal states, without clear intention to fulfil their content, which was made possible either through the usually weak control mechanism of the treaties, or through the use of procedural reservations which domestically incapacitated the potentially effective international human

---

1 The paper has been written within the project „Mezinárodní lidskoprávní závazky České republiky: trendy praxe, příčiny a důsledky“ (“International Human Rights Obligations of the Czech Republic: Trends, Practice, Causes and Consequences” funded by the Grant Agency of the Czech Republic under the No. GA-1327956-S.

rights regime. After the fall of the Eastern bloc, the newly democratizing countries subscribed to values which substantially differed from the previous set and gradually introduced mechanisms for free and fair election, and for safeguarding human rights, especially individual, and the rule of law.

Due to the abrupt change in the nature of political regime and accompanied values, the Czechoslovak (and then Czech) institutions were not fully prepared to absorb transformation, partially due to the lack of personnel with the mind-set conforming to the newly introduced set of values and requirements. Lawyers belong among the backbone of the state administration, they are necessary both in production of laws and then in their authoritative application. The idea of human rights permeates law in modern European (or more widely, Western) countries, therefore the graduates of the law faculties should be familiar with the fundamentals of values which substantiate the whole political and legal orders. The content of these values is to a large extent influenced by the international human rights treaties and their supervisory bodies.

Our paper focuses on the education in international human rights in Czech law schools and seeks to uncover some common trends in the Czech legal academia and identify the main differences in approaches of the Czech law schools. We build our inferences on the data gained from the list of international human rights courses and their syllabi available on websites, or delivered by the schools upon our request. We discuss advantages and disadvantages of individual approaches and make recommendations, so that graduates of domestic law schools better conform to expectations of nowadays European “legal market”.

## **2 Importance of Education in International Human Rights**

As already mentioned above, the direct applicability of human rights has become an inevitable feature of all liberal democratic states, not excepting the post-communist countries, in the last few decades. This process developed from the assertion that the human rights stipulated in the national constitutions represented simple monologues of the legislator<sup>2</sup> (i.e. “only” general principles and limits which the Parliament had set upon itself as rules for its future acts) to the concept of rights directly applicable on individuals in any judicial proceedings, or even in the relations between individuals.

Therefore, human rights represent almost an everyday part of lawyers’ activities, irrespective of the particular subject of their interest and specialization. Although there are, of course, spheres of law in which the knowledge of human rights and the methods of their application and interpretation are employed more often or even regularly, one must admit that they ceased to be subjects of expert legal knowledge and penetrate even to the civil law disciplines.

---

2 WEYR, František. *Československé právo ústavní*. Prague: Melantrich, 1937, pp. 248.

The human rights competency seems to be essential in all the spheres of legal work: from legislation, through clients' representation by attorneys, to adjudication at courts. As concerns the situation in the Czech Republic, any bill proposed by the Government must fulfil the test of human rights conformity that is conducted by the ministry presenting the bill and being responsible for the compliance of the bill with human rights.<sup>3</sup> The true exercise of this rule is however very debatable: in most cases, the proposing ministry does not perform a careful test of conformity with human rights. Instead, it rather shortly and vaguely stipulates that the act does not contravene fundamental rights and freedoms without employing any methods that are used in the conformity tests (see later in the text).<sup>4</sup> This example shows that even the lawyers employed by the state who are in the first line responsible for due implementation of human rights are not familiar with their relevance and impact.

The same scenario can be experienced at many proceedings before the ordinary courts: it happens quite often that a judge argues the human rights are determined and suitable for consideration only at higher courts proceedings, or even for the proceedings before constitutional courts or international human rights courts.<sup>5</sup> These practical examples demonstrate the importance of human rights education, either at universities, or at other educational institutions responsible for professional training of lawyers (for example, in the Czech Republic it can be the Judicial Academy or seminars organised by the Czech Bar Association).

One could say that the expert knowledge is still based on the detailed familiarity with the content of all human rights treaties, the documents and the decisions of all the bodies applying the treaties etc., while the general legal knowledge rests in the orientation of lawyers at least in the sources of human rights, human rights databases and in the application of methods through which the human rights are applied and interpreted by relevant international bodies.

It seems to us that it is not necessary to put into the curriculum of legal education detailed courses on international human rights treaties; the courses that would combine practical skills with the general theory of human rights and the specific methods of their application and interpretation are rather needed. This good practice should start from teaching the students where they can find dif-

---

3 For details see KNĚŽÍNEK, Jan. *Mezinárodní lidskoprávní závazky a jejich implementace v české legislativě*. In POSPÍŠIL, Ivo, TÝČ, Vladimír (eds.). *Mezinárodní lidskoprávní závazky postkomunistických zemí: případy České republiky a Slovenska*. Prague: Leges, 2016, pp. 138.

4 This assertion is very easy to verify: these short and vague stipulations create a part of the so-called explanatory report that is attached to every act passed by the Parliament.

5 See the particular experience of Martin Kopa in his review of the book *Mezinárodní lidskoprávní závazky postkomunistických zemí: případy České republiky a Slovenska*. In KOPA, Martin. *International Human Rights Obligations of Post-Communist Countries: the Cases of the Czech Republic and Slovakia*. In ŠTURMA, Pavel (ed.). *Czech Yearbook of Public and Private International Law*. Prague: Czech Society of International Law, 2016, pp. 496.

ferent sources of international human rights, what are the authoritative databases to be used and how to effectively work with these databases, including the methods of searching and undertaking research. Another part of the curricula should bring a more general and theoretical approach to the topic. Practically, it means introducing the students with the typology, generations or classification of human rights and the results that could derive from their different nature and character, and the methods of “optimization” between rights in conflict, rather than to present the students with the comprehensive catalogues of all the human rights stemming from the international treaties.

It requires at least to show the students that the application and interpretation of human rights have its specific aspects that differ from other legal disciplines. Methods of interpretation that are common in other legal fields such as the principle of “lex posterior derogat legi priori” or “lex specialis derogat legi generali” are replaced with different methods of thinking. For example, while interpreting mutually colliding rights and other principles, it is necessary to preserve the highest possible level of protection from both rights and principles using the methods of balancing. The students should get the information that there are different ways how to perform the balancing and that the particular method depends on the body applying human rights: there is a difference between the U.S. classification of rights that is connected with different tests (strict scrutiny, intermediate scrutiny and minimal scrutiny test – rational basis test), and many different models of proportionality tests used by international as well as national bodies worldwide.<sup>6</sup>

This part of the curricula should be later complemented with a part devoted to the practical examples that would show the application of these general methods in the jurisprudence and case-law of international bodies and courts. It is even possible to train the students by employing the different methods of balancing while using the existing cases. This will teach students to think critically and analytically about the application of human rights which is more important than to memorize the human rights catalogues.

### **3 International Human Rights Education in the Czech Republic<sup>7</sup>**

Even though human rights were one of the phenomena of the second half of the 20<sup>th</sup> century in the Western liberal world, the teaching of human rights at law faculties in the newly born Czech Republic had to start in the early 1990s practi-

---

6 For details see BARAK, Aharon. *Proportionality. Constitutional Rights and Their Limitations*. Cambridge: Cambridge University Press, 2012, pp. 202–205 and 509 ff. or in a shorter version, dealing specifically with the Czech example see KOSAŘ, David. Kolize základních práv v judikatuře Ústavního soudu. *Jurisprudence*, 2008, XVII, No. 1, pp. 3–19.

7 This part of the paper partially draws on SMEKAL, Hubert, ŠIPULOVÁ, Katarína, POSPÍŠIL, Ivo, JANOVSÝ, Jozef, KILIAN, Petr. *Making Sense of Human Rights Commitments: A Study of Two Emerging European Democracies*. Brno: Munipress, 2016.

cally from scratch. As was already mentioned, the communist Czechoslovakia did not shy away from signing and ratifying human rights treaties.<sup>8</sup> Similarly, human rights were not completely ignored by Czechoslovak law schools either, with the constitutional law textbooks usually devoting one chapter to them. However, the perception of human rights by socialist states differed significantly to how human rights were understood by the Western world. While liberal democratic states considered the individual to be at the centre of human rights, the Eastern bloc emphasized the role of the state and used human rights to promote its importance.<sup>9</sup> Human dignity and freedom, which are cornerstones of the present Czech constitutional order,<sup>10</sup> were of little significance in socialist constitutions.<sup>11</sup>

It follows that the academic staff at law schools in post-revolutionary Czechoslovakia had only limited experience with the human rights law as viewed and interpreted by liberal democratic countries. At the same time, there were basically no up-to-date human rights law publications in the Czech language. Indeed, foreign books were of little use because of the low level of students' knowledge of foreign languages (with the exception of Russian). These factors limited the possibilities for real progress in human rights education during the 1990s.<sup>12</sup>

As a result of a failed modernization of post-communist higher education,<sup>13</sup> human rights law continued to play rather a marginal role in Czech legal education even at the beginning of the decade that followed. Although the fundamentals of human rights were taught in both constitutional law and international law courses, human rights issues were mainly left to philosophers, politicians, non-profit organizations, and legal practitioners (especially constitutional courts) to deal with. Legal academics usually did not pay enough attention to human rights law.<sup>14</sup>

---

8 See also Šipulová, Katarína, JANOVSÝ, Jozef, SMEKAL, Hubert. *Mezinárodní lidskoprávní závazky České republiky a Slovenska*. In POSPÍŠIL, Ivo, TÝČ, Vladimír (eds.). *Mezinárodní lidskoprávní závazky postkomunistických zemí: případy České republiky a Slovenska*. Prague: Leges, 2016, pp. 25.

9 SHAW, Malcolm N. *International Law*. Cambridge: Cambridge University Press, 2008, pp. 268.

10 BAROŠ, Jiří. Čl. 1. In WAGNEROVÁ Eliška et al. (eds). *Listina základních práv a svobod. Komentář*. Praha: Wolters Kluwer, 2012, pp. 60.

11 WAGNEROVÁ, Eliška. *Základní práva*. In BOBEK Michal et al. (eds). *Komunistické právo v Československu. Kapitoly z dějin bezpráví*. Brno: Mezinárodní politologický ústav, Masarykova univerzita, 2009, pp. 346.

12 However, such a picture is not unknown also from social sciences – see KRPEC, Oldřich, OCELÍK, Petr, SMEKAL, Hubert. *Narrowing the Divide. Perspectives on the Future of Mixed Methods Report from Central and Eastern Europe*. *Journal of Mixed Methods Research*, 2016.

13 See TUCKER, Aviezer. *Reproducing Incompetence: The Constitution of Czech Higher Education*. *East European Constitutional Review*, 2000, vol. 9, No. 3, pp. 94–99.

14 MOLEK, Pavel. *Právo na spravedlivý proces*. Praha: Wolters Kluwer, 2012, pp. 13.

Real progress can therefore be seen only towards the end of the first decade of the 21<sup>st</sup> century as more human rights-related publications appeared,<sup>15</sup> the faculties recruited young lecturers and lecturers with experience from abroad, and the domestic doctrine of human rights began to take shape thanks to, among other factors, the case law of the Constitutional Court and the European Court of Human Rights. Consequently, some schools have created compulsory courses devoted specifically to human rights, while others have expanded their offer of non-mandatory human rights courses and other activities such as legal clinics or moot courts.

Today, human rights law is a firm part of the curriculum at every Czech law school. However, the schools differ significantly in the number and variety of human rights courses offered. The most common approach is to introduce human rights to students through the constitutional law and public international law courses which are usually compulsory and are taught mainly during the first two years. These courses serve to explain the concept of human rights and their position in the national legal order and international law, respectively. More in-depth study of human rights is then provided by specialized courses.

A notable exception to this concept is the law faculty in Olomouc which offers the first-year and the second-year students a compulsory course, entitled 'Fundamental Rights'. The law faculty in Brno also offers a compulsory human rights course ('Human Rights and Judiciary'), but it is designed for more mature students (usually fourth-year students). The idea behind compulsory courses in Olomouc and Brno, respectively, is therefore very different. The point of the 'Fundamental Rights' course can be seen in that it provides an initial introduction to human rights law, raises a certain level of human rights awareness among students and perhaps encourages them to choose more in-depth non-mandatory courses further down the road. Attending a human rights course so early in the curriculum should also lead the students to consider human rights questions in the rest of the courses as well. By contrast, Masaryk University considers it sufficient to introduce human rights only via a general constitutional law course. The students who take an interest in human rights may then attend non-mandatory courses while the rest will study human rights again in their fourth year. One of the advantages of this approach is that the older students should already have considerable knowledge of law which helps them to work with real human rights cases. Neither the law faculty in Prague, nor the law faculty in Pilsen offers a compulsory course oriented specifically on human rights, leaving it up to students' discretion whether or not they devote their time to human rights law at least via non-mandatory courses or other activities.

15 It should be mentioned, though, that already in 1990 Jiří Malenovský wrote the first edition of his book *'Mezinárodní právo veřejné'* ('Public international law'). The book, in its latter editions, is still the leading international law textbook in the Czech Republic. See MALENOVSKÝ, Jiří. *Mezinárodní právo veřejné – Obecná část a poměr k jiným právním systémům*. 6<sup>th</sup> ed. Brno: Doplněk, 2014.

As to non-mandatory courses, the majority of Czech law schools<sup>16</sup> offer a wide range of courses that are related to human rights law. These are often very practice-oriented and motivate the students not only to memorize but also to learn how to apply their knowledge. A great emphasis is given to the case law of the Czech Constitutional Court and the European Court of Human Rights and the students are often required to 'solve' a human rights case, or to write a mock petition to one of the aforementioned courts. This approach can be seen as a very positive change compared to how law was taught only a decade ago<sup>17</sup> and moreover, is present across all four Czech law faculties.

The emphasis on the practical aspects of human rights law is further enhanced by other activities that are organized or co-organized by the respective schools. These include summer schools,<sup>18</sup> legal clinics,<sup>19</sup> internships at courts or in non-governmental organizations,<sup>20</sup> and moot courts. As to the latter, the students may participate in various international moot courts, such as the European Human Rights Moot Court Competition<sup>21</sup> or the Philip C. Jessup International Law Moot Court Competition.<sup>22</sup> Moreover, the League of Human Rights<sup>23</sup> organizes a national human rights moot court competition with the finals taking

---

16 The lowest number of human rights oriented courses is probably offered by the law faculty in Pilsen.

17 See BOBEK, Michal. O nereformovatelnosti studia práv v Čechách. *Právní rozhledy*, 2005, Vol. 13, No. 10, pp. 365–370; No. 12, pp. 446–451; No. 14, pp. 523–529; No. 16, pp. 601–606.

18 An annual summer school on human rights is organized by the Law Faculty in Brno.

19 It is the faculty in Olomouc that is particularly active in this regard, organizing legal clinics dealing with social rights, discrimination law, refugee law, and medical law, as well as a specialized human rights clinic. In Brno, the students can attend legal clinics regarding medical law, international legal protection of children, refugee law, anti-discrimination law, and others. Building on a 15-year tradition, the Prague Law Faculty also offers practice-oriented courses in which students apply their skills and knowledge to real cases under the supervision of lawyers from non-governmental organizations or the office of the Public Defender of Rights

20 The students from Brno probably have a slight advantage in this area, given the fact that the Supreme Administrative Court, the Supreme Court, and the Constitutional Court, which are situated in Brno, have become increasingly open to offer internships lately. As part of these internships, the students often get the opportunity to work on a real case.

21 Particularly successful in this young competition has been the team from Prague, reaching the 7<sup>th</sup> place in 2013 (the inaugural year of the competition) and making it to the final 8 again in 2016.

22 While the Jessup primarily focuses on general international law, it usually raises at least one human rights issue. During past years, the Czech Republic has usually been represented by one team in the international rounds of the competition. The success of Czech teams has been rather moderate, although in 2010, the team from Brno finished in the 13<sup>th</sup> place in the written round of the global competition.

23 This non-profit organization organizes also other competitions and events focused on human rights. One of them is the 'Human Rights Dissertation', a competition for the best dissertation focused on human rights (the competition is not limited to law students).

place at the Constitutional Court. The judges of the Supreme Court, the Supreme Administrative Court and the Constitutional Court are usually invited to judge the final rounds. However, it should be noted, that although participation in a moot court competition – and particularly if it is an international one – certainly enhances one's curriculum vitae, the interest in these competitions among the students is in fact rather low. Schools rarely motivate their students,<sup>24</sup> or the faculty members, to take part in moot courts despite the fact that a success in the competition may raise the prestige of the school inasmuch as the media are interested in such events.

Indeed, the list of the courses and other activities offered to students do not tell the whole story. Of equal or even greater importance is the teaching staff. Without experienced and dedicated lecturers, there is not much difference between attending a course and reading a book at home. It is impossible to compare the respective teaching staffs and make a statement about the standing of individual faculties. That would require seeing each and every single one of the lecturers in action multiple times, and still it would be very difficult to evaluate staffs objectively. In general, though, the Czech law schools have benefited greatly from the possibilities the students and young lawyers have today to study or work abroad. The majority of young lecturers have had such experience during the past twenty years, and thus they have provided the schools with what had been so much missing during the communist era. It is not uncommon that faculty members have working experience from the highest national courts, or the European Court of Human Rights and other international institutions. Many of the law schools have also managed to attract various justices of the Constitutional Court (although not all of them necessarily teach human rights law), thereby providing the students direct contact with the 'real' human rights law as practiced among the highest human rights authorities.<sup>25</sup>

#### **4 Analysis of the Trends**

As we described above, human rights battled their way to the curricula of the Czech law schools only gradually. After the initial issues related to the lack of available and suitable lecturers and textbooks, competent personalities often with experience from abroad filled the places and publications in the field flourished. The initiative came from below; no pressure from above (e.g. from the Ministry of Justice, or Education) has been applied. On the other hand, the lack of coordination resulted in diversity in approaches in the international human rights education. Based on the aforementioned data from the four Czech law schools, we identified different approaches to the teaching of human rights,

24 Recently, at least, participation in a moot court has begun to be awarded with ECTS credits, something that just a few years earlier was not the rule.

25 For example, the Department of Constitutional Law and Political Science of the Faculty of Law of Masaryk University includes three Justices of the Constitutional Court (along with law clerks from the same court) and a judge of the Supreme Administrative Court.

which are further analysed and evaluated. The discussed aspects include the issue of a mandatory subject on human rights, its timing (early, or later in the curriculum), substitution of a mandatory subject via constitutional and/or international law, special activities like legal clinics and moot courts, and Eurocentric (or even European Convention-centric) approach.

The Czech law schools differ in the basic fact regarding education in human rights: two schools (Brno and Olomouc) have specialized courses on this issue, while the other two (Pilsen and Prague) not. We have elaborated on the importance of human rights in previous sections – they count among fundamental values of Western political and legal systems, permeate their functioning, and are enshrined in constitutional texts. Moreover, international treaties and case-law largely influence the domestic human rights practice. Thanks to the cross-cutting characteristics of human rights, their reach is close to unlimited – almost every issue can be viewed also through the human rights perspective.<sup>26</sup> The high importance of international human rights in nowadays European legal systems thus seems to be beyond doubt. It follows that graduates of (not only) Czech law schools should be familiar not only with readily useful practicalities like the texts of the treaties, case-law of international bodies and their interpretative techniques, but also with the most important theoretical concepts and “human rights approach” which informs interpretation of the bodies. It seems that understanding of this basis which provides sense for the practical superstructure requires a standalone course which would not be dominated by the international law, or constitutional law paradigm. It follows that a mandatory course on human rights is a preferable option from the perspective of the modern European legal curriculum.

The law schools in Brno and Olomouc both have a mandatory course on human rights, but approach it differently in the sense of its timing. While Palacký University in Olomouc places the course to the very first year of the legal education, Masaryk University in Brno waits until the late stage of the studies. Both approaches have their pros and cons and both present viable alternatives. Early exposure to the world of human rights raises the rights awareness and sensitivity freshly from the beginning of the university education and might encourage students to enrol in optional human rights courses later in the studies. Furthermore, it shall inform thinking of students also in other courses whose specific issues and questions could be seen in the additional layer of the human rights perspective. On the other hand, the mandatory human rights course in the later stage of legal education welcomes already more mature students with broader knowledge of law and with greater practical competences which enable them to work with real-life cases. Moreover, these advanced students have already been introduced

26 Compare for example the progressive encompassing of human rights by the European Union (then the European Communities) which have only slowly accepted them through the European Court of Justice as a part of the general principles in cases which are predominantly of economic nature and regard economic aspects of the European integration.

to human rights via courses in constitutional, or international law. But unfortunately, they have lost the chance to absorb the human rights perspective early which has narrowed their way of looking at legal problems during their legal education. Additionally, with advancing stages of the studies and approaching expectations of entering the job market, the demand for practical skills increases and students are usually robbed of the pleasure of theoretical thinking. Thus, the ratio of advantages and disadvantages of inclusion of a human rights course in the early phase of legal studies, in our view, overweighs its later addition.

The law schools which do not have a mandatory human rights course compensate this deficit through courses on constitutional and international law. As discussed above, both these legal fields are dominated by their own perspectives, and human rights form only a part of their interest, therefore their coverage remains limited. Moreover, the specific human rights approach typically remains side-lined in such scenario. The issue becomes even more pressing in nowadays Europe which faces numerous intertwined crises (economic, inequality, migration, legitimacy, etc.) contributing to the observed phenomenon of democratic backsliding.<sup>27</sup> If the support for advancement of human society forms part of the mission of universities, then inspiring lawyers – as a future backbone and elite of the society – in building respect for human rights shall form one of priorities of legal education. When a student does not take any optional course, it leaves them only with basic knowledge of constitutional and international law without necessarily paying much attention to human rights, which is clearly a suboptimal scenario. Introducing students to human rights through an early course on constitutional law remains a preferable option to the introduction through the course on international law, because constitutional law departments have typically attracted strong cadres shortly after the November 1989 Velvet Revolution, while positions in international law departments have been in lesser demand, also due to initial incompetence in foreign languages. Furthermore, constitutional law firmly incorporates human rights in their theoretical apparatus and bind the international norms with domestic practice.

All four Czech law schools have established promising opportunities for students interested in human rights. All of them offer a series of optional courses which cover different agendas. Moreover, various non-traditional additions to the classical legal education are on the rise – heretofore in the Czech legal education unknown activities such as legal clinics, summer schools and moot courts flourish.<sup>28</sup> Taken together with quite lively local non-governmental organiza-

---

27 See e.g. the debate on the democratic backsliding in the EU – special section in the *Journal of European Public Policy* introduced by Kelemen, R. Daniel, Blauberger, Michael. Introducing the debate: European Union safeguards against member states' democratic backsliding. *Journal of European Public Policy*, 2016.

28 Although moot courts could receive even more attention, because the international competition seems to be still beyond reach. But it seems that incentives both for students and their coaches are not high enough to attract e.g. for Jessup International Law Moot Court

tions scene, then students interested in human rights both theoretically and practically have enough chances for personal fulfilment.

The last item discussed in this section concerns again a common trend at all Czech law schools – a strongly Eurocentric approach with a dominant focus on the European Convention on Human Rights system. In the first half of 1990s, the International Covenant on Civil and Political Rights and the jurisprudence of its Human Rights Committee received some attention, but it has been since then replaced with the case-law of the European Court of Human Rights whose judgments receive much more publicity and the most important of them are summarized in Czech. Moreover, several publications on the European Convention system appeared, especially the comprehensive commentary on the European Convention which has successfully hegemonized the field.<sup>29</sup> The European Convention centred approach means that the activities of other bodies of the Council of Europe remain neglected which holds even more for the United Nations human rights regimes, let alone for other regional systems of human rights protection which leaves students close to untouched with the Inter-American or African systems. Such an educational reduction seems unfortunate, yet understandable. The European Court of Human Rights is considered the most effective court, it has a long tradition and an extensive case-law, therefore many domestic problems have been already discussed by the Strasbourg Court whose case-law is readily available, moreover accompanied by useful downloadable handbooks summarizing case-law on particular rights issued by the Council of Europe. Moreover, with the limited positions available at the Czech Law Schools, it would require Herculean efforts from the lecturers to follow not only domestic and international case-law, but also outputs of other treaty bodies and courts from different continents.

## **5 Conclusion and Recommendations**

The situation in international human rights education at Czech law schools has improved considerably over the last few years, especially with lecturers returning back home with diplomas from foreign universities and with working experience from international institutions. The Czech law schools already offer various human rights courses. These cover both national and international mechanisms of human rights protection, as well as both the theory and practice of human rights. There exist also growing numbers of possibilities for the students to apply and test their skills and knowledge. The emphasis on practical aspects can be seen in the evaluation methods used in many human rights courses: as a part of the final examination, students are typically required to dem-

---

which typically involves a strong human rights component teams from all four Czech law schools.

29 KMEC, Jiří, KOSAŘ, David, KRATOCHVÍL, Jan, BOBEK, Michal. *Evropská úmluva o lidských právech. Komentář*. Praha: C.H. Beck, 2012.

onstrate their ability to apply the human rights law in particular real life cases by writing a simulated constitutional complaint or judgement. Furthermore, the Czech law faculties have introduced and help co-organize a wide range of activities focused on human rights (such as legal clinics or moot courts), thereby providing hands-on legal experience to their students. Finally, important roles are played by high courts and non-governmental organizations, which are increasingly open to offering various internships for law students. All these opportunities make human rights law appealing for students and enhance the chances that a higher number of them will focus on human rights during their studies.

Admittedly, there still remains a room for improvement. The Czech education in international human rights seems to suffer from a lack of coordination (although first steps in this direction have been taken at least in Brno and Olomouc). Individual courses exist; however, the overall situation does not create an impression of a result of a well-thought plan with a bigger picture in mind, but rather a result of incremental piece-meal development. More communication among various entities dealing with international human rights shall occur, so that efforts are not doubled e.g. in a course on the European Convention system and in a regular criminal law course.

Finally, given a rather high number of law-school students and a limited amount of time that could be devoted to each area of law, it is probably beyond the possibilities of any school to assure that each and every of its graduates have an excellent knowledge of human rights law. The inclusion of a compulsory human rights oriented course can certainly help to increase the overall knowledge of the students in this area. However, if the student is truly interested in human rights law, it is up to them to actively look for other opportunities that their school offers, whether it is a non-mandatory course, legal clinic, moot court or an internship. At the majority of Czech law schools, these active students can get a solid foundation if they seek a career in the human rights field. On the other hand, the knowledge of human rights law of the disinterested alumni will be rather limited.

## RESPONSIBILITY OF A JUVENILE FOR A PROHIBITED ACT UNDER POLISH LAW

Paweł Daniluk & Joanna Mierzwińska-Lorencka

Institute of Law Studies, Polish Academy of Sciences

*paw87@wp.pl, mierzwinka@wp.pl*

DANILUK Paweł & MIERZWIŃSKA-LORENCKA, Joanna. Responsibility of a Juvenile for a Prohibited Act under Polish Law. *International and Comparative Law Review*, 2016, vol. 16, no. 2, pp. 99–115. DOI: 10.1515/iclr-2016-0017.

---

**Summary:** The law on juvenile delinquency proceedings creates a model of a paternalistic and welfare approach to juvenile justice, the protection and treatment of the juvenile at risk oriented allowing only a certain range, to use criminal sanctions against juvenile perpetrators of prohibited acts. The rule is that juvenile is not liable to the principles defined in the Penal Code, the Code of Petty Offences or the Fiscal Penal Code, and the law is applied to him is the Juvenile Act of 26 October 1982 which does not provide for a criminal responsibility. Special, nonpenal responsibility for juveniles applies for those between 13 and 17 years. For younger juveniles, special measures of exclusively educational and care character are possible.

**Keywords:** special juvenile responsibility, concept of juvenile, juvenile measures, age of criminal responsibility

---

### 1 Age of Criminal Responsibility and The Notion of a Juvenile in Polish Criminal Law

On the basis of the broadly understood Polish criminal law, whose basic legal acts are the Act of 6 June 1997 – Criminal Code (hereinafter referred to as the P.C.)<sup>1</sup>, the Act of 20 May 1971 – Code of Petty Offences (hereinafter referred to as the C.P.O.)<sup>2</sup> and the Act of 10 September 1999 – Fiscal Penal Code (hereinafter referred to as the F.P.C.)<sup>3</sup>, the concept of a juvenile understands the perpetrator of a prohibited act as an offence, fiscal offence, petty offence or fiscal petty offence,

- 1 The Penal Code is the basic legal act of the Polish criminal law in the sensu stricto sense, which regulates criminal responsibility of offences.
- 2 The Code of Petty Offences is the basic legal act of the Polish petty offences law, which is a part of the Polish penal law in the broad sense. The petty offences law regulates criminal liability in the sensu largo sense for petty offences, which are finer or less socially dangerous criminal acts than offences.
- 3 Fiscal Penal Code is the basic legal act of the Polish fiscal law, which is a part of the Polish criminal law in the broad sense. Fiscal Penal Law regulates criminal liability for fiscal offences and fiscal petty offences, and the separation is due to the specialized subject of fiscal offences protection norms. Namely, these norms protect the financial interests of the treasury and local government units.

which because of the age is considered to lack the capacity to criminally responsible and thus could not be criminally responsible. This means that juvenile, as a rule, is not liable to the principles defined in the P.C., the C.P.O. or the F.P.C., and the law is applied to him is the Juvenile Act of 26 October 1982 (hereinafter referred to as the J.A.) which does not provide for a criminal responsibility<sup>4</sup>.

Polish criminal law traditionally because since the first modern Polish criminal codify what was the regulation of the President dated 11 July 1932 – Criminal Code, involves the ability to bear criminal responsibility of the age of 17 years. P.C. in the article 10 § 1, C.P.O. in the article 8 and F.P.C. in the article 5 § 1 explicitly state that under the terms of the codes respond to the one who had committed a prohibited act after having reached 17 years of age. In this way it sets the minimum age from which updates the ability to bear criminal liability for committing an offence, fiscal offence, petty offence and fiscal petty offence. In accordance with those provisions, the responsibility may suffer only a person who commits a prohibited act after having attained 17 years of age. The perpetrator who committed a prohibited act before reaching the specified age is not criminally responsible.

Although the P.C., the C.P.O. and the F.P.C. do not define expressions “adult” and “juvenile” and do not use them in the articles 10 § 1 P.C., 8 C.P.O. or 5 § 1 F.P.C., it is accepted that a person who commits a prohibited act after having attained 17 years of age, is an adult, and the one who commits a prohibited act before having attained the age of 18 years is a juvenile. Calling juvenile perpetrators, which at the time of its commission has not completed 17 years does not correspond fully with the notion of a juvenile in the J.A. This Act provides for three – differently understood – categories of juveniles and none of them is semantically identical the above mentioned terms of the P.C., the C.P.O. and the F.P.C.

Article 10 § 1 P.C., article 8 C.P.O. and article 5 § 1 F.P.C. – acting on the commission of a prohibited act after the completion of 17 years – refers to the time of the prohibited act specified in the article 6 § 1 P.C., art. 4 § 1 C.P.O. and article 2 § 1 F.P.C. Under these provisions, a prohibited act is deemed to have been committed at the moment when the perpetrator has acted or has omitted an action he has been obliged to perform (was the behavior of the perpetrator). Criminal liability should be imposed only on perpetrators who had completed 17 years at the time of action or lack of action (to what was required), realizing the mark of the type of a prohibited act defining the behavior of the perpetrator. To determine whether the offender has committed a prohibited act after completing 17 years have no meaning other than the time of action or omission moments of time. In particular, time of occurrence is negligible effect, which is the mark of a prohibited act. In addition, there is no doubt irrelevance time of a trial court

---

4 A. Wąsek rightly said that the J.A. is not a legal act belonging to the criminal law (WĄSEK, Andrzej. *Penal Code. Commentary*. Gdańsk: Arche, 1999, pp. 130–131.

sentencing. Therefore, if the offender committed a prohibited act before the age of 17 years and at the time of a trial court sentencing has already completed 17 years is not subject to criminal liability under the rules provided in penal law.

## **2 Ability to fault**

The regulations of articles 10 § 1 P.C., 8 P.C.O. and 5 § 1 F.P.C. are based on the assumption that a person from the moment of completion of 17 years reaches a level of intellectual, social and moral development that allows to recognize correctly the importance of committed acts and their conduct<sup>5</sup>. Proper recognition of the importance of committed acts refers both to the ontology layer including bio-physical and causal consequences of the act (e.g. a person who completed 17 years should be aware that the task to another person a blow with a knife can cause death or injury), as well as their axiological layer on the moral and legal assessment of the act (e.g. a person who reached 17 years should be aware that you can not take other people's things). The opportunity to guide their behavior refers to being able to control their behavior and adapt it to the ontological and axiological recognition of its importance.

Achieving the level of intellectual, social and moral development, which allows correct recognizing the importance of committed acts and their conduct is a necessary condition for the assignment guilty<sup>6</sup>. Perpetrators of being incapable of either recognizing the significance of his act or controlling his conduct can not be charged with a prohibited act which is the essence of guilt under criminal law. At the basis of this accusation is that the offender has committed a prohibited act under conditions (situation) in which you can require a different, lawful behavior.

Thereby, achievement by the age specified in articles 10 § 1 P.C., 8 C.P.O. and 5 § 1 F.P.C. of the perpetrator is the premise of the assignment guilty. However, the perpetrator of a prohibited act who not reached the age is incapable of guilt and unable to bear criminal responsibility. The doctrine notes additionally, as it were presented issues of guilt, that the necessity of differential treatment of juveniles and the abandonment of pulling them to criminal liability is justified inexpediency, or even harm punish them according to the rules prescribed for adult perpetrators of criminal acts. In particular, it is pointed out that the punishment of juveniles by these rules precipitate them from the normal, appropri-

5 GIEZEK, Jacek (ed.). *Criminal Code. General Section. Commentary*. Warsaw: Wolters Kluwer, 2007, p. 87; GRZEŚKOWIAK Alicja, WIAK, Krzysztof (eds.). *Criminal Code. Commentary*. Warsaw: C.H. Beck, 2012, p. 102.

6 In the Polish criminal law only a person who commits an act that is culpable shall be subject to criminal liability. That is clear from art. 1 § 3 P.C., art. 1 § 2 C.P.O. and art. 1 § 3 F.P.C. The guilty under Polish criminal law will have to deal when the accusation can be made because of committed act. At the core of this accusation is the fact that the offender has committed a prohibited act under conditions (situation) in which you can from it require a different, lawful behavior.

ate for children and young people in a certain age, the rhythm of functioning, stigmatize as criminals and socially marginalized them<sup>7</sup>.

### **3 Degree of the particular perpetrators development**

#### *3.1 Preliminary remarks*

Adoption on the basis of article 10 § 1 P.C., 8 C.P.O. and 5 § 1 F.P.C. that the person at the completion of 17 years reaches a degree of intellectual, social and moral development, that allows it to correctly recognize the importance of committed acts and their conduct is a certain assumption or presumption. These provisions do not take into account while the actual degree of development of individual perpetrators. It is clear also for the rational legislator that in fact the dynamics of development is not the same for each person. These makes the perpetrators who despite not having concluded at the time of a prohibited act 17 years correctly recognize its importance and are fully able to control their conduct. On the other hand there are also perpetrators who despite the completion at the time of a prohibited act 17 years not actually recognize its significance or are not fully able to direct his actions.

On the basis of Polish criminal law these circumstances are taken into account by the legislator but only to a limited extent in a disaggregated way different in particular Codes.

#### *3.2 Penal Code*

The greatest flexibility when it comes to taking into account the actual degree of particular perpetrators development characterized by the P.C. In this regard, it should be pointed to the article 10 § 2 P.C., which introduces an exception to the rule in the article 10 § 1 P.C. and allows criminal prosecution (under the P.C.) a juvenile who after the age of 15 committed one of the prohibited act, exhaustively listed in the article 10 § 2 P.C. These are the following prohibited acts: the assassination of the President of the Polish Republic, the murder of a person in the basic type and the types of eligible, causing serious damage to human health, in this resulting in his death, to bring an event that threatens the life or health of many persons or property in large sizes, including resulting in death of man or severe damage to the health of many people, take control of the ship or aircraft using deceit or violence to a person or threat of immediate use of such violence, including causing immediate danger to life or health of many persons or human death or serious bodily injury of many people, bringing the disaster in motion by land, water or air, threatening the life or health of many persons or property in large sizes, this resulting in the death of a man or severe damage to the health of many people, rape, together with another person, to a minor under 15 years

<sup>7</sup> KONARSKA – WRZOSEK, Violetta. *Legal System of Dealing with Minors in Poland*. Warsaw: Wolters Kluwer, 2013, pp. 29–30.

of age or to ascendant, descendant, adoptee, adopter, brother or sister, including with particular cruelty, admission an assault on a public official or person to help him foster during or in connection with the performance of official duties, acting jointly and in concert with another person or using a firearm, knife or other similarly dangerous object or means overwhelming, if as a result of the assaults occurred due in the form of serious injury to a public official or person to help him foster, taking or keeping hostage to force the state authority or local government, institutions, organizations, natural or legal person or group of persons to a particular behavior, including binding with special torment hostage, robbery with use of violence against a person or threat of immediate its use or of bringing man to a state of unconsciousness or helplessness, including the use of a firearm, a knife or another similarly dangerous object or incapacitating agent, or acts in another immediately life-threatening manner or jointly with another person handling such weapon, object or agent, or acting in such manner.

It seems that the intention of the legislator in the catalog of prohibited acts of article 10 § 2 P.C. were to be the most serious offences<sup>8</sup>. If so, recognition of this directory can inspire and raises reasonable doubt, related primarily to the omission in it at least several serious offences, such as e.g. taking activity aimed directly to eliminate violence the constitutional authority of the Polish Republic, trafficking in human beings, the use of violence against a person or threat of immediate to use it, or bring people to a state of unconsciousness or helplessness, immediately after the theft, in order to maintain the possession taken away things<sup>9</sup>.

The condition of criminal liability of the juvenile who after the age of 15 committed one of the above prohibited acts is to appeal for the circumstances of the case and the degree of the perpetrator's development, his characteristics and personal conditions, especially if educational or correctional measures that had been applied previously have proven to be ineffective. Criteria referred in the article 10 § 2 P.C. are not defined in the P.C. What's more, they appear to be vague and difficult to unambiguous interpretation. This state of affairs is not met, however, with a uniform evaluation. On the one hand it is subject to criticism, in which it is alleged that the conditions of the article 10 § 2 P.C. as vague leave excessive discretion the courts which is not enough to guarantee in relation to a juvenile<sup>10</sup>. On the other hand rises that vague indications of the article 10 § 2 P.C. to ensure the application of this provision in a way that maximally individualized and flexible which is needed for proper settlement of specific cases<sup>11</sup>. Despite these differences in the assessment of how to approach article 10 § 2 P.C. according to the doctrine it is assumed that this provision as sets forth an

8 KONARSKA – WRZOSEK, Violetta. *op. cit.*, p. 122.

9 HAŁAS, Radosław. *Criminal responsibility of juveniles under the Penal Code of 1997*. Lublin: KUL, 2006, pp. 85–87.

10 GRZEŚKOWIAK Alicja, WIAK, Krzysztof (eds.). *op. cit.*, p. 105.

11 WĄSEK, Andrzej. *op. cit.*, p. 134.

exception to the general rule of criminal irresponsibility of juveniles can not be interpreted broadly<sup>12</sup>. A restrictive interpretation of the article 10 § 2 P.C. seems to accompany practice. V. Konarska-Wrzošek reports, citing data of the Ministry of Justice, that pulling the juvenile to criminal responsibility under article 10 § 2 P.C. occurs rarely. The number of juveniles convicted under this provision amounted in 2005 – 24, 2006 – 19, 2007 – 25, 2008 – 10, 2009 – 25, 2010 – 14<sup>13</sup>.

The most striking premise, which is to speak at the pull of a juvenile to criminal liability under article 10 § 2 P.C. is “the degree of the perpetrator’s development”. It emphasizes that criminal liability of the juvenile is the responsibility based on the principle of guilt and can not be deemed as a liability of the person unable to fault (exception to the principle of guilt expressed in article 1 § 3 P.C.). This was indeed the legislator’s intention, as evidenced by the justification of the project of the P.C. which stated in relation to article 10 § 2 P.C. that “in the context of the circumstances of the person causing the” accentuates the “degree of development” which is “a clear reference to the possibility of bringing the perpetrators plea from his actions, and so establish his guilt”<sup>14</sup>. Basing criminal responsibility of juvenile on the principle of guilt as referred to in article 10 § 2 P.C. is also confirmed in the formulation of this provision that juveniles may correspond to “the principles laid down in the Code”. After all, one of the principles set out in the P.C. is the principle of guilt (1 § 3 P.C.)<sup>15</sup>.

Perceiving the “the degree of the perpetrator’s development”, as referred to in article 10 § 2 P.C., through the prism of the principle of guilt, it is clear that he will be speaking at the pull of a juvenile to criminal liability when a young perpetrator who at the time of the prohibited act was on the degree of intellectual, social and moral development, which enabled him to properly recognize the importance of having committed action and their conduct, which is a prerequisite for apportioning blame.

“Properties and personal conditions” is a phrase that is quite often used in the P.C. provides the basis for assessing a perpetrator and the situation of perpetrator. It looks similar under article 10 § 2 P.C. where personal properties include age, health, personality and character, the degree of demoralization of the juvenile, and personal circumstances to the social environment of the juvenile, and especially the family environment, environment, colleagues or other environment where the juveniles resides<sup>16</sup>.

12 GRZEŠKOWIAK Alicja, WIAK, Krzysztof (eds.). *op. cit.*, p. 105; WĄSEK, Andrzej. *op. cit.*, p. 137.

13 KONARSKA – WRZOSEK, Violetta. *op. cit.*, p. 135.

14 *The new criminal codes with justifications* (Warsaw, 1997) p. 123.

15 GABERLE, Andrzej, Criminal responsibility of juveniles (remarks on the background of article 10 § 2 P.C.), In GIEZEK, Jacek (ed.). *Crime – punishment – criminal policy. Problems of creation and functioning of the law. The jubilee book on the occasion of Professor Tomasz Kaczmarek seventieth birthday*. Cracow: Zakamycze, 2006, p. 178.

16 KONARSKA – WRZOSEK, Violetta. *op. cit.* p. 124; WĄSEK, Andrzej. *op. cit.*, p. 135.

The most capacious and broadly defined premise of article 10 § 2 P.C. are the “circumstances of the case.” It seems that this premise should be viewed as complementary in relation to the other conditions of article 10 § 2 P.C.<sup>17</sup> while closely associated with a particular incident, which is committing a prohibited act referred to in that provision. Thus, the circumstances of the case must be understood as subjective and objective characteristics of the crime, including the behavior of the perpetrator (e.g. the brutality, aggressiveness), its motivation, and caused damage (material or immaterial)<sup>18</sup>.

Special premise strokes juvenile to criminal responsibility is the ineffectiveness of previous measures applied educational or corrective according to the provisions of the J.A. The specific nature of this condition lies in the fact that – unlike other conditions of article 10 § 2 P.C. they need not be met to initiate the criminal responsibility of a juvenile. Convinces the preceding of this premise with the phrase “in particular” which clearly indicates that this circumstance is purely exemplary. Consequently there is the possibility of holding a juvenile to criminal responsibility in accordance with article 10 § 2 P.C. when for example, in general, has not been used previously to him of educational or correctional measures. However, if such measures had been applied previously and have proven to be ineffective then this could be a very important argument for the stroke of a juvenile to criminal liability.

Pulling the juvenile to criminal responsibility in accordance with article 10 § 2 P.C. is optional. It is possible that in the situation that all the conditions of article 10 § 2 P.C. the court refrains from strokes juvenile to criminal responsibility and stop with the use of the measures provided for in the J.A. The court in deciding whether to start criminal responsibility of a juvenile pursuant to article 10 § 2 P.C. should be guided by the best interests of the juvenile which is a basic principle of the law on juvenile justice (article 3 § 1 J.A.)<sup>19</sup>.

Pulling the juvenile to criminal responsibility in accordance with article 10 § 2 P.C. does not mean that he is treated on the same basis as an adult perpetrator. We are dealing here with some of difference in terms of punishment. First of all, pay attention to the special directive sentencing a juvenile. It has been recognized in the article 54 § 1 P.C. and it states that while imposing a penalty on a juvenile, the court aims primarily at educating the perpetrator. The penalty predicated for juvenile is therefore serving primarily an educational function in the detail preventive sense. This does not mean, however, warrant a mild punishment of juveniles, because in some cases educational function can meet only punishment severe<sup>20</sup>.

---

17 WĄSEK, Andrzej. *op. cit.*, p. 134.

18 KONARSKA – WRZOSEK, Violetta. *op. cit.*, pp. 122–123.

19 HAŁAS, Radosław. *op. cit.*, p. 91; MARASZEK, Magdalena. *Minimum age of criminal responsibility in Polish law*. Warsaw: Wolters Kluwer, 2012, p. 129.

20 KONARSKA – WRZOSEK, Violetta. *op. cit.*, p. 132.

Another difference in the range of punishment of juveniles were expressed in article 54 § 2 and 10 § 3 P.C. The first of those provisions strictly prohibits the rule for the penalty of deprivation of liberty for life against the perpetrators who has not attained 18 years of age while committing an offence. This is justified as indicated by the legislator himself in the grounds of the draft of P.C. including the process of socialization of the perpetrators at that age is not yet generally completed<sup>21</sup>. On the other hand, article 10 § 3 P.C. states that the imposed penalty may not exceed two-thirds of the upper limit of the statutory penalty prescribed for a crime attributed to the perpetrator. At the basis of this regulation the belief of the legislator is that: “The guilty in the case of criminal liability of juveniles is always limited by the lack of maturity of the perpetrator. The introduction of reduced border threats gives expression to the principle of accepting the penalty can not exceed its severity degree of guilt”<sup>22</sup>. In addition, article 10 § 3 P.C. is a spontaneous basis optional extraordinary mitigation of penalty (generally speaking extraordinary mitigation of the penalty involves a sentence below the statutory limit risk or a milder type of penalty by the rules – see especially article 60 § 6 P.C.).

According to the provisions of P.C. the actual degree of development of individual perpetrators is taken into account also under the article 10 § 4 P.C. This provision requires the court order in relation to a perpetrator who has committed a misdemeanor<sup>23</sup> after having attained 17 years of age, but before attaining 18 years of age instead of a penalty impose educational, therapeutic or correctional measures prescribed for juveniles in the J.A. if it is expedient due to the circumstances of the case and the degree of perpetrator’s development, his characteristics and personal conditions. On the basis of this regulation the court has an obligation, not a possibility as in the case of article 10 § 2 P.C., to treat the adult perpetrator, so the one who has committed a prohibited act after completing 17 years as a juvenile which involves applying to him instead of a penalty educational, medical or correctional measures prescribed for juveniles in the J.A. This obligation is updating when an adult offender committed an offence before the age of 18 years, and for the use of educational, medical or correctional measures speak circumstances of the case and the degree of development of the perpetrator, his personal characteristics and conditions.

Conditions described in article 10 § 4 P.C. by the words “circumstances of the case”, “degree of development of the perpetrators”, “personal characteristics and

---

21 *The new criminal codes with justifications.* Warsaw 1997, p. 142.

22 *The new criminal codes with justifications.* Warsaw 1997, p. 123.

23 According to the art. 7 § 1 P.C., crimes under the Polish criminal law are divided into felonies and misdemeanours. A felony is a prohibited act penalized with the penalty of deprivation of liberty for a period of no less than 3 years or with a more severe penalty (art. 7 § 2 P.C.). A misdemeanor is a prohibited act penalized with a fine exceeding 30 daily rates or exceeding PLN 5,000, the penalty of limitation of liberty exceeding one month or the penalty of deprivation of liberty exceeding one month (art. 7 § 3 P.C.).

conditions” are the same as in article 10 § 2 P.C. and they have the same meaning in both of those provisions. The essence of the regulation of article 10 § 4 P.C. is similarly as in art. 10 § 2 P.C. with reference to the degree of development of the offender, which is a direct reference to the issue of guilt. On the basis of article 10 § 4 P.C. degree of development of the perpetrators will speak for using instead a penalty of educational, medical or correctional measures when an adult offender at the time of the prohibited act was characterized by the degree of intellectual, social and moral development, which stood in the way of fully proper recognition of the importance of the committed act and directing his actions.

### *3.3 Code of Petty Offences*

In contrast to the P.C. a total lack of flexibility when it comes to taking into account the actual degree of development of particular perpetrators, characterized by the C.P.O. This is due to the fact that the minimum age of criminal responsibility determined the art. 8 C.P.O. is a rigid (without exception). In particular, the C.P.O., contrary to article 10 § 2 P.C. does not provide a unique possibility of criminal liability offender who committed a prohibited act before the age of 17 years. Thus the actual achievement by the perpetrator of such a level of development that enabled him to properly recognize the importance of the committed act and their conduct, does not allow for pulling him criminally responsible for a petty offence if he has not completed 17 years at the time of the act.

The total lack of flexibility in the C.P.O. when it comes to taking into account the actual degree of development of particular perpetrators however is not the subject of criticism. On the contrary such a solution is assessed in the literature as a fully accurate “petty offences as acts of a finer nature must be evaluated (...) a bit different than criminal offences. Establishing a permanent border 17 years is quite sufficient for the application responsible for the petty offence without reduction”<sup>24</sup>.

### *3.4 Fiscal Penal Code*

We have slightly different situation while dealing on the basis of the F.P.C. There is already article 5 § 1 F.P.C., which requires completion of 17 years of reserves at the same time “unless the provision of the act provides otherwise” for criminal responsibility. Despite such reservations the F.P.C. does not provide for lowering the age of criminal responsibility. However, it contains the regulation which obliges the court to apply to the perpetrator who committed a fiscal offence or fiscal petty offence after having attained 17 years of age, but before having attained the age of 18 years, instead of a penalty or penal measure, educational, therapeutic or correctional measure provided for juveniles in the J.A. The condition of such a ruling is appealed to the circumstances of the case, the degree

---

<sup>24</sup> BOJARSKI, Tadeusz. *Polish petty offences law. Outline of lecture*. Warsaw: LexisNexis, 2012, p. 67.

of development of the offender and his personal characteristics and conditions (5 § 2 F.P.C.). This is analogous to the adjustment provided for in article 10 § 4 P.C., ordering to treat as a juvenile the adult offender who has committed a prohibited act after completing 17 years. In this context we are therefore faced with a regulation flexibiliser principle of article 5 § 1 F.P.C. and taking into account the actual degree of development of particular perpetrators.

The fact that the current legal F.P.C. does not provide for lowering the age of criminal responsibility meets with approval. Elevated by the fact that due to the nature of fiscal offences and fiscal petty offences that belong more to the category of *mala prohibita* than *mala per se* a breach of the principle of fiscal criminal irresponsibility of juveniles would have no rational justification<sup>25</sup>.

Legislator has prepared the F.P.C. for emergency lowering the age of criminal responsibility and take the responsibility of juveniles. He did this by posting in the F.P.C. a difference in terms of penalty of juveniles. Namely in the article 12 § 3 F.P.C. he predicted that the court taking penalty, penal measure or other measure to a juvenile is directed primarily to educate the perpetrator. In this manner as in the article 54 § 1 P.C. is expressed a particular directive sentencing a juvenile.

## **4 The Juvenile Act**

### *4.1 Introduction*

The law on juvenile delinquency proceedings creates a model of a paternalistic and welfare approach to juvenile justice, the protection and treatment of the juvenile at risk oriented allowing only a certain range (outside the said article 10 § 2 of the P.C.), to use criminal sanctions against juvenile perpetrators of prohibited acts<sup>26</sup>. In such a model juvenile it is not treated as an entity with its rights and obligations but as the subject of procedures of the court and the other authorities making decisions for his own good. Committing a prohibited act (a punishable act in principle, which will be discussed later) is only one of the symptoms of the threat. Adopted in the Polish legal system approach to juveniles is in fact the single-track system of dealing with juveniles, which means a uniform approach to both juvenile derogatory criminal law (committing punishable acts), and those who show only signs of demoralization<sup>27</sup>.

---

25 WILK, Leszek, ZAGRODNIK, Jarosław. *Fiscal Penal Code. Commentary*. Warsaw: C.H.Beck, 2014, p. 36.

26 According to the Preamble to the J.A., its main objectives are: to counteract the demoralization and delinquency of juveniles, to create conditions for those who have come into conflict with the law or with the rules of acceptable social behaviour, to return to normal life, to strengthen the care and educational functions of the family and its sense of responsibility for the development of children.

27 KONARSKA – WRZOSEK, Violetta. The problem of the need and desirability of changing the principles of responsibility and dealing with minors. *Archiwum Kryminologii* 2007–2008, XXIX-XXX, p. 352.

Fundamentals of action on juvenile cases can occur both independently and also together, and their existence obliges to investigate the case of a juvenile. The doctrine emphasizes that opportunity to start proceedings for a juvenile, not only because of the committed punishable act, but also because of the revealed signs of demoralization expresses the concept of “child in danger”, which should come to the aid in connection with the threat of demoralization in the further cultural, civilization and society development. Thus it should be assumed that the J.A. does not introduce any form of liability of juveniles, and these are the base of evidence to initiate proceedings in the case, but not against a juvenile. The point is to take action to apply appropriate measure which will provide support for juvenile<sup>28</sup>.

J.A. is characterized by moving away from the concept of criminal law in the fight against demoralization and the “crime” of juveniles, a parent directive in the whole area of dealing with juveniles is their welfare. It is a basic criterion for the diagnosis of cases of juveniles and its implementation contribute to the general objectives of this law on the prevention and combat against demoralization and the “crime” of juveniles, i.e. depenalization ways to fight the demoralization and the “crime” of juveniles, the flexibility of the procedure, depending on the personality of the juvenile and continuous legal protection<sup>29</sup>.

#### *4.2 The notion of a Juvenile*

The J.A. departs from the traditional criminal law notion of a juvenile which has already been mentioned, and does not include the typical, uniform definition of a juvenile. Status of a juvenile with the J.A. granted to different age groups of children and young people depending on the situation, with which it is associated. Article 1 § 1 of the J.A. the subjective and objective scope of the J.A. application covers the scope of this Act three categories of juveniles.

The first category includes persons less than 18 years who show symptoms of demoralization and there is a need to prevent and combat demoralization. The minimum age for juveniles displaying signs of demoralization is not provided by the J.A., which is a solution fully legitimate and reasonable. The need to initiate appropriate proceedings in the juvenile case because of demoralization should decide the real purpose of preventing demoralization.

The second category includes juveniles who committed a punishable act after having reached 13 years of age, but before having attained the age of 17 years. The lower limit of 13 years refers to the division of juveniles adopted in the P.C. of 1932 in which the force split into two age groups of juveniles i.e. at the age of 13 as acting without discernment, and from 13 to 17 years as a group of juveniles, for which the statutory presumption assumed that they act with discernment,

28 BOJARSKI, Tadeusz In BOJARSKI, Tadeusz, KRUK, Ewa, SKRĘTOWICZ, Edward. *Proceedings in juvenile cases. Commentary*. Warsaw: Wolters Kulwer, 2016, p. 55.

29 HAAK, Henryk. *Compulsory Treatment of Drug Addicts*. Toruń: TNOiK, 2000, p. 65.

although exceptions were possible. The upper limit circled as 17 years has a close relationship with the principle laid down in the system of criminal law that criminal liability can be held only person at the time of the offence were over 17 years.

The last category of juveniles are persons under the age of 21 years, where the rules of the J.A. apply for the purpose of the implementation of educational or correctional measures which have been adjudged by the court. Juveniles who after having reached the age of 17 years commit a punishable act or after having attained 18 years of age show other signs of demoralization can not be a subject of the regulation despite of the educational or correctional measures are carried out earlier. In terms of the performance of educational or correctional measures they will apply the rules of the J.A. to a certain category of “adult offenders” who have committed a prohibited act as an offence, fiscal offence or fiscal petty offence in the age of criminal responsibility (after having attained 17 years of age, but before having attained the age of 18 years), if the criminal court hearing the case considered it appropriate instead of punishment applied to them educational, treatment or correctional measures intended for juveniles (article 10 § 4 of the P.C., article 5 § 2 of the F.P.C., article 73 § 1 *in fine* of the J.A.). In the literature, as well as in the rulings indicates that the definition of this category of offenders as juveniles is wrong. In fact in terms of young adults who are treated as if they were juveniles in the performance means to them, because in accordance with the Polish criminal law completing 17 years old forever end the period of juvenile<sup>30</sup>.

#### *4.3 The legal basis for proceedings in juvenile cases*

The law provides two reasons for intervention: the first means that the juvenile shows symptoms of demoralization, the other ones means that the juvenile committed a punishable act. Each of these legal bases has an individual and sufficient character to start intervention.

##### *4.3.1 The showing signs of demoralization*

According to the article 2 of the J.A. showing signs of demoralization is one of the legal basis for action provided in the J.A. The law does not provide any definition of the notion of “demoralization” but in the article 4 of The J.A. lists by way of example (as indicated by the use of the phrase “in particular”) the circumstances indicating it, which include: breaking the principles of community life, committing criminal deed, systemic truancy of compulsory school or vocational training, use of alcohol or other drugs, prostitution, vagrancy and taking part in criminal gangs. Open catalog of circumstances indicating demoralization takes into account some specific external phenomena and behavior resulting from certain disorders determined by the family, school and peer environment. Listed by the legislature symptoms of demoralization are different types of reprehensible

---

<sup>30</sup> MARASZEK, Magdalena. *op. cit.*, p. 77; Ruling of the Supreme Court of 28 November 1989, V KZP 22/89, OSNKW 1990/1-3/6.

behavior which apart from committing a prohibited act are repetitive behaviors and testify to the demoralization of a juvenile. Some of those in the article 4 § 1 of the J.A. symptoms of demoralization, such as prostitution, vagrancy, taking part in criminal gangs only because of its repeatability and a high degree of threat to the proper development of the child empower to find that the juvenile is demoralized. Showing signs of demoralization not always evidence of actual demoralization of a person. Such an example may be a prohibited act which the commission can only connect to a lack of care in the management of the interest protected by law or the lack of ability to predict the proper age for a young offender<sup>31</sup>. In such cases the question may arise whether such one-time behavior, although undoubtedly violate the law proves the state or process of demoralization of a juvenile. It is very important to demonstrate that one of the signs of demoralization and committing a punishable act does not constitute ground for the application of educational and correctional measures, if not apparent from the demoralization of the juvenile. Such application comes from a number of specific provisions contained in the J.A., as well as the objectives of the regulations laid down in the preamble to the J.A.<sup>32</sup>.

#### *4.3.2 The punishable act*

The punishable act constitutes one of the legal basis of the proceedings initiation in juvenile case and must be distinguished from the prohibited act considered on the basis of criminal responsibility. The concept of the punishable act is established in the article 1 § 2 point 2 a and b of the J.A. According to this regulation a punishable act involves an offence or a fiscal offence and an exhaustively listed types of petty offences that have been identified in twelve indicated articles of the C.P.O. such as: possession in a public place dangerous items; disturbance of peace, public order, or the rest of the night calling the scandal in a public place; destroying, damaging, deleting, making ineffective the sign placed by a state authority to determine the identity of the object, closing it or surrender power regulation; destroying, damaging, removing or making illegible markings or inscriptions warning of imminent danger or fences or other devices to prevent danger; throwing stones or other objects in the motor vehicle in motion; arbitrary setting, destroying, damaging, deleting, enable or disable sign, signal, warning device or security or change their position, obscure or render invisible, and willful destruction, damaging, deleting, or setting tourist mark; driving mechanical or not mechanical vehicle in the state after the use of alcohol or similarly acting substance, as well as not mechanical vehicle in a state of intoxication or under the influence of similarly acting substance; petty theft or misappropriation of someone else's little things, i.e. such, the value of which does not exceed

---

31 KRUKOWSKI, Adam (ed.). *The Juvenile Act. Commentary*. Warsaw: Wydawnictwo Prawnicze, 1984, p. 19; GRZEŠKOWIAK, Alicja. *Proceedings in Juvenile Cases*. Toruń, 1986, pp. 50–51.

32 KONARSKA – WRZOSEK, Violetta. *op. cit.*, p. 62.

1/4 of the minimum monthly wage; small fencing intentional and unintentional, if the value of the property does not exceed 1/4 of the minimum monthly wage; the intentional destruction, damage or render unusable someone else's things, the damage does not exceed 1/4 of the minimum monthly wage; speculation entrance fees for artistic events, entertainment or sports; impeding or blocking out of malice or wantonness use of facilities intended for public use, such as in particular: a bench, a device for cleaning, the instrument alarm, lighting, clock, machine, phone, marking the place name, street, park or real estate. Admission to the juvenile other petty offences as well as fiscal petty offences may, however, be considered as a sign of demoralization.

The punishable act prohibited by law in the article 1 § 1 point 2a of the J.A. and therefore act exhaustive offence or fiscal offence, it is also the basis for the decision of the strictest provided in the J.A. measures, i.e. placing in a juvenile correctional centre. According to the article 10 of the J.A. the use of a correction measure in the form of placement in a correctional centre may take place against a juvenile who has committed a punishable act, as referred to in article 1 § 1 point 2a of the J.A. and for placing him in a correctional centre suggest a high degree of demoralization and the circumstances and nature of the act, especially when other educational measures have proven ineffective or do not augur the resocialization of the juvenile. Both of these conditions must occur together. The use of a correctional measure was therefore limited to a juvenile offender who has committed a punishable act corresponding to the notion of offence, not in case of a petty offence. This narrowing of the applicability of placement in a correctional centre is right as a rule but it may be unreasonable in relation to a specific case where a juvenile perpetrator of several petty offences will show a higher degree of demoralization than the offender of a criminal offence<sup>33</sup>.

#### *4.4 Measures imposed in Juvenile Cases*

Consequence of the finding symptoms of demoralization or committing the punishable act by a juvenile is the possibility of a judgment by a court of educational, therapeutic, corrective measures, and exceptionally – the penalty.

##### *4.4.1 The educational, educational – therapeutic measures and the corrective measure*

The measures provided for in the J.A. shall be applied by the principle of expediency and is subordinated to the juvenile's interest. A characteristic feature is that they have an indeterminate character, i.e. they are imposed in principle for an indefinite period time, as is the case of penalty. These measures are used as long as it is needed to achieve the educational effects, but not longer than until

---

33 Rulings of the Supreme Court of 9 October 2002, III KKN 563/00, Legalis; of 29 October 2002, III KKN 353/02, Legalis; of 22 April 2009, III KK 21/09, Legalis.

the age of 18, and for the purpose of the implementation of juvenile measures which have been adjudged by the court but not longer than till the age of 21<sup>34</sup>.

The court is not obliged to apply these measures and has complete freedom in their selection. This does not regard only the corrective measure of placing a juvenile in correctional center for which the legislature clearly circled the statutory rule (article 10 of the J.A.). A catalog of possible measures that may be imposed has been included in the article 6 of the J.A. It includes: caution; obligation to behave in a certain way, especially to repair the damage, to do unpaid work for the benefit of the victim or local community, to offer an apology to the victim, to start education at school or employment, to take part in educational or therapeutic trainings, to refrain from presence in certain milieus or places, to refrain from use of alcohol or drugs; responsible supervision by parents or by custodian; supervision by a youth organization or other association, an employer or trusted person, who is obliged to guarantee for juvenile's proper conduct; supervision by a probation officer; directing the juvenile to a probation center, a social organization or institution providing care, therapy or training for juveniles, applied with the consent of these institutions or organizations; withdrawal of driver's license; forfeiture of the proceeds of the punishable act; ordering the juvenile to be put in a foster family, in an appropriate child or educational institution, or in training and educational center; correctional center; other measures under the J.A. or Family Code.

The measures referred to as educational include the measures listed in the article 6 points 1–9 of the J.A. Educational – therapeutic measures are listed in the article 12 of the J.A. They may be applied to juveniles suffering from mental deficiency, mental disease, some kind of mental disorder or from alcohol and drug addiction. These measures consist in placing juveniles in a psychiatric hospital or other suitable health institution. If there is a need to ensure only care and protection, the juvenile may be placed in a social welfare institution or in suitable educational center. A corrective measure, as already indicated, there is only one, and has the form of placing a juvenile in a correctional center (article 6 point 10 of the J.A.), wherein this arrangement may rely both on the actual placement of juveniles in the correctional center, as well as, can be conditionally suspended.

#### *4.4.2 The penalty*

The legislator reserves in the art. 5 of the J.A. that in the cases provided for by law, if other measures are not able to provide rehabilitation of a juvenile penalty may be imposed. On the basis of the J. A. the legal basis for the imposition of a juvenile penalty is provided for in the article 94 of the J.A. This regulation provides for the imposition of a juvenile penalty in a situation in which a juvenile adjudicated placement in the correctional center but the measure has not been

---

34 KOBES, Paweł. *Adjudication and execution of a sentence of imprisonment of juveniles in Poland*. Warsaw: Difin, 2015, p. 69.

implemented to execute and a juvenile has already completed 18 years. The provision does not specify when the reasons which made it not been for placing a juvenile in a correctional center, and therefore it is assumed that they can be both the cause dependent juvenile (e.g. hiding), as well as beyond its control (e.g. a conditional suspension of the placement, the postponement of inclusion, health prevents placement of the plant, etc.). The court decides whether a measure ordered to perform or withdraw from its implementation and impose a juvenile penalty of compulsory extraordinary easing her, especially when a juvenile will achieve 21 years of age soon. The legislator states that in the event of the imposition of a penalty of imprisonment or a penalty of restriction of liberty its duration may not exceed the period remaining for the completion of the offender 21 years.

Article 94 of the J.A. also provides self-contained independent from the ground indicated in the P.C to withdraw from the punishment, especially when maintaining the perpetrator was a significant improvement, which is shown in progress in the educational work with juvenile.

The principle that the futility of accession to the enforcement of the decision on the placement of a juvenile offender in a correctional facility after he attains the age of 18 may justify the passage of punishment has had some arguments. At the same time there are doubts concerning the principle of guilt. The imposition of a juvenile penalty follows an earlier decision to place a juvenile in a reformatory, which did not happen for various reasons. Joining the enforcement of the judgment occurs when a juvenile is already 18 years old. It comes to change the decision to replace the reformatory punishment that can be imposed for the offence. Punishment should instead be coupled with the guilt which was not yet determined when decision of placing the juvenile in a correctional center was determined. Determining the amount of the penalty meted out in place of the predicate pre-correction measure implies the need to re merits of the case, including the need to establish the guilt of a juvenile which as rightly pointed doctrine prevents the use of the standard in an automatic manner by simple conversion put in a correctional centre for penalty<sup>35</sup>.

Reassessment of a past event, once already assessed in the context of punishment for juveniles under article 94 of the J.A. may raise some doubts. According to T. Bojarski can not be a practical solution that question. Since the P.C. in article 10 § 2 allows to reduce the lower limit of criminal responsibility to 15 years of age, the action provided for in article 94 of the J.A. is also fully justified. Responsibility pursuant to article 10 § 2 P.C. also can not ignore the issue of guilt, as has already been mentioned. In the case of article 94 of the J.A. important indication in this regard may be included in the opinion deliberative team of court experts, who usually speaks in terms of the so-called discernment of a juvenile (although the rules of the J.A. do not use this term). The replacement of correctional centre

<sup>35</sup> BOJARSKI, Tadeusz. *op. cit.*, p. 235.

on penalty under article 94 of the J.A. should not apply (the same way as it does under article 10 § 2 P. C.) for minors under 15 years of age and is only possible before the end of the juvenile 21 years<sup>36</sup>.

With respect to article 94 of the J.A. withdrawal from the punishment it should be noted that the fact that a juvenile is not started to execute a correction measure by reaching his 18 years, can not be a spontaneous basis to waive the punishment. The legislator expressly reserves fact that exemption from punishment may be “in particularly justified cases, especially when the behavior of the perpetrator was a significant improvement”. This means that the decision by the court important criterion is to change the behavior of a juvenile which may include among others on undertaking study or work, fulfillment of the obligations imposed or permanent break contact with undesirable environment. Improving behavior although undefined by the legislature as a long-term it should be sufficiently justified specific facts that it could inspire confidence about its durability<sup>37</sup>. Against automatically abandon of punishment can also speak that the placement of the correctional centre decides a high degree of demoralization of the juvenile, the circumstances and the nature of a punishable act and the ineffectiveness or absence of a favorable prognosis of rehabilitation in the use of educational measures. Arguments in favor of placing the juvenile in a correctional centre or the imposition of a penalty must be balanced in a particularly insightful.

Depending on the threat of sanctions for the perpetrators of an act attributable to a court, except imprisonment, the possibility of imposing penalties for non-custodial penalties in the form of restriction of liberty or a fine, not excluding the possibility of imposing punitive measures. And although the formal imposition of a juvenile penalty under the article 94 of the J.A. does not mean a conviction, which also emphasizes the Supreme Court, a ruling the court must sentence the offender to assign blame in line with the principle of *nulla poena sine culpa*<sup>38</sup>.

---

36 BOJARSKI, Tadeusz. *op. cit.*, p. 274.

37 GROMEK, Krystyna. *Commentary to the Juvenile Act*. Warsaw: LexisNexis, 2004, p. 403.

38 Ruling of the Supreme Court of 24 April 1985, VI KZP 1/85, OSNKW 1985/7-8/52.



# LIMITATIONS OF COMPARATIVE ADVERTISING PERMISSIBILITY: DENIGRATION/DISPARAGEMENT

Jozef Andraško & Soňa Ralbovská Sopúchová

Comenius University in Bratislava, Faculty of Law, Slovak Republic

*jozef.andrasko@flaw.uniba.sk, sona.sopuchova@flaw.uniba.sk*

ANDRAŠKO, Jozef & RALBOVSKÁ SOPÚCHOVÁ, Soňa Limitations of Comparative Advertising Permissibility: Denigration/Disparagement. *International and Comparative Law Review*, 2016, vol. 16, no. 2, pp. 117–125. DOI: 10.1515/iclr-2016-0018.

---

**Summary:** The authors analyse legal regulation of comparative advertising that refers to situations when competitor's goods or services are expressly or by implication identified in any form of advertising. Such an analyse is made from the perspective of European Union, United States and Indian legal orders. In particular, the main focus is on the issue of denigration or disparagement as limitations of comparative advertising permissibility. In addition, significant case law with respect to aspects of denigration or disparagement within issue of comparative advertising is analysed. Such an analysis would lead to identification of differences that arose within comparison of various legal orders and case law. These findings are necessary in order to make a conclusion which approach regarding to the issue in question is the most preferable.

**Keywords:** comparative advertising, trade mark, denigration, disparagement, limitations.

---

## 1 Introduction

Comparative advertising (hereinafter “CA”) refers to any form of advertising where competing goods or services are expressly or by implication identified. CA is considered as an important tool in promoting competition and transmission of information about goods and services to consumers. CA may refer to another's goods or services in positive or negative way. In the second case, where the competitor's goods or services are portrayed in negative light, it is the question of denigration or disparagement that can arise. Furthermore, this type of advertising strategy also involves use of trade mark without trade mark proprietor's consent what can be considered trade mark infringement and lead to disputes between competitors. Aforementioned situations can occur in different legal orders and courts can decide the dispute regarding to CA in different ways. Therefore, we decided to analyse the issue of denigration or disparagement as limitations of CA permissibility from the perspective of European Union (hereinafter “EU”), United States (hereinafter “US”) and India.

## 2 Legislative Background

We will focus on three different approaches regarding to regulation of CA, especially focusing on the meaning of “*denigration*” or “*disparagement*”, in relation to advertisements and trade marks. First of all, we will analyse the EU legislation, secondly we will focus on the US approach and last but not least we will analyse very peculiar Indian approach.

### 2.1 The EU Legislation

The issue of CA is regulated by the *Misleading and Comparative Advertising Directive 2006/114/EC* (hereinafter “MCA Directive”)<sup>1</sup>. MCA Directive contains the definition of the CA, in particular “*comparative advertising means any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.*”<sup>2</sup> In other words, in the case when advertisement identifies a competitor or goods offered by him, we have to comply with the provisions of the MCA Directive. The CA is permitted because it can be very useful for the consumer, but only if the advertising is truthful, non-deceptive and some conditions are fulfilled. In the case of EU legislation these conditions are stated in the Article 4 of the MCA Directive. According to this article CA is permitted if those conditions are met. One of these conditions is situation when CA “*does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities or circumstances of a competitor.*”<sup>3</sup>

Discrediting is a form of denigration and since both are covered there is no need for further distinctions. However, not all of CA which discredit the trade marks of a competitor have to constitute discrediting within the meaning of this provision since any critical CA involves a certain discrediting of the competitor or his products. In the case of absolute prohibition, the intended liberalisation of CA would not be achieved. Therefore, only in cases where advertising unnecessarily discredits or denigrates the trade marks, trade names, products or activities of a competitor, should be considered unlawful. In particular, if CA emphasises the benefits of its own goods or service and reasonably shows the disadvantages of other competitor’s product, this advertising is always permissible. On the other hand, a CA that only focuses on negative aspects of the competitor or his product is not acceptable. Discrediting can also result from an inappropriate and aggressive tone, an unobjective representation or valuation or even a unspecific, global rejection.

The CA to can be considered as legitimate when the competitor’s trade mark or his reputation are respected. Furthermore, it cannot denigrate or make a

---

1 Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising.

2 Article 2(c) of the MCA Directive.

3 Ibid. Article 4(d).

defamatory impression. Otherwise, the advertising will be considered unlawful under the provisions of the MCA Directive.

## *2.2 The US Legislation*

The rules regulating CA in US legislation may be considered as very similar to those in the EU legislation. CA is subject to regulation through a combination of federal, state and local law, as well as self-regulatory codes of conduct.

Firstly, we can find a definition of CA in *Statement of Policy Regarding Comparative Advertising* published by the Federal Trade Commission (hereinafter “FTC”) in 1979. According to this statement CA is “*advertising that compares alternative brands on objectively measurable attributes or price, and identifies the alternative brand by name, illustration or other distinctive information.*”<sup>4</sup> CA is permitted if it is truthful and non-deceptive. US approach is very liberal because FTC states that advertisements that attack, discredit or otherwise criticize another product are permissible. Of course, advertisements have to comply with the provisions mentioned above. The list of conditions that have to be fulfilled like the one included in the Article 4 of MCA Directive is missing.

It is necessary to point out that advertising cannot discredit in a false way the competitor or competitor’s goods or services. Section 43 (a) of the Lanham Act that is aimed at protecting trade mark prohibits any misrepresentation of the nature, characteristics, qualities or geographic origin of the advertiser’s or another person’s goods, services or commercial activities in CA. Under the Lanham Act, liability arises if an advertisement is either literally false or literally true or ambiguous, but is likely to deceive consumers because of an implied message.<sup>5</sup>

It could be helpful to mention that provisions of the National Advertising Division (hereinafter “NAD”)<sup>6</sup> applies higher standards to advertising that disparage a competitor’s product because “*claims that expressly or implicitly disparage a competing product should be held to the highest level of scrutiny in order to ensure that they are truthful, accurate and narrowly drawn.*”<sup>7</sup>

Therefore, in the case of US legislation great attention is given to the concept of disparaging. More liberal approach of the US legislation, in comparison with the EU legislation, allows competitor to criticize other competitor’s product. However, high level of scrutiny is used to ensure that the CA is in accordance with the provisions of the FTC, NAD and the Lanham Act.

---

4 16 CFR §14.15(c) FTC Statement of Policy Regarding Comparative Advertising.

5 15 U.S. Code § 1125.

6 National Advertising Division of the Council of Better Business Bureaus, Inc. is a self-regulatory agency that commands the respect of national advertisers, advertising attorneys, federal and state regulators and judiciary.

7 VILLAFRANCO, John, E. *The Law of Comparative Advertising in the United States. IP Litigator*, 2010, Vol. 16, No. 2, p. 1.

### 2.3 The Indian Legislation

In the case of Indian legal framework clear statutory definition of CA is missing. The limitations to CA permissibility are regulated by two main acts, namely: *Trade Marks Act*<sup>8</sup> (hereinafter “TM Act”) and the *Consumer Protection Act* (hereinafter “CP Act”).<sup>9</sup> CA is permitted under some limitations and these limitations are particularly related to the term “*disparagement*”. Because of missing legal definition of aforementioned term we have to use its dictionary meaning, where the term “*disparagement*” is understood as “*to bring discrediting or reproach upon; dishonour; lower in esteem; speak on or treat slightingly or vilify; undervalue, and deprecate.*”<sup>10</sup>

The CP Act states that disparagement of competitor’s goods is considered as an unfair practice. Unfair practice is defined as trade practice which “*for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice*”. With respect to disparagement, such a practice includes the practice of making any statement, whether orally or in writing or by visible representation which “*gives false or misleading facts disparaging the goods, services or trade of another person*”<sup>11</sup> (previously part of §36 of the Monopolies and Restrictive Trade Practices Act, 1969).

With respect to regulation of disparagement in TM Act, section 29(8) of the TM Act focuses on relation between disparagement and trade marks and states that “*a registered trade mark is infringed by any advertising of that trade mark if such advertising:*

- (a) *takes unfair advantage of and is contrary to honest practices in industrial or commercial matters; or*
- (b) *is detrimental to its distinctive character; or*
- (c) *is against the reputation of the trade mark.”*

The specific characteristic of the Indian legal framework regarding to CA is underlined by the Indian Court decision where was stated that a CA does not have to be truthful. Therefore, seller can declare false statements but he is not allowed to portray the competitor’s product in a negative light, as we will explain in the next section.<sup>12</sup>

### 3 Case Law

In this section we briefly discuss the most significant case law in respect to CA, in particular we focus on cases when courts had to resolve if the denigra-

8 The Trade Marks Act, 1999, No. 47 of 1999, 30th December, 1999.

9 The Consumer Protection Act, 1986, No. 68 of 1986, 24th December, 1986.

10 PATHAK, Akhileshwar. *Legal Aspects of Business*. New Delhi: Tata McGraw-Hill Education, 2007, p. 341.

11 Article 2 (1) r (1) x of CP Act.

12 Reckitt & Colman Of India Ltd vs M.P. Ramchandran & Anr; 1996 16 PTC 393.

tion or disparagement as the CA restrictions can be applied. First of all, we will analyse one of the most important cases relating to denigration of competitor's trade mark, *British Airways plc v. Ryanair Ltd* (2001).<sup>13</sup> Secondly, we will analyse U.S, EU and Indian case law focusing on issue in question.

### *3.1 British Airways v. Ryanair*

One of the most important cases dealing with CA, especially the aspect of denigration is *British Airways plc v. Ryanair Ltd* (2001).<sup>14</sup> Ryanair ran a CA campaign in various newspapers in the United Kingdom in 1999. The first advertisement is known as "Bastard" advertisement (headline "EXPENSIVE BA...DS!"), then later the "Expensive" advertisement (headline "EXPENSIVE BA"). The Bastard advertisement appeared in February and March, once in several national newspapers. The Expensive advertisement appeared just once in November, in the *Evening Standard*. British Airways plc (hereinafter "BA") has a registered trademark consisting of the letters BA registered for, amongst other services, air travel services. The Advertising Standards Authority (hereinafter "ASA") had upheld a complaint (made by members of the public) against the Bastard advertisement. ASA considered that the headline was likely to cause serious or widespread offence. Ryanair responded that it would not use the headline again. The second advertisement was the subject of an action for trade mark infringement and malicious falsehood.

Trade mark infringement and malicious falsehood falls within section 10(1) of the Trade Mark Act 1994, which corresponded with Art. 5 (1) (a) of the Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (hereinafter "TM Directive 89/104").<sup>15</sup> According to section 10(1) of the 1994 Trade Mark Act „*a person infringes the registered trade mark if he uses in the course of trade a sign which is identical with the trade mark in relation to goods or services which are identical with those for which it is registered.*"<sup>16</sup>

Ryanair tried to protect itself saying that its advertisement falls within the defences provided by section 10(6) and/or section 11(2)(b) of the Trade Mark Act 1994. Pursuant to the first mentioned provision "*nothing in the preceding provisions of this section shall be construed as preventing the use of a registered trade mark by any person for the purpose of identifying goods or services as those of the proprietor or a licensee. But any such use otherwise than in accordance with honest practices in industrial or commercial matters shall be treated as infringing*

---

13 *British Airways Plc v. Ryanair Ltd* [2000] EWHC Ch 55 (25th October, 2000).

14 *Ibid.*

15 TM Directive 84/104 was repealed by Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks.

16 Section 10(1) of the Trade Mark Act 1994.

*the registered trade mark if the use without due cause takes unfair advantage of, or is detrimental to, the distinctive character or repute of the trade mark.*<sup>17</sup>

The second defence, which corresponded with Art. 6. 1(b) of the Directive 89/104, reads “A registered trade mark is not infringed by –

*b) The use of indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services, or [...]*

*Provided the use is in accordance with honest practices in industrial or commercial matters.*<sup>18</sup>

BA alleged that the individual price comparison and destination comparison made by Ryanair were misleading and therefore Ryanair’s advertisement is not in accordance with honest practice in industrial and commercial matters as stated in section 10(6) of the Trade Mark Act 1994.<sup>19</sup>

Justice Jacob clarified what constitutes misleading advertisement. Furthermore, he established several important principles. First of all, he stated that the primary objective of the section 10(6) of the Trade Mark Act 1994 is to permit CA and that so long as the use of a competitor’s mark is honest, there is nothing wrong in telling the public of the relative merits of competing goods or services and using registered trade marks to identify them. The test for honesty is objective based on whether a reasonable reader would say that the advertisement is not honest, given the full facts. Honesty has to be gauged against what is reasonably to be expected by the relevant public of advertisements for the goods or services in issue. Furthermore, it should be borne in mind that the general public are used to the ways of advertisers and expect hyperbole. The court will not analyse the content of advertisement word to word but will take more broad approach in recognition of the way that the majority of people would consider the advertisement. The advertisement must be considered as a whole. Justice Jacob ruled in favour of Ryanair that its comparative advertisements were in substance true and even if they could be offensive it did not infringe BA’s trade mark. Therefore, there is a defence under section 10(6) and section 11(2)(b) of the Trade Marks Act 1994 and the malicious falsehood claim does not get off the ground.<sup>20</sup>

---

17 Ibid. section 10(6).

18 Ibid. section 11(2)(b).

19 BA had three complaints. The first one, it found Bastard headline offensive. The second one, it said that individual price comparisons were unfair. The last one, it said that the case of Frankfurt and Dinard the destination comparisons were unfair. Regarding to the offensive headline, Ryanair promised not to use it again. In the case of price comparison and the destination comparison Ryanair considered both comparisons to be fair.

20 Para. 30 of *British Airways Plc v. Ryanair Ltd* [2000] EWHC Ch 55 (25th October, 2000).

### 3.2 EU Case Law

The issue of denigration of competitor arose in the case of *Pippig v. Hartlauer*,<sup>21</sup> where Hartlauer (defendant) ran an advertising campaign by leaflets in which Pippig's (appellant) prices for frames with Zeiss lenses were directly compared with Hartlauer's prices in respect of the same brand of frames but with Optimed lenses.<sup>22</sup> The CJEU took the view that comparing prices cannot in itself entail the discrediting or denigration of a competitor who charges higher prices. Furthermore, the CJEU clarified that comparing rival offers, particularly comparing prices of products, is of the very nature of comparative advertising.<sup>23</sup>

Ryanair ran many comparative advertisement campaigns in different European countries. One of the most famous case is the one in Belgium, where the advertisements with text "*Welcome Ryanair and its lowest fares. Goodbye Sabena and its outrageously expensive flights*" appeared in newspapers. Ryanair refused to withdraw this advertisement and in addition, released an advertisement with a picture of the Brussels landmark the "Manneken Pis" a statue of a boy urinating, with the line "*Pissed off with Sabena's high fares? Low fares have arrived in Belgium.*" Furthermore, Ryanair published price comparison. Sabena brought the case to court and claimed, besides others, that the advertisements were unlawful because the text was denigrating and damaging to Sabena's reputation. The Brussels Commercial Court held that Ryanair's comparative advertising campaign was misleading and offensive and damaged Sabena's reputation.<sup>24</sup>

### 3.3 US Case Law

Broadly speaking, US case law places a greater emphasis on the consumer's right to information and therefore its approach regarding to CA limits is more liberal.<sup>25</sup> US courts recognize CA cases in relation to product disparagement that is also known as trade libel or slander of goods or services. Disparagement is considered any statement about a product or service of one company that is false and includes negative statements about these products or service. In addition, it can harm the reputation of a competitor.<sup>26</sup> In *Sylvania Case*<sup>27</sup> and *National Refin-*

21 Case C-44/01 Pippig Augenoptik GmbH & Co. KG v Hartlauer Handelsgesellschaft mbH and Verlassenschaft nach dem verstorbenen Franz Josef Hartlauer [2003] ECR I-3095.

22 Ibid. para. 16.

23 Ibid. para. 80.

24 BARIGOZZI, Francesca and PEITZ, Martin. *Comparative Advertising and Competition Policy*. In CHOI, Jay Pil (ed). *Recent Developments in Antitrust Theory and Evidence*. The MIT Press: Cambridge, Massachusetts, London, England, 2007, p. 235–236.

25 Trade libel and product disparagement claims became actionable under the 1988 amendments to Section 43(a) of Lanham Act.

26 RUSTAD, Michael. *Global Internet Law*. West Academic. 2016, p. 452.

27 *Smith-Victor Corporation v. Sylvania Electric Products, Inc.*, 242 F. Supp. 302 (N.D. Ill. 1965). In order to bring a suit for disparagement, the plaintiff must allege and prove that "(a) the statements referred to the plaintiff by name or the public knew that the statements referred to the plaintiff, and (b) statements were made by the defendant which disparaged

ing Case<sup>28</sup> court set out following three groups of statements that can be actionable for disparagement:

1. Statements which refer to the rival's goods and imputed to the rival's dishonesty or reprehensible business methods in connection with the goods;
2. Statements that relate to the quality of the goods without attributing dishonest or reprehensible business methods to the manufacturer; and
3. Alleged libelous statements that amount to no more than assertions by one tradesman that his goods are superior to those of his rival.<sup>29</sup>

### 3.4 Indian Case Law

In the case of *Reckitt & Colman of India Ltd. v. Kiwi T.T.K. Ltd.*<sup>30</sup> an unnamed product of Reckitt (appellant) was disparaged as being ineffective and uneconomical in comparison to Kiwi (defendant) product. The Delhi High Court (Court) held that manufacturer is entitled to make a statement that his goods are the best and also make some statements for puffing of his goods but this should not disparage or defame the goods of another manufacturer. However, a manufacturer is not allowed portraying the other's product in a negative light.<sup>31</sup>

A similar situation arose in the case of *Pepsi Company Inc. and Ors. vs. Hindustan Coca Cola*<sup>32</sup>, wherein the Delhi High Court (Court) held that Coca Cola (defendant) disparaged Pepsi (appellant) products as the registered trade mark "PEPSI" was infringed. Furthermore, factors to decide the question of disparagement were formulated, namely: (i) *Intent of commercial*; (ii) *Manner of the commercial*; (iii) *Story line of the commercial and the message sought to be conveyed by the commercial*.<sup>33</sup> The second factor is considered to be the crucial for deciding the disparagement. The Court stated that it is not actionable if the manner is only to show one's product better or best without derogating other's product. On the other hand, if the manner is to mock or to condemn other's product then it amounts to disparaging.<sup>34</sup>

## 4 Conclusion

Different assessments of the notions of the CA permissibility limitations, in particular denigration or disparagement in certain jurisdictions are consider-

---

the plaintiff or its product."

28 *National Refining Co. v. Benzo Gas Motor Fuel Co.*, 20 F.2d 763 (8th Cir. 1927)

29 MERENSKI, Paul. et. al. *Negative Comparative Advertising: A Legal Minefield*. In *Proceedings of the 1997 Academy of Marketing Science (AMS) Annual Conference*. Springer Cham Heidelberg New York, Dordrecht, London, 1997, p. 336.

30 *Reckitt & Colman of India Ltd. v. Kiwi T.T.K. Ltd.*, 1996 (16) PTC 393.

31 *Ibid.* para. 12.

32 *Pepsi Co. Inc. & Ors. v. Hindustan Coca Cola Ltd*, 2003 (27) PTC 305.

33 *Ibid.* para. 13.

34 *Ibid.*

able. EU legal framework on the one hand stated in MCA Directive that the competitor and his product cannot be discredited or denigrated. On the other hand, there is obvious lack of CA harmonization in different member states. In the case of India, the absence of a clear definition in respect to the CA and disparagement leads to legal uncertainty. CA legislation is in the US subject to federal and state laws as well as self-regulatory codes, wherein disparagement is stipulated as CA restriction.

Several cases analysed the issues regarding to trademark infringement and malicious falsehood in CA. This issue also arose in *British Airways v. Ryanair*, where Justice Jacob decided that the use of registered trademark BA in CA was just the use of the mark in relation to the proprietor and while the advertisement amounted to vulgar abuse or may be considered offensive, the advertisement did not amount to trade mark infringement or malicious falsehood. This case clarifies how far competitors can go in CA when calling one competitor Bastards doesn't denigrate its trade mark.

In the light of analysed cases, we have to make an observation that denigration or disparagement as limits of CA permissibility are realized by CJEU, EU national courts, Indian courts and U.S courts. However, differences in applying laws regarding to subject are considerable. First of all, Indian case law limited CA to portray the other's product in a negative light and to mock or condemn other's product by competitor. Secondly, CJEU presented CA friendly approach, however different interpretations of applying the denigration requirement by national courts as the result of lack of CA harmonization is apparent. Last but not least, however US case law is more liberal towards CA, its case law recognizes statements used in CA under which the disparagement can be actionable.

Considering aforementioned legal frameworks and case law in respect to denigration or disparagement as limits of CA permissibility, we would like to make an observation on the most preferable approach. From our point of view, EU approach provides by MCA Directive clear legal definition of CA and an exhaustive list of its limits, precluding the application of stricter requirements in national legislation. However, EU case law can provide different interpretations of CA, in particular denigration, it is necessary to point out that this approach emphasizes the right of trade mark proprietors when balancing trade mark protection and the freedom of CA.



FUNDING OF COLLECTIVE ACTIONS<sup>1</sup>

Klára Hamuláková

Faculty of Law, Palacký University Olomouc, Czech Republic

*klara.hamulakova@upol.cz*

HAMULÁKOVÁ, Klára. Funding of Collective Actions. *International and Comparative Law Review*, 2016, vol. 16, no. 2, pp. 127–144. DOI: 10.1515/iclr-2016-0019.

---

**Summary:** The paper deals with the questions of funding of collective actions. Proper funding has significant influence on the right to the access to the court and is a precondition for the efficient course of litigation in general, specifically in connection with a collective redress. Funding of class actions is also closely related with other issues such as costs and lawyer's fees, reimbursement of legal costs and moreover.

**Keywords:** Funding of collective actions, third party funding, collective redress, contingency fee

---

## 1 Introduction

There is an increasing number of cases in which a large group of persons has suffered harm as a result of the same illegal practice by a particular entity.<sup>2</sup> This typically occurs in relation to consumer rights, competition rights, financial services, securities, environmental protection, as well as in many other areas.

This phenomenon can then be reflected in procedural law as the growing number of disputes in which the subject-matter of the procedure and the defendants are identical. Naturally, it is then contrary to the principle of procedural economy and speed for these disputes to be dealt with separately. However, the enormous number of applicants often prevents the consolidation of these actions, both technically and administratively. In the second half of the twentieth century and at the beginning of the 21<sup>st</sup> century, “collective protection of rights” in the form of “collective actions” is therefore becoming increasingly important. Their purpose is not only to resolve the above situation, but also to prevent that the persons whose rights have been affected waive their right to judicial protection. Individual persons often assert only petty claims (although adding up to a large amount in aggregate) and, therefore, they decide not to bring an action

---

1 This article was supported by the Grant Agency of the Czech Republic – the project Collective protection of rights in the Czech Republic – current situation and the way forward (GA16-06065S).

2 See also article 2 of the Preamble to Commission Recommendation No 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

due to concerns about the procedural costs and the time needed (“rational apathy”). This is also related to a possible preventive effect of legislation on collective redress.

The European Union is also aware of the importance of collective protection of rights. The EU has so far focused on collective protection of rights to varying degrees in a number of documents aimed at specific areas of rights protection. A decisive step towards the general regulation of collective redress was the adoption of Commission Recommendation No 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (hereinafter the “Recommendation”). It presents a set of principles of judicial and out-of-court collective redress, which should be common in the legal systems across the Union, both for injunctive and compensatory relief. The Recommendation also quite extensively addresses the issue of funding of collective actions.<sup>3</sup>

## **2 General Definition of Issues Concerning Collective Actions**

Sufficient funding contributes significantly to the exercise of the right of access to a court and is one of the conditions for the proper course of litigation. It will also allow the defendant to successfully enforce its right to the reimbursement of costs if the defendant is successful, and the “loser pays” principle is applied when deciding on the reimbursement of litigation costs.

The importance of litigation funding then increases in the case of judicial collective redress. Naturally, judicial collective redress litigation involves increased costs (e.g. the cost of presenting evidence, representation costs).<sup>4</sup> In addition, those are incurred by a single person.<sup>5</sup> The group members are not responsible for the funding of the procedure. An exception is made for the costs of individual nature, e.g. cost of evidence proving the facts relating only to a specific person, or costs incurred in filing an appeal if it is permitted by law for individual group members to file an appeal against particular decisions. Different regulation could have a deterrent effect on judicial collective redress litigation, although some form of co-payment is not ruled out. It is for these reasons that the Recom-

---

3 The importance of the funding of collective actions is also emphasized in other EU documents. Cf. e.g. Commission Staff Working Document. Public consultation: Towards a Coherent European Approach to Collective Redress. SEC(2011) 173, or the Green Paper on Consumer Collective Redress COM(2008) 794.

4 On the other hand, the costs incurred will in aggregate be generally lower than in the case of individual procedures, which is an undeniable advantage of collective redress litigation.

5 Naturally, the costs are not incurred only during litigation, but may already be incurred in the preparatory phase, e.g. the cost of the publicity about the intention to file a collective action, the cost of collecting information on possible other persons affected, the coordination of these persons, etc. See also the study of BEUC. *The European Consumer Organisation. Litigation funding in relation to the establishment of a European mechanism of collective redress.* [online]. Available at: <<http://www.beuc.eu/publications/2012-00074-01-e.pdf>>

mendation assumes that the claimant must declare to the court the origin of the funds that the claimant is going to use to support the legal action (Article 14 of the Recommendation).

The obligation to ensure sufficient funds for the litigation process and declare to the court the origin of the funds is clearly applied in the case of “representative actions”, where the representative entity has the standing to bring a representative action. Although one of the prerequisites for the designation of a suitable representative entity is also sufficient capacity in terms of financial resources (Article 4 of the Recommendation)<sup>6</sup>, litigation may also be funded from other sources. Therefore, a representative entity must also declare to the court the origin of the litigation funds.

In the case of collective actions, there are multiple entities within the claimant party, the claimant and group representative playing a fundamental role. These two entities need not be identical – the claimant need not subsequently also become the group representative. Therefore, the question is who has the obligation to declare to the court the origin of the litigation funds. The payment of litigation costs is at first associated with the person of the claimant, until certification, i.e. a kind of recognition of group procedure by the court in which a group representative is appointed. The question of funding and demonstration of sufficient funds should therefore be associated with certification. The certification decision should designate a group representative from among persons who, in addition to other requirements, also guarantee sufficient and proper litigation funding. This is one of the reasons why certification should take place at the initial stage of litigation (see also Article 8 of the Recommendation).<sup>7</sup> However, the court must take account of sufficient litigation funding throughout the procedure, i.e. even after the actual certification.

The procedure may also be funded using the funds of the representative entity or group representative<sup>8</sup>, or using third-party funding (TPFL). In a collective action based on an opt-in, own funding may be supplemented to include contributions of other group members (e.g. in the form of an advance payment).

---

6 If such predetermined entities cease to meet the specified requirements, their entitlement must be terminated. However, the court may not revoke the entitlement to bring an action, although it may discontinue litigation because funding resources have been declared insufficiently.

7 Due to procedural economy and speed, certification is a more or less necessary step to be taken by a court in any legislative regulation governing collective actions, because the court can clearly state whether an action and the consequently initiated litigation may be approached as a collective redress procedure. This decision can be appealed. After the decision on certification becomes final and enforceable, the court continues with procedure on the merits. In an appeal against a decision issued in the second stage of the procedure, one may no longer argue that the prerequisites for collective redress procedure were not met.

8 For the sake of simplification, the text will hereinafter only refer to a group representative, even where the representative entity is also concerned.

This obligation may be imposed on group members directly by law (mandatory contributions). However, it may dissuade the affected persons from participating in the litigation. Co-financing of litigation by group members should therefore rather be based on an agreement between the group representative and the group members, without negative consequences for individual members who do not contribute (e.g. in the form of termination of participation in the litigation).<sup>9</sup> The group representative may request individual members of the group to provide cooperation, and may do so itself, or through a court. Given that a court designates the group representative also with regard to the demonstration of sufficient litigation funds, the agreement should be made before group certification, of course with a possible extension after the certification resolution during the litigation. Since the amount of the costs is unclear at the beginning of the litigation, and it is therefore not possible at an early stage of the litigation to choose the adequate amount of the advance payment, this method of funding may be unsuitable for all the persons involved. In the case of representative litigations, the representative entity may be (co-)funded based on the contributions of each of the persons concerned, without a direct connection to a specific litigation.<sup>10</sup>

### **3 Third Party Funding of a Collective Redress Procedure**

The relationship between a third party and group representative is contractual (“funding agreement”). In addition to questions concerning the scope of funding or remuneration for the funder, the agreement may address e.g. confidentiality of the group representative, or of the group members and funder.<sup>11</sup>

A third person is a person whose rights or legally protected interests are not the subject of the procedure; therefore, the third person is not the group representative or group member and it is usually not involved in the matter that is the subject of dispute. However, it is not excluded that the funder is the lawyer of the group representative.

A third party provides the group representatives with the funds to conduct the litigation; the agreement may also include a commitment to reimburse the costs of the other party if it wins the case.<sup>12</sup> It is not excluded that a third person

---

9 MULHERON, Rachael. *Costs and fundings of collective actions: Realities and possibilities. A Research Paper for submission to the European Consumers' Organisation*. 2011, p. 90. [online]. Available at: <<http://www.law.qmul.ac.uk/docs/staff/department/71112.pdf>>

10 See e.g. LOOS, Marco. *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – country report The Netherlands*. 2008, p. 6. [online]. Available at: <[http://ec.europa.eu/consumers/archive/redress\\_cons/nl-country-report-final.pdf](http://ec.europa.eu/consumers/archive/redress_cons/nl-country-report-final.pdf)>

11 A problem may occur in the stage prior to the actual conclusion of this agreement, because the third party will naturally require relatively detailed information on the subject-matter of the procedure.

12 The obligation to reimburse will lie with the group representative. However, if the group representative fails to fulfil this obligation voluntarily, the defendant will be allowed to

and the group representative only agree on the funding of the litigation costs in the case of a failure in the case, and the actual litigation will be funded by group representative from its own resources.

Third party funding does not affect collective redress procedures, but is also used in conventional court proceedings.<sup>13</sup> It gained popularity in the mid-1990s, and is currently quite common in common law countries (Australia, USA, UK)<sup>14</sup>, and, to a lesser extent, even in civil law countries (Germany, Switzerland, Austria).

Third-party litigation funding is usually not regulated in detail in the individual countries.<sup>15</sup> However, an appropriate regulation would act not only as a safe-

---

claim the performance from such a third party through decision enforcement transferring another monetary claim.

- 13 de MORPURGO, Marco. Comparative Legal and Economic Approach to Third-party Litigation Funding. *Cardozo Journal of International and Comparative Law*, 2011, vol. 19, p. 345. Available at: < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2167802](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2167802)>
- 14 In these countries, however, third party funding was initially severely limited by the champerty and maintenance doctrine. It prohibited third party funding for profit in the case of success. Third party funding first appeared in Australia in early 1990s and soon spread to other countries. The first statutory exemption to the champerty and maintenance doctrine concerned insolvency proceedings (de MORPURGO, Marco. Comparative Legal and Economic Approach to Third-party Litigation Funding. *Cardozo Journal of International and Comparative Law*, 2011, vol. 19, p. 391. Available at: < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2167802](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2167802)> ). In its judgment *Campbells Cash and Carry v Fostif*, the High Court reviewed the champerty and maintenance doctrine, and established the rules governing the status and role of third-party funders and their impact on litigation. In the UK, third party litigation funding developed as a result of restrictions on free legal aid, which was too expensive for the State (initially, funding was provided on the basis of conditional fee agreements, ATE insurance, later through various private companies). de MORPURGO, Marco. Comparative Legal and Economic Approach to Third-party Litigation Funding. *Cardozo Journal of International and Comparative Law*, 2011, vol. 19, pp. 347, 360. The 1994 case *Giles v. Thomson* brought a change in the approach to the champerty and maintenance doctrine related to third-party litigation funding. Save for exceptions, the UK courts no longer conclude general prohibition on third-party litigation funding. The basic rules for third-party litigation funding were then established in the case *Arkin v. Bouchard Lines* [2005] EWCA Civ 655. In this judgment, the court allowed third-party funding, and even admitted that it is an instrument which allows better access to courts. (de MORPURGO, Marco. Comparative Legal and Economic Approach to Third-party Litigation Funding. *Cardozo Journal of International and Comparative Law*, 2011, vol. 19, p. 398). This method of funding has its supporters, but also opponents in all the above States. E.g. in the USA, cf. the report of U.S. Chamber Institute for Legal Reform. *Selling Lawsuits, Buying Trouble: Third Party Litigation Funding in the United States*. Washington, D.C.: U. S. Chamber Institute for Legal Reform, 2009, p. 12; conversely, in the UK this method of funding is seen positively by Honourable Lord Justice JACKSON, Rupert. *Review of Civil Litigation Cost: Final Report*. pp. 117–24. [online]. Available at: <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>>
- 15 Exceptions include e.g. the regulation of legal expenses insurance and also legal aid. Internal self-regulation is also chosen e.g. by institutional investors, which are organized into associations with their own rules.

guard against possible abuse of collective action (in the form of vexatious actions or the pursuit of the interests of the funder), but would also lead to improving the position of the group representative.

Special attention in relation to litigation is paid to those forms of funding where the return on the funds provided by a third party and its reward is tied to the outcome of the procedure, especially in the case of contingency fees.<sup>16</sup> It is especially here that the third-party funder may actively intervene in the litigation and influence it through its actions.

Sources of third-party litigation funding include particularly<sup>17</sup>:

### **1. Funding by individuals**

The funding generally takes the form of a gift, with loans also being possible. Naturally, these are disadvantageous for the group representative, because they must be repaid even if the case is lost. In the case of this method of funding, the funder and group representative essentially have a personal relationship that leads to the provision of funds; the funds are not provided for profit, or profit is not the main purpose.

### **2. Legal Expenses Insurance**

Legal expenses insurance is a separate branch of insurance. It is usually taken out in the context of comprehensive policy concluded for multiple insurance risks. The funds are provided by the insurer – a public insurance company. Legal expenses insurance protects the insured person against the adverse consequences of litigation.<sup>18</sup> The scope of insurance may vary; in connection with litigation, it may involve the payment of costs incurred by the counterparty, as well as the costs incurred by the group representative. There are two types of this insurance.

---

16 Contingency fees are most often mentioned in connection with legal representation fees; however, it is also related to third-party litigation funding. The Recommendation mentions contingency fees for legal representation in Article 30. In Article 32, contingency fees are mentioned in connection with third-party litigation funding. In both cases, this method of remuneration is subject to the same rules.

17 The paper disregards the possibility of assignment of claims as one of the possible special types of third-party litigation funding. de MORPURGO, M. *A Comparative Legal and Economic Approach to Third-party Litigation Funding*, pp. 354–356.

18 Legal expenses insurance is regulated in Section 2856 et seq. of Act No 89/2012 Sb., the Civil Code. By a contract of legal expenses insurance, the insurer undertakes to pay, in the stipulated scope, the insured person's costs associated with the assertion of his rights, and provide associated services. These provisions are based on the implementation of Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance. Section 2857 of the Civil Code provides that stipulations restricting the insured person's freedom of choice of his representative are disregarded. [Article 4(1)(a) of the Directive].

(a) Before the event (BTE) insurance. This insurance is taken out in case of future litigation. This type of insurance is relatively widespread.<sup>19</sup> However, it usually only covers the actual litigation costs of the group representative or group members, and therefore it is necessary to also take out after the event insurance to cover any litigation costs incurred by the counterparty.<sup>20</sup>

(b) After the event (ATE) insurance. It is an insurance taken out after the dispute. This type of insurance is less common than BTE, it is used esp. in the UK.<sup>21</sup>

However, litigation funding through legal expenses insurance is not very convenient for the funding of collective redress procedures, because the coverage limit may be too low for this type of control. Also, insurance companies may have no interest in funding disputes which will bring benefit to persons other than the insured persons, i.e. members of the group.<sup>22</sup>

### **3. Banks and other financial institutions**

Banks and other financial institutions assume the costs and risks associated with litigation. Repayment of funds may be contingent on the success in the case where banks also get a share of the award.<sup>23</sup> Therefore, its nature is in this case analogous to the contingency fee. It is therefore a form of investment for the bank. However, banks may also provide the funds on credit.

### **4. Special institutional investors**

This method of litigation funding is widespread especially in England and Wales<sup>24</sup>, but also in Austria, Germany and the Netherlands. The return on the

19 E.g. in Germany, 43% of the population is covered by this type of insurance. HODGES, Christopher, VOGENAUER, Stefan, TULIBACKA, Magdalena. Costs and funding of civil litigation. *Oxford Legal Studies Research Paper*, 2009, no. 55, p. 30. Available at: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1511714](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1511714)>

20 MULHERON, Rachael. *Costs and fundings of collective actions: Realities and possibilities*. A Research Paper for submission to the European Consumers' Organisation. 2011, p. 81. [online]. Available at: <<http://www.law.qmul.ac.uk/docs/staff/department/71112.pdf>>

21 In Britain, this type of insurance began to develop in the late 1990s, together with the conditional fees as a result of government policy limiting the costly legal aid paid from public funds and supporting access to courts funded by private sources.

22 See e.g. results of research by MULHERON, Rachael. *Costs and fundings of collective actions: Realities and possibilities*. A Research Paper for submission to the European Consumers' Organisation. 2011, p. 83. [online]. Available at: <<http://www.law.qmul.ac.uk/docs/staff/department/71112.pdf>>

23 E.g. in Austria, it is 30–40%.

24 In England and Wales, an association was formed that brings together such investors. The membership in the association is voluntary. Interested parties who are considering this method of funding mostly choose investors that are members of this association, because they expect greater professionalism and credibility. The association has its Code of Conduct. The development of this type of funding is a result of the reform by Lord Justice Jackson. Examples of large investors in England and Wales include Burford Capital, Calunius Capital LLP and Harbour Litigation Funding Ltd. For more information, see <<http://associationoflitigationfunders.com/>>.

provided funds and remuneration is, again, contingent on the outcome of the litigation. If the case is won, the investor gets a certain percentage of the awarded amount, or a multiple of the costs incurred.

### **5. Public funds<sup>25</sup>**

This type of funding is rather typical for representative litigation.<sup>26</sup> The provision of financial resources from the fund is subject to predetermined criteria, e.g. whether the applicant has attempted to obtain the funds from other sources, whether there is a public interest in the litigation, and whether there is any hope of success.<sup>27</sup> Special funds to finance collective actions have been set up e.g. in Canada (Ontario and Quebec – Class Action Assistance Fund), Israel, Hong Kong, Australia or Austria. The scope of funding tends to be different; some exclude lawyer's fees (Ontario), others exclude reimbursement of costs incurred by counterparties in the case of failure in the case (Quebec). If the case is successful, the claimant may be obliged to pay a certain amount of the award into the fund (Ontario – 10%).<sup>28</sup>

### **6. Funding from special-purpose resources of the association.**

It is non-profit private funding. It is again typical for representative litigation where the representative entity funds the litigation using his own resources. However, this does not always have to be so. These resources may also be provided to support class action proceedings.

7. Collective redress procedure may also be funded by a lawyer of the group representative, most commonly based on lawyer's contingency fees (also termed *pactum de quota litis*, no win no fee, or no success no pay). The payment of the fee is contingent on the success in the case. In this case, lawyers represent and

25 Public funds for the funding of collective actions are also not excluded in the European Union. Cf. the study of BEUC, The European Consumer Organisation. *Litigation funding in relation to the establishment of a European mechanism of collective redress*. 2012. [online]. Available at: <<http://www.beuc.eu/publications/2012-00074-01-e.pdf>>.

26 However, this does not apply without exception. For example, in Quebec, individuals may also use the financial resources from the fund. However, financial resources from public funds are mostly provided to consumer protection organizations. E.g. the Austrian VKI (Consumers Association of Austria) or the German VZBV (Federation of German Consumer Organisations). However, these organizations are not funded only from public sources (which are often used esp. for other activities of organizations, such as awareness raising), but additionally also from other sources, e.g. from fines for antitrust violations. Cf. the study of BEUC, The European Consumer Organisation. *Litigation funding in relation to the establishment of a European mechanism of collective redress*. 2012. [online]. Available at: <<http://www.beuc.eu/publications/2012-00074-01-e.pdf>>.

27 See, e.g. the requirements of the Ontario fund. See MULHERON, Rachael. *Costs and fundings of collective actions: Realities and possibilities. A Research Paper for submission to the European Consumers' Organisation*. 2011, p. 97. [online]. Available at: <<http://www.law.qmul.ac.uk/docs/staff/department/71112.pdf>>

28 BALARIN, Jan. *Kolektivní ochrana práv v civilním soudním řízení*. Praha: Centrum právní komparatistiky, 2011, p. 114.

fund the claimant at the same time; however, it is also possible that the lawyer only funds the claimant.<sup>29</sup> In the case of contingency fees, the lawyer's remuneration is a percentage of the recovered amount.

In addition to contingency fees, there are also conditional fee arrangements or success fee arrangements.<sup>30</sup> In this case, the lawyer gets a regular hourly rate plus bonus (in the form of a lump sum or a certain percentage of the remuneration; however, the amount is not derived from the recovered amount).<sup>31</sup>

In some jurisdictions, this method of funding / lawyer's fee may be restricted. For example, in Sweden, contingency fees in its classic form are prohibited; however, the Swedish Group Proceedings Act allows the conclusion of a risk agreement (riskavtal). In this agreement, the group representative and the lawyer may agree on an increased fee for the lawyer if he wins the case and, conversely, on a reduced fee in the case of his failure in the case.<sup>32</sup> However, this agreement must be approved by a court; only then it becomes effective towards other members of the group [Articles 38 and 39 of Group Proceedings Act 2002:599].<sup>33</sup> Contingency fees are also prohibited in Austria (see Section 879(2)(2) of the ABGB).<sup>34</sup> Contingency fees are partially permitted in Germany or England and Wales.<sup>35</sup> The Polish act does not prohibit contingency fee agreements.<sup>36</sup> In the Czech

---

29 The lawyer may also represent the claimant based on contingency fees, without funding the litigation, i.e. the lawyer bears only the costs of legal representation.

30 However, the terminology is very often confused. See also The Law Reform Commission of Hong Kong, Conditional Fees Sub-Committee. *Consultation Paper, Conditional Fees*. 2005, p. 3. [online]. Available at: <<http://www.hkreform.gov.hk/en/docs/conditional-e.pdf>>

31 There are therefore two basic methods to determine the fees. Fees may be determined based on an hourly rate, regardless of the outcome of the litigation (lodestar method). The amount is equivalent to the level of risk involved in the case. The percentage-of-recovery method is computed as a share of the recovered amount. When determining the method and amount of remuneration, a combination of these two methods is typically used. BALARIN, Jan. *Kolektivní ochrana práv v civilním soudním řízení*. Praha: Centrum právní komparatistiky, 2011, p. 112.

32 This method of remuneration is not a strong incentive for collective redress procedure; on the other hand, it can help overcome the reluctance of some lawyers to get involved in this type of litigation. PERSSON, Annina H. *Evaluation of the effectiveness and efficiency of collective redress mechanism in the European Union – country report Sweden*. Brussels, p. 7.

33 Group members may file objections against it, or even appeal the court's decision to approve the agreement.

34 However, an agreement between a party and the legal representative on a flat fee or a percentage of recovery as additional remuneration has been found admissible by the Supreme Court. Decision of 8 November 2000, file no. 7 Ob 242/00i. Cited according to VRANÍK, Jakub. *Hromadná žaloba podle rakouského práva. Acta Iuridica Olomucensia*, 2016, no. 1, p. 93.

35 See HODGES, Christopher, VOGENAUER, Stefan, TULIBACKA, Magdalena. *Costs and funding of civil litigation. Oxford Legal Studies Research Paper*, 2009, no. 55, p. 28, 29. [online]. Available at: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1511714](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1511714)>

36 Article 5 of the Polish Collective Action Act (Ustawa o dochodzeniu roszczeń w postępowaniu grupowym of 17 December 2009) allows contingency fees, but up to a maxi-

Republic, contingency fees are permitted [see Article 10 of the Resolution of the Board of the Czech Bar Association No 1/1997 laying down the rules of professional ethics and competition of lawyers in the Czech Republic (Code of Ethics)]. However, a reasonable contingency fee should generally not exceed 25% (see Article 10(5) of the Code of Ethics).

### **8. Pro bono representation**

This type of funding is limited to legal representation costs and does not apply to the funding of the entire litigation. Pro bono legal services are provided on a completely voluntary basis.

### **9. Legal aid**

Sometimes also incorrectly called *pro bono*. Legal aid also particularly concerns legal representation. In this case, legal representation funds are provided by the State, which pays certain amounts to the association of lawyers, which then distributes them to specific lawyers. The decision on the application for legal aid is made by a court, the Bar Association or some other designated public authority. Legal aid is usually available only for a small number of beneficiaries (the test examines the financial situation of the applicant and reasonable merits – means and merits tests).<sup>37</sup>

Other possible methods of litigation funding also include crowdfunding.<sup>38</sup> The contributor's fee depends on success in the case. It is possible to consider the creation of a special fund at EU level where successful applicants would contribute. They would be encouraged to transfer the recovered amount or its part to the fund.<sup>39</sup> However, this type of funding does not seem to be too realistic and

---

mum of 20 % of the recovered amount.

37 This does not apply in the Netherlands, where legal aid covers 40% of the population; merits test does not apply in France. See HODGES, Christopher, VOGENAUER, Stefan, TULIBACKA, Magdalena. Costs and funding of civil litigation. *Oxford Legal Studies Research Paper*, 2009, no. 55, p. 27. [online]. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1511714](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1511714). Legal aid was substantially limited in late 20th century in many countries since it proved to be costly, inefficient and haphazard; as a result, governments reduced public funding of legal aid. MATTEI, Ugo. Access to Justice. A Renewed Global Issue. *Electronic Journal of Comparative Law*, 2007, č. 11.3, pp. 2–4. [online]. Available at: <http://www.ejcl.org/113/article113-14.pdf>. For example, in the UK this led to the development of other forms of third-party litigation funding and a restriction of champerty and maintenance doctrine. In the Czech Republic, the issue is now widely discussed; the current system is unsatisfactory, the State transfers its (even financial) responsibility particularly to the Czech Bar Association.

38 See, e.g. <<https://invest4justice.com/>>.

39 European Law Institute. *Statement of the European Law institute on Collective Redress and Competition Damages Claims*. Wien: European Law Institute, 2014, p. 34. [online]. Available at: <[https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Projects/S-5-2014\\_Statement\\_on\\_Collective\\_Redress\\_and\\_Competition\\_Damages\\_Claims.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Projects/S-5-2014_Statement_on_Collective_Redress_and_Competition_Damages_Claims.pdf)>.

would bring other problems, e.g. the appropriate definition of the mechanisms to decide on the collective actions to be funded, the criteria to be chosen, etc.

#### **4 Positive and Negative Aspects of Third-Party Litigation Funding**

Third-party litigation funding is in many cases the only way to ensure the constitutionally guaranteed right of access to a court, right to a proper procedure and also to ensure that the defendant obtains the right to the reimbursement of litigation costs if it wins the case.

On the other hand, this may bring many pitfalls, especially where a third party is compensated for the amount it provides and fee or interest only if the party which the third party financially supports wins the case.

Probably the biggest concerns relate to the potential increase in the number of litigations. Particularly contingency fees may encourage funders to actively seek disputes (in this context, lawyers are often referred to as private attorney generals<sup>40</sup>).

However, a third-party funder that is required under the agreement to receive the fee or its substantial part depending on the outcome of the litigation will generally consider what disputes to finance, i.e. what is the real chance of success in each case.<sup>41</sup> Those that use this method of funding for multiple disputes may of course balance their investments by investing in cases whose outcome is uncertain (but the potential amount to be recovered is high). However, this should not be considered a negative aspect, because in these cases the claimant retains his right of access to a court and the right to judicial protection.<sup>42</sup> Conversely, in more complex cases whose outcome cannot be predicted, the group representative may have difficulty in finding a person willing to fund the litigation, and such a third party may also dictate terms very unfavourable to the claim-

- 
- 40 COFFEE, John C. Jr. Understanding the Plaintiffs Attorney: The Implications of Economic Theory for Private Enforcement of Law through Private and Derivative Actions. *Columbia Law Review*, vol. 86, no. 4, p. 669. Cited according to BALARIN, Jan. *Kolektivní ochrana práv v civilním soudním řízení*. Praha: Centrum právní komparatistiky, 2011, p. 100. This negative aspect was in the USA partially inhibited by the adoption of the Private Securities Litigation Reform Act of 1995, an amendment to the Federal Rules of Civil Procedure in 2003 and the Class Action Fairness Act in 2005. See BALARIN, Jan, TICHÝ, Luboš. Kolektivní ochrana procesních práv v ČR: sen či skutečnost? *Bulletin advokacie*, 2013, č. 3, p. 23.
- 41 See also results of research in the UK. MULHERON, Rachael. *Costs and fundings of collective actions: Realities and possibilities*. A Research Paper for submission to the European Consumers' Organisation. 2011, p. 61. [online]. Available at: <<http://www.law.qmul.ac.uk/docs/staff/department/71112.pdf>>
- 42 An empirical study conducted by two American experts has shown that contingency fee increases the quality of actions and shortens the period of litigation (unlike in the case of traditional hourly rate). See HELLAND, E., TABARROK, A. Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets. *The Journal of Law, Economics & Organization*, 2003, č. 19, pp. 517–540.

ant. The consideration whether to fund a particular litigation, can be affected by the amount claimed, or the defendant and his readiness to pay any recovered amount and pay the litigation costs, as well as the nature of the dispute or the presented claim.<sup>43</sup>

The determination of the amount of funder's fee as such need not be advantageous for the group representative / group members. In the absence of any regulation, it is purely up to the parties to the contract to agree the amount. The fee will probably increase in proportion to the risk of failure in the case. The supported person must therefore consider in advance the amount of the fee which is still acceptable for him and the members of the group. If any of the members of the group disagrees with the amount, such a member still has the right to litigate individually.

Where the fee is contingent on the outcome of the litigation, one must consider the possible effort of the funder to influence the proceedings. However, the interests of the third party funder and the group representative / the group itself may be different. This may create conflict of interest between these entities during litigation.<sup>44</sup> This may manifest itself e.g. by the third party forcing the group representative (and, through the group representative, the lawyer) to sign an agreement which is disadvantageous for the claimant. Conversely, the funder may try to prevent the conclusion of the agreement between the group representative and the defendant if the agreement is not advantageous for the funder.

The relation between the funder and the group representative's lawyer may also be problematic. Only a group representative may grant the power of attorney to the lawyer. However, it cannot be excluded that the funder will try to influence the group representative's choice of the lawyer. However, according to ethical rules, the legal representative should always act in the interest of the client and on its instructions.<sup>45</sup> The group representative's lawyer is often the funder. In this case, the conflict of interest may be obvious, as the interests of the lawyer as the funder will be completely different from those of a mere lawyer.

---

43 Cf. results of survey by MULHERON, Rachael. *Costs and fundings of collective actions: Realities and possibilities*. A Research Paper for submission to the European Consumers' Organisation. 2011, p. 59–62. [online]. Available at: <<http://www.law.qmul.ac.uk/docs/staff/department/71112.pdf>>

44 A related issue – how to address potential impartiality of the judge in relation to the funder – is also interesting. Czech law provides that judges are excluded from considering and deciding on a case if there is a reason to doubt their impartiality with regard to their relation to the matter, to the parties or their legal representatives. (Section 14 of Act No 99/1963 Sb., Civil Procedure Code). I believe that if the judge is aware of the identity of the funder and there is a reason to doubt his impartiality, this should constitute grounds for the disqualification of the judge from the consideration of the case. However, this may cause problems with regard to a statutory judge in the case of causal jurisdiction of courts dealing with these cases.

45 However, it cannot be ruled out that the group representative will give instructions to the lawyer in accordance with the instructions of the funder.

Third-party litigation funding may also lead to a situation where the funder's main motive to provide funds is to harm the defendant, for example where the defendant is the funder's competitor.<sup>46</sup>

It is clear that in addition to positive aspects, third-party litigation funding also brings about many negative ones. Legal systems of individual states, however, generally do not contain any safeguards to avoid these negative aspects and do not allow for the obligation of the group representative to declare to the court whether the litigation is funded by a third party.

### **5 Safeguards Against Abuse Laid Down in the Commission Recommendation**

The regulation of third-party litigation funding in legislation concerning collective judicial redress must ensure that the aforementioned adverse effects on litigation are minimized. In judicial collective redress procedures, courts have a specific position. Litigation concerns the rights and legitimate interests of a large number of entities. Members of the group may not influence the litigation process, or may do so only to a limited extent. The court appoints a group representative that conducts the litigation for other members.

The European Union is aware of the possible abuse of collective action, also through its funding. Article 13 of the Preamble to the Recommendation states that "principles [of the Recommendation] should ensure that fundamental procedural rights of the parties are preserved and should prevent abuse through appropriate safeguards. Article 19 of the Preamble to the Recommendation then, in connection with the litigation funding, states that *the availability of funding for collective redress litigation should be arranged in such a way that it cannot lead to an abuse of the system or a conflict of interest*. The text of the Recommendation then defines certain safeguards to fulfil this general proclamation.<sup>47</sup> A court must therefore ensure that the litigation is free from violations of the rights of group members ("litigation management"), also in relation to the funding of collective actions.<sup>48</sup>

However, the legislation governing the funding of collective actions must not consequently lead to a *de facto* prevention of access to a court, must comply with both requirements and establish a natural balance between them.<sup>49</sup> It is often the

---

46 The Recommendation also draws attention to situations where the funder is dependant on the defendant (Article 16 of the Recommendation).

47 The question of funding is regulated in Part III of the Recommendation (Principles common to injunctive and compensatory collective redress), Articles 14, 15 and 16.

48 The intensity of court interventions in litigation should also depend on the nature of the parties and the subject matter of the dispute. The situation in consumer claims may be different from cases concerning corporate law.

49 Even European Justice Forum (a group of large international companies, whose aim is to create a fair, balanced and effective legal environment for consumers and entrepreneurs)

funding agreement that allows the group representative (the group members) to exercise its right to access to a court, and eliminates or reduces the risks associated with adverse outcome of litigation.

According to Article 14 of the Recommendation, the claimant party should be required to declare to the court at the outset of the proceedings the origin of the funds that it is going to use to support the legal action.

If the procedure is to be funded by a third party, the court will require the submission of a funding agreement.<sup>50</sup> The scope of third party funding is left up to the parties of the agreement; the funding may include legal representation, evidence costs, or the reimbursement of litigation costs in the case of failure.<sup>51</sup>

The court will determine whether a third party has sufficient resources to meet its financial obligations to the claimant initiating collective action. In addition, it must also be clear to the court whether the claimant party has sufficient resources to meet any adverse costs should the collective redress procedure fail. (Article 15 of the Recommendation). The degree to which litigation funding was provided will be considered by the judge. It will obviously be difficult due to the fact that costs cannot be clearly identified in advance. If the court concludes that resources are not sufficient, the group representative cannot be appointed, and unless there is another suitable representative, the group cannot be certified.

The court must take account of proper funding throughout the litigation process. If it finds that there has been a change in the facts relating to litigation funding, it should give the claimant party a space to remedy. The Recommendation talks about the possibility of the court to stay the proceedings (Article 15 of

---

states that collective actions will not be used without a liberal set of rules for funding. However, it also says that if the possibility of financial gain from litigation funding is high enough to support funding, it is also high enough to carry the risk of abuse. See <[www.europeanjusticeforum.org](http://www.europeanjusticeforum.org)>, cited according to HIGGINS, Andrew, ZUCKERMAN, Adrian A. S. Class actions in England? Efficacy, autonomy and proportionality in collective redress. *Oxford Legal Studies Research Paper*, 2013, no. 93, p. 41. Also available at: <<http://ssrn.com/abstract=2350141>>. Higgins and Zuckerman, however, add that the lack of incentives for litigation also provides a good reason for international companies to violate competition rules and consumer protection rules at the expense of those who buy their products or use their services. According to these authors, the prospect of profit leading to an action being filed works as a certain counterbalance to the prospect of profit by the breach of rules where there is very little chance of public enforcement. *Ibid*.

50 The agreement will be concluded between the group representative and the third party. However, it is not excluded that a third party may insist on the agreement being concluded with all members of the group. MULHERON, Rachael. *Costs and fundings of collective actions: Realities and possibilities*. A Research Paper for submission to the European Consumers' Organisation, 2011, p. 70. Available at: <<http://www.law.qmul.ac.uk/docs/staff/departement/71112.pdf>>.

51 Another related issue is whether the defendant should have access to information in the agreement, and to what extent, with respect to any right to the reimbursement of litigation costs, which should also be governed as part of funding.

the Recommendation) if financial resources are provided by a third party and it does not have sufficient resources to meet its financial obligations towards the claimant party initiating collective action. The court will act analogously if the claimant party (including its funder) has insufficient funds to cover the expenses of the counterparty if it fails the case. If the claimant party fails to provide for the necessary funds within a specified period, the court must remove the original representative and appoint a new one. If the group does not include a person who could be the group representative, it will lead to the decertification of the group, i.e. a *de facto* termination of the collective redress procedure and its discontinuation. The court should revoke the certification decision.<sup>52</sup> This is obviously a very sensitive issue; one must take into account the costs already incurred and the efforts and interests of group members.<sup>53</sup>

If litigation is to be funded by a third party, the court must also verify whether or not there is a conflict of interest between the group representative and the funder, a relationship between the funder and the defendant, and also prevent potential influence on the process steps of the group representative by the funder.

Article 16 of the Decision expressly provides, *inter alia*, that Member States should ensure, that in cases where an action for collective redress is funded by a private third party, it is prohibited for the private third party to seek to influence procedural decisions of the claimant party, including on settlements, and to provide financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant.

The third party may actually influence the group representative in the litigation process, and if its interests are different from the interests of the group, it may have a negative impact on the litigation process. However, it would be naive to assume that a third party, especially if its fee is contingent, will stand idly dur-

---

52 If the group representative no longer meets the condition in a representative litigation, the court discontinues the procedure (there is no certification/decertification of the group).

53 If, after group decertification, a collective redress procedure is discontinued, individual group members would probably have to file individual actions. However, there may be a problem with the claim becoming time-barred. One of the plausible scenarios is breaking the procedure down into separate procedures after the revocation of the certification decision, where the accession of parties to the original procedure would be considered an application initiating procedure. However, this is not possible in a collective action based on the opt-out system. A potential use of existing litigation results in individual litigation is also problematic, because group members did not play an active part in it, the procedural acts were made by the group representative. However, it could probably be established that they are obliged to accept the case as it was at the time of decertification.

ing the litigation.<sup>54</sup> “Influencing” is in the legitimate interest of third parties.<sup>55</sup> However, it is essential that the interest of third parties does not prevail over the legitimate interests of the claimant group. The court must assess the influence of the third party on the litigation and its correctness.<sup>56</sup> Any subsequent actions taken by the court will be the same as in the above case.

The safeguards to avoid increasing the number of collective redress procedures and reducing the recovered amount also include restrictions on contingency fees. The Recommendation tends to reject this type of funding and remuneration of lawyers for legal representation. *The Member States should ensure that, in addition to the general principles of funding, for cases of private third party funding of compensatory collective redress, it is prohibited to base remuneration given to or interest charged by the fund provider on the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties. (Article 32 of the Recommendation).* Article 29 of the Recommendation provides that *Member States should ensure that the lawyers’ remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties.* Article 30 of the recommendation further specifies this principle, stating that *Member States should not permit contingency fees which risk creating such an incentive. The Member States that exceptionally allow for contingency fees should provide for appropriate national regulation of those fees in collective redress cases, taking into account in particular the right to full compensation of the members of the claimant party.*<sup>57</sup>

The Commission therefore allowed contingency fees under the condition that Member States will adequately regulate these fees<sup>58</sup> and, in particular, take

54 It must also be considered whether or not a funder can become an intervener and participate in the litigation process, at least to a limited extent. In principle, this should not be ruled out. If acts of the intervener are inconsistent with the acts of the party supported by the intervener in the litigation, the court shall assess them after considering all the circumstances (see Section 93(3) of Act No 99/1963 Sb., Civil Procedure Code).

55 European Law Institute. *Statement of the European Law institute on Collective Redress and Competition Damages Claims*. Wien: European Law Institute, 2014, p. 32. Available at: <[https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Projects/S-5-2014\\_Statement\\_on\\_Collective\\_Redress\\_and\\_Competition\\_Damages\\_Claims.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Projects/S-5-2014_Statement_on_Collective_Redress_and_Competition_Damages_Claims.pdf)>.

56 European Law Institute: *Statement of the European Law institute on Collective Redress and Competition Damages Claims*. Wien: European Law Institute, 2014, p. 32. Available at: <[https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Projects/S-5-2014\\_Statement\\_on\\_Collective\\_Redress\\_and\\_Competition\\_Damages\\_Claims.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Projects/S-5-2014_Statement_on_Collective_Redress_and_Competition_Damages_Claims.pdf)>.

57 Although Article 29 of the Recommendation is included under the Part V. ‘Specific principles relating to compensatory collective redress’, it also applies to fees for legal representation in proceedings on injunctive claims.

58 The provision of financial resources by a third party may, in addition to judicial control, also be subject to other safeguards, e.g. the Financial Services Authority, Solicitors Regulation Authority, or professional unions associating providers of financial resources. See MULHERON, Rachael. *Costs and fundings of collective actions: Realities and possibilities*.

into account the rights of the claimant party members to a full reimbursement. Solutions could include the provision of the maximum percentage. It should also be prohibited to charge excessive interest on the funds provided. (Article 16 of the Recommendation).

Aspects discouraging from an apparently unsuccessful exercise or protection of rights also include the rule contained in Article 13 of the Recommendation, and the reimbursement of litigation costs depending on the outcome of the case.<sup>59</sup> The abuse of collective actions is also to be avoided by an adequate statutory court fee.

## 6 Conclusion

The issue of funding plays a key role in collective judicial redress. Only sufficiently and properly funded judicial procedure is capable of fulfilling its role and providing all interested parties with the space to exercise their rights. With regard to the increased costs in the collective redress procedures, third party litigation funding is used more than in any other type of procedure. It is often only thanks to this type of funding that claimants can exercise their right of access to a court. There are a number of methods of third-party financing; individual methods can also be combined or used to supplement the claimant's own resources. However, third party funding can also lead to the abuse of collective actions, especially where third party funding is based on contingency fees. The main concern relates to the increase in the number of judicial procedures, but also to the potential influence of the funding provider on the procedure. Particularly where the interests of the group representative, or the group and a third party are in an apparent conflict, collective actions can be exploited in the competition between the defendant and the fund provider.

In order to avoid these negative aspects, it is necessary to regulate third party funding in a certain way. The Recommendation proposes a set of principles, also in the funding of collective redress actions, which EU Member States should transpose into their national legal systems, the basic principle being the obligation of the claimant to declare to the court the origin of the funds for collective redress procedures. Their specific implementation will then depend on the legislative regulation of the Member State.

---

A Research Paper for submission to the European Consumers' Organisation, 2011, p. 69. Available at: <<http://www.law.qmul.ac.uk/docs/staff/department/71112.pdf>>.

59 We talk about the "English" model of decision-making on reimbursement of litigation costs, which is typical for European countries. The "American" model is the opposite, where the costs are borne by the two parties. Where the principle of success in the case is applied, the issue of funding (esp. by a third party) is essential, as it can significantly increase the litigation costs incurred by the applicant. HIGGINS, Andrew, ZUCKERMAN, Adrian A. S. Class actions in England? Efficacy, autonomy and proportionality in collective redress. *Oxford Legal Studies Research Paper*, 2013, no. 93, p.42. Available at: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2350141](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2350141)>.

However, the degree of regulation must be set so as not to result in a *de facto* exclusion of that method of funding. Individual countries must therefore adopt such regulation which reduces the above mentioned negative effects, while not deterring third parties from funding collective redress procedures. Whether or not individual Member States permit contingency fees to a certain limited extent is likely to be crucial. If contingency fees are completely prohibited, the group of entities willing to finance litigation will be significantly reduced, making further safeguards against abuse practically redundant.<sup>60</sup>

---

60 As a result, funders will be able to set less favourable conditions for group representatives.

**BREXIT, EEA AND THE FREE MOVEMENT OF WORKERS:  
STRUCTURAL CONSIDERATIONS ON FLEXIBILITY<sup>1</sup>****Václav Stehlík**

Faculty of Law, Palacky University Olomouc, Czech Republic

*vaclav.stehlik@upol.cz*

STEHLÍK, Václav. Brexit, EEA and the free movement of workers: structural considerations on flexibility. *International and Comparative Law Review*, 2016, vol. 16, no. 2, pp. 145–156. DOI: 10.1515/iclr-2016-0020.

---

**Summary:** The article focuses on the regulation of the free movement of workers under Agreement on the European Economic Area in the light of the considered accession of the United Kingdom to this agreement after the Brexit takes place. The participation in the European Economic Area would keep the United Kingdom part of the EU internal market including the free movement of workers. The article tries to answer the question on the degree of flexibility in the EEA Agreement which would give space for the UK to pursue its own policies on the movement of workers. The article argues that structurally the EEA Agreement gives a space for some flexibility, however, only in case of very specific circumstances.

**Keywords:** free movement of persons, Brexit, Agreement on the European Economic Area, EFTA.

---

**1 Introductory remarks**

In June 2016 the British voters decided that the United Kingdom should leave the European Union. One of the main topics in the pre-referendum campaign was the status of migrant workers coming from other EU countries, especially from Eastern Europe. The British pro-exit politicians called strongly for restrictions of the free movement of workers and their access to social benefits in the host Member State. One of the main concerns was that migrant workers reduce the offer of jobs available to the British citizens and overburden national social security system.<sup>2</sup> The benefits or losses derived from the free movement of workers have been discussed elsewhere and will not be a main concern of this article.<sup>3</sup> An assumption that in some sectors the effects of inflow of cheap labour force

---

1 The article was prepared with the support of Jean Monnet Chair, „EU Law in Global Perspective“.

2 For these arguments, see f.e. <http://campaignforanindependentbritain.org.uk/border-control/>.

3 For analysis of Brexit impact on EU industries see f.e.: <http://www.migrationobservatory.ox.ac.uk/resources/reports/potential-implications-of-admission-criteria-for-eu-nationals-coming-to-the-uk/>.

has significantly changed employment patterns may be true and may cause justified worries for the British citizens. At the same time, effects of immigration from the overall economic perspective seem to be evaluated positively.<sup>4</sup>

Anyway, it is most certain that the movement of workers will play a key role in the process of shaping post-Brexit relations to the EU. The solution will depend on the legal outcomes of the exit negotiations. Pro-exit campaigners often suggested that the UK should follow the Norwegian model based on the Agreement on the European Economic Area<sup>5</sup> concluded between countries grouped in European Free Trade Association<sup>6</sup> and the EU. The UK accession to the EFTA and, then, as an EFTA Member State, to EEA Agreement might seem one of the first-sight options for the UK. Still, the sense of romance of the homecoming of the former EFTA Member State<sup>7</sup> may not be a reliable guide as the ex-partners from EFTA have moved a long way forward since then, and their relations to the EU became much more complex<sup>8</sup> and closer than any time before.

Definitely, any prospect relationship, including EEA Agreement, requires a **common accord** of both the UK and the EU and will not be a one-sided choice. Interestingly some scholars<sup>9</sup> refused this consensus requirement. They deduced from the wording of EEA Agreement that the UK could automatically continue in its membership based on the succession of its present status even without an EFTA membership and a new ratification process on its accession to EEA.<sup>10</sup> The arguments put forward in this regard are interesting but, in our opinion, too much purpose-oriented. The interpretation of EEA Agreement in favour of this solution is rather clumsy from both the legal<sup>11</sup> and political point of view. Even if disregarding the strict legal assessment, this reading of the EEA Agreement would have to be persuasive and acceptable also for the UK's partners, namely the EU and the EFTA states. It would actually have to be acceptable even for the UK as the liberalisation of free movement of workers in the EEA Agreement is

---

4 For a commentary on the effects of immigration on British employment sector see f.e.: <https://www.theguardian.com/politics/2016/may/20/reality-check-are-eu-migrants-really-taking-british-jobs>; <https://www.theguardian.com/uk-news/2014/nov/05/uk-magnet-highly-educated-migrants-research>.

5 Further referred as "EEA Agreement".

6 Further referred as "EFTA" and "EEA EFTA states".

7 The UK being a founding member of EFTA in 1960.

8 Most evidently in Switzerland that refused EEA Agreement in referendum. Afterwards it concluded a number of agreements taking over EU internal market rules including free movement of persons. Most recently, the Swiss people refused the EU-Swiss agreement on movement of person in 2014 and Swiss government is obligated to renegotiate it with the EU until February 2017.

9 Yarrow, George. *Brexit and the Single Market. Essays in Regulation*. Oxford: Regulatory Policy Institute, 2016, No 6.1.

10 Including also ratification in all EU Member States.

11 See f.e. a reaction to Yarrow's analysis in Richard North's paper published here: <http://eureferendum.com/blogview.aspx?blogno=86236>.

very advanced (as will be shown below) and it might be reasonably expected that the UK would desire to alter at least some features in that regard during the accession negotiations.<sup>12</sup>

Therefore, the decision on the part of UK to participate on EEA Agreement must go hand in hand with a consent of the EU as well as the EEA EFTA states.<sup>13</sup> This does not automatically mean that both the EU and the UK will not have its own vision of mutual liaisons and own priorities to be reflected in the post-Brexit relations. Negotiations should not be based strictly on a “take or leave” attitude; the final agreement needs to be properly weighed-out and acceptable for both sides; expectedly, this will be very difficult especially in the area of free movement of persons.

In the following, we will examine the EEA-Agreement option for the UK; especially the question how the status of workers is legally constructed compared to the EU regulation and whether it might be flexible enough to meet the UK expectations.

## **2 EEA and EU: varying perspectives, aims, objectives**

Before going into details on the movement of workers it will be useful to shortly pause on the **underlying objectives** on which both forms of economic integration are founded.

It is well known that the EU integration is not based on purely economic<sup>14</sup> but also on non-economic principles and objectives.<sup>15</sup> Among these especially the aim to set up common citizenship and ever closer union<sup>16</sup> are relevant for the shaping of the free movement of persons which, consequently, goes beyond the pure movement of an economic factor. The underlining principle further reflected in the EU founding treaties is the prohibition of discrimination not only as far as work conditions are concerned but also in relation to other circumstances in which the free moving person (not only worker) can get in a host

---

12 Perhaps similarly as was agreed in relation to Lichtenstein, the Protocol VIII and correspondingly Protocol V to the EEA Agreement introduced percentage limits for workers outside Lichtenstein. According to this protocol, sectoral adaptations for Lichtenstein reflected its special geographical situation; thus, we do not think that it is possible to expect the same political and legal solution in relation to the UK.

13 Namely, Norway, Island and Lichtenstein.

14 The Preamble to Treaty on the European Union (TEU) talks among others about strengthening and convergence of Member States' economies, establishment of economic and monetary union including a single and stable currency, promotion of economic and social progress.

15 Such as liberty, democracy and respect for human rights, solidarity between EU nations, democratic and efficient functioning of the institutions, comp. Preamble to the TEU. The economic principles are further worked out in the preamble of Treaty on the Functioning of the EU (TFEU).

16 Comp. Preamble to the TEU.

Member State. Yet, the approximation between the status of own citizens with those of other Member States does not equal to assimilation. The EU law enables to set up limits based particularly on the respect for national social and health insurance systems<sup>17</sup> and other fundamental interest of Member States.<sup>18</sup>

Similarly, the Preamble to the EEA Agreement refers to non-economic objectives.<sup>19</sup> Even though the EEA Agreement shares some objectives of non-economic character, they are much narrower than those formulated in the EU founding treaties.<sup>20</sup> Comparatively more emphasis is put on economic issues<sup>21</sup> and the EEA Agreement principally expanded the EU internal market freedoms and other selected EU policies to the EEA EFTA states. The overarching idea is that the **legal environment** in all EU and EEA EFTA states should be **homogenous** so that the movement of economic factors can be smooth and free of any unjustified restrictions.<sup>22</sup>

Whereas in relation to the free movement of persons the EU is based on common citizenship and ever closer union, an objective of the EEA Agreement is the **fullest possible realisation of the free movement** of four freedoms including persons. This might indicate availability of more divergences in the interpretation of the free movement provisions and, in practice, extent of rights attributed to migrant workers. The objective of “fullest possible free movement” might even resemble “program” or “aim” oriented provisions. However, this must be read in line with individual provisions of the Agreement on the free movement, possible exceptions and their enforcement.

From the UK's perspective the crucial issues will be the extent of obligations in relation to workers and availability of exceptions, in other words, flexibility of the obligations of contracting parties.

### **3 A brief comparison of free movement rules in EEA and EU law**

The first issue concerns the extent to which EU-origin rules must be incorporated in legal orders of EEA EFTA states. In this regard, it is important to focus particularly on the obligation of EEA EFTA states to comply with the EU primary and secondary law.

17 See Directive 2004/38/EC Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, p. 77–123.

18 Namely public policy, public security, protection of health and employment in public service, comp. art. 45 TFEU.

19 Such as contribution to the Europe based on peace, democracy and human rights.

20 The partnership between EU and EFTA states is considered a privileged one based on proximity, common values and European identity.

21 Such as trade liberalisation and cooperation, equal conditions of competition and their enforcement.

22 Comp. indent 4 and 5 of the preamble of the EEA Agreement.

### *3.1 The EEA Agreement and EU primary law*

The free movement of persons is set up in Part III of **EEA Agreement**; specifically, in **art. 28** which regulates status of workers and self-employed persons. This article introduces:

- freedom of movement for workers (art. 1)
- abolition of discrimination based on nationality between workers coming from EU Member States and EEA EFTA States as regards employment, remuneration and other conditions of work and employment (art. 2)
- right to accept offers of employment, move freely within the territory of EU Member States and EEA EFTA states for this purpose, to stay in their territory and remain there after having been employed there (art. 3)
- exceptions based on limitations justified on grounds of public policy, public security, public health and employment in the public service (art. 3 and 4).

As concerns EU primary law, while TEU does not contain any specific regulation of free movement of workers,<sup>23</sup> all regulation is concentrated in **TFEU**, namely in its art. 45. The article 28 of EEA Agreement is a mirror provision as it fully copies article 45 TFEU. Thus, the regulation in EU primary law and EEA Agreement seems to be identical.

### *3.2 The EEA Agreement and implementation of EU secondary law*

The extent of individual rights is regulated in **EU secondary law** setting up details on the rights guaranteed in the primary law and in some respects also consolidating case law of the European Court of Justice (CJEU).<sup>24</sup> In practice EU secondary law concerns especially the entry of workers, their right of residence, rights connected to employment, including social security, and justifiable restrictions/exceptions. The obligation to incorporate EU secondary legislation in relation to EEA EFTA states is set up in **art. 7 of the EEA Agreement** which distinguishes between EU regulations and directives. According to this article:

- an act corresponding to an EU regulation must be made part of the internal legal order of the Contracting Parties (EEA EFTA states) and
- an act corresponding to an EU directive leaves to the authorities of the Contracting Parties (EEA EFTA states) the choice of form and method of implementation.

---

23 TEU in general speaks about the free movement of persons and the area of freedom, security and justice (art. 3 para 2) and establishment of the internal market (art. 3 para 3).

24 This is clearly visible f.e. in relation to the Directive 2004/38 in relation to the applicability of exceptions from the principle of free movement.

Evidently article 7 of the EEA Agreement keeps the distinctions between **regulations** and **directives** similarly as they are known in EU law.<sup>25</sup> It does not expressly refer to other acts of the EU law, especially decisions; nevertheless, this does not exclude them from the incorporation in EEA rules.<sup>26</sup> The acts that must be taken over by EEA countries are enumerated in the **annexes** to the EEA Agreement and in the **decisions of the EEA Joint Committee**. Acts referred to or contained both in annexes and the decisions of the Joint Committee are binding upon the contracting parties.<sup>27</sup>

In practice, the implementation of EU secondary legislation in relation to workers is carried out mainly through **Annex V** of the EEA Agreement. This annex lists the EU legislation, which the EEA EFTA states have to take over. Flexible adaptation to changes of EU legislation is secured through the decisions of the EEA Joint Committee with the competence to insert new EU legislation into the annexes. At present this annex requires the implementation of the fundamental EU law on the free movement of persons, including the Directive 2004/38/EC,<sup>28</sup> Regulation (EU) No 492/2011,<sup>29</sup> Commission Implementing Decision 2012/733/EU,<sup>30</sup> Commission Regulation (EC) No 635/2006,<sup>31</sup> Council Directive 77/486/EEC<sup>32</sup> or Directive 2014/54/EU.<sup>33</sup>

Except for Annex V, also **Annex VII** plays a key role for the free movement of workers as it concerns recognition of qualifications. The EEA EFTA states are

---

25 Comp. Art. 288 TFEU.

26 Decisions can be made binding by decisions of the EEA Joint Committee, see f.e. Commission Implementing Decision 2012/733/EU of 26 November 2012 implementing Regulation (EU) No 492/2011 of the European Parliament and of the Council as regards the clearance of vacancies and applications for employment and the re-establishment of EURES, OJ L 328, 28.11.2012, p. 21, in Annex V of the EEA Agreement or Commission Decision 2009/17/EC of 19 December 2008 setting up the Committee of Experts on Posting of Workers, OJ L 8, 13.1.2009, p. 26, in Annex XVIII.

27 See in that regard art. 7 EEA Agreement.

28 Directive 2004/38/EC Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, p. 77–123.

29 Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141, 27.5.2011, p. 1.

30 Commission Regulation (EC) No 635/2006 of 25 April 2006 repealing Regulation (EEC) No 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State, OJ L 112, 26.4.2006, p. 9

31 Commission Regulation (EC) No 635/2006 of 25 April 2006 repealing Regulation (EEC) No 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State, OJ L 112, 26.4.2006, p. 9.

32 Council Directive 77/486/EEC of 25 July 1977 on the education of the children of migrant workers, OJ No L 199, 6.8.1977, p. 32,

33 Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, OJ L 128, 30.4.2014, p. 8.

obliged to take over particularly Directive 2005/36/EC.<sup>34</sup> Annex VII introduced minor adaptations in relation to EEA EFTA states concerning some professions specific to these countries. Further, it took over EU coordinating legislation in this area<sup>35</sup> and EU rules in relation to legal professions.<sup>36</sup> The Annex sets up also a **soft obligation** in relation to non-binding legal acts as the EEA EFTA states do not have to implement these acts but should take notice of them.<sup>37</sup>

Finally, **Annex XVIII** requires implementation of a number of EU rules on health and safety at work,<sup>38</sup> equal treatment for men and women<sup>39</sup> or labour law.<sup>40</sup>

In short, from the above survey it is clear that the EEA EFTA states are obliged to take over most relevant EU legislation in the area of free movement of workers, their employment and conditions of work. There are no substantial exceptions that would exempt them from some of fundamental EU rules.

Nevertheless, any conclusions on the equivalence of EU and EEA rules would be premature unless we deal with the question whether the interpretation of EU

---

34 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255, 30.9.2005, p. 22, including its amendments.

35 Commission Decision 2007/172/EC of 19 March 2007 setting up the group of coordinators for the recognition of professional qualifications, OJ L 79, 20.3.2007, p. 38.

36 Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, OJ No L 78, 26.3.1977, p. 17; Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ L 77, 14.3.1998, p. 36, and their amendments specified in the Annex

37 Commission Recommendation 89/601/EEC of 8 November 1989 concerning the training of health personnel in the matter of cancer, OJ No L 346, 27.11.1989, p. 1.

38 F.e. Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ No L 183, 29.6.1989, p. 1.

39 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ No L 6, 10.1.1979, p. 24; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23.

40 F.e. Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.8.1998, p. 16; Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (Codified version), OJ L 283, 28.10.2008, p. 36–42.

283, 28.10.2008, p. 36). Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ No L 288, 18.10.1991, p. 32. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1.

and EEA rules is the same and whether identical exemptions from the free movement rules are available.

#### **4 Notes on structural sources of heterogeneity between EU and EEA law**

Except a direct disapplication of EEA law equalling to an open breach of EEA law, there are several other risks complicating a full application of relevant EU law. These concern primarily:

- the interpretation of EU law-origin rules *vis-à-vis* their interpretation by the CJEU
- the procedures for transposition of EU law and, especially, the use of safeguard measures.

##### *4.1. Variability in the interpretation of mirror provisions under EEA Agreement?*

###### *4.1.1 Judicial apprehension of mirror provisions*

The EU law principles for interpretation of mirror provisions in external agreements were articulated by the CJEU in *Polydor* case<sup>41</sup> where the CJEU formulated a **context-related interpretation**.<sup>42</sup> Consequently, that similarity of terms in EU external agreements and EU law does not automatically mean that the CJEU interpretation of the relevant EU law would apply to the interpretation of the contested provision of the agreement.<sup>43</sup> Much will depend on the aim and context of the provision of the agreement compared to the objectives and context of the EU law.<sup>44</sup>

In relation to the EEA Agreement it could be recalled that in its negative *Opinion 1/91*<sup>45</sup> on its first draft the CJEU refused the competence of the proposed EEA Court as it would intrude in its exclusive powers under EU law, especially its task to preserve autonomy of Community legal order.<sup>46</sup> The CJEU pointed out to differences between objectives and context of both integration projects.<sup>47</sup> Based on this the interpretation of mirror provisions were also scru-

---

41 270/80 *Polydor*; ECLI:EU:C:1982:43.

42 Comp. Thym, Daniel, Zoetewej-Turhan, Margarite (eds). *Rights of Third-country Nationals under EU Association Agreements*. Leiden/Boston: Brill/Nijhoff, 2015, p. 205.

43 Comp. point 15 of *Polydor* decision.

44 See C-312/91 *Metalsa*, ECLI:EU:C:1993:279, point 11; commentary at f.e. Thym, Daniel, Zoetewej-Turhan, Margarite (eds). *Rights of Third-country Nationals under EU Association Agreements*, p. 106.

45 *Opinion 1/91* on the EEA Agreement, ECLI:EU:C:1991:490. For a detailed commentary see f.e. Brandtner, B.: The 'Drama' of the EEA Comments on Opinions 1/91 and 1/92, 3 EJIL (1992) 300–328.

46 See *Opinion 1/91*, point 35.

47 Comp. especially points 15–17.

tinised.<sup>48</sup> Consequently, difference of both integration projects could also justify **diverging interpretation** of individual provisions of both treaties (and corresponding acts).

#### 4.1.2 EEA Agreement rules

The EEA agreement tried to avoid differences in the enlarged internal market. The aim of homogeneity in all EEA states could be reached only with respect to CJEU case law, which is crucial for shaping the regulation of the internal market. Thus, the EEA Agreement set up exact rules on the interpretation of mirror provisions and established a **duel effect of the CJEU case law** depending a certain decision delivered. Under art. 6 of the EEA Agreement:

- the interpretative judgments of the CJEU delivered **prior** to the date of signature<sup>49</sup> of the EEA Agreement are **binding**. This means that substantively the same provisions of the EEA agreement and EU law should be interpreted in the same way. In this regard it is important to recall that the aim to create internal market was announced by the White Paper issued in 1985 with the prospect to reach the aim in the year 1992. The establishment of the internal market was strongly supported by the CJEU; consequently, most of the principle-setting case law was adopted until the beginning of the 90's; still, some of the key cases such as *Bosman*<sup>50</sup> were adopted after this date;
- interpretative judgments of the CJEU delivered **after** the date of signature of the EEA are not explicitly covered in art. 6. The “impact” of CJEU case law is regulated in Agreement establishing EEA Surveillance Authority and EFTA Court.<sup>51</sup> According to its art. 3, para 2, in the interpretation of identical provisions of the EU law and EEA Agreement, a **due account** should be paid to the principles laid down by the relevant rulings.<sup>52</sup>

In order to avoid legal inconsistencies after 1992 the EEA Agreement created mechanisms how to deal with differences in the interpretation of the CJEU and EFTA Court. The **homogeneity** of interpretation is protected especially **through procedures** set up in art. 105-107 EEA Agreement. The aim is to secure as uniform interpretation as possible.<sup>53</sup> In this process an important role is played by the EEA Joint Committee that keeps a constant review of the CJEU and EFTA case law. A **dispute on the interpretation** of identical EU and EEA Agreement

48 Comp. points 42.

49 The EEA Agreement was signed on 2 May 1992.

50 C-415/93 *Bosman*, ECLI:EU:C:1995:463.

51 This agreement was adopted by EFTA states in order to implement obligations set up in EEA Agreement.

52 See art. 3, para 2 of Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, OJ L 344, 31.1.1994, p. 3.

53 Comp. Art. 105. para 1.

provisions may be referred to the Joint Committee also by contracting parties (comp. art 111 EEA Agreement). If the problem is not settled by the Joint Committee, it may be referred to the CJEU to give a ruling on that issue or finally may lead to the adoption of unilateral action by a Member State (especially safeguard measures under art. 112 EEA Agreement).

Evidently, the procedures for taking over EU law are constructed so that there would be a high consistency between interpretation of EU and EEA law. Complexity of these provisions show that it was a crucial issue for the contracting parties. This reflects the aim of really a free movement of workers with absence of any restrictions except those presumed in the EU law and EEA Agreement. Any unilateral solution is a last resort choice, though it is not fully excluded. It does not seem that this could be an accessible way to efficiently and, above all, systematically disregard selected rules on the free movement of workers by an EEA EFTA Member State.

#### *4.2. Disruptions of homogeneity of EEA rules: some remarks*

Except the preceding discussion on the interpretation of mirror provision there are actually other means how to contest EU law rules or disregard them by EEA EFTA states. This may concern especially:

- the process of their implementation on the EEA level
- the use of exceptions presumed in art. 28 EEA Agreement and
- the use of safeguard measures.

##### *4.2.1 Implementation of EU law under EEA Agreement*

The first danger to the requirement of homogeneity of free movement rules is based on the fact that the EU internal market law including the free movement of goods does not become automatically part of EEA Agreement. Thus, the art. 7 of the EEA Agreement empowers the EEA Joint Committee to decide on insertion of EU legislation in the relevant annex of the EEA Agreement.<sup>54</sup> The art. 102 para 1 of the EEA Agreement seems to be quite strict and does not give a choice whether to implement the concerned act or not. The implementation is done by each Member State (f.e. through adoption of legislation by national parliament). Still, under art. 103 the binding effect of EEA Joint Committee decision may be subject to the fulfilment of national **constitutional requirements** in a Member State. If these constitutional requirements are not overcome, this may lead to **provisional suspension** of the contested act and further procedures for solving the problem are initiated.<sup>55</sup> We assume that potentially this may be a way for a Member State to obstruct the insertion of unwanted rules in its legal order.

---

<sup>54</sup> For detailed procedures for implementation of EEA relevant acts see: <http://www.efta.int/eea/eea-institutions/eea-decision-making>.

<sup>55</sup> See in that regard art. 103 para 2 in connection with 102, paras 5 and 6.

#### *4.2.2 Use of exceptions and safeguard measures*

The use of **exceptions** referred to in **art. 28 of EEA Agreement** is a possibility presumed by the agreement and can be used by Member States if (mostly case-law-based) conditions are fulfilled. In principle these conditions mirror EU law provisions and can be used in similar situations as by EU Member States. Previous considerations on the interpretation of mirror provisions are applicable also in this context. Nevertheless, as far as we know their use has not been much discussed even though they might be of interest to EEA EFTA states.

Last but not least, it has been suggested that the UK as a signatory of EEA Agreement could systematically and even permanently have recourse to the **safeguard measures** presumed in art. 112 and 113 of the EEA Agreement.<sup>56</sup> We assume that these considerations would go against objectives of the EEA Agreement. The use of safeguard measures refer to crisis-like situations, should be exceptional and not planned in advance. Even though this might be “a last resort” legally presumed possibility, we suppose that the UK should frankly say what are its intentions in the area of free movement of persons whether or to what extent it is going to preserve it. The consensus on this issue should be embodied in the exit agreement.

### **5 Conclusions and final considerations**

First of all, the EEA law is not straightforwardly EU law and in EEA Agreement there are structural sources of possible divergence in regulation. We assume that the aim of homogeneity does not mean that the provisions must be totally the same in every detail. The overall aim should be the functionality of the internal market including the EEA EFTA states; the general functionality should enable to reflect well justified local differences.

We think that joining the EEA Agreement would be mutually advantageous solution for both the EU and the UK, as it would secure close bonds between the EU and the UK. Still, the characteristics of EEA integration should play a central role in the process of decision whether to accede the EEA Agreement or not. It cannot be well expected that the EEA principles and objectives would substantially change according to UK's desires. Particularly, any advance plans not to rely on the principles of the Agreement, including the free movement of workers, and more on the exceptions must be refused. The same is true in relation to any practice in that regard after its potential accession to the EEA Agreement. The

---

56 See f.e. Yarrow, George. *Brexit and the Single Market. Essays in Regulation.* p. 17–19, available at: [http://www.rpieurope.org/Publications/Yarrow\\_Brexit\\_and\\_the\\_single\\_market.pdf](http://www.rpieurope.org/Publications/Yarrow_Brexit_and_the_single_market.pdf). The recourse to safeguard measures is reflected also in other papers, though it is not expected on a daily basis, see f.e. North, Richard, Oulds, Robert. *Market Solution: Flexcit: Flexible Exit and Continuous Development: The Definite EU Exit Plan for Britain.* Epsom: Bretwalda Books, 2016, p. 17, available at: <http://www.eureferendum.com/themarketsolution.pdf>.

UK should clearly say what are its priorities in individual areas, including the free movement of workers, and negotiate about them. This does not exclude that there may be a divergent interpretation of EU origin rules based on common agreement of all EEA partners including the UK or the UK will have recourse to envisaged restrictions of the free movement of workers including safeguard measures. However, these must be read rather strictly, as they go against the objectives of the EEA integration.

Finally, we might return to the question in the title of this article, namely, whether the EEA Agreement is flexible or, better said, whether it is sufficiently flexible for the UK to fulfil its priorities of the movement of workers. The answer is that it has some flexibility potential but mostly for exceptional situations and not for regular use. Thus, much will depend on the vision of the UK in the area of migration. If requirement for full or dominant control wins, the EEA Agreement solution is not acceptable. If it would be sufficient for the UK to keep powers to solve more or less exceptional situations, then, the EEA solution could be well satisfactory. The decision is now on the UK to formulate its vision.

# THE LEGAL PROBLEMS OF OCCUPATIONAL AND HEALTH SAFETY IN ESTONIA

**Kristi Joamets**

Tallinn Law School Tallinn University of Technology

**kristi.joamets@ttu.ee**

&

**Liina Luukas**

Estonian Ministry of Interior

**liina.lks@gmail.com**

JOAMETS, Kristi & LUUKAS, Liina. The Legal Problems of Occupational and Health Safety in Estonia. *International and Comparative Law Review*, 2016, vol. 16, no. 2, pp. 157–172. DOI: 10.1515/iclr-2016-0021.

---

**Summary:** Number of occupational accidents has decreased in recent years in Estonia. Article discusses whether the reason for this can be insufficient labour inspection legal system. The conformity of Estonian occupational health and safety regulation on supervision to the national law providing rules for labour inspection in this field is evaluated. More specifically, ILO conventions no 81 and no 129 and European Council directive 89/391/EEC are analysed to find out whether the high number of occupational accidents derive from the non-compliance of the international rules. Difficulties in following the international law rules are analysed, presenting and discussing also the problems appearing in the context of new labour relations in a changing society

**Keywords:** government supervision, occupational health, occupational safety, labour law, labour inspection

---

## 1 Introduction

People spend more than half of their life working. Job offers people economic security and mental satisfaction – a possibility of self-accomplishment. Therefore, it is important that the conditions under which people work, meet the requirements of law and assure the protection and safety of people at work.

Unfortunately, the number of occupational accidents has increased in recent years in Estonia. One reason for this can be Estonian insufficient legal national labour inspection system. Labour inspection is disserted in a variety of different legal acts, but none of them would be individually or in a whole appropriate for the effective supervision developed in many other European Union Member States.

Article discusses Estonian occupational health and safety legislation, supervision and praxis over occupational health and safety (OSH) requirements derived from the legal acts to find out what can be reasons for the insufficient labour inspection system. Could the reason be the inaccordance of national law to the international law? As main rules for OSH system derive from the international law then the ILO conventions no 81 and no 129 are analysed in parallel to the Estonian national legislation. However, as conventions no 81 and no 129 are similar and largely identical, with the exception of some specific technical nuances, article bases mainly on the convention no 81. Also, article analyses the applicability of the convention 81 and European Council directive 89/391/EEC on non-traditional labour relations assuming that not all the rules provided by those legal acts are applicable for such relations.

Research is an empirical qualitative study in which authors use a comparative analysis and legal dogmatic method to examine legal regulations and practice.

## **2 International conventions regulating occupational and health safety**

The origin of monitoring working conditions can be attributed to two important principles. Firstly, the emergence of national labour inspection services accrued from the social pressure to regulate the national economic forces. In other words, the final years of the 19th century gave evidence of heinous and intolerable working conditions labour force had to bare in industrialized states. Something had to be done in order to stop the exploitation of women and children and the twelve to sixteen hour workdays. The aim was to increase wages so that people would not have to work for such a small salary which made them barely cope. Secondly, another reason was the need to protect the exploited layers of society. Resulting from that, a situation which allowed state to create a law protecting people from exploitation was developed.<sup>1</sup> In summary, it can be said that the reason for developing the monitoring of working conditions was the poor working conditions and the people's discontent with the situation. It was evident that something had to be done to change the situation and one solution for this was to regulate the supervision of working conditions.

From International Labour Organisation's (ILO) point of view, the application of the laws on labour depends on the efficiency of labour inspection. Labour inspectors are the ones who are obliged to examine how national labor standards are implemented in the workplace and provide employers and workers advice on how to improve the application of national law on matters like working hours, wages and OSH. In addition, labour inspectors notify the local authorities of the deficiencies of the national law. Labour inspectors play a vital role in ensuring that labour law is applied equally to all employees and employers. As the international community recognizes the monitoring of working conditions, the

---

1 PIRES, Robert. *Labour inspection and development: Some reflections*. Geneva, ILO, 2011, pp. 2-3.

ILO has made it a priority to promote ratification of the two Labour Inspection Conventions (no 81<sup>2</sup> and 129<sup>3</sup>).<sup>4</sup> ILO conventions are socially legitimate and they have a strong influence as the conventions offer realistic solutions to the problems.<sup>5</sup> ILO standards have increasingly been emphasised in many countries and have a very strong impact.<sup>6</sup> Conventions are a source of guidance to provide a pattern on which successfully build a national policy, law and everyday practice.<sup>7</sup>

The first convention (no 81) was adopted in 1947 and it has been ratified by more than one hundred countries. The second convention was adopted in 1969 and it has been ratified slightly less – by more than 40 countries. Despite the fact that according to the ILO's constitution all the ratified conventions have the same legal force, eight core conventions (fundamental rights at work) and four priority conventions have been disserted differently for many years. The above-mentioned conventions belong to the four priority conventions.<sup>8</sup> Priority conventions are important because they ensure an effective system of international labour standards.<sup>9</sup>

In order to understand what is provided by ILO conventions, it is important to understand what is labour inspection. For ILO, the role of labour inspection is to ensure the enforcement of national laws concerning labour law, dealing with the issues such as working conditions and workers' health and safety. Labour inspection is one of the key functions of any work organization system. The range of topics, which labour inspection comprises, may differ from country to country, but generally it involves the promotion of OSH. In addition, labour inspection comprises promotion of workers' fundamental rights, such as freedom of association, non-discrimination and the functioning of relevant employ-

---

2 Labour Inspection Convention – Convention concerning Labour Inspection in Industry and Commerce.

3 Labour Inspection Convention – Convention concerning Labour Inspection in Agriculture.

4 ILO. *International Labour Standards on Labour Inspection*. [online]. Available at: <[www.ilo.org/global/standards/subjects-covered-by-labour-standards/labour-inspection/lang-en/index.htm](http://www.ilo.org/global/standards/subjects-covered-by-labour-standards/labour-inspection/lang-en/index.htm)>.

5 BRONSTEIN, Arturo. The Role of the International Labour Office in the Framing of National Labor Law. *Comparative Labor Law & Policy Journal*, 2005, 26 (3), pp. 346–347.

6 GRAVEL, Eric, DELPECH, Quentin. International Labour Standards: Recent Developments in Complementarity Between the International and National Supervisory Systems. *International Labour Review*, 2008, 147 (4), p. 405.

7 VON RICHTHOFEN, Wolfgang. *Labour Inspection: A Guide to the Profession*. Great Britain: Biddles Ltd 2002, p. 80.

8 *Ibid*, p. 15.

9 CASALE, Giuseppe, FASANI, Mario. *International Labour Standards and Guiding Principles on Labour Administration and Labour Inspection*. Geneva, ILO, 2012, p. 1. [online]. Available at: <[www.ilo.org/public/libdoc/ilo/2012/112B09\\_185\\_engl.pdf](http://www.ilo.org/public/libdoc/ilo/2012/112B09_185_engl.pdf)>.

ment relationships and social dialogue. Labour inspection is ensured by labour inspectors.<sup>10</sup>

ILO conventions no 81 and 129 do not formulate the concept of governmental supervision. Conventions stress that every member of ILO who has ratified the above-mentioned conventions, must have a labour inspection system.<sup>11</sup> According to the convention no 81, the mission of the labour inspection system is to ensure, within the competence of labour inspectors, the enforcement of laws which regulate working conditions and workers protection, provide advice to employer and the employees how to follow the laws and inform the competent authority of the shortcomings that the existing laws do not regulate.<sup>12</sup>

Since the convention no 129 is in essence the same in meaning, ensuring the monitoring of working conditions, the missions in convention no 129 article 6 are essentially the same. The difference is due to the last point of article 6, that in addition to informing competent authorities of the shortcomings of the legislation, it also provides an opportunity to submit proposals to amend the legislation.<sup>13</sup>

The rights of labour inspectors are listed in article 81 of the convention no 81. According to the convention, they have a right to enter and control enterprise unannounced and organize surveys and checks to be sure of regulatory compliance. Therefore, they also have a right to interview workers, access various documents of the enterprise and take necessary materials and samples with them.<sup>14</sup>

Labour inspectors are allowed to use the foregoing rights only when they have an authorization. Again, the principles of the two conventions are quite similar in this matter, but there are some differences in the convention no 129. Convention no 129 does not contain a right to “demand the posting of notices which have been designated by law“. Under the article 16 of the convention no 129 there is added a provision (p. 2), which does not allow labour inspectors to enter the home of the head of and agriculture enterprise without the heads' acceptance or without the permission of a competent authority.

In addition to the labour inspectors rights, there are also prohibitions. Prohibitions in both conventions have the same content and they are formulated in the article 15 of the convention no 81 and in the article 20 of the convention no

---

10 ILO. *Labour administration and inspection key to good global governance*, 2011. [online]. Available at: <[www.ilo.org/global/about-the-ilo/newsroom/features/WCMS\\_156165/lang-en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_156165/lang-en/index.htm)>.

11 Convention concerning Labour Inspection in Industry and Commerce RT II 2004, 40, 149, art 1; Convention concerning Labour Inspection in Agriculture RT II 2004, 40, 149, art 3.

12 Convention concerning Labour Inspection in Industry and Commerce RT II 2004, 40, 149, art 3 lg 1.

13 Convention concerning Labour Inspection in Agriculture RT II 2004, 40, 149.

14 Convention concerning Labour Inspection in Industry and Commerce RT II 2004, 40, 149, art 12, p 1.

129. First, labour inspectors are not allowed to be interested in the enterprises which are under their supervision. Second, labour inspectors, even after they leave their occupation, are not allowed to disclose the manufacturing and trade secrets which have been found out during their duty. If the labour inspectors do not follow the foregoing prohibitions, appropriate sanctions or disciplinary action is applied. Finally, labour inspectors are not allowed to disclose the complainant, who informed about the violation of law or about the deficiencies of complying it. It is also prohibited to notify the employer or his representative that the inspection was prompted by a complaint.

### **3 Requirements arising from The Safety and Health at Work Directive 89/391/EEC**

Because of the common legal framework of the European Community the Member States have also formulated uniform conditions about OSH requirements.<sup>15</sup> Most directives have been provided OSH requirements (specifically, more than half of the directives regulate just OSH), which show how serious workers' health and safety is considered.<sup>16</sup> The most important law in the field of labour law is OSH Framework Directive 89/391/EEC (hereinafter directive 89/391). This directive is considered to be a novel approach to OSH field.<sup>17</sup> The purpose of the directive is to introduce measures to encourage the improvement of workers OSH.<sup>18</sup> The directive lays down minimum requirements but does not justify any reduction in levels of protection already achieved in the Member States. Therefore, when some Member States had already introduced similar measures to ensure better protection of workers health and safety before the adoption of the directive, then those Member States did not have to cut existing national standards. The same idea is repeated in article 1(3) of the directive. Directive 89/391 disserts mainly the responsibilities of employer and employee in ensuring OSH.

Article 3 of the directive 89/391 formulates the concept of employer, under which the employer is a natural or legal person who is in a work relationship with the worker and who is responsible for the enterprise or institution. A general obligation for the employer is formulated in the article 5(1) of the directive 89/391, according to which the employer is obligated to ensure workers' OSH in

---

15 HOWES, Victoria. Health and Safety Regulatory Framework – A Comparative Perspective. *The International Journal of Comparative Labour Law and Industrial Relations* 2003, 19 (1), p. 85.

16 HAVERLAND, Markus, ROMEIJN, Marleen. Do Member States Make European Policies Work? Analysing the EU Transposition Deficit. *Public Administration*, 2007, 85 (3), Oxford: Blackwell Publishing, pp. 757–778, p. 761.

17 BARNARD, Catherine. *EC Employment Law*. Oxford: Oxford University Press Inc. 2006, p. 381.

18 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, *ELT L 183/1*, 29.06.1989, art. 1, p. 1.

all work-related aspects. It is important to notice that according to the art 5(3) an employer is responsible despite the workers' obligations in the field of OSH. Therefore, it is the employer who has the task to ensure safe work environment and carry out the surveillance.

Article 6 of the directive 89/391 formulates general obligations of the employer. The employer must take all necessary measures to ensure the protection of workers OSH. In addition, the employer must prevent occupational risks, provide information and training and ensure the necessary arrangements and corresponding tools. In order to improve the situation an employer must take into account the constantly changing circumstances. In point 2 of the same article there are preventive principles, under which the employer must take measures to ensure the safety and protection of workers health: avoiding risks, analysing inevitable risks, crowding the risks at the source, adapting work to the individual and according to the technical progress, replacing dangerous factors with safe ones, developing coherent prevention policy, preferring collective protective measures and giving appropriate instructions to the workers. According to point 3 of the same article, the employer must account the risk to workers OSH, taking into consideration the nature and the activities of the enterprise. Accordingly to the resolution of European Court, the employer must assess all the risks associated with employees OSH.<sup>19</sup>

It is essential to define the legal status of a person engaged in work, which helps to implement the laws that regulate work.<sup>20</sup> Article 3 of directive 89/391 lays down the definition of an employee, according to which the employee is a person employed by an employer, including trainees. According to article 13(1) of directive 89/391, every employee is obliged to take care of their own and other workers OSH in accordance with their training and instructions given by the employer. This idea is a part of proactive policy, involving employees in order to develop a real culture of risk prevention.<sup>21</sup>

Article 13(2) of the directive 89/391 formulates workers' general obligations as three main tasks. First, employees must make proper use of personal protective equipment, tools, dangerous substances and other means of production. Second, the employee is obliged to inform the employer about other employees, who have a special responsibility for the OSH of workers, of any work situations they have a reasonable ground for believing that they pose a serious and immediate danger to OSH and also of any shortcomings in the protection systems.<sup>22</sup>

<sup>19</sup> *Ibid*, p. 12.

<sup>20</sup> HALJASMÄE, Reelika. Majanduslikult sõltuva töötajaja õiguslik kaitse. *Juridica* 2007 nr 4, pp. 274–280, p. 274.

<sup>21</sup> BARNARD, Catherine. *EC Employment Law*. Oxford: Oxford University Press Inc. 2006, p. 561.

<sup>22</sup> Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, ELT L 183/1, 29.06.1989, art 13, lg 2, p (d).

Third, employees must cooperate with the employer in order to perform duties assigned by the competent authority to protect the OSH at work<sup>23</sup> and to make sure that the working environment and working conditions are safe.<sup>24</sup>

Despite the fact that according to the article 4 of the directive 89/391 Member States must take all necessary measures to ensure that employers, employees and employers' representatives follow necessary provisions to implement the directive, the Member States have the final responsibility and they have to ensure adequate control and supervision.<sup>25</sup> Therefore, the governmental supervision over the questions concerning OSH is crucial.

Based on the foregoing, the authors of this paper are on the opinion that the employer is the one who is mainly responsible for all aspects of the workplace, but the employee must not use it maliciously. As much as the employer has a duty to ensure the safety of employees at work, the employees have also the obligation to comply with the safety rules. Since the employer has a great responsibility, it is reasonable for him to learn the requirements related to OSH or to hire a person responsible for the work environment. Ignorance does not release from liability.

In order to understand the application of the directive, it is important to realize the overall scope of its application, it applies to both, public and private sectors in all activities, but in minor exceptions. According to the article 2(2) the directive does not apply in cases where certain public service activities, such as the armed forces, the police or the civil protection services activity may conflict with it.

Here may be a misunderstanding whether the everyday work of certain public services, such as the armed forces and the police, belong to the scope of the directive or not. This issue is explained by many resolutions of European Court of Justice. According to point 53 of the case C-397/01 – C-403/01<sup>26</sup>, the article 2(2) of directive precludes from the scope of the directive not the civil protection services, but certain specific activities of those services, which due to its characteristics get into variance with rules laid down in the directive. The exception in the directive is intended for only providing essential effective services and in large-scale accidents, which is characterized by the fact that in this case it is impossible to plan the amount of the activities provided by public services<sup>27</sup>. Court decides that rescue services do not fall within the scope of the exception in article 2(2) of directive 89/391 and the directive generally applies to the provision of such services. The authors of this article find that the essence of the public service is similar to other traditional works, which belong to the scope of the

---

23 *Ibid*, art 13, lg 2, p (e).

24 *Ibid*, art 13, lg 2, p (f).

25 BARNARD, Catherine. *EC Employment Law*. Oxford: Oxford University Press Inc. 2006, p. 562.

26 ECJ 5.10.2004, connected cases C-397/01 – C-403/01, p. 47–61.

27 *Ibid*, p. 55.

directive and it would be unthinkable that the public service workers' health and safety would not be taken into account on a daily basis.

#### **4 Conformity of the Estonian OSH regulation to the convention no 81 and some problems**

After Estonian independence the first occupational and health safety act (OHSA) was enforced in 1999 and was based mainly on a directive 89/391<sup>28</sup>. Since then 19 EU directives have been adopted related to the occupational health and safety<sup>29</sup>. Characterising the adoption of EU rules one can note that as a big amount of directives were taken over in a short time period then unfortunately the regulations were remained often too formal because there was not left enough time to adopt them. Since 1999 the OHSA has been changed more than 20 times. Considering that there are also a number of decrees applying the OHSA the regulation of OSH in Estonia is considered as a complicated legal act to apply in practice.

Also the ILO conventions have been taken over quite well, still, based on the analyse of OHSA in 2011 there are some serious deficiencies.<sup>30</sup>

In Estonia the labour inspection is performed by the Labour Inspectorate following the rules provided by the OHSA. Labour Inspectorate is a government agency operating within the area of government<sup>31</sup> of the Ministry of Social Affairs, hence performs the obligation of cooperation between the government agencies and other institutions. However, the cooperation provided by the art 5 of the convention no 81 could be better. Similarly to other countries<sup>32</sup> the cooperation should be based on certain written agreements providing includingly the procedure of the joint operation, otherwise the obligation provided by the convention is declarative as nobody knows what exactly should be done and in practice is not followed at all.

Article 3(2) of the convention no 81 provides that any further duties which may be entrusted to labour inspectors shall not be such as to interfere with the effective discharge of their primary duties or to prejudice in any way the authority and impartiality which are necessary to inspectors in their relations with

---

28 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

29 *Töötervishoiu ja tööohutuse strateegia 2010–2013* (The policy of occupational and health safety), p. 7. [online] Available at: <[www.sm.ee/sites/default/files/content-editors/ees-margid\\_ja\\_tegevused/Too/Tookeskkond/tto\\_strateegia\\_2010-2013.pdf](http://www.sm.ee/sites/default/files/content-editors/ees-margid_ja_tegevused/Too/Tookeskkond/tto_strateegia_2010-2013.pdf)>.

30 KWANTES, Jan, Harmes, et al. *Töötervishoiu ja tööohutuse seaduse õiguslik analüüs. TNO aruanne*. (Legal analyse of occupational and health safety act. Report of TNO). 2011, p. 37.

31 Article 4 of the Convention 81 provides that supervision over the conditions of the work must be placed under the supervision and control of a central authority.

32 KWANTES, Jan, Harmes, et al. *Töötervishoiu ja tööohutuse seaduse õiguslik analüüs. TNO aruanne*. (Legal analyse of occupational and health safety act. Report of TNO). 2011, p. 28.

employers and workers. Such provision has not been adopted to Estonian legal system directly but a question has been raised in Estonian practice. The Ministry of Social Affairs has confirmed that some labour inspectors have acted as trainers.

Article 10 of the convention no 81 provides that the number of labour inspectors must be sufficient to secure the effective discharge of the duties of the inspectorate. Based on an overview of the working environment 2014 in Estonia<sup>33</sup> there can conclude that the number of controlled entities is increasing. ILO has provided the rules for the number of inspectors: one inspector for 10 000 employees in a state with developed market economy, 1 inspector for 20 000 employees in a state with transfer economy and 1 inspector for 40 000 employees in less developed state.<sup>34</sup> In Estonia the situation is quite good: there is 1 inspectorate approximately for 15 000 employees. Based on the data of Labour Inspectorate there are 55 inspectors but this number includes also 17 inspector-lawyers. Amount of the tasks labour inspectors have to fulfill is increased by the number of inspectors has been remained unchangeable.

Even for such a small state like Estonia the number of inspectors is not enough for sufficient supervision. This has raised even a question of conflict of interests as some inspectors acted as trainers in the companies. The situation is problematic because additional tasks can obstacle the performance of the main tasks. Though it seems to be welcomed that competent officials deliver their knowledge, then the contribution to his/her main labour tasks can be diminished. Includingly, “selling” the knowledge collected from the position in a public service to the private companies can cause the conflict of interests. Situation reflected the deficit in a labour market: insufficient number of competent trainers. Certainly a person who is experienced in supervision can better turn attention to the mistakes in the field. But, in such cases there should be specific officials whose main task is training and additional task supervision. Still, a question remains whether such inspector is wholly dedicated to the supervision? Those inspectors who are seriously interested in schooling should be relocated to work as a labour inspector but as a training provider and then they are not inspectors any more. As a solution, in 2014 was started a workplace consulting services which meant that an entrepreneur could invite into its entity a consultant of Labour Inspectorate and consultant will advice the questions of working conditions. In 2014 61 entrepreneurs used the service. According to the Labour Inspectorate 2395 working places became safer by this new tool.<sup>35</sup>

33 Tööinspektsioon. *Töökeskkonna ülevaade 2014* (Review of the surveillance of the occupational health and safety), pp. 10–11. [Online]. Available at: <[www.ti.ee/fileadmin/user\\_upload/failid/dokumendid/Meedia\\_ja\\_statistika/Toeokeskkonna\\_ulevaatad/2014/2014\\_toeokeskkonna\\_ulevaade\\_A4\\_web\\_13042015.pdf](http://www.ti.ee/fileadmin/user_upload/failid/dokumendid/Meedia_ja_statistika/Toeokeskkonna_ulevaatad/2014/2014_toeokeskkonna_ulevaade_A4_web_13042015.pdf)>.

34 ILO calls for strengthening labour inspection worldwide. [Online]. Available at: <[http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_077633/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_077633/lang--en/index.htm)>.

35 Tööinspektsioon. *Töökeskkonna ülevaade 2014* (Review of the surveillance of the occu-

Art 12 of the convention allows labour inspector to enter the controlled entity in a day-time and in the night with no previous warning. According to Estonian law labour inspector can visit entities only at the working time or with an attendance of the owner of the entity. Also, Estonian labour inspectors can demand the application of the appropriate measures to rectify the deficiencies which can danger the OSH of the employees. Art 16 of the convention provides that the entities should be controlled as often and properly as useful to ensure the following of the legal norms. Estonian law does not regulate how often entities should be inspected. Labour inspectorate has its own working plan for this.

Art 17 of the convention gives an inspector the right to decide whether to turn to the court with the case. In Estonia it is a rare practice that labour inspector decides to turn to the court. Also, based on the review of the working conditions<sup>36</sup> the percentage of the follow-up control has been falled year by year because the employer fulfills the obligations provided by the inspectors better and better. However, there are some obligations employers cannot manage with: organisation of health control<sup>37</sup> and internal control<sup>38</sup>. State works upon the problem, but again the problem is on the one hand insufficient human resource in Labour Inspectorate: employers need teaching because the rules they have to follow are in so many different legal acts and quite complicated to understand. Estonian labour market can be described as a lot of small entities acting as employers and they are not financially capable to hire well-qualified OSH experts. The fact is that the deficiencies in organisation of health control and internal control exist not because of the negligence or even intent but the lack of knowledge.

## **5 Exceptional labour relations and occupational health and safety control**

As mentioned above the fast development of technology has brought along new labour relations. This means that aside traditional labour relations exist also exceptional work formats. Most common is distance work and domestic work. Cho states that non-traditional work formats are one of the main problems in labour law because they cause instability and inequality and allow an employer to avoid the obligations derived from the law.<sup>39</sup> Supervision over exceptional work formats is different from the traditional work and certainly more complicated as in the supervision process one must consider specific aspects, e.g. inviolability of the home, constantly changing working place etc.

---

pational health and safety), pp. 10–11. [Online]. Available at: <[www.ti.ee/fileadmin/user\\_upload/failid/dokumentid/Meedia\\_ja\\_statistika/Toeokeskkonna\\_uelevaat-ed/2014/2014\\_toeokeskkonna\\_uelevaade\\_A4\\_web\\_13042015.pdf](http://www.ti.ee/fileadmin/user_upload/failid/dokumentid/Meedia_ja_statistika/Toeokeskkonna_uelevaat-ed/2014/2014_toeokeskkonna_uelevaade_A4_web_13042015.pdf)>.

36 *Ibid.*

37 *Ibid.*

38 *Ibid.*

39 CHO, Kyungbae. Legal Problems and Assignments of Non-Standard Workers. *Journal of Korean Law*, 2002, 2 (2), pp. 111–134, p. 111.

Distance work has many definitions. In general distance work can be described as a work made in a place which is far away from the undertaking and with the result that an employee has no direct contact with colleagues, but still has an opportunity to contact them via internet or else.<sup>40</sup> Estonian Employment Contract Act<sup>41</sup> defines distance work as a work done by the employment contract but outside the undertaking of the employer (§ 6 lg 4). In Estonian law distance work is not related only to the use of IT tools which means that distance work can cover also the work just made outside the undertaking. The idea of the regulation is to ensure the same working conditions for those employees who work in different places. However, regulation does not give clear rules for labour inspector nor employer, also does not provide the rights and obligations of employer related to working environment, working conditions, and responsibility.<sup>42</sup> Also, ILO conventions and EU council directives do not provide specific rules for non-traditional labour conditions.

Legal literature distinguishes distance work from home workers. Home workers are those who make traditional handwork, who lack of special skills and their salary is poor and depends often from the amount and quality they do while distance workers are employees who have special skills and use IT in their every day work. However, such distinguishing has caused problems, especially in ensuring the equal treatment for distance workers and home workers.<sup>43</sup> Employees, despite their skills, working place or way of working should be treated the same. Some types of work e.g. moving work is more complicated to match OSH requirements and it is not easy to supervise them but it is important not to forget that all employees should be treated equally. Every type of work has specific requirements to be followed by the employer and employee. Some requirements are less strict than the others but all in all it is important to follow them. However, the main principle is that it must be possible to control the welfare and health of the employee.

Supervision is not always easy to perform. For example, when an employee makes distance work at home. According to the Estonian Constitution<sup>44</sup> the home is inviolable: no one's dwelling or other premises lawfully occupied by him or her, or his or her workplace may not be forcibly entered or searched, except in the cases and pursuant to the procedure provided by the law to protect public order, public health or the rights and freedoms of others, to prevent a criminal

---

40 DI MARTINO, Vittorio, WIRTH, Linda. Telework: A New Way of Working and Living. *International Labour Review* 1990, 129 (5), pp. 529–554, p. 530.

41 Estonian Employment Contract Act RT I 12.07.2014, 146.

42 KÜNNAPAS, Kaido. Kaugtöö aktuaalseid probleeme. *Juridica* 2014(4), pp. 279–290.

43 NEVENS, Koen. Home Work, Telework and the Regulation of Working Time: A Tale of (Partially) Similar Regulatory Needs, in Spite of Historically Rooted Conceptual Divergence. *International Journal of Comparative Labour Law and Industrial Relations*, 2010, 26 (2), pp. 193–216, p. 200.

44 Estonian Constitution RT I 15.05.2015, 2, § 33.

offence, to apprehend the offender, or to ascertain the truth in a criminal case. On the other hand employer is required to suspend an employee from work if he or she is under the influence of alcohol, narcotics or toxic or psychotropic substances.<sup>45</sup> Also, according to the paragraph 12 (1) of OSHA an employer must ensure the following of the occupational and health safety requirements in every situation provided by the law.

In a labour relation an employee is subordinated to the employer and employer is the one who performs the direct control over the employee. Labour inspectorate has the right to control the trim of the tools and the following of the working requirements provided by the law.<sup>46</sup>

Now there is a situation where on the one hand control over the working place is required but on the other hand it is excluded. This shifts the control over the working conditions in the background because of the inviolability of the home. How to solve a situation? One solution can be the exchange of the information: an employer informs employee about the requirements of OSH and the risks derived from them, and an employee organises his/her working environment according to the requirements. In other words, an employer delegates the responsibility to the employee. However, though it is understandable that in a such situation an employer cannot be responsible because he/she cannot control whether the instructions are followed by the employee, and employer does not know all the risks employee can have at home. But in a civil law countries where disputes are solved strictly based on a written norm, it would not be sure that an employer would be released from the responsibility when an accident happens with an employee even when it is proved that an employer has informed employee but employee did not match the working conditions according to the law. As long as the mutual responsibility of OSH concerned the distance work is not clear, the main principle that an employer is responsible, applies. But it is strongly disputable in exceptional labour relations.

In some states, e.g. France and Italy, law provides that it is an employer's responsibility to control whether working conditions of distance workers conform to the OSH requirements. In Hungary the OSH requirements are applicable for distance work only when an employee uses the tools of employer.<sup>47</sup> Both solution provide who is responsible but do not specify how to perform supervision.

According to Estonian law employer has an obligation to give the employee the tools to work – not only IT tools but also a working desk, chair, lamp etc. In distance work it is disputable whether an employer has to buy and set these tools

---

45 Estonian Occupational and Health Safety Act. RT I 10.11.2015, § 13(1.15).

46 TAVITS, Gabriel. Kaugtöö ja töösuhete reguleerimine. *Juridica*, 2000(2), pp. 93–99, p. 97.

47 RAMOS MARTIN, Nuria., VISSER, Jelle. A More 'Autonomous' European Social Dialogue: The Implementation of the Framework Agreement on Telework. *International Journal of Comparative Labour Law and Industrial Relations*, 2008, 24 (4), pp. 511–548, p. 540.

especially considering other requirements like light and heat etc. in employee's home. When in general in Estonia employer's responsibility is to design and furnish a workplace such that it is possible to avoid occupational accidents and damage to health and to maintain an employee's work-ability and well-being,<sup>48</sup> then it would be complicated to accomplish this at employee's home.

In distance work an employee designs and furnishes a workplace him/herself. In case of not following the requirements it is not easy to determine who is responsible – an employer or employee? Another option is that in distance work the requirements should not be applied at all. When thinking as an example about a mother having a baby and working at home, then toys on a floor should not be considered as a danger, it should be employees responsibility how secure is the workplace. But when the wire of the IT tool given by the employer is broken and can cause a fire then there is another situation. An employee should immediately inform the employer and employer must fix the problem as soon as possible because it is employer's responsibility to control the equipments given for a distance worker to use, regularly. However, when a working place the distance work is made, is hundreds of kilometers away, it could be an additional burden and maybe even unreasonable expense for the employer to fix the problem.

Another problem is domestic work. Domestic work means that an employee works in someone else's household.<sup>49</sup> Domestic helpers are often left outside the protection of labour law because they do not make traditional work. As a result they suffer of poor working conditions.<sup>50</sup> Not the persons who hire them nor the workers themselves do not take their work as an employment contract and hence do not know their mutual rights and obligations.<sup>51</sup>

To protect domestic workers ILO has enforced in 2013 a convention concerning decent work for domestic workers<sup>52</sup> providing working requirements for domestic workers. According to the art 1 of the convention a domestic worker is any person engaged in domestic work within an employment relationship. Estonia has not ratified this convention but domestic work is widely spread. As in Estonia there is a trend to use other than labour contracts for such works the

---

48 Estonian Occupational and Health Safety Act. RT I 10.11.2015, § 4 (2).

49 ILO. *Domestic workers across the world: global and regional statistics and the extent of legal protection*. Geneva, ILO 2013, p. 7. [Online]. Available at: < [www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_173363.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_173363.pdf) >.

50 TOMEI, Manuela., BELSER, Patrick. New ILO Standards on Decent Work for Domestic Workers: A Summary of the Issues and Discussions. *International Labour Review*, 2011, 450 (3–4), pp. 235–264, p. 431.

51 OELZ, Martin. The ILO's Domestic Workers Convension and Recommendation: A Window of Opportunity for Social Justice. *International Labour Review*, 2014, 153 (1), pp. 143–173, p. 145.

52 *Domestic Workers Convention*, 2011 (No. 189) (Convention concerning Decent Work for Domestic Workers). [Online]. Available at: < [www.ilo.org/dyn/normlex/en/f?p=NORML EXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C189](http://www.ilo.org/dyn/normlex/en/f?p=NORML EXPUB:12100:0::NO::P12100_ILO_CODE:C189) >.

OSH requirements are not obliged to follow. However, in case of dispute too often such contracts are considered as labour contracts. As disputes arise mainly when an injury has already occurred it is not possible to prevent the situation by the rights and obligations of the employer and employee derived from the labour contract. It is so because such contract has not been made and the rules derived from the law for labour contract are not followed. Even when an employee works through the cleaning company and has a labour contract it is complicated to follow the employer's obligation to ensure the OSH requirements for the employee. Also, the right of labour inspectorate to enter into the working places to control is disputable.

It is often forgotten that working in someone's own home can become in one moment a working relationship. In principle Estonian labour law provides that working in one's household is not considered as labour contract meaning common everyday work in household and for the benefit of the family. But when the household is mixed with entrepreneurship, e.g. a farm and children or spouses work there to bring income for the parent or spouse, then such working relationship has become a labour relationship and all the requirements of OSH should be applied. Certainly it is rather complicated to draw a line between working in a household for a family and for income, as it has been considered as private matter and hence it is also complicated to supervise the relations.<sup>53</sup>

OHSA obligates an employer to perform systematic internal control over working conditions by organising and supervising whether the OHR follows the rules provided by the law. Internal control means cooperation between employees and bases on a risk analyze.<sup>54</sup> Sieger defines internal control as a systematic activity designed to ensure the planning of all the performances of the company: organisation, administration and control based on a regulation of OHS.<sup>55</sup> In Estonia the results of internal control are presented to the Environment Council who's duty is to give a feedback to the internal control. Environment Council has also an authority to demand the elimination of shortcomings.

As a tool internal control and risk analyse should avoid the lawbreaking and facilitate by this the inspection. Unfortunately, risk analyses and internal control have been made often too superficially. So the idea that profound risk analyse gives a review of the risks and an opportunity to improve the situation without the intervention of the labour inspectors, has not been carried out. Includingly, risk analyse should facilitate the task of labour inspectors as they get a set of information about the problems of the entity.

---

53 See RODRIGUEZ, Ricardo. Study on Child Labour and Protection of Young Workers in the European Union – final report, p. 21. [Online]. Available at: <[www.ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=209](http://www.ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=209)>.

54 TTOS RT I, 10.11.2015, § 13(1.1).

55 SIEGER, Argo. *Töökeskkonna ohutegurid ja riskianalüüs*. Tallinn, Teabekirjanduse OÜ 2006, p. 126.

However, insufficient risk analyses do not meet the objective. It is complicated to assume whether the reason of insufficiency comes from the conscious infringement or inability. When the last one should be improved by teaching and informing then the first one leads to the need of punishment.

It appears that the implementation of occupational and health safety rules provided by a state are not easy to follow in exceptional labour relations. The reason is not unintentionance of an employer to ensure an employee with provided conditions but the insufficient regulation as it is not clear what are the exact rights and obligations of both parties – an employer and employee. Even more, it is not clear what are the rights of the labour inspector to enter the home of the employee.

## **6 Conclusion**

Conventions no 81 and 129 provide the rights and prohibitions for labour inspectors and demands a Member State to ensure sufficient high quality system to support inspectors but also employees and employers in connection with OSH. Also, European Council directives regulate OSH. Most important of them is OSH Framework Directive 89/391/EEC providing the minimum requirement for OSH mainly through the responsibilities of employer and employee.

This article analysed whether the reason for the increase of the number of occupational accidents derive from the non-following the rules and principles provided by the convention no 81 and 129.

Though in principle Estonian OSH law conforms the conventions and European Council directives there are some deficiencies discussed in an article. Discussions show that cooperation between the agencies should be based on certain written agreements to provide clarity. Insufficient number of advisers on OSH lead to the situation where labour inspectors acted as trainers in the entities which they inspected. This caused the conflict of interests. However, the situation was solved by introducing the instrument of consultant of Labour Inspectorate. Similarly to other states also in Estonia there is a shortage of labour inspectors and advisers on OSH. Though the regulations and obligations do exist there is a lack of persons with certain knowledge to understand them or teach them to the others. One reason for this is too big amount of the rules apart in different legal acts. The result is weak internal control and risk analyse in the entities. As the development of labour relations have created exceptional labour relations then the existing rules for OSH needs adoption to those new relations. As an example, article discussed briefly two exceptional labour relations – distance work and domestic work. Analyse showed that based on a legal regulation it is not evident who should be responsible for OSH and in what extent in such non-traditional relations – an employer or employee. Also, the rights an inspector has can collide with the rights employer or employee has impeding the inspection.

To conclude, though the area of OSH improves, it needs a continuous development considering more seriously the development of labour relations.

# RESIDENTIAL CO-OWNERSHIP WITHIN THE SUPERFICIARY RIGHT OF BUILDING – THEORETICAL HOTCH-POTCH OR PRACTICAL REALITY?<sup>1</sup>

Pavel Petr

Faculty of Law, Palacký university Olomouc, Czech Republic

*pavel.petr@upol.cz*

PETR, Pavel. Residential co-ownership within the superficiary right of building – theoretical hotch-potch or practical reality? *International and Comparative Law Review*, 2016, vol. 16, no. 2, pp. 173–179. DOI: 10.1515/iclr-2016-0022.

---

**Summary:** The new approach to a thing enables the concept of residential co-ownership within the superficiary right of building. Residential co-ownership may be created where a building with at least two apartments forms the component part of the immovable thing. The superficiary right of building is established as a derivative of the superficies solo cedit principle. Therefore, it requires the accession of building and land. The building is no longer a separate thing in the legal sense, but part of the superficiary right of building. If the building which is part of the superficiary right of building contains two apartments, then residential co-ownership may also be established as part of the superficiary right of building

**Keywords:** superficiary right of building, residential co-ownership, civil law, superficies solo cedit, ownership.

---

*New laws take time to become a habit and enter public consciousness. Nothing is more harmful than frequent changes in laws, the Constitution and institutions, which do away with that which has barely entered public consciousness.*

Motto of the Compilation committee on the Civil Code  
of Empress Maria Theresa (1753–1756)

## 1 Introduction

One would say that guests need to be received with dignity and respect. However, as regards the superficiary right of building (*Baurecht; Erbbaurecht* or colloquially *Erbpacht; użytkowanie wieczyste*), it is rather the return of a lost child. Known to First Republic lawyers, paradoxically the concept disappeared from our law later than the superficies solo cedit principle. Its return is rather due to necessity than wish. This is related to the main purpose of the superficiary

---

<sup>1</sup> This article has been written as part of the Development Project with the institutional support of the Palacký University in Olomouc.

right of building, which we see in a certain antagonistic interconnection with the superficies solo cedit principle. The superficiary right of building constitutes its derivative. In other words: one complements the other. On the other hand, it must be noted that the land always represents the principal thing, and it is also capable of being encumbered by immovable things other than the superficiary right of building. It is not the first time that the motto in the heading of the article appears in legal literature. This is perhaps because it is a traditional issue of recodification work of introducing new, or, in this case, a re-established one. The following text focuses on some – rather practical – aspects of this concept. Tomáš Dvořák<sup>2</sup> once asked me a fiendish question: “*Can residential co-ownership be established within superficiary right of building?*” Almost instantaneously, I was about to say no. The reason for this was certainly not my snappy legal intuition, but rather a natural reflection of the incompatibility between temporary right *in re aliena* and an ownership right arising from a specific concept of apartment ownership.

New private law requires a far greater degree of legal abstraction, which is precisely the case with the above-mentioned question.

## 2 Grey theory

Theory distinguishes between *undivided* and *divided* shared co-ownership. Fiala<sup>3</sup> (and other authors referring to him<sup>4</sup>) talks about a third form – *shared co-ownership of an accessory thing*<sup>5</sup>. Co-ownership of an accessory thing combines divided co-ownership (each co-owner of an immovable thing with undivided share owns a specific part of the immovable thing – unit), and undivided co-ownership (undivided share in the common parts of the immovable thing). Residential co-ownership is therefore a special form of shared co-ownership of an accessory thing.<sup>6</sup> In a way, it is also a form of separate ownership.

In accordance with Section 1158(1) of the Civil Code, residential co-ownership is the co-ownership of an immovable thing arising from the ownership of units. Residential co-ownership may be established where a building with at least two apartments forms the component part of the immovable thing. In order for the statutory provision to become activated, we must fully fulfil its hypothesis. The elements of residential co-ownership require co-ownership of an immovable thing. Superficiary right of building is an immovable thing (Section 1242

---

2 As the reviewer of my dissertation.

3 FIALA, Josef. Pasivní věcná legitimace společenství vlastníků jednotek. *Právní fórum*, 2005, no. 4, p. 132.

4 KRÁLÍK, Michal. *Podílové spoluvlastnictví*. Praha : C.H.Beck, 2008. p. 23.

5 Jde o frekventovanější a pravděpodobně i správný výraz, viz např. DVOŘÁK, Tomáš. O vlastnictví bytů a nebytových prostorů jakožto akcesorickém spoluvlastnictví a o některých otázkách s tím spojených. *Právní rozhledy*, 2010, č. 7. s. 229.

6 Do not confuse with Section 1223 et seq. of the Civil Code. It is a theoretical classification.

of the Civil Code). The term “co-ownership” implies that there must be plurality of persons. In my judgment, a sole owner of the superfiary right of building cannot lawfully establish residential co-ownership within superfiary right of building. The situation is different if the ownership of all units in the building merges within one person for the duration of the superfiary right of building.

In addition to the plurality of persons, co-ownership also requires the plurality of things. That means – and here we can see the characteristic elements of divided co-ownership – that the integrity of an immovable thing breaks down to apartments and undivided shares in the common parts of the immovable thing. Individual disposal of apartments and undivided shares is not possible. In this I see its accessory nature. This nature is also petrified by the term “unit” defined by the Civil Code, which, unlike the 1994 Housing Act, considers integral parts of units to include not only apartments, but also undivided shares in immovable things.

The Civil Code explicitly requires the existence of two apartments. Certain authors<sup>7</sup> ignore Section 1158(2) of the Civil Code, which provides that the provisions of the Division (Section 1158, including Subsection 1, of the Civil Code) on apartments also apply to non-residential premises. It then goes on to erroneously state that unless a building which is part of an immovable thing contains at least two apartments (rather than an apartment and non-residential premises, or only two non-residential premises), residential co-ownership may not be established. The argument against these provisions is based on systematic interpretation. When analysing the provisions of Section 1158(1) and (2), we may conclude that the provisions of that Division on apartments also apply to non-residential premises. This is also supported by teleological interpretation. The purpose of residential co-ownership has long since ceased to be the mere satisfaction of the housing needs of “citizens”. The present time demands diversity of *ius in rem* solutions, and the law caters to that demand. Separate ownership of various establishments, garages and other non-residential spaces is desirable, and the idea that buildings which are part of an immovable thing should, in addition to a workshop, contain two flats, is unsustainable.

It seems logical that the creation of a condominium will require the existence of two apartments (at least two rooms). However, this is not the case in Polish legislation. Case law<sup>8</sup> has inferred that it is possible to also define the ownership of apartments in a building with only one space (apartment or non-residential premises).<sup>9</sup> The court has recognised the right of the owner of the land to define a unit in a building erected thereon in which there is only one non-residential

---

7 PRAŽÁK, Zbyněk. *Bytové spoluvlastnictví Komentář k § 1158–1222 nového občanského zákoníku a k zákonu č. 67/2013 Sb.* Praha : Leges, 2014, p. 2.

8 The decision of the Polish Supreme Court (Sąd Najwyższy) dated 26 January 2008, file no. CSK 402/07.

9 Cf. Section 2 of the Premises Ownership Act

space. The reasoning of the court relied on the provisions of Section 46 of the Polish Civil Code, which does not prohibit this, as well the fact that permanent walls can be considered to include the external walls of buildings which also define an internal unit. The aim of this peculiar<sup>10</sup> argument is probably to allow the definition of two subjects of the right of ownership – a quasi-apartment, and quasi-common parts. It should be emphasized that the Polish Civil Code / Premises Ownership Act contains no provision which would prevent the creation of a single-unit condominium, and so the court permits it, in the spirit of the principle *quod lege non prohibitum, licitum est*.<sup>11</sup> A similar argument, whose sense is not entirely clear to us, can also be found in the U.S. concept of “zero unit condominium”.<sup>12</sup>

### 3 Green tree of life

As suggested by Zítek<sup>13</sup>, there is another element of residential co-ownership that poses a greater interpretative problem. It is the provision of Section 1158(1) if: Residential co-ownership may be created where a building with at least two apartments forms the component part of the immovable thing. As already mentioned above, the superficiary right of building is established as a derivative of the superficies solo cedit principle. Therefore, it requires the accession of building and land. The building is no longer a separate thing in the legal sense, but part of the superficiary right of building. If the building which is part of the superficiary right of building contains two apartments, then residential co-ownership may also be established as part of the superficiary right of building. After all, this possibility is suggested in the explanatory memorandum to the Civil Code.<sup>14</sup>

Austrians surprisingly allowed the creation of the concept of residential ownership from superficiary right of building by an amendment in 1990. The Austrian regulation of residential co-ownership consists in an agreement between land co-owners on the exclusive right to use and dispose of specific apartments (other spaces) in the building erected on the land. Co-owners cannot independently dispose of the common parts. It is also impossible for an apartment to be co-owned (except community property of spouses). Residential co-ownership as part of superficiary right of building became an issue, because Austria aban-

10 R. Strzelczyk in STRZELCZYK, Ryszard, TURLEJ, Aleksander, A. *Własność lokali*. 2. wyd. Warszawa : C.H. Beck, 2010. p. 54.; similarly also DZICZEK, Roman. *Własność lokali. Komentarz*. 6. wyd. Warszawa : LexisNexis, 2012. p. 48., which mentions a strange, borderline case.

11 Bońcak-Kucharczyk, Ewa. *Własność lokali i wspólnota mieszkaniowa*. 3. wyd. Warszawa : Wolters Kluwer, 2016. p. 59.

12 BUCK, George. The Zero Unit Condominium. *The Practical Real Estate Lawyer*, 1991, No.1, p. 31–39.

13 ZÍTEK, Adam. Několik zamyšlení nad novou úpravou vlastnictví bytů. *Rekodifikace & praxe*, 2015, no. 2., p. 19.

14 ELIÁŠ, Karel. *Nový občanský zákoník s aktualizovanou důvodovou zprávou a rejstříkem*. Ostrava : Sagit, 2012, p. 499.

doned horizontal (floor) ownership, and because a statute prohibited the establishment of the superficiary right of building to individual floors. Other entitled persons may establish apartment ownership in favour of the person entitled under the superficiary right of building. This right is governed by the provisions of the Apartment Ownership Act with the necessary modifications (cf. Section 6 of the Austrian Act on the Superficiary Right of Building).

Polish law also allows for the possibility to establish residential co-ownership within superficiary right of building.<sup>15</sup> However, let me remind here that the scope of persons that may establish the superficiary right of building is limited to public corporations. This possibility was enacted in the Polish Apartment Ownership Act only after a 2004 amendment to the Property Administration Act. However, it is not possible to establish residential co-ownership on one plot of land (the owner of the apartment being at the same time the co-owner of the land under such ownership), and then establish the superficiary right of building. Apartments may only be defined as part of the superficiary right of building.<sup>16</sup>

The Polish doctrine is not unanimous on the question of whether, upon the termination of the superficiary right of building, it is only the land on which the building is erected, or also the apartments defined as part of the superficiary right of building which pass to the State/municipality, as a result of the termination of the legal division of the building to units due to the expiration of the period for which the superficiary right of building was established. Polish Supreme Court has ruled<sup>17</sup> that the superficiary right of building is the key right, while apartment ownership is secondary in this case. As such, it becomes virtually extinguished with the expiration of the period for which the superficiary right of building was established. The transferor therefore receives the land on which the building with the defined apartments was erected. However, this is opposed by certain advocates of the doctrine. Strzelczyk believes that in the context of a weaker, temporary right, it is impossible to establish a stronger right which may last forever. He literally speaks about grotesque legislation that lacks logic and resembles a steel structure with feet of clay.<sup>18</sup>

To understand this condemnation, one should understand the purpose of the superficiary right of building (*užitkovanie wieczyste*) in Poland. Unlike in Austria, where superficiary right of building was introduced in the early 20th century, the Polish legislators introduced it only in 1961, i.e. at a time of severe communist dictatorship.<sup>19</sup> Once again, be reminded that in Poland the right to

15 Bońcak-Kucharczyk, Ewa. *Własność lokali i wspólnota mieszkaniowa*. 3. wyd. Warszawa : Wolters Kluwer, 2016. p. 59

16 DZICZEK, Roman. *Własność lokali. Komentarz*. 6. wyd. Warszawa: LexisNexis, 2012. p. 64.

17 NS decision of 3 September 2009, ref. no. I CSK 6/09.

18 R. Strzelczyk in STRZELCZYK, Ryszard, TURLEJ, Aleksander, A. *Własność lokali*. 2. wyd. Warszawa : C.H. Beck, 2010. p. 111.

19 Cf. Ustawa o gospodarce terenami w miastach i osiedlach 32/1961 Sb.

establish superficiary right of building lies only with municipalities, State and other public corporations, which hinders its development. Originally, it had a very administrative nature (land allocation). In terms of its purpose, it resembles the well-known personal use of land, which was introduced by the socialist Code of 1964. Basically, it was a different way to the same objective. By the way, the socialist “private-law” legislation was not created in a vacuum. Quite the opposite – recodification institutions of people’s democracies worked together.<sup>20</sup>

Currently, there is a possibility to transfer superficiary right of building to ownership.<sup>21</sup> This means, that the right will change from temporary to permanent. This is justified by the impossibility of private ownership of land at the time when superficiary right of building is established. It resembles the situation with the transition provision of the major 1991 amendment concerning the right of personal use. Although relativised by some authors<sup>22</sup>, the original aim was to eliminate the concept because of its ideological bias<sup>23</sup>.

The superficiary right of building was replaced by the concept of “temporary” ownership (*własność czasowa*)<sup>24</sup>, which was introduced after World War II. Basically, it was superficiary right of building “inside out”, which also could last a minimum of 30 and maximum of 80 years. This right to the land could be transferred to an individual by the State or a municipality, to which the land passed back upon the expiration of the right. The right was established by an entry into a public register. After that, the right could be converted to the superficiary right of building.

The situation in Warsaw was specific. The “Warsaw Decree” of 26 October 1945<sup>25</sup> nationalized the land (but not buildings on it) in the entire territory of Warsaw. The purpose was purely political. Without the nationalization of land, the rebuilding of the capital would have been impossible. However, the problems did not end there. The owners were stripped of their ownership right to the land (ca. 40,000 plots) and, moreover, obliged by another decree to restore the war-damaged houses (about 24,000) which remained in their possession. If the owner failed to act, the City acted in his stead, but on the owner’s account. In this

---

20 However, the sad truth is that while the Polish Code has retained at least the basic pillars typical for private-law codifications in Europe, the opposite was the case for the Czechoslovak one.

21 Ustawa o przekształceniu prawa użytkowania wieczystego w prawo własności nieruchomości č. 175/2005 Sb.

22 KOKOT, Sebastian. *Ekonomiczne zagadanie užitkovanie wieczystego w gospodarce nieruchomościami gmin*. Szczecin : Winus, 2009. 299 p.

23 KALUS, Stanisława, HABDAS, Magda. Czy nas na to stać? *Gazeta Prawna*, 2003, no. 239, p. 20.

24 It was established on the basis of a special Decree on *In Rem* Rights of 1946. The Decree had the force of a statute.

25 It is sometimes referred to as Bierut Decree in honour of the Chairman of the National Council Bolesław Bierut.

case, the title to the building was transferred to the city as a security until the price of repairs has been paid. The compensation for the removal of ownership of land was addressed either by emphyteusis, or the offer of municipal bonds. Ultimately, the decree has caused a slowdown of construction in the capital. The situation was partially resolved in costly litigation only after 1989.

#### **4 Conclusion**

If we go back to the possibility to establish residential co-ownership within the superficies right of building, then there is the question of *cui bono*, i.e. who can benefit from such a dogmatically objectionable concept. We do not have to look too far for an answer. Surely, the beneficiaries will exclude those who need to meet their housing needs, because the prospect of a long-term mortgage after the repayment of which they will lose ownership of the apartment is certainly not rational. On the other hand, if the superficies payment is very low (lower than a rent in a comparable apartment), it could be an alternative. However, that will probably not be the case. Conversely, the definition of units within the superficies right of building may be suitable for developers, if we ignore the fact that developers mostly rent non-residential premises in an office building erected on land encumbered by the superficies right of building. We can find another suitable solution – the sale of such a “temporary” unit. Again, this may not be interesting for a person that wants to own the thing permanently. However, if we look at it from a purely entrepreneurial and practical perspective, it can be a highly attractive solution. If the developer sells all the units it creates within the superficies right of building, it may ultimately be profitable and become released from all the rights to the land. Alternatively, the developer may simply lease parts of the superficies right of building, i.e. specifically defined units (apartments, garages, establishments, warehouses, workshops, etc.). It may again be advantageous from the perspective of a person that purchases the unit knowing that it will not be for a limited period of time. If such a person is an entrepreneur that wants to lease the unit, then this will be easier than subleasing leased premises within the superficies right of building. If the person wants to live in the apartment, then he or she may only be motivated by the economic benefits of such a transaction at the most.



# INFORMATION AND COMMUNICATION IN PUBLIC ADMINISTRATION IN THE CONTEXT OF MANAGEMENT CONTROL FUNCTIONING IN THE PUBLIC FINANCE SECTOR IN POLAND

Ambroży Mituś

Department of Public Law, Cracow University of Economics, Poland

*mitusa@uek.krakow.pl*

MITUŚ Ambroży. Information and Communication in Public Administration in the Context of Management Control Functioning in the Public Finance Sector in Poland. *International and Comparative Law Review*, 2016, vol. 16, no. 2, pp. 181–196. DOI: 10.1515/iclr-2016-0023.

---

**Summary:** The aim of this article is to present the essence and significance of information and communication in public administration in the context of the management control. Broadly understood information in public administration allows both to control the activity of this administration and to make correct decisions and actions in order to perform public tasks effectively. Therefore, the existence of a proper system for sharing and exchanging information is an essential component of the management control, ensuring the execution of the tasks and objectives in a way that is consistent with the law, effective, efficient and timely. The article points to i.a. the types of information and means of communication that may be deemed effective or legally acceptable tools for conveying information and communicating in public information. In this context it should be emphasised that – in particular – sharing public information requires that a relevant form be retained and a proper sharing procedure be followed.

**Keywords:** public administration, management control, information, public information, communication, goals and tasks.

---

## 1 Introduction

For a modern human living in the so-called information society<sup>1</sup>, broadly understood information (and its derivatives) is one of the basic commodities. Of course, information may be of different nature – from standard, purely informative data to information with special meaning and legal status. Thanks to information, i.a. obtained or created by public administration as well as information

---

1 The present term „information society” focuses on the axiological aspect; it has replaced the previously used „information society” in the meaning related more to information technologies. More about information society, i.a.: CWALINA, Wojciech. Generacja Y – ponury mit czy obiecująca rzeczywistość. In ZASĘPA, Tadeusz (ed). *Internet – fenomen społeczeństwa informacyjnego*. Częstochowa: Edycja Świętego Pawła, 2001, pp. 29–42.

transferred outside by this administration, various „products” are created which may also be provided electronically.

Using the interest criterion, all the information, especially transferred or loaded on the Internet, may be divided into personal/private information and socially useful (including public) information<sup>2</sup>. The latter group of information – and strictly speaking, only one part thereof – is the subject matter of my paper, where I analyse the essence, meaning and types of information and communication in the context of achieving goals and performing tasks of the public administration.

## **2 Information and communication in management control**

Information and communication (i.e. transferring and receiving information) are important for efficient functioning of each organization, including such specific organisation as public finance sector entities. However, in practice, not much attention is paid to communication and information, as it is assumed they are at least on a satisfactory level – this means that the information is correct and is conveyed in a way comprehensible for the recipient. Only after the control, audit or analysis of the functioning of an entity does it turn out that one of the reasons behind these irregularities was or still is the lack of relevant information and incorrect communication. This is why the so called management control<sup>3</sup> pays attention to this functional area of public entities; this control constitutes „a total of activities taken in order to ensure the execution of tasks and objectives in a way that is consistent with the law, effective, efficient and timely” (art. 68 para. 1 of the Public Finance Law<sup>4</sup>).

The European Commission and many EU member states describe this type of control as *Internal Control* or *Public Internal Control*. In Poland, the notion „management control” was adopted, so as to distinguish it from the internal

2 See: GOLAT, Rafał. *Internet – aspekty prawne*. Warszawa: Difin, 2003, p. 15.

3 The term „management control” was introduced in the Polish law with the act of 27 August 2009 – the Public Finance law (original text: Journal of Laws 2009, No. 157, item 1240), whereby it replaced the previously functioning term (i.e. in the previous Public Finance Law of 30 June 2005, Journal of Laws 2005, No. 249, item 2104, as amended) „financial control”. However, it was not only a change of name, but also a change of scope – management control, although it primarily refers to financial control, also includes in its scope other aspects of public finance sector entities.

For management control see e.g.: WINIARSKA, Kazimiera (ed). *Kontrola zarządcza w jednostkach sektora finansów publicznych*. Warszawa: Oficyna a Wolters Kluwer business, 2012, pp. 1–246; *Kontrola zarządcza w sektorze finansów publicznych. Istota, unormowania prawne i otoczenie. Kompendium wiedzy (wersja 1.0)*. Warsaw: Public Finance Audit Sector Department – Ministry of Finance, 2012, pp. 1–141. [online]. Available at: <[http://www.mf.gov.pl/c/document\\_library/get\\_file?uuid=ec119301-3422-4b56-af7d-318b470fd973&groupId=764034](http://www.mf.gov.pl/c/document_library/get_file?uuid=ec119301-3422-4b56-af7d-318b470fd973&groupId=764034)>

4 The Public Finance Law of 27 August 2009 (consolidated text: Journal of Laws 2016, item 1870); hereinafter: PFL.

control, rooted in public administration, which has no managerial character. Although internal control should still be treated as part of management control, it still functions in the institutional dimension, and is manifested in positions and organisational units for internal control, authorised within organisational units of public finance sector entities.

Management control, and more precisely: the management control system functioning in the public finance sector entity, is a dynamic system, adjusted (i.a. to its organisational structure and tasks performed) and adapted to changing internal and external conditions. That's why a model template of management control cannot be developed, be it for a given type of public finance sector entities, or for a particular entity „once and for all”.

Grasping the essence of management control is possible after becoming familiar with the Public Finance Law of 27 August 2009 (it defines i.a. the purpose and entities obliged to ensure the functioning of management control in a public finance sector entity) and with the relevant standards<sup>5</sup> and guidelines<sup>6</sup>. From among the latter group, particular significance is attached to the *Standards of management control*<sup>7</sup>, which – as indicated therein – include guidelines for creating, evaluating and improving management control systems.

Discussed standards of management control have one group of standards devoted to this area (*D. Information and communication*), made up of three standards, i.e.: current information as well as internal and external communication. The standards from this group underline the need to provide both people in charge of an entity and employees with access to information essential for them to perform their obligations correctly<sup>8</sup>. They also point out the need for an inter-

5 Announcement No. 23 of the Minister of Finance of 16 December 2009 as regards the standards of the management control for the public finance sector (Official Journal of the MF 2009, No. 15, item 84), hereinafter: *Standards of the management control*.

6 Szczegółowe wytyczne w zakresie samooceny kontroli zarządczej dla jednostek sektora finansów publicznych (Announcement No. 3 of the Minister of Finance of 16 February 2011, Official Journal of the MF 2011, No. 2, item 11) and Szczegółowe wytyczne dla sektora finansów publicznych w zakresie planowania i zarządzania ryzykiem (Announcement No. 3 of the Minister of Finance of 6 December 2012 r., Official Journal of the MF 2012, item 56).

7 Standards of the management control – as indicated therein – consider the following international standards: „a) „*Internal control – integrated framework concept*” and “*Risk management in a company*” – reports elaborated by the Committee of Sponsoring Organizations of the Treadway Commission – COSO, b) “*Guidelines for the internal control standards in the public sector*” – adopted in 2004 by the International Organization of Supreme Audit Institutions – INTOSAI, c) “*The Revised Internal Control Standard for Effective Management SEC (2007) 1341 appendix 1*”.

8 Nowadays, various types of ICT networks are used to transmit information and to communicate (within and outside the entity). Internet is used to share external communication and information, whereas for internal communication and information one tends to resort to the –Intranet. –Extranet is usually used in order to share external communication and information, but limited in particular to supervised or controlled units.

nal and external communication system in an entity, which should be efficient and effective (i.e. correctly functioning and providing information comprehensible for a given group of recipients) and structured in a way that enables the flow of important and essential information. It seems that in the case of internal communication, such a flow must be possible both in a vertical and horizontal axis. Therefore, solutions existing in an entity should enable in particular the direct communication on an entity manager not only with the managers of departments or organizational units, but also with lower level employees. Communication should also be possible between particular employees on the same level within the organizational structure of the entity.

### **3 The notion and essence of information**

Information possessed by public administration is of great importance both for the administration itself and for the citizens and other entities which are hierarchically not subordinated to it. Sharing information (informing citizens) is not only an expression of overt and transparent actions of the state/ public authorities/ public administration, but also an instrument for disclosing the intentions and plans. The citizens who know the state policy, its intentions and plans of the public authorities may easier understand the existing and introduced obligations and prohibitions. This is why one of the important sources of information on the intentions of the state/public authorities are acts, policies and plans which include important information, i.a.: objectives and tasks performed in order to achieve these objectives, methods of their execution and controlling the achievement of intended results<sup>9</sup>. Thanks to these and other sources, a citizen may more consciously participate in the life of a given community and undertake actions consistent with the public interest<sup>10</sup>.

Although many legal acts use the notion of „information”, none of them formulates a legal (statutory) definition of the concept. Nevertheless, the Polish legal system knows multiple types of information (e.g. public information, financial, educational, economic, criminal information), which are legal terms defined most of all by exemplary indication of the data that is included under a particular type of information or what data constitutes a set of particular information.

Information shared by public administration is a certain statement (representation) of particular facts, intentions, mandatory legal regulations etc. Spe-

---

9 See: NOWORÓL, Aleksander. *Planowanie rozwoju terytorialnego w skali regionalnej i lokalnej*. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2007, p. 142.

10 See: TARAS, Wojciech. *Informowanie obywateli przez administrację*. Wrocław: Zakład Narodowy im. Ossolińskich – Wydawnictwo PAN, 1992, p. 8; SZUSTAKIEWICZ, Przemysław. Dostęp do informacji na podstawie ustawy o dostępie do informacji publicznej. In GARDOCKA, Teresa (ed). *Obywatelskie prawo do informacji*. Warszawa: Oficyna a Wolters Kluwer business, 2008, p. 13.

cialist literature assigns various functions to these representations, which may be divided into three categories, i.e.<sup>11</sup>:

1. Communicative function – information is a statement of facts (e.g. a description of a particular status quo), wishes etc.;
2. Appealing function – information is an utterance containing some expectation that the addressee will behave in accordance with the message received (so called optative);
3. Regulatory function – information is an utterance that changes the normative situation.

Distinguishing between these functions shows what types of utterances public administration may use when performing public tasks. In practice, provided information contain various types of interrelated utterances. This is why it is often hard to define what type of statement we have in particular situation<sup>12</sup>.

The existence of various types of utterances is the result of the fact that while operating within the boundaries of mandatory legal provisions (i.e. operating on the basis and within the limits of law<sup>13</sup>), public administration is creative and does not limit its actions only to performing its tasks (applying the law)<sup>14</sup>. It seems that nowadays this „creative” area of the activity of public administration should be expanded, because the dynamically changing reality will in its complexity more and more often require that public administration take on ad hoc, immediate tasks, at the same time suited to the current conditions and particular needs. Nevertheless, in order for this to be possible, it seems necessary to offer a new interpretation of the principle of legality<sup>15</sup>, where the area of acceptable activity of public administration and permitted legislative interference with social relations shall be determined by the public interest<sup>16</sup>. What H. Izdebski and M. Kulesza emphasise on this occasion, it is not only the mandatory law, but also political will that decides what is public interest. This is why the debate on what is public interest has been a bone of contention and a factor that differen-

---

11 KRAUSE, Peter. *Rechtsformen des Verwaltungshandelns*. Berlin: Duncker & Humblot, 1974, pp. 60–61 as cited TARAS, Wojciech. *Informowanie obywateli przez administrację*. Wrocław: Zakład Narodowy im. Ossolińskich – Wydawnictwo PAN, 1992, p. 14.

12 TARAS, Wojciech. *Informowanie obywateli przez administrację*. Wrocław: Zakład Narodowy im. Ossolińskich – Wydawnictwo PAN, 1992, p. 14.

13 Pursuant to Article 7 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, No. 78, item 483) each public authority is obliged to follow them and act within the limits of the law (the legality principle).

14 TARAS, Wojciech. *Informowanie obywateli przez administrację*. Wrocław: Zakład Narodowy im. Ossolińskich – Wydawnictwo PAN, 1992, p. 14.

15 See: MITUŚ, Ambroży. Działania faktyczne administracji publicznej a zasada legalizmu – zarys problematyki. In NICZYPORUK, Janusz (ed). *Teoria instytucji prawa administracyjnego. Księga pamiątkowa Profesora Jerzego Stefana Langroda*. Paryż: Polska Akademia Nauk, 2011, pp. 349–359 and the cited bibliography.

16 IZDEBSKI, Hubert, KULESZA, Michał. *Administracja publiczna. Zagadnienia ogólne*. Warszawa: Liber, 2004, pp. 96–97.

tiated between political views, thus allowing to distinguish between doctrines and epochs<sup>17</sup>; it follows from the fact that a change in political will brings about relevant amendments in the law, and consequently, changes in the function of public administration, its objectives and tasks as well as forms and operational methods.

As mentioned before, information provided by public administration should be classified as the so called statements of knowledge. As W. Taras claims, a feature that distinguishes utterances classified as statements of knowledge (i.e. information) from those containing regulations (i.e. norms of conduct) is that the former describe reality and are defined according to the „true-false” criterion, whereas the latter apply the criterion of conformance to the model (i.e. „legal-illegal”). Furthermore, whereas a norm of conduct may be deprived of its power e.g. through a normative or administrative act, information starts its independent functioning from the moment it is shared and may only be rectified, or a new piece of information with a different content can be shared subsequently<sup>18</sup>. In case of doubts whether or not in particular situation you are dealing with information, it is necessary to emphasise that a letter (document) that contains a resolution is definitely not a piece of information, even if it does not have the form stipulated by the law – in this case, it will be an administrative act, not information.

Information shared by public administration should be sufficiently express and clear, so that the information is comprehensible for an average recipient. The comprehensibility of shared information should not only refer to the content, but also to the form of the message. Information shared by public administration should also be socially useful and have relevant content scope, which – if not legally prescribed – should be defined with the consideration of the intention, addressees and objective to be achieved. This need follows from the fact that both laconic and too specialised and extended information may not be understood and absorbed by the addressees. In the latter case, too much information, especially redundant, causes the so called information noise.

Sharing particular information may be an obligation or only a certain right of a public entity. If there is an obligation to keep the citizens informed, legal provisions define: the public administration body or entity obliged to share the information; scope and subject matter of the information; addressees and possibly the time and form of sharing such information<sup>19</sup>.

Providing information – as recognised in the category of legal forms of administrative activity – should be regarded as the so called material and technical activities, i.e. actual activities which in themselves do not produce legal effect,

17 Ibid., p. 97.

18 TARAS, Wojciech. *Informowanie obywateli przez administrację*. Wrocław: Zakład Narodowy im. Ossolińskich – Wydawnictwo PAN, 1992, pp. 16–17.

19 See: Ibid., pp. 50–51.

but constitute a preparation for legal actions and for the occurrence of particular results<sup>20</sup>. Therefore, the literature claims that these activities cause legal effects through facts<sup>21</sup>.

#### **4 Public information**

In public administration, basic type of information is public information which is any piece of information concerning public matters (art. 1 para. 1 of the Law on the Access to Public Information<sup>22</sup>). Public information refers to the sphere of facts and data held by public authorities, as well as other entities to the extent they perform public obligations or manage public property<sup>23</sup>. Classifying a particular piece of information as public is done pursuant to the substantial criterion, i.e. the content and character of information<sup>24</sup>. This is why not each piece of information in public administration constitutes public information. By way of an example, even if information transferred between the employees of an entity refers to the performed public tasks, it does not constitute public information due to the lack of the formal value<sup>25</sup>. Nor do the „applications concerning individual affairs, (...) applications concerning future actions of the authority in individual matters, (...) applications concerning private documents, notes, records and opinions of the officers, even if on the top level, constitute public information if they have not been made official”<sup>26</sup>.

The right to information is one of the basic rights of a citizen and human being. Therefore, the Constitution of the Republic of Poland<sup>27</sup> and other legal regulations contain instruments that make it possible to obtain or demand relevant information. Although exercising the right to information is made possible due to the principle of administrative openness, it is the right to information itself that necessitates the creation and maintenance of openness<sup>28</sup>. In a demo-

20 ZIMMERMANN, Jan. *Prawo administracyjne*. Warszawa: LEX a Wolters Kluwer business, 2014, p. 399.

21 STAHL, Małgorzata. *Czynności materialno-techniczne*. In STAHL, Małgorzata (ed). *Prawo administracyjne. Pojęcia, instytucje, zasady w teorii i orzecznictwie*, Warszawa: LEX a Wolters Kluwer business, 2013, p. 486.

22 Law of 6 September 2001 on the access to public information (Journal of Laws 2015, item 2058).

23 See: The Verdict of the Provincial (Voivodship) Administrative Court in Gorzów Wielkopolski of 15 January 2015, II SAB/Go 123/14, *LEX no. 1623233*.

24 The Verdict of the Provincial Administrative Court in Łódź of 3 March 2015, II SAB/Łd 204/14, *LEX no. 1663009*.

25 The Verdict of the Supreme Administrative Court in Warsaw of 18 September 2014, I OSK 3073/13, *LEX no. 1569520*.

26 The Verdict of the Provincial Administrative Court in Rzeszów of 3 June 2014, II SAB/Rz 25/14, *LEX no. 1486072*.

27 See: art 61 and art. 74 para. 3 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, No. 78, item 483).

28 WRZESIŃSKI, Krzysztof. *Prawo do informacji w procesie cywilnym*. In GARDOCKA, Teresa (ed). *Obywatelskie prawo do informacji*. Warszawa: Oficyna a Wolters Kluwer busi-

cratic state of law, the right to information – as emphasised by the Supreme Court in one of the verdicts – „is there to ensure that the public authority is transparent in all its forms and aspects”<sup>29</sup>. In another verdict, the Provincial Administrative Court in Warsaw indicates that the right to information is „a significant element of public life and of the control that the public opinion has over the actions of authorities and bodies.”<sup>30</sup>

Pursuant to art. 2 para. 1–2 of the Law on the Access to Public Information, the right to public information is granted to anyone, without showing any legal or actual interest. This right includes the right to obtain public information, also the so called processed information<sup>31</sup>; insight into official documents and access to the meetings of collective public authority organs originated in the course of public elections. Therefore, the right to public information includes not only the right to obtain information (being informed), but also sharing the sources of such information<sup>32</sup>. Providing public information is the responsibility of the authority/public entity which holds it; the fact that a particular piece of information has been created within the competence of another organ/public entity is immaterial<sup>33</sup>.

The right to public information does not have absolute character and is subject to restraint. This restraint may be imposed only pursuant to the law and due to the protection of the freedom and rights of other people and business entities and due to the protection of public order, security or important economic interest of the state (art. 61 para. 3 of the Constitution of the Republic of Poland). The Law on the Access to Public Information specifies constitutional norms: in art. 5 para. 1–2 it claims that the right to information is subject to restraint to the extent and pursuant to the rules defined in the provisions related to the protection of confidential information and on the protection of other secrets subject to statutory protection<sup>34</sup>, as well as due to personal privacy or corporate secret.

---

ness, 2008, p. 201.

29 The Verdict of the Supreme Court of 8 December 2015, II PO 2/15, *LEX no. 1996831*.

30 The Verdict of the Provincial Administrative Court in Warsaw of 20 November 2012, II SAB/Łd 1527/12, *LEX no. 1249113*.

31 In the case of processed information, it is possible to obtain it only to the extent it is particularly important for the public interest. Processed information is understood as public information which will be „specially” prepared for the requestor. Therefore, its creation will require intellectual effort and involvement on the part of the entity obliged to provide such information, with the use of additional means and resources, on the basis of the data held by this entity, with regard to the requestor’s demand and pursuant to the criteria indicated by the requestor. See: The Verdict of the Provincial Administrative Court in Poznań of 10 December 2014, IV SA/Po 940/14, *LEX no. 1575922*.

32 The Verdict of the Provincial Administrative Court in Szczecin of 16 July 2014, I SA/Sz 144/14, *LEX no. 1490138*.

33 OLEJNICZAK-SZAŁOWSKA, Ewa. Zasada jawności administracyjnej. In STAHL, Małgorzata (ed). *Prawo administracyjne. Pojęcia, instytucje, zasady w teorii i orzecznictwie*, Warszawa: LEX a Wolters Kluwer business, 2013, p. 155.

34 In the Polish legal system, restraints in the access to the public information are regulated

Restraining access to information does not refer to the information on people holding public functions, information related to holding such functions, including the information on the conditions of assigning and performing such functions, as well as in the case when a natural person or an entrepreneur waive a right they are entitled to (art. 5 para. 2 sent. 2 of the Law on the Access to Public Information).

Sharing public information is done by: announcing public information, including official documents, in the Public Information Bulletin (BIP); sharing in the so called central repository; exposing or putting up in generally accessible places; sharing information on request; introduction to the meeting of collective public authority organs formed in the course of public elections and sharing materials documenting such meetings (art. 7 para. 1 clause 1–4 of the Law on the Access to Public Information).

One of the tools that make it possible to share public information is the above-mentioned BIP, used for general sharing of public information in the form of uniform system of websites in an ICT network<sup>35</sup>. It is a useful, although underappreciated tool, which enables a one-way transfer of public information held by a particular public entity. Although by nature it does not ensure the exchange of information with external entities, but only makes it possible to become familiar with information uploaded therein, the data contained in the tool may undoubtedly be used for information exchange through other tools (e.g. e-mail). However, it is possible only if the information contained therein is useful (i.e. updated, complete and provided in a comprehensible form). From such a source as BIP the information may be obtained by the employees of a particular entity as well as the employees of subordinated or controlled entities. It should also be emphasised that BIP is the only legally defined place (official ICT publisher) used for publishing any public information, not only this indicated in art. 8 para. 3 of the Law on the Access to Public Information, defining the minimum scope of shared data. It should be noted that even in the situations when information disclosure is excluded, the scope and legal basis of such exclusion is stated and the organ or person who performed such exclusion is indicated, and in some cases<sup>36</sup>, also the entity for the benefit of which the exclusion of disclosure was made (art. 8 para. 5 of the Law on the Access to Public Information). Public information shared in

---

first of all by the Law on the Protection of Classified Information of 5 August 2010 (consolidated text: Journal of Laws 2016, item 1167), and a few dozen other normative acts including provisions on „other secrets protected by law” mentioned in art. 5 para. 1 of the Law on the Access to Public Information. Due to this, an entity obliged to provide public information, on the one hand must consider the existing restraints to granting such information, and on the other hand must remember that if it fails to share public information (although it should do so) – it will face criminal liability as specifically defined in art. 23 of the Law on the Access to Public Information.

35 See: art. 8 para. 1 of the Law on the Access to Public Information.

36 See: art. 5 para. 2 of the Law on the Access to Public Information.

BIP or the central repository<sup>37</sup> is not subject to the obligation of being shared on request (art. 10 para. 1 of the Law on the Access to Public Information).

The opportunities offered by BIP, when fully used, make it a tool that can serve to create the image of an entity as a subject functioning properly, not having anything to hide and performing its imposed duties in a model manner (which can be relatively easily checked). BIP may provide reliable information on any signs of activity on the part of public administration and reinforce the citizens' awareness (i.e. realising the existence of certain facts) as regards social, economic and legal conditions that impact the functioning of an entity and the actions it takes. Placing a piece of information in BIP constitutes a certain substitute of participating in public life (passive participation) and facilitates social control over the actions of public administration. Furthermore, what is important in the context of management control, information placed in BIP does not require any actions related to it being shared on request, and in turn, it does not involve the employees, who can deal with other activities leading to the achievement of assigned objectives.

Pursuant to art. 10 para. 1 of the Law on the Access to Public Information, public information which has not been shared in BIP or the central repository is shared on request. The provisions of the Law on the Access to Public Information define the rules for sharing information that is not published in BIP, the dates of such sharing, the cost, manner and form of a refusal to share public information and discontinuance of the proceedings related to sharing such information.

Incorrect and unreliable maintenance of BIP, including i.a. untimely upload of information or uploading partial, incomplete information may jeopardise the achievement of assigned objectives by the public entity. The main reason is the fact that among the basic information included in BIP is the data related to the manner of dealing with a particular affair. Therefore, a wrongly presented procedure, incorrect form or list of necessary documents (attachments) will delay and impede the proceedings instead of simplifying and accelerating them – not to mention the adverse impact on the image of the entity/office. First of all, it should be mentioned that from the legal point of view, failure to upload information e.g. on vacancies may trigger an accusation of the lack of disclosure or limiting the competition – in the case of a failure to upload information on the proceedings related to the commissioning of a public task.

To summarise the considerations of public information, one may ask a question whether apart from public information, public administration owns any other types of information. Definitely. At this point, one should mention „pri-

---

37 Pursuant to art. 9a para. 1 of the Law on the Access to Public Information, central repository is the place for sharing public information that is of particular importance for the development of innovation within the state and the growth of information society. Due to the manner of storage and sharing, this information may be used again in a useful and effective way.

vate information” obtained e.g. with regard to solving private affairs, or working information useful for completing tasks and shared within a public entity and having no formal character. What is close to this division is the classification of information into external (i.e. information to be shared) and internal (i.e. information not to be shared) such as private and working information. On this occasion, one should note that in this classification, not every piece of public information is external, because not every piece of public information is subject to sharing. Furthermore, in the context of the management control it should be stated that although not every piece of information held by public administration is of public nature, each type of information (which does not mean every single piece of information) contributes to achieving the goals and objectives by the public administration.

## **5 The notion and forms of communication**

Communication is, generally speaking, exchange of messages between two entities or parties; it is transmitting and receiving information (messages, data) in a way comprehensible for both parties. Such understanding of communication is strictly linked to the content of information. This is why e.g. even the best legal opinion written in a language that is incomprehensible for the recipient is not an element of correct communication, but only a formal document; in extreme situations, instead of helping to achieve the goals of an entity, it may jeopardise it when wrongly read and incorrectly interpreted by the recipient. The same is valid for communication with external entities, especially with particular community – a wrongly understood piece of information may contribute to the increase of doubts and exacerbating a conflict rather than eliminate doubts and solve conflicts. This is why – especially in the context of public administration – correct communication is important, which involves:

- communication (i.e. exchanging messages) with those who need a particular message,
- as much communication (i.e. the scope of message, information) as needed,
- communication in such a form that is the most adequate in a particular case (for a particular matter) and legally acceptable,
- communication at the time when it is needed (i.e. transferring the message at a particular point in time).

Correct communication impacts the effectiveness and efficiency of the actions taken. As regards the management control, it refers to such information and such conveying that is related to achieving certain objectives and goals. In this context, it seems that an instrument of communication may be anything that enables the transfer of messages between entities, including any devices and ICT solutions. However, at the very beginning we are faced with a question of whether such communication may take place with the use of various so called

social media (e.g. Twitter, Facebook). It seems that in this respect it is crucial what public administration is communicating (i.e. what the conveyed message refers to). Although various forms of communication may be indicated (oral, written, also electronic) with various impact (information addressed to a defined or undefined recipient) and various means of communication, including distant communication means, in many cases public administration is now allowed to use them freely, because legal provisions define both the form of communication and the means of communication that can be used. Pursuant to the provisions of the act on the IT development of the bodies performing public tasks<sup>38</sup> – public bodies may perform their tasks with the use of an ICT system<sup>39</sup> or via electronic communication<sup>40</sup> (art. 13 para. 2)<sup>41</sup>. As an example we could quote providing information to the citizens (inhabitants) via text messages, especially when notifying them on the existing or pending threat.

Restraints as regards the use of forms and means of conveying information refer in particular to public information. Pursuant to art. 7 para. 1 clause 1 of the act of the Access to Public Information, one of the ways to share public information, including official documents, is to announce them in BIP. As mentioned before, public information which has not been shared in BIP or the central repository is shared on request. This means that only public information published in BIP or the central repository shall be treated as shared in the light of this act. That's why public information shared e.g. on the Internet websites of entities obliged to share public information or public information functioning in public domain, but not shared in the abovementioned manner, shall be treated as not shared and must be shared on request. This was confirmed in one of the verdicts of the Supreme Administrative Court of Poland in Warsaw<sup>42</sup>.

We can also look at the situation from another angle, i.e. from the point of view of a person requesting public information to be shared. We can ask: is it

---

38 The act of 17 February 2005 on the IT development of the bodies performing public tasks (consolidated text: Journal of Laws 2014, item 1114); hereinafter: the act on ITD.

39 The provision of art. 3 clause 3 of the act on ITD explains an ICT system as „a set of cooperating IT devices and software, ensuring the processing, storage as well as sending and receiving data by ICT networks through an IT end device appropriate for a particular network type (...)”.

40 Pursuant to art. 3 clause 4 of the act on ITD in connection with art. 2 clause 5 of the act of 18 July 2002 on electronic services (consolidated text: Journal of laws 2016, item 1033), electronic means of communication are defined as „such technical solutions, including ICT devices and cooperating programme tools which make it possible to communicate individually at a distance with the use of data transmission between ICT systems, in particular electronic mail”.

41 More about it, see: art. 13–20c of the act on ITD. These provisions define i.a. basic requirements that ICT systems should conform to (e.g. interoperability); these requirements are defined specifically in implementing acts (lower-order acts).

42 The Verdict of the Supreme Administrative Court in Warsaw of 23 September 2014, I OSK 34/14, *LEX no. 1569532*.

possible to file an effective request for public information to be shared via social media? Of course, assuming that the entity obliged to share this information has an account/website in such media and setting aside numerous legal doubts related to the use of such media by public entities. However, the answer to the above question was basically provided by the Provincial Administrative Court in Warsaw in the decision of 15 March 2013, in which it rightly stated that in a democratic state of law, in the light of the legality principle, the activity of public authorities (competences, tasks and operational mode) are defined by mandatory legal provisions. This is why the Provincial Administrative Court in Warsaw claims that having a website in social media – in this case it was the website of local authorities – usually only serves „promotional purposes, presents the achievements of the local authorities, defined the intentions and points to social initiatives (...). In the mandatory legal order, this type of website is not an acceptable way of communicating the so called official business, and it is not meant for filing applications and requests”<sup>43</sup>.

One of the solutions which guarantees the citizens and entrepreneurs communications with public administration entity and ensures communication between public administration entities is the electronic platform of public administration services (ePUAP)<sup>44</sup>. It is an ICT system where public entities share their services through a single access point in the Internet<sup>45</sup>. In ePUAP, through the so called ePUAP trusted profile (which is a set of information identifying and describing the account user in ePUAP, whose data has been reliably confirmed by the authorities) it is possible to manage many official affairs. That's why ePUAP is an exponent of e-administration, i.e. administration which uses ICT solutions in performing public services.

## **6 Information and communication in management control standards**

Standard of the management control „D 16. *Current information*” requires that managing staff and employees be guaranteed access to proper and useful, as well as updated and reliable information necessary for the completion of tasks. This information should be transferred in a correct and comprehensible form and in a proper moment. The interest of the management control in this area of public administration is supposed to reinforce and facilitate the execution of tasks and objectives imposed on public finance sector entities. It follows from the fact that information (data) transferred within an entity, regardless of the character (i.e. from purely informative data to the data with special significance and status, e.g. public information), always serve the execution of tasks and objectives.

---

43 The decision of the Provincial Administrative Court in Warsaw of 15.03.2012, (II SAB/Wa 513/12), *LEX no. 1375081*.

44 <<https://epuap.gov.pl/wps/portal>>

45 Art. 3 clause 13 of the act on ITD.

Since the very information transfer is not sufficient to ensure successful execution of tasks and objectives, it is necessary to communicate with subjects inside and outside the entity. Proper internal communication in public administration requires effective mechanisms for sharing important information both within the organisational structure of an entity (level I of the management control), and within the department of government administration and local government unit (level II of the management control)<sup>46</sup>. To this end, there are relevant procedures and various solutions related to e-office, which ensure i.a. optimum document flow and timely handling of affairs. However, just like the lack of procedures may be a problem – excess of the same may be a trouble, too (overregulation).

In order to prevent falsifications, information should be transferred directly to the person interested in it. Additionally, atmosphere at work should encourage people to ask questions related to the assigned tasks and to provide honest answers; communication style has considerable role in this respect – the same information may be shared in multiple ways, and consequently, it may also be received in a number of ways. However, the key element in communication is a competent and communicative employee. This is why the mandatory provisions related to the so called official pragmatics<sup>47</sup> as well as internal recruitment procedures are supposed to ensure the selection of the best candidate for a particular job.

With reference to external communication, *Standards of the management control* require an effective system for the „exchange of important information with external subjects that impact the achievement of objectives and execution of tasks“. This is reasonable, because correct communication undoubtedly contributes to efficient and effective achievement of an assigned objective within an assumed deadline. This is why public administration, especially regional authorities, and most of all municipal authorities, should keep the public informed at least of the most important public affairs.

A useful communication tool, especially in the municipal government, may be own websites, where a public entity itself decides on the type and scope of published information. On one's own website an entity may publish information related to e.g. important events from the life of the community (photos, films, etc.), which do not constitute public information. Having one's own website seems a relatively cheap tool for keeping the inhabitants informed and promoting the municipality, because the information uploaded there will surely impact the perception of the municipality, also with regard to its tourist or investment value and attractiveness.

---

46 See: Standards of the management control.

47 Here we should mention the act of 21 November 2008 on local government employees (consolidated text: Journal of Laws 2016, item 902); act of 21 November 2008 on civil service (consolidated text: Journal of Laws 2016, item 1345); and the act of 16 September 1982 on public officials (consolidated text: Journal of Laws 2013, item 269).

The role of an intermediary in transferring information could be assigned to the media, but they do not usually inform the public on correct (efficient, effective etc.) actions of public administration, but on scandals, corruption and all other types of irregularities. If they do take on the role of an intermediary, then such a message is often a result of the actions taken by public administration, which shares information with the media during various press conferences, interviews, briefings or e.g. in a local news bulletin.

## **7 Conclusion**

As W. Taras emphasises, information is the statement of knowledge issued by a public administration body or another administrative entity, made in the form of material and technical activity and related to the particular actual or legal status, or consequences following from it<sup>48</sup>.

One of the categories of information owned by public administration is public information, characterised by the formal status and the value related to the domain of public facts and data. Such information is meant to be shared, whereby it enables the citizens to control the activity of public administration and increases the public officials' feeling of responsibility for the actions they perform. In this respect, information is the means and guarantee of democratisation of public life<sup>49</sup>.

In the context of management control, having relevant information and sharing it with entities that impact the execution of tasks and objectives is an essential factor facilitating the achievement of assumed effects. It seems that many people may confirm that at least on one occasion they failed to achieve particular goal (and a noble goal it was indeed), only because of a lack of reliable information and proper communication. Information and communication make it possible to eliminate or reduce the apprehensions and to understand the decisions made and actions performed. If the citizens are additionally guaranteed the opportunity to influence the decisions that are made, if only by having their suggestions/proposals considered, this will probably reinforce the authority of a public entity to take actions and will be beneficial for all the stakeholders. This is why it is worth introducing communication rules applicable in the situations when mandatory legal provisions do not specify the requirements, especially in territorial organs, which are nearest to the citizen.

Finally, it should be mentioned that a public entity having relevant information must also manage it in a proper way. It should not only implement a correct information policy, but also – although this wasn't included in the analysis – introduce a proper information security policy defined in legal provisions and

---

48 TARAS, Wojciech. *Informowanie obywateli przez administrację*. Wrocław: Zakład Narodowy im. Ossolińskich – Wydawnictwo PAN, 1992, p. 21.

49 *Ibid.*, p. 29.

e.g. in a document containing the rules for information management and sharing as well as for protecting the information against destruction, unauthorized modification or unauthorized use<sup>50</sup>.

---

50 SŁAWIŃSKA-TOMTAŁA, Ewa. *Kontrola zarządcza w sektorze publicznym. Praktyczne wskazówki wdrożenia systemu*, C.H.Beck, Warszawa: Wydawnictwo C. H. Beck, 2010, p. 74. The obligations of a public entity related to the implementation and use, monitoring and review as well as maintenance and development of the information security management system in electronic form are defined in particular in § 20 of the Regulation of the Council of Ministers of 12 April 2012 as regards the National Interoperability Frameworks, minimum requirements for public registers and electronic information exchange as well as minimum requirements for ICT systems (consolidated text: Journal of Laws 2016, item 113).

# MISREPRESENTATION UNDER ENGLISH CONTRACT LAW AND ITS COMPARISON TO SLOVAK CONTRACT LAW

Lucia Šírová

Faculty of Law, Comenius University in Bratislava, Slovakia

*lucia.sirova@flaw.uniba.sk*

ŠÍROVÁ, Lucia. Misrepresentation under English Contract Law and Its Comparison to Slovak Contract Law. *International and Comparative Law Review*, 2016, vol. 16, no. 2, pp. 197–208. DOI: 10.1515/iclr-2016-0024.

---

**Summary:** The aim of this paper is to introduce and analyse the concept of misrepresentation under the English contract law. In this regard, the paper primarily deals with the distinction between a term and a representation, key elements of misrepresentation, types of misrepresentation and remedies available to misrepresentees once the misrepresentation has been established. Furthermore, the author subsequently also presents a brief analysis of the Slovak contract law in order to identify any statutory provisions which could be applied to situations where a contract governed by the Slovak law contains representations and outlines what remedies are eventually available in situations where such representations later turn out to be false.

**Keywords:** common law, contract law, representations, misrepresentation, fraudulent misrepresentation, innocent misrepresentation, negligent misrepresentation, rescission, damages

---

## 1 Introduction

According to the recent trends and developments in the area of contract law, a number of common law concepts have had to be dealt with lately by continental law countries as a result of ever growing globalisation. Representations and warranties<sup>1</sup> have become a standard part of a number of international commercial contracts entered into also in the Slovak Republic especially due to lots of supranational companies and their business activities carried on in Slovakia.

- 
- 1 The term “representations and warranties” is quite frequently incorporated in a number of commercial contracts in a way implying that the term “representation” means the same as the term “warranty”. Actually, in the US legal terminology, these terms are currently used almost interchangeably, whereas in the UK a distinction is made between these two terms. For more information about this issue, see an article titled *Representations and Warranties in Private M&A* at <http://www.osborneclarke.com/connected-insights/blog/representations-and-warranties-in-private-mergers-and-acquisitions/> [seen on 7.9.2015]. For the purposes of this paper and given the limitation of its extent, we only deal with the concept of representations further on.

They may be found incorporated in e.g. loan agreements, share purchase agreements, license agreement, sales agreements, etc. Representations and warranties stem from the English contract law and they do not correspond to the Slovak regulation of the concept similar to representations or warranties (such as the one contained in Section 429 of the Commercial Code<sup>2</sup>).<sup>3</sup>

In this regard, we provide a brief insight into the English contract law where the concept of representations is very closely related to misrepresentation, i.e. providing false statements in order to induce the other party to enter into a contract. Misrepresentation is related to the period prior to the formation of the contract and can arise as a result of contracting parties' conduct. This concept recognized by the English contract law is not reflected in the Slovak law in the same way and one could only wonder how the Slovak contracting parties or Slovak courts ought to deal with it.

The purpose of this paper is to introduce and analyse the concept of misrepresentation as regulated by the English contract law and to compare it to the Slovak contract law and identify any possible statutory provisions under the Slovak Civil Code and Commercial Code which could be applied to a situation where a contract governed by the Slovak law contains various representations which turn out to be false and thus cause damage to one of the contracting parties.

## **2 Representations under English Contract Law**

Contracting parties and eventually the judges as well have to be able to ascertain whether a statement made by one party to the other party before a contract is formed has been incorporated into such contract as a representation. Such statement can possibly also be incorporated into a contract as a term and this difference could be significant especially due to different remedial consequences.

A representation is defined as a statement made by one of the two contracting parties to the other before or at the time of making the contract, in regard to some fact, circumstance, or state of facts pertinent to the contract, which is influential in bringing about the agreement.<sup>4</sup> To put it simply, a representation as a statement is made in order to motivate the other contracting party to enter into the contract. Representations are not considered to represent contractual stipu-

---

2 Act No. 513/1991 Coll. (Commercial Code) as subsequently amended.

3 For more information about representations and warranties and their impact on the Slovak contract law, see also: FERTAĽOVÁ, Alžbeta. *Prehlásenia a záruky (Representations and Warranties) a ich význam v obchodných zmluvách*. In *Obchodné záväzky: Všeobecná časť. Zborník z III. študentského sympózia z obchodného práva*. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, 2016, pp. 58–65. and also GYÁRFÁŠ, Juraj. *Inštitút "representations and warranties" v slovenskom práve*. In *Bulletin slovenskej advokácie*, 2013, vol. 19, no. 3, pp. 26–35.

4 Definition available online at: < <http://thelawdictionary.org/representation/>>

lations in their true sense; they merely confirm the fact that a contracting party provided these statements during the formation of pre-contractual relationships.

A term, on the other hand, is defined as any provision which forms part of a contract.<sup>5</sup> In order to have a clearer picture of the distinction between a representation and a term, we refer to a statement presented by some authors who described terms as “being part of the contract” while representations only “floating around the edge of the contractual relationship but being outside its borders and not forming part of the contract.”<sup>6</sup>

However, it is still rather complicated to determine whether the statement is a representation or a term of the contract. A number of tests are used by the English courts to distinguish a term from a representation since it is not possible to recognise a term from a representation only by looking at the words used by the contracting parties.

Generally, it has been established that one has to look at the circumstances and ask what a reasonable person would normally think of a particular statement in its overall context. Let us illustrate this fact by providing two similar cases with different outcomes. In spite of the fact that these cases are not quite up-to-date, they provide a very good insight into this issue.

In *Oscar Chess Ltd v Williams* (1957)<sup>7</sup>, a car was sold by Mr Williams to Oscar Chess Ltd which was a dealer. Mr Williams stated that the car was a 1948 model according to the registration book. However, the car was in fact a 1939 model and therefore its price was much lower. The dealers therefore claimed the difference in value as damages for the breach of contract. The judge applied the so-called objective test of intention in deciding the case and stated that Mr Williams was not in a position where he should have known the true facts – he relied on the information set out in the registration book which turned out to be misleading so the statement was classified as a representation. The car dealer had a greater knowledge and would be in a better position to know the age of manufacture than the defendant (Mr Williams). Furthermore, the judge also noted in this regard that if a contract is later written down, it is very probable that any oral statements repeated in the written contract are intended to represent contractual terms and any statements which are omitted are likely to represent representations since the parties are likely to record only those statements which they want to form part of the contract. However, this is not an absolute rule which could always be applied.

---

5 MARTIN, Elizabeth A. (ed). *Oxford Dictionary of Law. Sixth edition.* New York: Oxford University Press, p. 545.

6 TAYLOR, Richard, TAYLOR, Damian. *Contract Law.* New York: Oxford University Press, 2013, p. 96.

7 See the whole case at: <<https://cases.legal/en/act-uk2-43.html>>

On the other hand, in *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* (1965)<sup>8</sup> where the dealers Harold Smith (Motors) sold a car to Dick Bentley Productions Ltd while stating that the car had done 20,000 miles (as originally shown on an odometer which later turned out to be incorrect information), the court ruled that under such circumstances the dealer was in a position to know or at least find out the true mileage and thus concluded that such statement was intended to be a term not a representation.

Differences between terms and representations are especially crucial as to remedial consequences. If a statement has been incorporated as a term and the person fails to comply with the statement, then there is an automatic right to damages for the breach of contract. In the event that the statement has not been incorporated as a term but as a representation, there is not an automatic right to damages if the representation turns out to be untrue.<sup>9</sup> A false statement being a representation in respect of the contract may entitle the innocent party to damages (if there is a fault) but the usual remedy is to rescind the contract. However, even this remedy could be lost under specific circumstances.

In conclusion, the difference between a representation and a term of the contract is crucial especially as far as the available remedies are concerned.

### **3 Misrepresentation under English Contract Law**

Once the concept of representations has been introduced, we can move onto the law of misrepresentation. English legal dictionaries define misrepresentation as an untrue statement of fact made by one party to the other in the course of negotiating a contract that induces the other party to enter into the contract.<sup>10</sup> Misrepresentation thus actually refers to the fact that one “has been had”, i.e. misled into a contract by the other contracting party which provided a false statement.

Misrepresentation arises within the period prior to the formation of the contract during negotiations which are held between the contracting parties. The English law does not recognise any positive duty to negotiate in good faith and instead imposes a negative duty upon contracting parties not to make false statements of fact to each other which would induce the other party to enter into the contract.

---

8 See STONE, Richard, CUNNINGTON, Ralph. *Text, Cases and Materials on Contract Law*. Oxon: Routledge-Cavendish, 2007, p. 366.

9 In the past, before the Misrepresentation Act 1967 was passed in the UK and before the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465, damages could only be recovered for the fraudulent misrepresentations under the English contract law.

10 MARTIN, Elizabeth A. (ed). *Oxford Dictionary of Law. Sixth edition*. New York: Oxford University Press, 2008, p. 354.

The law of misrepresentation is seen as rather complicated due to the fact that it occupies the boundary between a contract, tort and unjust enrichment. In fact, misrepresentation falls more naturally in the territory regulated by the law of torts and thus questions which arise more usually in the law of torts (whether misrepresentation was made fraudulently or negligently) are crucial in deciding whether there should be any compensation. However, its effects on contracts are definitely an important part of the law of contracts and have significant consequences for the contracting parties. We comment on and deal with these consequences further below.

The English contract law currently distinguishes between fraudulent, negligent and innocent misrepresentation.<sup>11</sup> The fraudulent misrepresentation is established when a person makes a false statement which he knows is not true and has no belief in its truth or which he makes recklessly not caring whether it is true or not.<sup>12</sup> In other words or to put it simply, in order to sue someone for fraudulent misrepresentation, you have to prove that the person knew he or she was lying, or said something that he or she was not technically sure was a lie, but he or she had no reason to believe it was true. Moreover, another important element constituting the fraudulent misrepresentation is the fact that the misrepresentation is material to the transaction in question, i.e. it must be made in connection with the transaction and the person must be intentionally trying to affect the transaction with such lie.

The negligent misrepresentation is established when a false statement is made by the person which the person may honestly believe to be true but without reasonable grounds for believing it to be true. This class of misrepresentation is stipulated in Section 2(1) of the Misrepresentation Act 1967 and the burden of proof is on the representor to demonstrate he had reasonable grounds for believing the statement to be true. An example of the negligent misrepresentation is a situation in which a salesman claims that a cell phone that he is trying to sell has specific features without knowing if it does or not. He would be liable for committing negligent misrepresentation if the plaintiff was harmed by the misleading fact.

The last one of the three recognized types of misrepresentation is the innocent misrepresentation which is the one which the representor honestly believed to be true and he can demonstrate reasonable grounds for belief in the truth of the statement. Apart from the elements necessary to constitute the negligent and fraudulent misrepresentation, there is a special element unique for the innocent

11 However, the law of misrepresentation underwent a number of significant changes in the past. In particular, there were only two main categories of misrepresentation, fraudulent and innocent, until the 1960s. The concept of the negligent misrepresentation was introduced later, around 1964.

12 The definition of this class of misrepresentation was provided in *Derry v Peek* [1889] by Lord Herschell. To read a brief summary of the case, see MARTIN, Jaqueline, TURNER, Chris. *Contract Law, Key Cases*. Oxon: Bookpoint, 2006, p. 76–77.

misrepresentation – if the misrepresentation made does not benefit the person who made it, or hurts both parties to the contract, it will not be considered a case of misrepresentation by the courts.

In order to ascertain whether misrepresentation arose or not, one has to firstly carefully examine the nature of representation and determine on what grounds it becomes actionable due to its falseness. The English case law has established several approaches in this regard to which we point in a rather brief way further below. It was ruled that unambiguous statements of fact can be actionable as misrepresentation unlike the statements of intention which cannot constitute actionable misrepresentation unless such statement of intention carries with it an implied statement of fact as to the state of mind of the representor.<sup>13</sup> In terms of an opinion, a mere statement of it does not represent actionable misrepresentation.<sup>14</sup> However, a statement of opinion can give rise to actionable misrepresentation provided that it is contradicted by other facts known to the representor. On the other hand, it was also ruled that a statement of opinion will not be actionable if the representee did not have reasonable grounds to rely on the representor's opinion. The courts also dealt with the issue of a false statement of law and whether this might constitute an actionable misrepresentation which eventually led to several contradictory decisions since the courts had difficulties in distinguishing between representations of law and representations of fact. Previously, it had been thought that a false statement of law was not actionable as a misrepresentation but this traditional rule was questioned by the decision of the House of Lords in *Kleinwort Benson v Lincoln City Council* [1999]. What about being silent and not making any statements at all? What implications could such situation have? The general rule is that there is no misrepresentation by silence since no duty to disclose material facts is recognised by the English law. However, there are several exceptions to this general rule.

In spite of the fact that nothing has been said, the misrepresentation might also originate from a conduct of a contracting party.<sup>15</sup>

Furthermore, apart from the nature of representation, it is also necessary to refer to another key element of misrepresentation which the claimant is also

---

13 See e.g. *Curtis v Chemical Cleaning & Dyeing* [1951], a case in which it was established that unambiguous statements of facts are actionable as misrepresentation and e.g. *Edgington v Fitzmaurice* (1885), a case in which the directors of a company issued a prospectus inviting subscriptions for debentures and such prospectus stated that it was intended to use the money obtained to make improvements in the company by altering buildings, purchasing horses and vans, etc. However, the real intention was to use the money obtained to pay off existing debts of the company. Therefore, the Court of Appeal held that the statement of intention was misrepresentation of fact as to the state of mind of the directors since there had never been an intention to use the money in the manner stated.

14 See e.g. *Bisset v Wilkinson* [1927]

15 One of the notorious cases in this regard is *Spice Girls Ltd v Aprilia World Services BV* [2002].

required to show –representation must have been material which means that it would have induced a reasonable person to enter into a contract. In order to demonstrate that representation induced the representee to enter into the contract, the claimant would have to show that representation was known to the representee, intended to be acted on and actually acted on. All of these requirements have to be met cumulatively.<sup>16</sup>

#### **4 Remedies Available for Misrepresentation**

The protection against false representations has increased considerably during the last third of the twentieth century. Remedies awarded in cases of misrepresentation differ depending on the type of misrepresentation – one has to distinguish between fraudulent, negligent and innocent misrepresentation as it has already been pointed out. Before outlining these distinctions, we have to say that for any misrepresentation, the remedy of rescission is in principle available. Rescission is defined as setting aside of a voidable contract which is thereby treated as if it had never existed<sup>17</sup>. In addition to rescission, other remedies are available as well depending on the type of misrepresentation.

Originally, rescission was only available for fraudulent misrepresentation in the past. However, equity extended this right to all categories of misrepresentation and therefore any type of misrepresentation renders a contract voidable – the misled representee is given the option to either set the contract aside or, alternatively, to affirm it. In case the contracting party decides to rescind the contract, it will be set aside retrospectively and prospectively. The aim of this remedy is to put the contracting parties in their original position as though the contract had not been made – the contracting parties will thus be restored so far as it is possible to their pre-contractual positions.<sup>18</sup>

The injured party may rescind the contract by notifying the representor that he or she intends to rescind the contract but this is not always necessary as any act indicating the rescission (notifying the court) may suffice.

However, there are certain limitations with respect to the right to rescind the contract and the injured party may thus lose this right under certain circumstances. There are four situations in which the right of the injured party to rescind the contract is lost: (i) the injured party affirms the contract – with the full knowledge of misrepresentation and of the right to rescind the contract, the party expressly states that it intends to continue with the contract (or the party does an act from which such intention may be implied); (ii) the injured party does not take any action to rescind the contract within a reasonable time; (iii)

16 See e.g. *Horsfall v Thomas* (1862), *Peek v Gurney* (1873), *Atwood v Small* (1838).

17 MARTIN, Elizabeth A. (ed). *Oxford Dictionary of Law. Sixth edition*. New York: Oxford University Press, 2008, p. 473.

18 We shall also note in this regard that before the Misrepresentation Act 1967 was adopted, rescission was not available where the contract had been performed.

in case a substantial restoration is impossible – if the parties cannot be restored to their original positions and (iv) if a third party acquires rights in property in good faith and for value.

In addition to or as an alternative to rescission, damages for misrepresentation may be claimed and awarded as well. In case of fraudulent misrepresentation, the remedies available are rescission and damages in the tort of deceit unlike in the case of the negligent misrepresentation where the remedies available are damages in tort for negligent misstatement and rescission. As for the innocent misrepresentation, the remedy is either rescission with an indemnity or damages in lieu of rescission under the court discretion.

### **5 Slovak Contract Law and the Ways It Could Deal with Misrepresentation**

Given the fact that a number of contracts governed by the Slovak law frequently contain representations (and warranties), it is inevitable to determine how the Slovak law should deal with such representations provided that they turn out to be false and thus cause damage or harm to the relevant contracting party. These representations may concern both the contracting party as well as the subject matter of a contract.

In order to identify the relevant Slovak statutory regulation which would deal with providing false statements prior to concluding a contract, we analysed the statutory regulation contained in the Civil Code and Commercial Code and attempted to identify any provisions which would bear a resemblance to the English concept of misrepresentation. There are several situations which could be actually taken into account and which have also been presented by several legal practitioners dealing with these issues.<sup>19</sup>

Firstly, having studied the Slovak Civil Code<sup>20</sup> which represents one of the most significant sources of law regulating the contract law, we could claim that provisions which bear a resemblance to the English concept of misrepresentation are the ones contained in Section 49a of the Civil Code under which a legal act shall be voidable if such act is performed by a person erroneously and such error arises from a fact which is decisive for the performance of such legal act and the person to whom such legal act was addressed gave rise to such error or must have known about it. A legal act shall also be voidable if the error was given rise to by such person deliberately. Under the Slovak contract law the error may

19 See e.g. FERTALOVÁ, Alžbeta. Prehlásenia a záruky (Representations and Warranties) a ich význam v obchodných zmluvách. In *Obchodné záväzky: Všeobecná časť. Zborník z III. študentského sympózia z obchodného práva*. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, 2016, pp. 58–65. and also GYÁRFÁŠ, Juraj. Inštitút “representations and warranties” v slovenskom práve. In *Bulletin slovenskej advokácie*, 2013, vol. 19, no. 3, pp. 26–35.

20 Act No. 40/1964 Coll. (Civil Code) as subsequently amended.

lie in the reason for which the legal act is formed, in the subject matter of legal act, parties to legal act or in other circumstances in the absence of which such legal act would have never been performed. As it is obvious from the respective statutory provisions, the error is relevant as far as the legal consequences are concerned only in those situations where a contracting party is involved in causing the error, e.g. causing such error directly or in a situation where although it does not cause such error directly, it must know about such error in consideration of all circumstances. In analysing the concept of error under the Slovak law further, the Slovak regulation thereof stipulates that not every single error which has been made may lead to a voidable legal act. Generally, only a “material error” is of legal relevance, i.e. an error related to the nature of the legal act itself. However, in the event that an error is caused by the contracting party with a malicious intention, the fact whether the error is material or immaterial is not important – even an immaterial error is of a legal relevance. Apart from the voidability of legal act, one may also seek damages as a remedy available in the event that all general conditions under which the liability for damage arises are met. However, given the aforementioned, such approach could be rather complicated since it is believed that representations may not be directly considered as a legal act performed by a contracting party under the Slovak law since the nature of a representation does not meet the statutory definition of a legal act according to Section 34 of the Civil Code.

Secondly, some legal practitioners opine that once representations (and warranties) are regarded as an individual contractual relationship, their truth should be regarded as a contractual obligation, i.e. term, and their falseness (misrepresentation) should give rise to a claim for compensation under Section 373 of the Commercial Code (everybody who breaches his obligation arising from a contractual relationship is obliged to compensate the other contracting party for damage which such party suffers unless he is able to show that the breach of such obligation was caused by circumstances exempting one from the liability) or possibly under Section 420 of the Civil Code (everybody shall be held liable for damage which he caused by breaching his legal obligation). In this regard, contracting parties very often tend to incorporate into their contracts provisions such as “the falseness of representations (misrepresentations) is deemed to represent the breach of terms by the contracting party” However, such approach can be rather problematic as well given the provisions of Section 494 of the Civil Code pursuant to which an obligation in general means that one has to give something, act in a particular way, refrain from doing something or tolerate something done to him. Furthermore, such approach does neither correspond to the English concept of misrepresentation law which emphasizes the distinction between a term and a representation.

Thirdly, several opinions presented in this regard point out the fact that once a contracting party provides certain representations in e.g. a sales agreement, such

representations could correspond to and be regarded as the qualities of the thing subject to the sale which the parties agreed upon and which should thus be binding. It is a situation in which e.g. the seller declares that the thing which the buyer intends to purchase has particular qualities, i.e. is of a particular nature, usually the one requested by the buyer. Therefore, in the event that they turn out to be untrue and false (in the event of misrepresentation) such conduct could give rise to the liability for defects. The general statutory regulation of liability for defects is contained in Section 422 *et seq.* of the Commercial Code stating, *inter alia*, that the seller is obliged to deliver the goods in the quantity, quality and design which has been agreed upon in a contract and in the event that the seller fails to comply with such requirements, the goods are defective. Furthermore, these provisions also deal with legal defects of goods stating that such legal defects arise where the goods are encumbered with third party's rights. These provisions also state that should the delivered defective goods amount to a substantial breach of contract, the buyer shall have several remedial options, including (i) removal of defects by replacement, provision of missing goods or removal of legal defects, (ii) repair of defective goods provided that such repair is possible, (iii) reasonably discounted purchase price or (iv) rescission. In terms of the statutory provisions dealing with the liability for defects contained in the Commercial Code, we should also refer to Section 486 of the Commercial Code dealing with the liability for defects in case of the transfer of undertaking. The relevant general statutory regulation of liability for defects contained in the Civil Code may be found in Section 499 *et seq.* stating, *inter alia*, that everybody who gives a thing in exchange for payment, shall ensure that such thing is of a desired nature and such thing may be used in accordance with the character and purpose of a contract or in accordance with what has been agreed upon by the contracting parties and furthermore, he shall ensure that there are no legal defects in the thing. In the event that such defect may not be removed and the thing may not be used in the way agreed upon, the injured party shall have a right to seek rescission. Otherwise, the party shall have a right to seek the reasonably discounted purchase price, exchange of defective goods or their repair. In addition to the foregoing provision, Section 596 *et seq.* of the Civil Code also deals with the liability for defects in connection with a purchase contract. Under these provisions, in negotiating a purchase contract, the seller is obliged to notify the buyer of the defects in the things he knows about. In the event that a defect arises later on, without the seller having previously warned the buyer about such defect, the buyer is firstly entitled to a reasonably discounted price and in the event that such defect may not be removed, the buyer shall have a right to rescind the contract. Furthermore, the buyer shall have a right to rescind the contract also where the seller assured the buyer that the thing was of a certain quality, in particular the quality which the buyer desired, or the seller assured the buyer that such thing was not defective but such statement turned out to be false.

In addition to the foregoing approaches, we could also refer to provisions stipulated in Section 45(1) of the Commercial Code dealing with the so called deceptive advertising which means advertising goods, services, real property, trade name, trademark and other rights and obligations which is or may be misleading for persons for whom it is intended and which, due to its deceptive nature, may affect the economic behaviour of these persons or which is or may be detrimental to other competitors or consumers. In terms of remedies available to parties whose rights were violated or endangered through deceptive advertising, the injured parties may request that the other party refrains from such conduct or compensates them (even monetarily) or sue on the grounds of unjust enrichment.

## **6 Conclusion**

Under the English law, misrepresentation has been developing as an individual area of law with a very specific position in the contract law. Misrepresentation is, in fact, a tort, a civil wrong, which has its statutory regulation contained in the Misrepresentation Act and the character of which has also been significantly shaped by the relevant case law. Once established, misrepresentation leads to a number of remedial consequences which are important for the contracting parties and the contracts they entered into and it is therefore also very important to differentiate between a representation and a term in a contract.

As it has been pointed out in this paper, representations have also been frequently incorporated into a number of commercial contracts governed by the Slovak law and have thus led to uncertainty as to their interpretation in case they turn out to be false since such concept is not regulated and recognised by the Slovak law in the same way. Legal practitioners have been trying to solve this issue by referring to and applying various statutory provisions contained either in the Civil Code or Commercial Code (depending on the nature of contractual relationship at issue) which bear the greatest resemblance to them.

No uniform approach has been adopted so far since one has to assess every particular situation individually and differently. In this respect, it is always extremely important for any contracting party entering into a contract governed by the Slovak law and containing representations to clearly and unambiguously stipulate what implications the misrepresentation has for the contracting parties – what obligations it constitutes and imposes on the misrepresenter – in order to avoid any uncertainty in their interpretation and remedial consequences.

We also believe that the Slovak case law will be more developed in the future and will provide a more useful guidance on how to deal with this issue since the number of contracts containing representations will most likely increase. Moreover, one could possibly propose a certain statutory development in the area of

the Slovak contract law which would reflect the given issue in a particular way and provide an answer to numerous questions arising in this regard.

# GROUP INSURANCE AND REINSURANCE BUSINESS IN THE LEGAL RELATIONS WITH AN INTERNATIONAL ELEMENT

Petr Dobiáš

CEVRO INSTITUT, Department of Private Law

petr.dobias@vsci.cz

DOBIÁŠ, Petr. Group Insurance and Reinsurance Business in the Legal Relations with an International Element. *International and Comparative Law Review*, 2016, vol. 16, no. 2, pp. 209–220. DOI: 10.1515/iclr-2016-0025.

---

**Summary:** Currently, no internationally unified legal regulation of group insurance contracts and reinsurance contracts is available. As a result, a national legal regulation determined according to conflict-of-law rules is applied to both types of contracts in legal relations with an international element. The differences between national legal regulations could be overcome through the application of optional instruments, namely the Principles of the European Insurance Contract Law and the Principles of Reinsurance Contract Law.

**Keywords:** insurance, reinsurance, insurer, policyholder, insured.

---

## 1 Introduction

The Principles of European Insurance Contract Law (further referred to as “the PEICL”) were **first** published in 2009. The first edition consisted of three parts (Part One – Provisions Common to all Contracts included in the Principles of European Insurance Contract Law, Part Two – Provisions Common to Indemnity Insurance and Part Three – Provisions Common to the Insurance of Fixed Sums). In 2015 the PEICL were published for **the second time**, the final wording being amended by another three parts (Part Four – Liability Insurance, Part Five – Life Insurance and Part Six – Group Insurance). The arrangement of legal regulations concerning insurance as set out in the PEICL differs from Czech Act No. 89/2012 Coll. of the new Civil Code (further referred to as “the NCC”), the content of the General Provisions of the NCC corresponding with the First, Second, Third and Sixth Part of the PEICL. In the NCC life insurance (Section 2833 to 2843) and liability insurance (Section 2861 to 2867) is systematically arranged into individual subsections which follow the General Provisions (Section 2758 to 2832). The subject of the analysis and comparison will be the applicability of the PEICL as an instrument allowing to **overcome the differences between national legal regulations of group insurance**<sup>1</sup> in the case of effecting group

---

1 The NCC covers group insurance in Section 2827 within the General Provisions on the

insurance with an international element (e.g. between a policy holder and an insurer with a place of business on the territory of different states). Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (further referred to as “the Rome I Regulation”) does not comprise the conflict-of-law rule to determine the law applicable to group insurance. Provisions of Article 3 of the Rome I Regulation allow the choice of the applicable law of a particular state, which does not preclude contractual parties from incorporating by reference non-State standards into their contracts (compare recital 13 of the Rome I Regulation).

In autumn 2015 a new project group was set up with the aim to develop **the Principles of Reinsurance Contract Law (further referred to as “the PRICL”), which are to be completed in 2018.** Unlike the PEICL, the PRICL do not contain mandatory provisions. Compared to the PEICL, the PRICL are not a complex regulation containing principles of reinsurance – they are model rules. As it is obvious from the title of the PRICL, their application shall not be limited solely to Europe. The PRICL may be applied when settling **litigation** between insurers and reinsurers, in the case where the direct insurer and the reinsurer incorporate the PRICL into their contract, or if they authorize **arbitrators** to use them to decide a dispute concerning reinsurance.

---

Insurance of Persons. K Haas states correctly that such systematic classification could lead to the wrong conclusion that group insurance can be concluded only within the framework of the insurance of persons, although group insurance may as well be concerned with group insurance of a bond, group insurance of damage liability and group insurance of credit cards (DVOŘÁK, Jan, FIALA, Josef, ŠVESTKA, Jan: *Občanský zákoník, komentář (Civil Code, commentary) volume VI, Section 2521 to 3081*, Prague: Wolters Kluwer, 2014, p. 673). To compare, in the German Insurance Contract Act of 2008 [Act adopted on 23rd November 2007, came into effect on 1st January 2008 (BGBl. p. 2631), further referred to as “the GICA”] there is a separate regulation on group insurance within the provisions on giving consent with life insurance (Section 150 par 2 – collective group insurances within the framework of company pension schemes) and within the provisions on the termination of health insurance (Section 206 par 4 and Section 207 par 2). Greek Act No 2496/97, on Insurance Contract within Article 29 par 3 only states that in a group insurance it is possible to negotiate a different time limit for paying the surrender value than the one given for individual insurance within the same provisions. In that the Greek regulation differs from Article L 132-23 of the French Insurance Code of 1976 (further referred to as “FIC”), which, besides two exceptions, excludes paying the surrender value in case the insurance benefit is subject to termination of labour activity. In Articles L 141-1 to L 142-5 the French regulation provides for the basic issues connected with group insurance (definitions, exclusion of the insured from the insurance, obligations of the policyholder etc.). In the UK the Insurance Act of February 12, 2015 (effective from August 12, 2016), in Article 13 provides for the remedies for fraudulent claims within group insurance and in Article 18 it deals with the applicability of provisions on concluding group insurance contracts. The above stated examples of Acts can be used to prove that legal regulation of group insurance in national legal orders provides just for the sub-issues related to this type of insurance.

### 1.1 Definition of Group Insurances

Under Article 1:201(7) of the PEICL “**contracts for group insurance**” are **contracts between an insurer and a group organiser<sup>2</sup> for the benefit of group members<sup>3</sup> with a common link to the group organiser** (e.g. an employer concluding group insurance for his/her employees or a professional chamber concluding group insurance for its members).<sup>4,5</sup> A contract for group insurance may also cover the family of the group members. In Section 2827 par 1 of the NCC it is stated more precisely that if insurance covers the members of a particular group or their families and their dependants, where applicable, the contract does not have to contain the names of the insured persons if the insured persons can be identified without any doubts no later than at the time of the insured event. The authors of the NCC thus prevented possible any ambiguities connected with determining the scope of the people covered by group insurance. Further, in Section 9 of the same provision the PEICL define “**Elective group insurance**” as a group insurance under which group members are insured as a result of personal application or because they have not refused the insurance. From the point of view of Czech legislation such provision is not surprising since under Section 2827(2) of the NCC the consent of the insured is not required in group insurance. However, under German legislation written consent of the insured, except for collective group insurance within the occupational pension schemes, is required on pain of annulment.<sup>6</sup>

### 1.2 Characteristics of Provisions Regulating Group Insurance in the PEICL

The PEICL contain a relatively small number of provisions which are **mandatory for all contracting parties** of the insurance contract (Articles 1:102 second

- 2 From the legal point of view a sole insurance contract is, considering the insurance-technical perspective, viewed as consisting of as many insurance relationships as equals to the number of insured group members (BENKEL, Gert, A., HIRSCHBERG, Günther: *Lebens- und Berufsunfähigkeitsversicherung*, Munich: C. H. Beck, 2011, marginal no. 3).
- 3 Neither the NCC nor the PEICL define a group. Further, they do not provide for the number of group members, compared to Article 1496 of Turkish Act No 6102/2011 (effective from July 1, 2012) of the Business Code which regulates that a group is formed by a minimum of 10 persons but the decrease in number of members in the course of the duration of the contract does not result in its termination.
- 4 The reason for concluding group insurance is usually the possibility to negotiate a decrease in premiums paid by the policyholder for more insured persons (e.g. insurance concluded by an employer for more employees) considering the premiums paid by the insured/policyholders in the case they would conclude individual insurance contracts related to the same insurance risk.
- 5 The revoked provision in Section 3 of Act 37/2004 Coll., on Insurance Contract defined group insurance as “a private insurance that applies to a group of insured persons specified in more detail in the insurance contract, the identities of which are usually not known at the time of the conclusion of the contract”.
- 6 W. Schnepf a Y. Gebert in VEITH, Jürgen, GRÄFE, Jürgen, GEBERT, Yvonne: *Der Versicherungsprozess*, Baden Baden: Nomos, 2016, marginal no. 53.

sentence, 2:104, 2:304, 13:101, 17:101, 17:503 and Articles sanctioning fraudulent behaviour). All other provisions of the PEICL are unilaterally mandatory, i.e. they cannot be derogated from to the detriment of the policyholder, the insured or the beneficiary. **An exception** to this rule (in the case of group insurance) is found in the option to derogate from any unilaterally mandatory provision of the PEICL in relation to the policyholder who possesses personal characteristics specified in Article 13 par 27 (b) or (c) of Regulation No 2009/138/ES (Solvency II).<sup>7</sup>

### *1.3 Special Provisions for Group Insurance comprised in the PEICL*

#### *1.3.1 Group Insurance in General*

##### a) Applicability

Contracts for group insurance are subject to the PEICL on the condition that the group organiser and the insurer agreed on their application. According to the PEICL group insurance is classified as either **accessory** (Chapter I. 3.2) or **elective** (I. 3.3.).

##### b) General Duty of a Group Organiser

In the course of negotiation and performance of the contract for group insurance, the group organiser shall act **dutifully and in good faith** taking account of the legitimate interests of the group members for he or she is in a position similar to the one held by an insurance agent. In the case where the group organiser breaches the duty, he or she shall be liable for damage. The group organiser shall submit all relevant notices for the group members issued by the insurer and shall inform them of any change in the contract (including the termination of the

---

<sup>7</sup> It concerns insurance of the so called “large risks”, specifically:

a) risks within category 14 (credit) and 15 (guarantee/suretyship) in Part A of amendment I to Solvency II Directive if the policyholder professionally pursues industrial or commercial activity or one of the liberal professions, and the risk relates to this activity;

b) risks within category 3 (land vehicles other than railway rolling stock), 8 (fire and natural forces), 9 (other damage to property), 10 (motor vehicle liability), 13 (general liability), and 16 (miscellaneous financial loss), in Part A of amendment I to Solvency II Directive, in so far as the policyholder exceeds the limits of at least two of the following three criteria:

i) balance sheet total of 6.2 million Euros;

ii) net turnover within the meaning of the Council Directive 78/660/EHS from July 25, 1978, based on Article 54 par 3(g) of the Contract on Annual Accounts of Companies (note: although this directive was repealed by Directive 2013/34/EU of the European Parliament and of the Council of June 26, 2013 on annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, the reference in Article 13 par 27(c) of Solvency II Directive had not been updated): 12,8 million Euros;

iii) average number of employees during financial year: 250.

contract). The reason for such regulation is the limited access of group members to information on insurance.

### *1.3.2 Accessory Group Insurance*

#### a) Application of the PEICL

Accessory group insurance enables **additional members (of the insurance) to join (or more precisely be joined to) the concluded group insurance automatically** on a gradual basis. If necessary, other provisions of the PEICL shall apply *mutatis mutandis* to accessory group insurance. If e.g. a beneficiary is to be designated, it will usually be a group member, not a group organiser, who designates the beneficiary, although the application of Article 17:102 par 1 of the PEICL<sup>8</sup> would suggest the opposite conclusion.<sup>9</sup> In this regard Article 17:102 par 1 of the PEICL differs from Section 2829 of the NCC which stipulates, only for cases where death of an insured is the insured event, that the policyholder may determine the ultimate beneficiary, either by his name or by his relationship to the insured person.

#### b) Information Duty

If a group member joins the group, a group organiser shall inform the member without any necessary delay on:

- the existence of an insurance contract,
- the extent of cover,
- any precautionary measures and other requirements for preserving cover, and
- the claims procedure.

Thus, the information duty does not have to be fulfilled before the member joins the group. The burden of proof regarding whether the group member obtained information as stated in the previous paragraph lies on the group organiser (e.g. an employer who hired new employees).

#### c) Termination of the Contract by the Insurer

Within the framework of accessory group insurance provisions the PEICL sets out special derogations for some cases related to the termination of the insurance contract. From the below stated overview it is evident that the termination concerns individual group members whose reason to terminate the contract is given, and does not automatically relate to all members as a group.

---

8 Text of Article 17:102 par 1 (sentence 1) of the PEICL states: “The policyholder may designate one or more beneficiaries of the insurance money and may change or revoke such designation, unless the designation has been declared irrevocable.”

9 J. Norio-Timonen in BASEDOW, Jens, BIRDS, John, CLARKE, Malcolm, COUSY, Hermann, HEISS, Helmut, LOACKER, Leander: *Principles of the European Insurance Contract Law*, Cologne: Sellier/Otto Schmidt, 2016, p. 358.

The exercise of the right of termination by the insurer after the occurrence of the insured event shall only be regarded as reasonable if it is limited to **the exclusion** from cover of the group member to whom the insured event occurred.

In the case that the policyholder or the insured **intentionally violated the duty to adopt preventive measures or the insurance risk had been aggravated**, the exercise of the right of termination by the insurer shall only have the effect of excluding those group members from the insurance cover who had not taken the required precautionary measures or whose risks were aggravated, as the case may be.

In the case where the **conveyance of the insured property** had already been effectuated, the termination of the insurance contract shall only have the effect of excluding only those group members who have conveyed their title to the insured property from cover.

#### d) Right to Continue Cover – Group Life Insurance

If a **contract for accessory group life insurance is terminated** or if a member leaves the group, the coverage ends after three months or with the expiry of the contract for group life insurance, whichever takes place earlier. When this occurs, the group member shall have a right to the equivalent coverage under a **new individual contract** with the insurer concerned without a new assessment of the risk (e.g. a sportsman suffers an injury with lasting consequences and subsequently ceases to be a member of a sports association providing insurance for sportsmen).

The group organiser shall inform the group member in writing without undue delay about:

- the imminent termination of his cover under the group insurance contract,
- his/her right to coverage through the conclusion of a new individual insurance contract and
- how to exercise this right.

If a group member has indicated his intention to conclude a new individual insurance contract, the contract between the insurer and the group member shall continue as an individual insurance contract at a premium calculated on the basis of an individual policy at that time without taking into account the current state of health or age of the group member.<sup>10</sup> The regulation in question apparently draws on the regulation comprised in Section 178m of the Austrian Insurance Contract Act of 1959 (further referred to as “the AICA”)<sup>11</sup>, which provides for better protection of the insured in that it sets a one-month period for

<sup>10</sup> This provision is compatible with Section 2828 of the NCC which allows the insurer to inquire on the state of health of the insured only with the consent of the insured.

<sup>11</sup> Federal Act from December 2, 1958, published under No 2/1959 of the BGB.

exercising the right to conclude a new insurance contract, the given period not running until the insurer notifies the insured that he or she can conclude insurance under the same circumstances as those that applied for group insurance.

### *1.3.3 Elective Group Insurance*

#### a) Definition of Elective Group Insurance

Elective group insurance is deemed to be a combination of a framework contract<sup>12</sup> between the insurer and the group organiser and individual insurance contracts concluded within such a framework by the insurer and the group members.<sup>13</sup>

The PEICL apply to the individual insurance contracts where the group organiser and the insurer have agreed on their application but, except for provisions defining group insurance and obligations of the group organiser, the PEICL do not apply to the framework contract.

#### b) Alteration of Terms and Conditions

Alteration of terms and conditions of the framework contract shall only affect the individual insurance contracts if effectuated in compliance with the requirements of Articles 2:603 of the PEICL (Alteration of Conditions of the Insurance Contract), 17:303 (Adjustment of Premium and Benefits Payable) and 17:304 (Alteration of Contractual Insurance Conditions), which shall be applied on group insurance as appropriate.

#### c) Continuation of Coverage

Termination of the framework contract or cessation of membership on the part of an individual group member shall not have any effect on the insurance contract between the insurer and the group member.

### *2.1 Law Applicable to Reinsurance*

Article 7 of Regulation Rome I **does not apply to contracts on reinsurance and on insurance contracts covering other than large insurance risks outside the EU<sup>14</sup> and thus in these types of contract the law applicable shall be determined by the general conflict-of-law rules provided for in Rome I (provisions of Articles 3 and 4) in the following way:**

12 Note: Framework contract is not an insurance contract since it only determines the insurance scheme.

13 In German jurisprudence this type of group insurance is referred to as quasi group insurance.

14 M. Fricke's opinion (compare Fricke, M.: Das internationale Privatrecht der Versicherungsverträge nach Inkrafttreten der Rom-I-Verordnung, *Versicherungsrecht* No 10/2008, p. 448) that it is an editorial error has been rejected by jurisprudence (compare e.g. Gruber, U., P.: *Insurance Contracts* publ. in Ferrari, F., Leible, S.: *Rome I Regulation – The Law Applicable to Contractual Obligations in Europe*, Sellier, Munich, 2009, p. 123).

- **choice of law** made by parties under provisions of Article 3 of Rome I,
- if under provisions of Article 3 of Rome I no choice of law is made, then law of the country where the party required to effectuate **the characteristic performance of the contract** has his habitual residence or place of business shall apply,
- where it is clear from all the circumstances of the case that the contract **is manifestly<sup>15</sup> more closely connected with a country other** than the country of the party required to effectuate the characteristic performance of the contract, the law of that other country shall apply.

Within jurisprudence and legal practice it is still a matter of controversy **whether the characteristic performance in case the choice of applicable law had not been made shall be effectuated by the reinsurance company or the primary insurer.** Authors supporting the opinion that the law of the place of business of the primary insurer shall apply draw on the fact that the existence of the contract on reinsurance depends on the existence of the insurance contract in question. In the authors' opinion the reinsurer shall eventually provide only pecuniary performance, therefore it is the primary insurer, directly guaranteeing insurance coverage in the insurance contract, who shall effectuate the characteristic performance.<sup>16</sup> To support this opinion, M. Fricke states that the Solvency II Directive draws on the fact that the risk which is the subject of the reinsurance contract finds itself within the place of business of the branch of the primary insurer and therefore, in order to prevent confusion, it is recommended to apply the law of the place of business of the primary insurer.<sup>17</sup> According to

---

15 The word "manifestly" was inserted in Rome I Regulation additionally, compared to provisions of Article 4 par 5 of the Rome Convention, on the Law Applicable to Contractual Obligations of 1980 in order to accentuate the exceptional use of the escape clause and thus prevent its excessive use by courts of the EU Member States.

16 Compare D. Czernich in HEISS, Helmut, CZERNICH, Dietmar: *EVÜ – Das Europäische Schuldvertragsübereinkommen – Kommentar*, Vienna: Orac, 1999, p. 106–107, FRICKE, Martin: *Das internationale Privatrecht der Versicherungsverträge nach Inkrafttreten der Rom-I-Verordnung, Versicherungsrecht*, 2008, No 10, p. 446 and A. K. Schnyder and P. Grolimund in REITHMANN, Christoph, MARTINY, Dieter: *Internationales Vertragsrecht*, Cologne: Verlag Dr. Otto Schmidt, 2015, p. 1435. M. Fricke maintains his opinion even in the commentary to Rome I Regulation and presents a number of logical arguments to support the applicability of the law of the state where the primary insurer and the reinsurer have their place of business [comp. RAUSCHER, Thomas (ed.): *Europäisches Zivilprozess- und Kollisionsrecht: Kommentar (Rom I-VO, Rom II-VO)*, Munich: Sellier, 2011, p. 345–347]. Finally, he again concludes that it is appropriate to apply the law of the place of business of the primary insurer considering that it is the territory of the given state where the primary insurer concludes the majority of the contracts against which reinsurance is provided.

17 RAUSCHER, Thomas (ed.): *Europäisches Zivilprozess- und Kollisionsrecht: Kommentar (Rom I-VO, Rom II-VO)*, Sellier, Munich, 2011, p. 343–347. The same, D. H. Wendt in RAUSCHER, Thomas (ed.): *Europäisches Zivilprozess- und Kollisionsrecht: Kommentar (Rom I-VO, Rom II-VO)*, Cologne: Otto Schmidt, 2015, p. 350–352.

the second group of authors<sup>18</sup> it is the pecuniary performance of the reinsurer that shall be considered the characteristic performance in a reinsurance contract. Nevertheless, this is a purely academic debate as the majority of contemporary reinsurance contracts comprise provisions on the choice of law. The problem is that national legal orders usually do not comprise national legal regulations on reinsurance contracts and therefore a general regulation of contract law, which disregards the specificities of such contractual obligations, is applied to this type of contracts. Besides, some legal regulations exclude the application of national legal regulation of insurance contracts on reinsurance contracts.<sup>19</sup> Therefore, this area offers space for the introduction of the PRICL which could serve as a manual for concluding reinsurance contracts.

## *2.2 The Applicability of the PRICL to the Conclusion of Reinsurance Contracts with an International Element*

The authors of the PRICL do not wish for the incorporation of these principles into the national legal regulation or their taking on the form of a treaty or an EU regulation. The PRICL are to be used in combination with the commercial contract principles (and commercial usage), such as the UNIDROIT Principles for International Commercial Contracts from 2010 serving as a model during the development of the PRICL. The application of the PRICL is not confined to international reinsurance contracts, and therefore they can be applied to national reinsurance contracts as well.

The use of the PRICL is limited by mandatory standards that make part of the public law regulation governing the insurance industry.<sup>20</sup> The contractual parties are free to modify the text of the PRICL. The PRICL accentuate the need for respecting good faith at the conclusion of reinsurance contracts. The text of the PRICL will comprise the definition of a reinsurance contract, the draft of which has now been subject to a debate by the project group.<sup>21</sup> There has also been a debate over the insertion of the arbitration clause at the end of the text of

---

18 Compare BĚLOHLÁVEK, Alexander: *Římská úmluva, Nařízení Řím I (Rome Convention, Rome I Regulation), Volume I*, Prague: C. H. Beck, 2009, p. 1180, GRUBER, Urs, Peter: *INSURANCE CONTRACTS*. In FERRARI, F., LEIBLE, S.: *Rome I Regulation - The Law Applicable to Contractual Obligations in Europe*, Munich: Sellier, 2009, p. 112 or HEINZE, Christian: *Insurance contracts under the Rome I Regulation, Nederlands Internationaal Privaatrecht*, volume 27, 2009, No 4, p. 452.

19 It concerns e.g. Article L111-1 of the FIC, Section 209 of the GICA, Section 186 of the AICA and Section 101 par 1(1) of the Swiss Federal Act on Insurance from April 2, 1980 (as effective in January 1, 2011).

20 From the viewpoint of international private law these mandatory rules from the domain of financial law will usually be regarded as overriding mandatory provisions.

21 Under the draft Article No 1.2.1. of the PRICL the term "Contract on Reinsurance" refers to a contract under which one party, the reinsurer, in consideration of a premium, promises another party, the reinsured, cover against the risk of exposure to insurance and/or reinsurance claims under a contract of insurance.

the PRICL as it is expected that disputes over reinsurance are resolved under the PRICL in arbitration in states which enable settlement of disputes based on the rules chosen by the parties to the dispute.<sup>22</sup>

### *2.3 General Provisions of the PRICL*

Currently, the draft General Provisions of the PRICL have been debated over by members of the project group, primary insurers and reinsurance companies. The PRICL are interconnected with the UNIDROIT Principles for International Commercial Contracts from 2010 but they differ in that the PRICL can be applied to national contracts (i.e. without the international element) as well. In Article 1.1.3. the PRICL enable the parties to agree on an exclusion of the application or on the modification of some provisions. The formulation of this provision is based on the fact that if a primary insurer and a reinsurer choose to apply the PRICL for their reinsurance contract, exclusion of the application of all principles within the PRICL instead of just some of them is unacceptable.<sup>23</sup> Under Article 1.1.4 the Parties shall be bound by any usage to which they have agreed and by any practices which they have established between themselves. A trade usage which is regularly known to and observed by parties to a reinsurance contract shall be taken into account when interpreting the terms of the contract. Such a provision is not surprising and it gives consideration to the fact that the PRICL represents the general model of the best usage applied when concluding reinsurance contracts. As stated above, Article 1.1.5 of the PRICL regulates that the application of the PRICL shall not restrict the application of mandatory rules of national law and rules of international contracts. Thus, we can sum up that the application of the PRICL in legal relations with an international element shall be limited by the agreement of the Parties, usage (within the meaning of Article 1.1.4), by mandatory rules of law applicable in accordance with rules of private international law and by international treaties. Nevertheless, in the case of a dispute between the primary insurer and a reinsurer it may be difficult to determine the content of usage to which the Parties have agreed and the practices which they have established between themselves.<sup>24</sup>

### *2.4 Rights and Obligations of the Reinsurer and the Reinsured*

The draft Article 2.1.1. of the PRICL emphasizes that in the process of arrangement, conclusion and performance of the reinsurance contract, as well

---

22 Typically, it will concern states which incorporated Article 28 (Rules Applicable to the Substance of Dispute) of the UNCITRAL Model Law on International Commercial Arbitration from June 21, 1985, with amendments as adopted in July, 7, 2006 (United Nations documents A/40/17, annex I and A/61/17, annex I) in their legal orders.

23 Comments of H. Heiss on Article 1.1.3 adjoining the draft PRICL from September 13, 2016.

24 Compare this issue with BURLING, Julian, LAZARUS, Kevin: *Research Handbook on International Insurance Law and Regulation*, Cheltenham: Edward Elgar, 2011, p. 149.

as in the case of termination of a reinsurance contract the Parties to the contract have obligations expressly provided for in the PRICL, the applicable law or the UNIDROIT Principles for International Commercial Contracts from 2010. The Parties to the contract are enabled to adjust their rights and obligations by themselves if the PRICL, or the applicable law does not provide for otherwise (Article 2.1.2 of the PRICL). The respective provisions in fact reiterate General Provisions of the PRICL, and therefore their modification or exclusion in the course of further discussions may be presumed. Further, the PRICL define the principle of *Utmost Good Faith* in the following way: *Utmost Good Faith* signifies honesty and transparency in the process of exchanging information and requires that none of the Parties provides a significantly distorted interpretation or refuses to inform of essential facts that the Party has been or should have been aware of, would the Party have acted with due diligence. It has been considered that the application of this principle will be prevented from exclusion since its application has key importance for reinsurers who are frequently dependent on information regarding insurance risks which provide them with reinsurance. In the case that the contractual Party breaches the principle of *Utmost Good Faith*, such a Party shall be obliged to rectify damage inflicted upon the other Party depending on the circumstances of the case and seriousness of the damage. With regard to the above stated the reinsured is obliged to provide the reinsurer with complete and truthful information on all substantial circumstances concerning the insured insurance risks. A substantial circumstance is defined as a fact with a possible influence on the decision of a reasonable and circumspect reinsurer whether to conclude a reinsurance contract. Under Article 2.2.1 of the PRICL in case there arises a doubt whether a particular circumstance should have significant importance for the conclusion of a reinsurance contract, the burden of proof lies with the reinsurer. The reinsurer is thus entitled to ask the reinsured to provide all necessary information, data and documents concerning the insured insurance risks and damage incurred. The details of this obligation are usually provided for in the reinsurance contract. Naturally, the information duty of the reinsured comprises the obligation to inform the insurer in due manner and time on the insured events including information on a substantial rise in the risk of damage that should be covered by the reinsurer. Nevertheless, as a general rule, failure to meet this obligation will not result in withholding performance by the reinsurer, except if the breach of information duty by the reinsured would cause him excessive damage. The reinsured is entitled to provide benefits regarding all insured events covered by reinsurance, while keeping his power to compromise claims and litigate over benefits without any intervention from the part of the reinsurer. The reinsurer is obliged to provide benefits regarding all claims covered by the reinsurance in accordance with the *follow the fortunes* principle.<sup>25</sup>

---

25 The instructive determination of the *follow the fortunes* clauses can be found e.g. in the ruling of the U. S. District Court for the Southern District of New York in *Aetna Casualty and Surety Company v. Home Insurance Company* – 882 F. Supp. 1328 (S.D.N.Y. 1995) March

The reinsured is obliged to ask for the consent of the reinsurer to provide performance, if they had agreed so previously. In the case that the reinsurer wrongfully withholds his consent, he shall indemnify the incurred damages. Under Article 2.4.4. the burden of proof regarding the wrongfulness of the reinsurer's refusal to provide consent lies with the reinsured.

### 3 Conclusion

**The PEICL are an optional instrument** developed in order to overcome the obstacles connected with the cross-border conclusion of insurance contracts. At the same time, they are an outcome of a compromise, their authors coming from states with Anglo-Saxon as well as the Continental legal systems. Developed by a *Project Group on a Restatement of European Insurance Contract Law*, the PEICL belong in the Common Frame of Reference, and therefore provisions of the EU Directives, serving as an instrument of harmonization of legal regulations of the EU Member States and accentuating the protection of the weaker contractual party (the consumer, the policyholder and the insured), are reflected in their provisions. From the above stated it may be presumed that the PEICL will assert themselves in the domain of group insurance, where the PEICL represent a balanced standard of an optional regulation, being an outcome of legal comparison by renowned experts, theoreticians as well as practitioners. The legitimacy of their application is also supported by the fact that group insurance has not been given a complex treatment in the examined national legal orders (note: the French regulation being an exception in this regard).

**Currently, the PRICL are being shaped by drafters** with some of the regulations not yet provided with precise formulation. Therefore it is too early to evaluate the impact of the PRICL on a relatively closed reinsurance sector. Nevertheless, the project group has been making an effort to develop a draft of a so called *soft law* that would balance the interests of primary insurers and reinsurance industries and thus it is also too early to speculate on the importance of the PRICL for the conclusion of international reinsurance contracts. Considering the fact that the PRICL are closely connected with the UNIDROIT Principles for International Commercial Contracts of 2010 (note: some provisions have been included in the PRICL without almost any alteration) it will be necessary that the primary insurers and reinsurers accept not only the application of the PRICL in their contractual relations, but, to a large extent, the application of the UNIDROIT Principles for International Commercial Contracts of 2010 as well.

---

27, 1995. Since in the United States the *follow the fortunes* doctrine is not implied into reinsurance contracts, its proposed regulation within the PRICL is considered relevant (compare the analysis of relevant judicature in the United States covered in article HALL, ROBERT, M. *Should Follow the Fortunes/Settlements be implied into Reinsurance Contracts*, available online at <http://www.robertmhall.com/articles/FolForImpliedArt.pdf>)

# PROPERTY REGIMES OF SPOUSES AND PARTNERS IN NEW EU REGULATIONS – JURISDICTION, PROROGATION AND CHOICE OF LAW<sup>1</sup>

Lucia Valentová

Faculty of Law, Palacký University Olomouc, Czech Republic

*lucia.valentova@upol.cz*

VALENTOVÁ, Lucia. Property Regimes of Spouses and Partners in New EU Regulations – Jurisdiction, Prorogation and Choice of Law. *International and Comparative Law Review*, 2016, vol. 16, no. 2, pp. 221–240. DOI: 10.1515/iclr-2016-0026.

---

**Summary:** There are millions of international couples living and working in the EU. Not a small number of those face difficult time when their marriage or partnership comes to an end. On top of dealing with loss, the couples have to navigate through a lot of administrative and legal obstacles to figure out the division of their property located in different Member States or governed by different national law. These proceedings are lengthy and expensive. European Commission, aware of the issue their citizens face, introduced two proposals for regulations on matrimonial property and property of registered partners. In 2013 the proposals did not get the required unanimity, in 2016 they are being re-introduced in enhanced cooperation.

**Keywords:** Regulation, enhanced cooperation, property, marital property, registered partners, jurisdiction, applicable law, enforcement.

---

## Opening Remarks

The death of a spouse or a divorce is a difficult time for anyone. Citizens should not be burdened even more by complicated administrative or legal procedures that cost time and money. As more and more people fall in love, marry or create partnerships across borders, clear rules are needed to decide how joint property is divided in case of death, divorce or separation.<sup>2</sup> This is a statement from the European Commission's press release on 2<sup>nd</sup> of March 2016 introducing two proposals for regulations concerning issues of matrimonial property and property of the register partners hoping this time around, after a significant

---

1 This article was created with contribution from the Grant Agency of the Czech Republic for the grant No 16-10589S Foreign dispute resolution clauses – their validity and enforcement by Czech national courts.

2 EUROPEAN COMMISSION. *Property effects of marriage and registered partnership* [online]. ec.europa.eu, 29. 9. 2016 [cit. 30. October 2016]. Available at <[http://ec.europa.eu/justice/civil/family-matters/marriage/index\\_en.htm](http://ec.europa.eu/justice/civil/family-matters/marriage/index_en.htm)>.

compromise, the regulations aiming to save the time and money of international couples will get adopted by the Parliament and the Council.

## **1 Introduction**

The European Union has under the art. 81 para 1 of the Treaty on Functioning of the European Union, further “TFEU”, the competence to develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. In family law issues with cross-border implications, however, the legislation has to undergo a special legislative procedure and that is that the Council shall act unanimously after consulting the European Parliament.<sup>3</sup> The issues, that the Commission has seen as one of the most problematic for some time, is the division of the property in case of death of one spouse and when the marriage ends up in divorce or in legal separation. Because there are 28 different national point of views on the joint property division, this issue was difficult not only from creation of the rules point of view but even more so from the point of the adoption process. The situation is even more complicated when the property that is supposed to be divided belongs to the registered partners. It is because of this complexity that the Commission had to introduce the new regulations twice.

The European Commission proposals aim to clarify the property rights for international married couples or registered partnerships. The Commission wishes that the regulations will establish clear rules in cases of divorce or separation and bring an end to parallel and possibly conflicting proceedings in various Member States, for instance on property or bank accounts. By **enabling the married international couples to choose the law** that applies to their property in case of death or divorce, **enhancing legal certainty for registered partnerships** with an international dimension, by submitting the joint property to the law of the country where the partnership was registered, **bringing legal certainty for international couples**, married or in registered partnerships, through a coherent set of rules for identifying which country’s court is responsible and which law will apply and by **increasing the predictability for couples** by smoothing out the process for recognizing judgments, decisions and titles throughout the EU, the

---

3 Art. 81 para 3 TFEU – Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament. The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament. The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.

regulations will ultimately bring more legal clarity for international couples. Still the Commission needed to stress out that the regulations do not harmonize or change any of the substantive national laws on marriage or registered partnerships and are not aiming to push a sensitive agenda too hard.<sup>4</sup>

## **2 International Level**

Property regimes of spouses have always been a question that the international community had to deal with. Usually in connection with marriage itself but always as a part of the complex family law issues. Even national lawmakers are trying to adopt national rules to new trends and offer spouses and partners various regimes and modification.<sup>5</sup> Mainly the Hague Conference on International Private Law produced two conventions that touched this area. 1905 Hague convention concerning conflict of laws relating to the effects of marriage on the rights and duties of spouses in their personal relations and on their property and 1978 Hague Convention on the law applicable to matrimonial property regimes.

1905 Hague Convention only dealt with law applicable to the personal relations and property of the spouses. The contracting parties were Germany, Belgium, France, Italy, The Netherlands, Poland and free city of Gdansk, Portugal, Romania and Sweden. The Convention went to effect in all states by the end February 1915 and then all the Contracting States stepped out of the treaty by the August 1987.

The 1978 Convention also dealt exclusively with applicable law to matrimonial property regimes and was based on the principle of universality.<sup>6</sup> Although the principle of universality seemed promising for creation of an international cooperation and understanding, only a few states became the Contracting states. For Austria and Portugal, the Convention never came into effect and that left only France, Luxemburg and The Netherlands to cooperate.

The latest 2005 Convention on Choice of Courts Agreements in its art. 2 para 2 letter c) expressly excludes other family law matters, including matrimonial property regimes and other rights or obligations arising out of the marriage or similar relationships out of its scope of application. It is safe to conclude that there is no international cooperation in this matter at the moment. So to create the harmonized cooperation is of great importance as well of great difficulty.

---

4 EUROPEAN COMMISSION. *Property effects of marriage and registered partnership* [online]. ec.europa.eu, 29. 9. 2016 [cit. 30. October 2016]. Available at <[http://ec.europa.eu/justice/civil/family-matters/marriage/index\\_en.htm](http://ec.europa.eu/justice/civil/family-matters/marriage/index_en.htm)>.

5 Check COUPLES IN EUROPE. *The law for couples in the 27 EU countries* [online]. coupleseurope.eu, 2012 [cit. 30. October 2016]. Available at <<http://www.coupleseurope.eu/en/home>>.

6 According to Art. 2 the convention applies even if the nationality or the habitual residence of the spouses or the law to be applied by virtue of the following articles is not that of a contracting state.

### **3 European Law Level**

#### *3.1 History*

The adoption of European legislation on matrimonial and partners' property regimes was among the priorities identified in the 1998 Vienna Action Plan. The programme on mutual recognition of decisions in civil and commercial matters was adopted by the Council in late November 2000.<sup>7</sup> The Hague programme<sup>8</sup> which was adopted by the European Council three years later, set the implementation of the mutual recognition programme as a top priority and called on the Commission to submit a Green Paper on 'the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition', and stressed the need to adopt legislation by 2011. In 2003 research on these issues was conducted also on the academic level as requested by the Commission mostly thanks to the TMC Asser Institute and Département de droit international of the Catholic University of Leuven (UCL).<sup>9</sup> The Stockholm Programme, which was adopted by the European Council in December 2009, also stated that mutual recognition must be extended to matrimonial property regimes and the property consequences of the separation of unmarried couples. In the 'EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights',<sup>10</sup> adopted on 27 October 2010, the Commission identified uncertainty surrounding the property rights of international couples as one of the main obstacles faced by EU citizens in their daily lives when they tried to exercise the rights the EU conferred on them across national borders. To remedy this, it was announced that the Commission would adopt in 2011 a proposal for legislation to make it easier for international couples, either married or registered partners, to know which courts had jurisdiction to deal with their property rights and which law applied to their property rights. A group of experts, PRM/III, was set up by the Commission to draw up the proposal. The group was made up of

- 
- 7 EUROPEAN COMMUNITIES. *Official Journal L 12 Volume 44* [online]. ec.europa.eu, 16. 1. 2001 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/legal-content/CS/ALL/?uri=OJ:L:2001:012:TOC>>.
  - 8 EUROPEAN COMMISSION. *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Justice, Freedom and Security in Europe Since 2005: an Evaluation of The Hague Programme and Action Plan* [online]. eur-lex.europa.eu, 10. 6. 2009 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:52009DC0263&from=cs>>.
  - 9 BRUNO, Giorgio. *Commission's Proposals On Matrimonial Property Regimes and Property Consequences of Registered Partnerships* [online]. conflictsoflaws.net, 24. 3. 2011 [cit. 30. October 2016]. Available at <<http://conflictsoflaws.net/2011/commissions-proposals-on-matrimonial-property-regimes-and-property-consequences-of-registered-partnerships/>>.
  - 10 EUROPEAN COMMISSION. *EU Citizenship Report 2010* [online]. ec.europa.eu, 21. 10. 2010 [cit. 30. October 2016]. Available at <[http://ec.europa.eu/justice/citizen/files/com\\_2010\\_603\\_en.pdf](http://ec.europa.eu/justice/citizen/files/com_2010_603_en.pdf)>.

experts representing the range of professions concerned and the different European legal traditions. It met five times between 2008 and 2010. The Commission also held a public hearing on 28<sup>th</sup> September 2009 involving some hundred participants. The debates confirmed the need for an EU instrument for matrimonial property regimes that covered in particular applicable law, jurisdiction and the recognition and enforcement of decisions. A meeting with national experts was held in March 2010 to discuss the thrust of the proposal being drafted.<sup>11</sup>

On 16<sup>th</sup> March 2011, the Commission finally adopted proposals for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes<sup>12</sup> and a for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.<sup>13</sup> The proposals related to judicial cooperation in civil matters covering ‘aspects relating to family law’ where the Council has to act unanimously after consulting the European Parliament. The European Parliament delivered its opinion on 10<sup>th</sup> September 2013<sup>14</sup> and the Commission proposals were discussed in the Council Working Party on Civil Law Matters until the end of 2014. In December 2014, the Council decided to grant a reflection period to those Member States which continued to have difficulties for a single year. At its meeting on 3<sup>rd</sup> December 2015, the Council concluded that no unanimity could be reached for the adoption of the proposals for regulations on matrimonial property regimes and the property consequences of registered partnerships and that therefore the objectives of cooperation in this area could not be attained within a reasonable period by the Union as a whole.<sup>15</sup>

- 11 BRUNO, Giorgio. *Commission's Proposals On Matrimonial Property Regimes and Property Consequences of Registered Partnerships* [online]. conflictsoflaws.net, 24. 3. 2011 [cit. 30. October 2016]. Available at <<http://conflictsoflaws.net/2011/commissions-proposals-on-matrimonial-property-regimes-and-property-consequences-of-registered-partnerships/>>.
- 12 EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* [online]. ec.europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:en:PDF>>.
- 13 EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnership* [online]. ec.europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0127:FIN:en:PDF>>.
- 14 EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* [online]. ec.europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:en:PDF>>.
- 15 Explanatory Report to EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* [online]. ec.europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:en:PDF>>. and EUROPEAN COMMISSION. *Proposal for a Council Regulation on*

Although it seemed as unsuccessful attempt the Council noted that several Member States expressed their readiness to give positive consideration to the establishment of at least enhanced cooperation on the matters covered by the proposals.<sup>16</sup> From December 2015 to February 2016, 17 Member States, namely Sweden, Belgium, Greece, Croatia, Slovenia, Spain, France, Portugal, Italy, Malta, Luxembourg, Germany, the Czech Republic, the Netherlands, Austria, Bulgaria and Finland, addressed a request to the Commission indicating that they wished to establish enhanced cooperation between themselves in the area of the property regimes of international couples and, specifically, of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, and asking the Commission to submit a proposal to the Council to that effect.

The proposal for a Council Decision contained a detailed assessment of the legal conditions governing, and the appropriateness of, the introduction of enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships.

Even the Vice-President Frans Timmermans and the EU Justice Commissioner Věra Jourová stated, that the regulations represent legal certainty for thousands of European couples notwithstanding whether they are married or in registered partnerships. With regulations being only applicable in form of enhanced cooperation the rules will only help a fraction of international couples,<sup>17</sup> but it is certainly a progress. The EU Justice Commissioner added that the international couples face a difficult situation when their relationship comes to an end and it is not made any less easy for them when they need to deal with burdensome administrative procedures and unclear legal situations concerning often their

---

*jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnership* [online]. ec.europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0127:FIN:en:PDF>>.

16 Enhanced cooperation allows a group of at least nine member states to implement measures if all 28 Member States fail to reach agreement. Other EU countries keep the right to join when they want (Article 331 TFEU).

17 17 Member States have requested enhanced cooperation to adopt this legislation. They represent 67% of EU population, and a majority of international couples who live in the European Union. The non-participating Member States will continue to apply their national law (including their rules on private international law) to cross-border situations dealing with matrimonial property regimes and the property consequences of registered partnerships.

houses and livelihoods. The regulations pave the way for those Member States willing to go forward with this important initiative.<sup>18</sup>

### *3.2 Challenges*

The questions that the Commission posed were rather serious. What will happen to your home, when you get divorced and your husband is of different nationality? What will happen to your joined bank account when your spouse dies? What will happen when you and your partner have the same nationality but you have property and accounts abroad?

Nonexistence of adequate answers to these questions was the decisive impulse for the European Union. Giving the fact that the marriage as an institute is recognized in all 28 Member States and 9 of those, namely the Netherlands, Belgium, France, Denmark, Luxembourg, the United Kingdom (England and Wales), Spain, Sweden and Portugal, recognize marriage between two persons of the same sex and that the registered partnership exists in regulation of 18 Member States, precisely Austria, Belgium, Croatia, the Czech Republic, Denmark, Germany, Finland, France, Greece, Hungary, Ireland Luxembourg, Malta, Netherlands, Slovenia, some regions of Spain, Sweden and the United Kingdom and Belgium, France, Luxembourg, Malta and the Netherlands allow for registered partnership even between two persons of different sex, the clear rules on joint property of spouses and partners is a factor to consider when ensuring the fundamental rights of EU citizens, mainly the freedom to move and reside.<sup>19</sup>

Even though the numbers are clear every single time when EU introduced new regulation that could potentially touch the issue of spousal and partner property, the legislator chose to exempt property rights and regime from their

18 EUROPEAN COMMISSION. *Commission goes ahead with 17 Member States to clarify the rules applicable to property regimes for Europe's international couples* [online]. europa.eu, 2. 3. 2006 [cit. 30. October 2016]. Available at <[http://europa.eu/rapid/press-release\\_IP-16-449\\_en.htm](http://europa.eu/rapid/press-release_IP-16-449_en.htm)>.

19 Art. 20 TFEU Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship. 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States; (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; C 326/56 EN Official Journal of the European Union 26.10.2012 (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language. These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

scope of application. In case of Brussels I bis regulation<sup>20</sup> art. 1 para 2 letter a) states that this regulation shall not apply to *the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage*. Brussels II bis's<sup>21</sup> art. 1 para 3 letter f) exempts *trusts or succession* from the scope of application and finally Regulation on succession<sup>22</sup> does not deal with *questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage* as stated by art. 1 para 2 letter d).

The fact that majority of Member states recognize registered partnership and all of them regulate marriage is not as pressing as the actual statistics that show how relevant this issue is. Out of 16 million international couples at least 650 000 deal with issues of property distribution every day. According to data from 2007, 2,4 million new marriages were entered into and 13 %, around 310 000, out of them were with international element. Number of registered partnerships oscillates around 211 000 out of which 19,5%, 41 000, were with international element. 8,500 partnerships were dissolved by separation, 1,266 ended by death of one of the parties. To resolve all of the disputes estimated 1,1 billion EURO had to be spent. The Commission proposes to reduce the cost of litigation by one third.<sup>23</sup>

So far the typical case involving property dispute with international element unfolds like this. A Hungarian man and his Greek wife got married in Greece and lived there for three years after the wedding, then moved to Hungary where the marriage failed after a further two years. In this case, it is not clear whether Greek or Hungarian laws would cover the division of the couple's property. The liquidation of the matrimonial regime was governed by Greek substantive law under the Greek conflict of law rule (common habitual residence of the spouses at the time of marriage), whereas it is governed by Hungarian substantive law under the Hungarian conflict of law rule (common habitual residence of the

---

20 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

21 Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

22 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

23 EUROPEAN COMMISSION. Commission proposes clearer property rights for Europe's 16 million international couples [online]. europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <[http://europa.eu/rapid/press-release\\_IP-11-320\\_en.htm](http://europa.eu/rapid/press-release_IP-11-320_en.htm)>.

spouses at the time of divorce). How will the property regime be regulated with absence of harmonized rules?<sup>24</sup>

Without regulation, the complexity of property distribution proceedings manifest itself also in its lengthy. The Commission provides an example of twenty years of legal proceedings when a Spanish citizen married a man with double nationality: Dutch and German. The couple got married in Düsseldorf (Germany) in 1965. Their matrimonial property was (automatically) governed by a community regime; both spouses were aware of this. For cultural and practical purposes, the Spanish wife changed her nationality, after marriage, from Spanish to Dutch and the couple moved to the Netherlands. They owned property both in Germany and in Spain. At the time of the divorce, both parties had their habitual residence in the Netherlands and were of Dutch nationality, and therefore the proceedings took place in the Netherlands. During the divorce proceedings, the parties agreed that the husband would keep the property in Germany whilst the wife would keep the property in Spain, an agreement that was formalised by a letter signed by the husband confirming that he passed on the ownership rights of the Spanish property to his ex-wife. However, before the conclusion of the divorce the wife had to move back to Spain for health reasons and established her habitual residence there. This had unintended consequences when she decided, a year after the divorce, to name their children as the legal owners of the property in Spain. As she started the procedures for the transfer of the property rights, she discovered that she needed her ex-husband's consent to do so because she had been married under the community of property regime and the letter drafted by her ex-husband (which would have been sufficient to transfer property under Dutch law) was not recognised in Spain. The case came to an end after twenty years of legal proceedings and fees after her ex-husband agreed to sign before a notary a document transferring the property ownership rights to the children.<sup>25</sup>

### *3.3 Proposed Regulations*

The both regulations have the same structure. After preamble, scope and definitions, the regulations give rules on the jurisdiction. In the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes the rules on jurisdiction are divided into three categories based on the reason for dissolution of the marriage. In event of the death of one of the spouses the court determined in accordance with Regulation (EU) No 650/2012 on matters of the

---

24 EUROPEAN COMMISSION. *Clearer property rights for Europe's 16 million international couples – frequently asked questions* [online]. europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <[http://europa.eu/rapid/press-release\\_MEMO-11-175\\_en.htm](http://europa.eu/rapid/press-release_MEMO-11-175_en.htm)>.

25 EUROPEAN COMMISSION. *Clearer property rights for Europe's 16 million international couples – frequently asked questions* [online]. europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <[http://europa.eu/rapid/press-release\\_MEMO-11-175\\_en.htm](http://europa.eu/rapid/press-release_MEMO-11-175_en.htm)>.

succession shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that succession case.<sup>26</sup>

If the dissolution of the marriage is a result of divorce, legal separation or marriage annulment the proposed regulation connects the proceedings on property with proceedings on divorce, legal separation or marriage annulment under Brussels IIbis Regulation (EC) No 2201/2003.<sup>27</sup> Jurisdiction in matters of matrimonial property regimes shall be subject to the spouses' agreement where the court that is seized to rule on the application for divorce, legal separation or marriage annulment is the court of a Member State in which the applicant is habitually resident and he or she resided there for at least a year immediately before the application was made,<sup>28</sup> or is the court of a Member State of which the applicant is a national and the applicant is habitually resident there and resided there for at least six months immediately before the application was made,<sup>29</sup> or it is the court determined under Article 5 of Regulation (EC) No 2201/2003 in cases of conversion of legal separation into divorce, or is seized under Article 7 of Regulation (EC) No 2201/2003 in cases of residual jurisdiction. The spouses have to agree on the jurisdiction of court determined after art. 5 of the proposed regulation. If the agreement is concluded before the court is seized to rule on matters of matrimonial property regimes, the agreement shall comply with rules on prorogation of the court.

When no courts of a Member State has jurisdiction according to above mentioned rules, especially in cases where the marriage is not being dissolved, e.g. when the spouses are merely altering their property regime, jurisdiction to rule on a matter of the spouses' matrimonial property regime shall lie with the courts of the Member State either in whose territory the spouses are habitually resident at the time the court is seized, or failing that in whose territory the spouses were last habitually resident, insofar as one of them still resides there at the time the court is seized, or failing that in whose territory the respondent is habitually

---

26 Art. 4 EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* [online]. ec.europe.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:en:PDF>>.

27 Art. 5 EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* [online]. ec.europe.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:en:PDF>>.

28 In accordance with Article 3 (1) (a) fifth indent of Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Regulation Brussels IIbis).

29 In accordance with Article 3 (1) (a) sixth indent of Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Regulation Brussels IIbis).

resident at the time the court is seized and finally there, where is the common nationality of the spouses' at the time the court is seized.<sup>30</sup>

Newly the spouses may consent on a court they wish will have the jurisdiction over their property case. This prorogation is allowed only in cases where the marriage is not dissolved because of the death of the spouse, divorce legal separation or marriage annulment. Thus only in cases covered by Article 6, the parties may agree that the courts of the Member State whose law is applicable in accordance with Articles 22, 26 (1) (a) or (b) or the courts of the Member State of the celebration of the marriage shall have exclusive jurisdiction to rule on matters of their matrimonial property regime. The Articles 22, 26 para 1 letter a) or b) point to courts of Member State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded, or Member State of nationality of either spouse or future spouse at the time the agreement is concluded. Furthermore, spouses may choose the courts of Member State of the spouses' first common habitual residence after the celebration of the marriage or, failing that of the spouses' common nationality at the time of the celebration of the marriage. The agreement on choice of court has to be expressed in writing and dated and signed by the parties. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

The proposal of the regulation in matters of matrimonial property regimes further regulates jurisdiction based on the appearance of the defendant, alternative jurisdiction, subsidiary jurisdiction, forum necessitatis rule, counterclaims, limitation in proceedings, seizing the court, examination as to jurisdiction and admissibility, lis pendens, related actions and provisional including protecting measures.<sup>31</sup>

Above interesting is the question of alternative jurisdiction. Since the proposal of the regulation on matrimonial property regimes is merely in enhanced cooperation, the regulation foresees that the national private international law may not recognise the marriage in question for the purposes of matrimonial regime proceedings. It is only by the way of the exception, but the court that would have had the jurisdiction according to art. 4 to 8 may decline its jurisdiction based on the non-recognition of the marriage. If the court decides to do so, it shall do it without undue delay. Where a court having jurisdiction under Articles 4 or 6 declines jurisdiction and where the parties agree to confer jurisdiction to

30 Art. 6 EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* [online]. ec.europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:en:PDF>>.

31 EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* [online]. ec.europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:en:PDF>>.

the courts of any other Member State in accordance with Article 7, jurisdiction to rule on matrimonial property regime shall lie with the courts of that Member State. In other cases, jurisdiction to rule on the matrimonial property regime shall lie with the courts of any other Member State under Articles 6, 8 or the courts of the Member State of the celebration of the marriage.

As to the applicable law the regulation is based on the principle of universality and unity.<sup>32</sup> The unity in this case means that the law applicable to a matrimonial property regime under Articles 22 or 26 shall apply to all assets falling under that regime, regardless of their location. The regulation prefers spouses or future spouses to choose the applicable law to their property regime provided that it is the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded, or the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded. Spouses may decide to change the law applicable on their property regime during the marriage. The regulation allows spouses to agree otherwise, however the change of the law applicable to the matrimonial property regime made during the marriage shall have prospective effect only.<sup>33</sup> Any retroactive change of the applicable law shall however not adversely affect the rights of third parties deriving from that law.<sup>34</sup>

In the absence of a choice-of-law agreement, the law applicable to the matrimonial property regime shall be the law of the State of the spouses' first common habitual residence after the celebration of the marriage or, if there is no such State, the law of State of the spouses' common nationality at the time of the celebration of the marriage or, failing that, with which the spouses jointly have the closest connection at the time of the celebration of the marriage, taking into account all the circumstances. If the spouses have more than one common nationality at the time of the celebration of the marriage, the law of State of common nationality rule cannot be applied.

By way of exception and upon application by either spouse, the court having jurisdiction to rule on matters of the matrimonial property regime may decide that the law of a State other than the State whose law is applicable shall govern

---

32 Art. 20 and 21 EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* [online]. ec.europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:en:PDF>>.

33 Art. 22 para 2 EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* [online]. ec.europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:en:PDF>>.

34 Art. 22 para 3 EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* [online]. ec.europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:en:PDF>>.

the matrimonial property regime if the applicant demonstrates that the spouses had their last common habitual residence in that other State for a significantly longer period of time than in the State the application of art 26 para 1 letter a pointed at and that the both spouses had relied on the law of that other State in arranging or planning their property relations. The law of that other State shall apply as from the celebration of the marriage, unless one spouse disagrees. In the case of disagreement, the law of that other State shall have effect as from the establishment of the last common habitual residence in that other State. This rule however shall not be used, when the spouses have concluded a matrimonial property agreement before the establishment of their last common habitual residence in that other State.

Apart from the rules on choice of law and law applicable with absence of the choice, the regulation introduces provisions on formal validity of the agreement on a choice of applicable law, consent and material validity, formal validity of a matrimonial property agreement and scope of the applicable law, that shall determine among other the classification of property of either or both spouses into different categories during and after marriage, the transfer of property from one category to the other, the responsibility of one spouse for liabilities and debts of the other spouse, the powers, rights and obligations of either or both spouses with regard to property, the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property, the effects of the matrimonial property regime on a legal relationship between a spouse and third parties, and the material validity of a matrimonial property agreement. The regulation does not omit to regulate effects in respect of third parties, adaptation of rights in rem, overriding mandatory provisions, public policy, exclusion of renvoi, territorial conflicts of laws, inter-personal conflicts of laws and non-application of the Regulation to internal conflicts of laws.<sup>35</sup>

When regulating the process of recognition, enforceability and enforcement of the decisions under the proposed regulation, the EU lawmaker choose to link this procedure to the recognition and enforcement under regulation 650/2012.<sup>36</sup> A decision given in a Member State shall be recognised in the other Member States without any special procedure being required.<sup>37</sup> Naturally the regulation

35 EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* [online]. ec.europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:en:PDF>>.

36 Explanatory Report to EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* [online]. ec.europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:en:PDF>>.

37 Art. 36 para 1 EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* [online]. ec.europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at

in subsequent article offers grounds for non-recognition, which are the same as in all EU regulations, namely, that the recognition is manifestly contrary to public policy in the Member State in which recognition is sought, the decision was given in default of appearance under said circumstances, it is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought or with an earlier decision given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.<sup>38</sup> Further the regulation provides rules for prohibition of review of jurisdiction of the court of origin and to the substance of the decision, enforceability and determination of domicile, declaration of enforceability, appeal against the decision on the application for a declaration of enforceability, legal aid and interestingly a provision of art. 38 on fundamental rights. The regulation states expressly that the rules on recognition shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles recognised in the Charter of Fundamental Rights of the European Union, in particular Article 21 thereof on the principle of non-discrimination.<sup>39</sup>

The Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships is quite similar to the proposed regulation on matrimonial property issues with few differences in jurisdiction and applicable law rules. Firstly, since the area of the registered partnership and its legal implications is new and complex, the regulation provides definitions of key terms. All of these are meant to be interpreted autonomously for the purposes of the regulation.<sup>40</sup> The EU is not forcing any new regulation on the Member States. The proposed regulation for example understands under the notion ‘registered partnership’ the regime governing the shared life of two people which is pro-

---

<<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:en:PDF>>.

38 EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* [online]. ec.europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:en:PDF>>.

39 Art 21 of the Charter of Fundamental Rights of the European Union – Non-discrimination 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. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

40 Explanatory Report to EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnership* [online]. ec.europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0127:FIN:en:PDF>>.

vided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation and by 'property consequences of a registered partnership' the set of rules concerning the property relationships of the partners, between themselves and in their relations with third parties, as a result of the legal relationship created by the registration of the partnership or its dissolution.<sup>41</sup>

In case that the registered partnership is dissolved on grounds of death of one of the partners, the jurisdiction to rule on matters of the property consequences of the registered partnership arising in connection with that succession case will according to art. 4 lie with the court seized under provisions of regulation on succession. So in this case the both regulation follow the same pattern. Going on further it is no longer possible. When the property consequences of the registered partnership are based on dissolution or annulment of the partnership, the proposed regulation cannot link the jurisdictions based on the rules of Brussels IIbis regulation. The EU has deal with this issue by stating that where a court of a Member State is seized to rule on the dissolution or annulment of a registered partnership the courts of that State shall have jurisdiction to also rule on the property consequences of the registered partnership arising in connection with that case of dissolution or annulment, where the partners so agree. The agreement has to be concluded before the court is seized and shall comply with rules on prorogation.<sup>42</sup>

In all other case the jurisdiction to rule on the property consequences of a registered partnership shall lie with the courts of the Member State in whose territory the partners are habitually resident at the time the court is seized, or failing that in whose territory the partners were last habitually resident, insofar as one of them still resides there at the time the court is seized, if there is no such court than in whose territory the respondent is habitually resident at the time the court is seized, or failing that, of the partners' common nationality at the time the court is seized. The last option when the court cannot be determined by any of the rules above, the jurisdiction will lie under whose law the registered partnership was created. Moreover, in all of these cases the parties may agree that the courts of the Member State whose law is applicable in accordance with Articles 22 or 26 para 1 or the courts of the Member State under whose law the registered

---

41 Art 3 para 1 letters a) and b) EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnership* [online]. ec.europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0127:FIN:en:PDF>>.

42 Art. 5 EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnership* [online]. ec.europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0127:FI N:en:PDF>>.

partnership was created shall have exclusive jurisdiction to rule on the property consequences of their registered partnership. The prorogation of the jurisdiction is for the registered partners' property distribution linked to the courts of the State where the partners or future partners, or one of them, is habitually resident at the time the agreement is concluded, or the law of a State of nationality of either partner or future partner at the time the agreement is concluded, or the law of the State under whose law the registered partnership was created. The agreement the partners will concluded in order to choose the preferable court shall be expressed in writing and dated and signed by the parties. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.<sup>43</sup>

Apart from the jurisdiction based on the appearance, the proposal for regulation on property of registered partners follows the regulation on matrimonial property also with regulation of alternative jurisdiction. If the Member State, whose courts' would have had jurisdiction under the regulation does regulate the institution of registered partnership, it may decline its jurisdiction without undue delay. The parties again may with accordance to rules on prorogation confer jurisdiction to the courts of another available Member State. In other cases, jurisdiction to rule on the property consequences of a registered partnership shall lie with the courts of any other Member State under rules on jurisdiction in other cases and jurisdiction based on appearance.<sup>44</sup>

Especially for the regulation on partners' property the art. 9 para 3 gives a rule that excludes application of this article as whole when the parties have obtained a dissolution or annulment of a registered partnership which is capable of recognition in the Member State of the forum. The wording "capable of recognition" follows the articles 33–34 of Brussels Ibis regulation. This rule is guarantying the access to justice for the registered partners and is preventing Member States to claim public policy exception in situation where they de facto have recognized the partnership when giving the decision on its annulment or dissolution.

As to the regulation of applicable law the partners or future partners have according to art. 22 right to designate or to change law of the Member Stat that law attaches the property consequences to the institution of the registered partnership and that it is the law of the State where the partners or future partners,

---

43 Art. 6 EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnership* [online]. ec.europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0127:FIN:en:PDF>>.

44 Art. 8 EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnership* [online]. ec.europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0127:FIN:en:PDF>>.

or one of them, is habitually resident at the time the agreement is concluded or the law of a State of nationality of either partner or future partner at the time the agreement is concluded, or finally the law of the State under whose law the registered partnership was created. The partners may again change the law during the course of their registered partnership but they have to mind the rights of third parties deriving from that law.

If the partners do not choose the applicable law, the law applicable to the property consequences of registered partnerships shall be the law of the State under whose law the registered partnership was created. Out of this general rule, there is an exception the partners have to apply for. The court having jurisdiction to rule on matters of the property consequences of a registered partnership may decide that the law of other Member State shall govern the property consequences of the registered partnership if the law of that other State attaches property consequences to the institution of the registered partnership and if the applicant demonstrates that the partners maintained their last common habitual residence in that State for a significantly long period of time and that they both had relied on the law of that other State in arranging or planning their property relations. The law shall then apply as from the creation of the registered partnership, unless one partner disagrees. In that case the law of that other State shall have effect as from the establishment of the last common habitual residence in that other State. Application of this exception may not adversely affect the rights of third parties deriving from the law of the Member State where the partnership was created, unless the partners have concluded a partnership property agreement before the establishment of their last common habitual residence in that Member State.

In the rest of the Regulation on matrimonial property and partners' property match. The reason why the Commission submitted two proposals for two separate regulations is however in the difference in features and legal impact of matrimonial property and property of registered partners.<sup>45</sup>

#### **4 Ordre Public Guarantees**

Controversy of the subject matters of the regulations caused the impossibility to reach unanimity among all 28 Member states. Denmark in accordance with Articles 1 and 2 of the Protocol on the position of Denmark<sup>46</sup> did not take part in the adoption of the proposed Regulation and is therefore not bound by it nor

---

45 Explanatory Report to EUROPEAN COMMISSION. *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnership* [online]. ec.europa.eu, 16. 3. 2011 [cit. 30. October 2016]. Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0127:FIN:en:PDF>>.

46 THE LISBON TREATY. *Protocol on the Position of Denmark* [online]. lisbon-treaty.org [cit. 30. October 2016]. Available at <<http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/protocols-annexed-to-the-treaties/851-protocol-on-the-position-of-denmark-851.html>>.

it is a subject to its application. In accordance with Article 1 and 2 of Protocol on the position of the United Kingdom and Ireland<sup>47</sup> the both countries did not give notice of their wish to take part in the adoption and application of the proposed Regulation. Other Member States are free to join the regulations if they decide to do so.

The principle of universal application of the Regulations may however point to the law of a non-cooperating Member State, as well as any rule on jurisdiction except of the *lex loci celebrationis*, mainly the alternative jurisdiction rule. These rules allow for a Member State that does not have national legislation regulating matrimonial property regimes in particularly formed marriages and moreover does not recognize registered partnership or even more, it is contrary to its public policy, to face another Member States court's decision on this issue forcing it to act.

Many Member States, who objected against the first regulations and who are not cooperating on the second, expressed concerns about their public policy and demanded guarantees that no regulation will be forced upon them and they would not have to recognize and enforce decisions in issues they do not regulate.<sup>48</sup>

In case of Slovakia, who is not cooperating, the representation at European Commission advocated for guarantees in respect of both regulations. In case of matrimonial property regimes Slovakia demanded that from the scope of application will be the issues of existence, validity or recognition of a marriage. The definition of „marriage“ is to be left to national systems of the Member States. Slovakia firmly stands on position, that valid marriage may occur only between a man and a woman.<sup>49</sup> If in front of a Slovak court a decision of another Member State on matrimonial property regime arising from the marriage, which, according to Slovak regulations is not valid (e.g. the spouses are of the same sex or the marriage was entered in by a minors, polygamous marriage etc.), the regulation has to allow the court to decline jurisdiction. Slovak courts cannot be forced to decide on property regimes of marriage, which, according to the Slovak law, do not exist. Spouses from such unrecognized marriage would have to resolve

---

47 THE LISBON TREATY. *Protocol on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice* [online]. lisbon-treaty.org [cit. 30. October 2016]. Available at < <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/protocols-annexed-to-the-treaties/669-protocol-on-the-position-of-the-united-kingdom-and-ireland-in-respect-of-669.html>>.

48 VNUKOVÁ, Jana. Niektoré aspekty navrhovanej úpravy majetkových režimov manželov a registrovaných partnerov navrhovaná v Evropskej Únii. In LENHART, Michal, GIBA, Marián et al. (eds.) *Milníky práva v Stredoeurópskom priestore*. Bratislava: Univerzita Komenského v Bratislave Právnická fakulta, 2016, s. 121–126.

49 See ALIANCIA ZA RODINU. *Rodina je najdôležitejšia hodnota v Európe, ale ...* [online]. alianciazarodinu.sk [cit. 30. October 2016]. Available at <<http://www.alianciazarodinu.sk/preco-chranit-rodinu/>>.

property regime at a court other than Slovak. If a foreign court decision is subsequently seeking recognition in the Slovak Republic, the recognition and enforcement of such decision on matrimonial property regimes will not mean recognition of the marriage by that decision. This guarantee will mean that Slovak courts will not have to acknowledge the existence of another Member State's marriages in Slovak territory. The recognition is necessary only with respect to the related property rights.

In case of property consequences of registered partnerships, Slovak representation advocated again that the existence, validity or recognition of a registered partnership will be excluded from the scope and demanded that Member State, whose law does not regulate registered partnerships, is not forced by the regulation to include and regulated registered partnership in its national law. If one of the parties would like to sue on the property consequences of registered partnerships in Slovakia, the courts would have had the right to decline the jurisdiction. Slovak court is not obliged to rule on the property consequences of registered partnerships, as this institute does not exist in the Slovak law. If a party would seek to recognize and enforce a foreign court decision in the Slovak Republic, recognition and enforcement of that decision on the property consequences of registered partnerships does not imply recognition of registered partnership by the decision.<sup>50</sup>

Simply put, Slovakia, along with other traditional Member States, needed to be ensure that it will keep the right to decline jurisdiction or recognition and enforcement of any court decision on matrimonial property in case of marriages that are contrary to the Slovak public policy and property of registered partners since this issue is not even regulated. Even though there is undeniable proof of thousands of international couples that are not deemed to be traditional, some Member States didn't want to be pressured by the European Union to recognize foreign court decision based on these relationships and indirectly recognizing this forms as having legal consequences but didn't want to closed the door to potential cooperation as well.

## **5 Conclusion**

Migration is a backbone of the EU Single market. Freedom to move and reside freely in the territory of the Member States is protected under art. 20 para 2 letter a) of TFEU. It is, however, difficult for the citizens of EU truly freely move within EU when relationships with international element, which are inherently part of the choice to live outside of the Member State of one's habitual residence,

---

50 VNUKOVÁ, Jana. Niektoré aspekty navrhovanej úpravy majetkových režimov manželov a registrovaných partnerov navrhovaná v Evropskej Únii. In LENHART, Michal, GIBA, Marián et al. (eds.) *Milníky práva v Stredoeurópskom priestore*. Bratislava: Univerzita Komenského v Bratislave Právnická fakulta, 2016, s. 124.

are so difficult, time consuming and expensive to resolve when they get complicated.

The European Union tries to react on the most pressing issues and presents more and more regulations and directives that should simplify court proceedings and ensure access to justice. After the rules on jurisdiction, enforcement and recognition in civil and commercial matters, matrimonial matters, maintenance obligations, issues of inheritance and law applicable on divorce and separation of the marriage, the European Union tried to face another obstacle in matrimonial property regimes and property of registered partners and didn't fail, but didn't succeed.

The proposals for new regulation should enter into force in 2017 and without doubt bring more legal certainty to international couples, at least the most of them. European Union is unable in recent years<sup>51</sup> to present crucial regulations in family law matters that would reach unanimity and truly regulate and harmonize rules for international couples. It times when the whole world is in crisis of the values the European Union is not leading by example.

Regulations, even as enhanced cooperation, on matrimonial property regimes and property regimes of registered partners are indisputably a step forward. They are a result of careful compromise and when upholding their public policy guarantees, they may one day transfer to fully binding regulations. At this point it is safe to say that they are a great achievement in the field of international cooperation on property matters.

---

51 See for example Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

## **INSTRUCTIONS FOR THE AUTHORS AND PUBLISHING CONDITIONS**

- ICLR seeks to publish original research papers that make a significant contribution to legal studies in the field of international, European and comparative law. Discussions, book reviews, notes and information's are also accepted for publication.
- No fees or charges are required for manuscript processing or publishing of the papers.
- Authors are encouraged to submit their articles electronically – via email at editors address: [iclr@upol.cz](mailto:iclr@upol.cz).
- Sending a manuscript indicates that papers is not actively under consideration for publication with other journals.
- Manuscripts should not extend recommended extent of:
  - 15–25 pages (27000–45000 characters, including spaces) for articles
  - 2–10 pages (3600–18000 characters, including spaces) for discussions, book reviews, notes and information's.
- Manuscripts should be written in English (occasionally in German and French) and must include: title, names, e-mail addresses and affiliations of all authors, abstract (100–150 words), keywords (5–10), introduction, main text and conclusion. The preferred format is MS Word (.doc and .docx documents). Text of papers should be properly divided into separate paragraphs; each paragraph starting in a new line. For quotations and notes please, use the automatic function – Insert / Footnote. All notes should be numbered automatically.
- For footnotes, references and quotations style see journals' Style Sheet (available at [iclr.upol.cz](http://iclr.upol.cz)).
- All manuscripts fulfilling the formal requirements undergo a double blind review process provided by the members of the Editorial Board and two anonymous external reviewers. The double blind process means that neither the author knows the reviewer's identity nor the reviewer knows the name of the author or other reviewer. The manuscript is accepted, accepted conditionally or rejected on the basis of the reviewers' suggestions. If accepted conditionally, the author is supposed to correct it while taking the remarks of the reviewers into account and the reviewers are entitled to ask for re-evaluation of the paper. The final decision is made by the Editor-in-Chief. Finally, accepted manuscripts are edited in accordance with the practices of the journal.
- Editors reserve the right to refuse any contribution which does not comply with the requirements of form and content or which will be assessed as not suitable for publishing by the reviewer.
- The editors reserve the right to decide on the need of author's corrections. If the editor's office finds there is no necessity of author's corrections, the author is not authorized to require it.