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EDITORIAL

In the first half of 2019 the Editorial Board was informed that our title had been evaluated for inclusion in the *Scopus* database by the Content Selection & Advisory Board, which advised that our journal would be accepted for inclusion. We are particularly satisfied at this development since, notwithstanding the presence of "CLR" in other recognizable databases, the admission to *Scopus* provides us with additional incentives to maintain and improve the journal's academic quality.

This year's issue of the "CLR" includes three studies, nine articles and one case-law note. Traditionally, the contributions relate both to private and public law. In addition to studies covering interesting comparative perspectives from Latin America and Asia, there are several articles dealing with legal issues within the Council of Europe and the European Union. The present volume's authors have discussed also some intriguing issues of constitutional law in Poland and abroad.

I wish to welcome new members of the Academic Board who kindly agreed to accept our invitation: Professor Fabian Salvioli from the National University of La Plata (Argentina), UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non repetition, and Professor Gabriella Mangione from the University of Insubria (Italy).

My special words of thanks go to our Editorial Assistants: Dr. Daria Gęsicka and Dr. Julia Kapelańska-Pręgowska. I also wish to thank Mr. Christopher Wright for his continuing, excellent support as language adviser and proof-reader.

Prof. Michał Balcerzak

Editor-in-Chief

STUDIES

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Rafael Carrano Lelis*

IN SEARCH OF LOST LATIN-AMERICAN COLOURS: AN ANALYSIS OF THE CONSTITUTIONAL PROTECTION OF LGBTI RIGHTS IN LATIN AMERICA

Abstract

This study investigates the constitutional protection of LGBTI rights in South America and Mexico. Under the theoretical framework of Nancy Fraser's postwestphalian democratic justice, it questions whether the constitutional protection of these rights in such countries is satisfactory in order to move forward towards the accomplishment of justice to LGBTI persons. The research conducts an empirical study and undertakes a qualitative analysis using the techniques of literature review, documental analysis, and survey. Among the results, it was determined that only two of the analysed constitutions expressly prohibits both sexual orientation – and gender identity-based discrimination. Only one of them uses gender-neutral language in the provision regarding civil union and, therefore, enables the union between two people of the same gender. Under another perspective, the answers of the majority of the Latin-American organizations in the survey indicated that the constitutional protection of LGBTI rights is unsatisfactory in their countries. Therefore, after the analysis of all the data obtained in the research, it was possible to conclude that the constitutional protection is precarious and does not guarantee the most basic rights to LGBTI population.

Keywords

comparative constitutional law – LGBTI rights – Latin-American constitutionalism – social movements – sexual orientation – gender identity

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I. Introduction

In search of lost time, by Marcel Proust,[1] was one of the first literary productions to focus explicitly on the dilemmas of homosexuality; and, according to some interpretations, even transgender issues. That is why it became an inspiration for the title of this paper. Although the discourse used by the author may be the subject of several criticisms, the representative role played by the novelist's writings is undeniable. The narrative, especially regarding the character of the Baron de Charlus, enables the reader to identify one of the most recurrent forms of violence experienced by lesbians, gays, bisexuals, trans, and intersex (LGBTI) persons[2]: the violence of the closet[3]. Despite significant achievements, many of these people, under the fear and guilt created by society, are forced to hide their true condition, sometimes even from themselves, limiting their freedom and their full existence as human beings. It is an

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[1] Proust, Marcel. *Em busca do tempo perdido: Sodoma e Gomorra – volume quatro*. São Paulo: Globo, 2008.

[2] The use of the acronym "LGBTI" represents only one of the possibilities, within a very diverse universe of acronyms to represent this sector of the population. Its use is not intended to exclude any other forms of identity or sexuality that are not directly encompassed by its letters. Its application was defined precisely because it is considered to be one of the most inclusive forms of referring to the diverse members of this population. In addition, in coherence with the theoretical framework adopted, it is understood to be closer to a transformative remedy, as will be seen later, when using an acronym with a lower number of letters and yet representing a great diversity of individuals; such as using the letter "T" and the word "trans" to refer to the various members of the trans population. This is because the smaller number of categorizations implies less differentiation, stigmatization, and hierarchization of identities, thus, destabilizing and deconstructing the establishment of standards and allowing the recognition of more fluid identities, without erasing certain specificities.

[3] The word "closet" is used here, and in the rest of this paper, metaphorically. It represents, as constructed by Sedgwick, the oppression experienced by LGBTI, condemned to hide their sexuality or gender identity. Moreover, even if they do not want to hide it, they are obliged to reveal it daily, at each new environment they attend to, because of the presumption of heterosexuality and cisgender identity in our society. See: Sedgwick, Eve Kosofsky. *Epistemology of the closet*. Berkeley and Los Angeles: University of California Press, 2008.

oppression invariably suffered by LGBTI in several, if not all, the days of their lives. But it is not the only one.

Sexual orientation and gender identity that are seen as deviant are used to discriminate against LGBTI, preventing them from accessing the most basic civil, political, economic, social, and cultural rights. Only in 1990, the World Health Organization (WHO) removed homosexuality from the International Classification of Diseases (ICD). Still in 2019, transsexuality remains inserted in this classification[4]. It was merely withdrawn from the chapter of mental disorders, reallocated in the section on "conditions relating to sexual health".

Moreover, LGBTI still face daily physical and symbolic violence. They are harmed and murdered for no reason other than their own condition. They are condemned for being born and for sustaining their existence, for believing that they are free to love and express themselves. All these factors motivated the beginning of this research.

An initial concern revolved around how justice could be achieved for LGBTI people, and how to ensure dignity for their lives. However, this is an extremely complex dilemma and cannot be solved unless by exploring its ramifications in several other dilemmas. And that is what this article seeks to do: to advance in the investigation of one of the many dimensions that involve this greater problem. In this sense, adopting as a theoretical framework the theory of postwestphalian democratic justice, proposed by Nancy Fraser, the central question of this article asks whether the constitutional protection of LGBTI rights in Latin America is satisfactory. The initial hypothesis, based on the recorded numbers of assaults and assassinations committed against these persons, indicates that the protection would be insufficient, because it could not protect them from such events.

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[4] It should be noted that, in the case of trans people, the discussion about depathologization should take into account the different realities and contexts. This is because, as Berenice Bento points out, in many countries access to gender affirming surgery and hormonal treatment depends on the classification of trans identity as a disease. Thus, the struggle for depathologization must always be accompanied by the recognition of surgery and hormonal treatment as fundamental rights (derived from the right to health) of trans persons, which must be provided free of charge by the State. See: Bento, Berenice. "Na Escola se Aprende Que a Diferença faz a Diferença". *Revista Estudos Feministas* 19, no. 2 (2011): 549–559.

In order to test the hypothesis, it was followed by a juridical-comprehensive type of investigation. According to Gustin and Dias,[5] this modality of research consists in the decomposition of the legal problem at various levels for its in-depth study. In this sense, the analysis of the problem was divided into two aspects: 1) the normative constitutional provision of rights for LGBTI; 2) the LGBTI movement's perception of the constitutional protection and concretization of their rights. Judicial decisions were excluded from the examination because it is considered that the absence of provision in the constitutional text already demonstrates a protective insufficiency[6], since a written constitutional clause establishing those rights is essential for the realization of its symbolic value, as well as for the guarantee of greater legal certainty.

In addition, an imaginative approach to comparative law was adopted, as proposed by Geoffrey Wilson.[7] According to the author, unlike traditional comparative law, which limits itself to comparing texts and legal systems for their better understanding, an approach that uses an "informed imagination" is not limited to traditional methods nor to what is formally designated as law. Therefore, it is concerned with the social aspects of research. In this sense, we also highlight the markedly interdisciplinary character of this work, adopting a bibliography that includes not only legal texts, but also writings from psychology, philosophy, sociology, politics, history, linguistics, and literature.

For the development of the investigation, the techniques of literature review, documental analysis, and survey were applied. An empirical research of eminently qualitative character was conducted, although on some occasions quantitative elements were also emphasized. The literature review was used to better understand the theoretical framework adopted, as well as to obtain secondary data regarding the protection of LGBTI rights. In turn, the documental analysis consisted in examining the

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[5] Gustin, Miracy Barbosa de Sousa, and Maria Tereza Fonseca Dias. *(Re)pensando a pesquisa jurídica: teoria e prática*. Belo Horizonte: Del Rey, 2013.

[6] This is especially important in civil law legal systems such as the ones that have been analysed in this research.

[7] Wilson, Geoffrey. "Comparative Legal Scholarship". In *Research Methods for Law*, eds. Mike Mcconville and Wing Hong Chui (Edinburgh: Edinburgh University Press, 2007), 87–103.

constitutions from all South American countries and Mexico, in the search for the protection of specific rights regarding LGBTI persons. Finally, the survey, directed to Latin American organizations that work with LGBTI issues, made it possible to capture the opinion of the movement about the constitutional protection of their rights, favouring a bottom-up legal approach.

Thus, the overall objective of the work was to discover the extent and form of the constitutional protection of LGBTI rights in South America and Mexico. In addition, the research had as specific objectives: 1) the realization of a wide literature review on theories of justice and recognition; as well as the revision and careful readings of texts on constitutional interpretation, queer theory, Latin American constitutionalism, and LGBTI rights; 2) the reading and examination of all the constitutions from South American countries and from Mexico; 3) the application of a survey to LGBTI organizations located in Latin America, and its subsequent analysis.

For a better exposition of the research conducted, this article is divided into three sections. In the first section, the theoretical framework is explored while the second section is dedicated to the analysis of the first part of the empirical data collected. In this sense, the segment is devoted entirely to the demonstration of the criteria applied in the analysis of constitutional texts, as well as the results obtained from this examination. Finally, the third section is dedicated to the analysis of the survey's answers. Thus, the method used in the selection of the sample and, later, the methodology applied in the examination of the answers are highlighted.

II. The Theory Of Postwestphalian Democratic Justice

As previously mentioned, the theoretical framework chosen to guide the analysis of the data is Nancy Fraser's postwestphalian theory of democratic justice. Thus, this section intends to provide a brief overview of her theory, in order to facilitate further analysis in the development of the article.

A philosopher dedicated to themes such as justice and democracy, Nancy Fraser elaborated a three-dimensional theory that includes three levels for the realization of justice, accomplishing parity of participation: economic, cultural, and political. Initially designed only with the first two facets, the political dimension was recently elevated to an autonomous category, responding to the anxieties caused by the current stage of globalization.[8]

In this way, each of these dimensions has its corresponding levels of justice and injustice. Economic injustice is materialized through maldistribution; cultural, by misrecognition; and the political is embodied in misrepresentation. As the author points out, these three aspects are essential to understanding the means for achieving justice. Although in certain contexts one can perceive the prevalence of some of the types of injustice, it is necessary to consider that the three form an interdependent set, neither layer being able to be reduced to the injustice generated by the other.[9]

The economic dimension of justice is represented by the idea of the distribution of goods, resources, and wealth that generates class differences and promotes the exploitation of labour in the capitalist world. Examples of this level of injustice are: the economic exploitation of workers by companies which profit from the work of a certain segment of the population, and the denial to certain people of the enjoyment of the material goods offered by the market, which, in many cases, were produced precisely by themselves as workers.[10]

As mentioned, the second dimension responsible for the realization of justice is the cultural one, in which the demands for the recognition of each of the despised groups are framed. In this way, Fraser proposes an approach based on the conceptualization of recognition as a matter of social status. From this criterion, misrecognition would translate as a form of social subordination. In this sense, the concept is related to the

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[8] Fraser, Nancy. *Scales of Justice: reimagining political space in a globalizing world.* New York: Columbia University Press, 2010.

[9] Fraser, Nancy. "From Redistribution to Recognition? Dilemmas of justice in a 'postsocialist' age". In *Adding Insult to Injury: Nancy Fraser debates her critics*, ed. Kevin Olson (London: Verso, 2008), 11–41.

[10] Ibid.

institutionalized reproduction of subordination patterns that prevent the participatory parity of certain individuals in social life. Hence, the institutional factor is essential for the characterization of the injustice of misrecognition, which will happen through the stigmatization of certain people as inferior, excluding them from (and invisibilizing them in) social interaction.[11]

One of the most pressing possibilities of this institutionalization is the legal-normative field. In this sense, laws that categorize certain social actors as inferior or transgressors (as opposed to others, which would be within the social norm) provoke the subordination of status. Nonetheless, this also occurs when legislation, disregarding the very possibility of existence of certain individuals (positioning them as non-beings), fails to consider them in the normative edition, creating gaps that prevent their participation in social life. As an example, a law prohibiting marriage between people of the same gender participates in this kind of injustice; however, so does the law that regulates only heterosexual unions, ignoring the very existence of other family arrangements and remaining silent about them.

Fraser points out that the root of injustice against gays and lesbians (the despised sexualities) would be in the cultural dimension, given that it reproduces itself through institutionalized and reiterated social patterns, not through division of labour[12]. For this reason, she characterizes homophobia as the "cultural devaluation of homosexuality"[13], while heterosexism would be the reassertion of heterosexual privileges through the issuance of norms that impose them. Such a situation is easily discernible through the innumerable rights denied to this group, as well as the frequent social situations in which these sexualities are subjected to discrimination, violence, harassment, and humiliation. For this reason, Fraser points out that "overcoming homophobia and heterosexism requires a change in the order of sexual status, de-institutionalizing the

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[11] Fraser, Nancy. "Rethinking Recognition". *New Left Review* 3 (May–June 2000): 107–120.

[12] Fraser, Nancy. "From Redistribution to Recognition? Dilemmas of justice in a 'post-socialist' age". In *Adding Insult to Injury: Nancy Fraser debates her critics*, ed. Kevin Olson (London: Verso, 2008), 11–41.

[13] Ibid, at 21.

heteronormative patterns of value, replacing them with patterns that express equal respect for gays and lesbians".[14]

Finally, having analysed the cultural and economic aspects of justice, we can move to the last of Fraser's dimensions: the political. According to the author, the political dimension serves as a stage for the claims for redistribution and recognition to be debated and demanded. In this sense, it is responsible for establishing the procedures through which such demands may legitimately be conveyed.

The realization of political justice occurs through representation. The injustice in this dimension is therefore that of misrepresentation. In this respect, Fraser distinguishes between three levels of political injustice: the first, related to the ordinary-political misrepresentation, covering already known issues regarding electoral rules; the second linked to what she called a misframing, referring to the borders of politics and justice itself, which can be identified in discussions, for example, about the extent of a given jurisdiction[15]; and the third, related to "the failure to institutionalize parity of participation at the meta-political level"[16], which is named meta-political misrepresentation.

In view of the reality of injustices, there are two possible remedies to the solution of inequality: affirmative or transformative. According to Fraser, affirmative remedies, in general, would be those aimed at correcting inequities with the instruments provided by the current system itself. That is, using the tools available within the structure that causes the injustice. This type of remedy clearly has a limited scope of action, since it does not intend to substantially alter the *status quo*, aiming at only a small advance in social reality. On the other hand, a transformative remedy seeks precisely the opposite: the correction of unequal results by restructuring the framework that generates them.[17] Thus, while

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[14] Fraser, Nancy. "Redistribuição, Reconhecimento e Participação: por uma concepção integrada de justiça". In *Igualdade, Diferença e Direitos Humanos*, eds., Daniel Sarmento, Daniela Ikawa and Flávia Piovesan (Rio de Janeiro: Lumen Juris, 2010), 167–189 at 173.

[15] Fraser, Nancy. *Scales of Justice: reimagining political space in a globalizing world*. New York: Columbia University Press, 2010.

[16] Ibid, at 26.

[17] Fraser, Nancy. "From Redistribution to Recognition? Dilemmas of justice in a 'post-socialist' age". In *Adding Insult to Injury: Nancy Fraser debates her critics*, ed. Kevin Olson (London: Verso, 2008), 11–41.

transformative remedies are ideal to end injustices in a long term, the affirmative ones are also necessary in a short-term basis, although their application is limited, and they are not able to completely eliminate inequalities.

Lastly, it must be highlighted that all of these dimensions of Fraser's theory, as well as the different types of remedies, will be essential to fully understand the analysis of the empirical data collected. That is the purpose of the next two sections.

III. The Constitutional Protection of LGBTI Rights

Epstein and King point to "replicability" as an essential rule to be observed by the researcher in empirical investigation.[18] Thus, it is important to expose, in a detailed way, how the data used in the research was collected. In this sense, the authors point out that "good empirical work adheres to the pattern of replication: another researcher must be able to understand, evaluate, base on, and reproduce the research without the author providing any additional information." Therefore, this section is devoted to the explanation of the form of data collection performed in the documental analysis.

Initially, the study object was very broad: to analyse all Latin American constitutions, including those of the countries from South America, Central America (and the Caribbean), and Mexico. However, as the data was collected, we noticed that the defined object was extremely vast and that would prevent, because of time, a detailed and critical analysis of the information obtained. Thus, given the temporal and financial limitations of the investigation, it was decided to examine the constitutions of the countries from South America, as well as Mexico. The main reason for the choice of those countries is the understanding that their constitutional tradition is more similar to each other than to that of the Caribbean, in view of the composition of the so-called "New Latin-

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[18] Epstein, Lee and Gary King. *Pesquisa empírica em direito: as regras de inferência*. São Paulo: Direito GV, 2013 at 56.

American Constitutionalism", even if not all of those countries are included in such a tradition.

Within this geographic framework, the analysis of the Falkland Islands, South Georgia and South Sandwich Islands, and French Guiana was also excluded. This is because the first two are under the jurisdiction of the United Kingdom, while the latter submits itself to the French legal system. In this way, since the objective is to draw a panorama of protection in Latin America, it is not adequate to examine its constitutional charters. Thus, Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Mexico, Paraguay, Peru, Suriname, Uruguay, and Venezuela remained in the list of countries to be investigated.

The text of each of these constitutions was obtained from official websites of the legislative or executive of those States or, when it was not available in these media, on the website of the Organization of American States (OAS). Access to these documents and its archiving were carried out between November 12th and 18th of 2017. Therefore, only the constitutional amendments approved up to that period were considered.

Due to possible ambiguities or changes of meaning from translations, the texts were read in their original language. However, there is one exception. In view of the official language of Suriname, the Dutch language, and owing to the lack of mastery of this vernacular by this researcher, it was necessary to use a translated English version made available by Unesco.[19]

Regarding the method, the examination of the data was guided by a tripartite qualitative analysis of empirical documentation proposed by Mario Cardano.[20] The analysis method proposed by the author includes the following steps: segmentation, qualification, and individuation of relations. Segmentation refers to the establishment of markers, "whose function is to identify relatively homogeneous segments to be subjected to comparison within empirical materials".[21] In this sense, all the constitutions

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[19] This translated version can be found at: <http://www.unesco.org/education/edurights/media/docs/dfcff4209dad7879549a7d46dc0bcbf82919c591.pdf>.

[20] Cardano, Mario. *Manual de pesquisa qualitativa: a contribuição da teoria da argumentação*. Petrópolis: Vozes, 2017.

[21] Ibid, at 273.

were fully read in the search for the provision of specific rights, but guided by three criteria to be specially observed, forming the segmentation. These are: 1) the use of gender-inclusive language; 2) the prohibition against discrimination of LGBTI; 3) the possibility of civil union between persons of the same gender. In addition to the peculiar motives to each of these criteria, which will be explained later, the three were chosen because their presence (or absence) can be more easily perceived in the normative text.

Further, the qualification stage is conceptualized by Cardano as the "assignment of one or more properties to a given segment of empirical documentation, useful for its characterization".[22] In this way, the technique allows one to deepen the analysis dimension of the document by means of its greater specification. Therefore, for the qualification of the segments, a "template analysis" was used as proposed by Nigel King.[23] The method consists in the composition of an analytical grid from the characterization of the identified elements in order to enable its comparison. The use of template analysis can be based on two main approaches: inductive (data-driven), in which the grid is composed of categories that were observed in the analysis of the material, or deductive (theory-driven), in which the data found in the analysed document is allocated into predefined categories. In the examination of the constitutions, an inductive approach was applied in the segments related to non-discrimination and inclusive language (in the second, using textual absences as well) and a deductive approach in the case of civil union, observing a categorization previously established.

Finally, the individuation of relations consists of an analysis from the comparison of qualifications or even of the separation of a certain qualification for analysis. Thus, in this last stage, the analysis was performed through the cross-examination of the qualifications and also of the deviant cases, unravelling their distinction in relation to the others.

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[22] Ibid, at 293.

[23] King, Nigel. "Doing Template Analysis". In *Qualitative Methods in Organizational Research: core methods and current challenges*, eds. Gillian Symon and Catherine Cassel (London: SAGE Publications, 2012), 426–450.

1. The Use of Gender-Inclusive Language in the Constitutional Text

Daniel Borrillo has gone deeply into the study of homophobia[24] and its various forms of manifestation. In his work, the author seeks to categorize some of the main types of expression of this prejudice, emphasizing the differentiations between irrational and cognitive homophobia and between general and specific homophobia.[25] At this point, we are particularly interested in the author's idea of homophobia in its general perspective.

According to him, homophobic practices are intrinsically linked to the sexism that is deeply instilled in our society, through which roles of feminine and masculine are naturalized. That is, a sexual order that "implies both the subordination of the feminine to the masculine, and the hierarchy of sexualities".[26] In this way, homophobia, in its most general aspect, would be the product of the sexist pattern, which harasses those who do not fit the expression of their assigned gender, male or female. Thus, gays and lesbians, by assuming some of the characteristics of the originally opposing gender (such as sexual desire) break this barrier, which provokes social disapproval. Even more bold, under the sexist logic, are trans and intersex people who effectively transgress, completely, the norm that crates a gendered society.

In this sense, if one of the forms of externalization of prejudice against LGBTI is sexism, it would be coherent to think that those societies – in this case represented by their legal systems – that are more advanced in the fight against gender inequality, would also be closer to recognizing rights of LGBTI persons.

For this reason, the use of gender-inclusive language in the constitutional text was adopted as one of the criteria to be analysed. It is important to note that the adoption of this type of language demonstrates

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[24] The author's idea of homophobia intends to encompass all forms of LGBTIphobic prejudice.

[25] Borrillo, Daniel. *Homofobia: história e crítica de um preconceito*. Belo Horizonte: Autêntica Editora, 2016.

[26] Ibid, at 30.

an even greater commitment to overcoming the gender inequality barrier than the mere provision of rights for women, for example. This is because it implies a change in the rooted linguistic structure that historically values male predominance, especially in languages of Latin origin. There are numerous legislations that provide specific rights for women. Few, however, are those that allow the breaking of the language barrier, which daily exercises symbolic violence over them.

Also worthy of attention is the fact that the criterion chosen is the observance or not of a *gender-inclusive* language. And not of a *gender-neutral* language. An inclusive language still uses gender markers, but always demarcating both the masculine and feminine genders. On the other hand, gender-neutral language would require a much greater subversive effort from the legislator, which, of course, was not found in any of the texts. This second modality would require the total abstention of using traditional markers of feminine and masculine. That is, the use of only terms that do not have this designation (such as "people") or the replacement of traditional markers with a single alternative (such as using the "x" or "e" in words)[27].

In this way, it is highlighted that, despite being a great advance, inclusive language is not the ideal final level. This is because, although it solves the linguistic subordination of feminine to masculine, it still maintains a binary logic, excluding all other forms of gender expression that do not fall into these categories.

In view of these observations, it is pointed out that the objective at this moment was to identify whether there is any relation between the use of gender-inclusive language (which represents the advance of overcoming inequality between men and women) and the protection of LGBTI rights. The hypothesis was that an order with a high degree of evolution (to the point of modifying the language used) would also be more sensitive to the themes of sexual orientation and gender identity.

In order to verify the conformity of this hypothesis, the rules of inference defined by Epstein and King were followed, more specifically in the attempt to establish a causal inference. According to the authors, inference is the "process of using facts that we know to learn about the

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[27] Once again, this is of special relevance when concerning languages of Latin origin.

facts that we do not know".[28] The causal inference, in turn, consists of the same process by the conjugation of two different variables: a dependent variable (which would be, in the present case, the advance in the protection of LGBTI rights, represented by the fulfilment or not of the civil union and the non-discrimination criteria) and a main variable (which in this case would be the advance in combating gender inequality, represented by the use of gender-inclusive language). Thus, the correspondence of the causal effect occurs through the analysis of whether the insertion or withdrawal of the main variable causes any change in the dependent variables. In our context, it is to say: whether the use of gender-inclusive language by the Constitution leads to the provision of rights to the LGBTI population as well.

This criterion was assessed through the use of the two gender designations, for example, "his and hers", "he and she", instead of only "his" or "he".

After this examination, it was identified that only 30.77% of the investigated constitutions adopted this language modality. This corresponds to a total of four countries. They are: Bolivia, Ecuador, Guyana, and Venezuela. Subsequently, for testing the initial hypothesis, this was combined with the other analysis criteria (prohibition of discrimination and the possibility of civil union). Thus, trying to detect if, as expected, these four countries would also have a positive result in the two other parameters.

Unfortunately, that was not what happened. As shown in Table 1, of the four countries, only the constitutional charters of Bolivia and Ecuador have provisions that prohibit discrimination against LGBTI.

In addition, the Constitutions of the three Latin-speaking countries expressly provide that marriage is between "*a man and a woman*" (or vice versa). This framework is repeated in the clause regarding "stable union", with the exception of the Ecuadorian Constitution, which, in this second type of civil union, identifies that it would be a relationship between "persons".

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[28] Epstein, Lee and Gary King. *Pesquisa empírica em direito: as regras de inferência*. São Paulo: Direito GV, 2013 at 47.

Table 1. Relation of Constitutional Protection of LGBTI Rights among Countries that Adopt Gender-Inclusive Language

Country	Prohibition of Discrimination Against LGBTI	Civil Union	
		Marriage	**Stable Union (*"uniones de hecho"*)**
Bolivia	Yes (based on sexual orientation and gender identity)	Between "*una mujer y un hombre*"	Between "*una mujer y un hombre*"
Ecuador	Yes (based on sexual orientation, gender identity and HIV status)	Between "*hombre y mujer*"	Between "*dos personas*"
Guyana	No	Without regulation	Without regulation
Venezuela	No	Between "*un hombre y una mujer*"	Between "*un hombre y una mujer*"

In the case of Guyana, although there is no constitutional regulation of the civil union, the juridical system is even more drastic in rejecting any form of relationship between persons of the same gender. The country's legislation opted for the criminalization of homosexual conduct or, more specifically, gay, since the legal device refers notably to the interaction between two men.

Thus, it is clear that, despite the advancement of this legal framework in relation to the reduction of gender inequality, the scenario for the LGBTI population is devastating. Unlike most cases, homosexual relationships are repressed, not only in the public sphere, but also in the private one. In addition, it was decided to carry out such repression through the criminal law, which aggravates its character, criminalizing the existence of these individuals. Gays and bisexuals are forbidden to love and relate, have all their dignity withdrawn and can be punished with life imprisonment for something inherent to their own existence. Something that cannot be voluntarily altered: their sexuality, their desire for other human beings.

In fact, the hypothesis initially suggested was not demonstrated concretely, and it was not possible to draw the intended inference. In other words, there does not seem to exist a necessary relationship between advancing the fight against gender inequality and providing specific rights for LGBTI. However, the opposite reasoning is corroborated by the data. The two countries whose constitutional protection of LGBTI has been shown to be the most comprehensive and advanced (as will be further examined later) are also two legal systems that adopt gender-inclusive language in their constitutional text: Ecuador and Bolivia. Therefore, if the advancement in women's rights does not presuppose that the same legal system will be sensitive to issues of sexual orientation and gender identity, on the other hand, the advance in LGBTI issues occurs in legal orders in which there is already a consolidation, at least textual, of specific rights for women, attenuating gender inequality. It should be noted, however, that such inference should not be taken categorically, but merely as an illustrated tendency, given that the reduced sampling does not permit any categorical and generalized assertion.

2. Prohibition of Discrimination Against LGBTI

The second criterion chosen for the analysis of the documents was the presence or not of clauses that prohibit discrimination against the LGBTI population. The fundamental right to non-discrimination derives directly from the right to equality, being a necessary prerequisite for the realization and usufruct of all other individual guarantees, ensuring legal and social isonomic treatments. In this perspective, the prohibition of discrimination (in its arbitrary aspect) is the most basic of rights necessary to overcome injustices of recognition and representation, effecting parity of participation.

On this topic, Bandeira de Mello points out that "isonomy is enshrined as one of the greatest guiding principles of individual rights".[29] Thus, without equality, there is no way to advance in the prediction of other

[29] Mello, Celso Antônio Bandeira de. *O Conteúdo Jurídico do Princípio da Igualdade*. São Paulo: Malheiros Editores, 2010 at 45.

specific rights, which cannot be done without the safeguarding of non-discrimination. It is precisely for this reason that this criterion was chosen: considering it as the starting point for deeper and more complete guarantees, since it is the founding (albeit precarious) level of other normative provisions that may focus on LGBTI persons.

As a starting point for the documental analysis, attempts were made to identify the mention of markers such as "sexual orientation" or "gender identity" (and its possible variants) among the list of reasons why a differential or discriminatory treatment is prohibited.

In the first examination of the constitutional charters, it was found that in only 23% of the countries is there express provision that prohibits, to some extent, discrimination against LGBTI. This corresponds to only three of the thirteen analysed constitutions, which is a very small number in the studied whole.

Nevertheless, the data collected deserves more careful and detailed treatment. In this sense, the constitutional provisions were divided into four categories, which are detailed in Table 2. The first one refers to the prohibition of discrimination based on both sexual orientation and gender identity. In the second category, there are provisions that prohibit discrimination based solely on sexual orientation. The third classification refers to texts that do not list any form of prohibition of discrimination related to LGBTI, although they do so in relation to other markers such as race and gender. Lastly, the fourth section refers to those countries whose constitutional texts have chosen not to define a list of situations where discrimination is prohibited or where there is no provision relating to such legal category.

It is important to note that there is no constitution that bans discrimination based on gender identity, but does not do so with respect to sexual orientation. This demonstrates how, in general, there is more resistance to the consolidation of the rights of trans and intersex[30] persons. And, also, when they do protect trans and intersex rights, it is always in a legal system that already covers protection against discrimination against lesbian, gay, and bisexual (LGB) persons.

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[30] Although, ideally, it would be better to mention "sex characteristics" to proper protect intersex persons.

Table 2. Classification of the Possibilities of Prohibition of Discrimination Against LGBTI by Country

Classification	Prohibition of Discrimination Based Both on Sexual Orientation and Gender Identity	Prohibition of Discrimination Based Only on Sexual Orientation "preferencias *sexuales*")	Absence of Prohibition of Discrimination Against LGBTI	Without Regulation or Group Specification
Countries	Bolivia and Ecuador	Mexico	Brazil, Colombia, Guyana, Paraguay*, Peru, Suriname and Venezuela	Argentina, Chile and Uruguay

As can be seen, a more detailed examination of the data further demonstrates how the protection of LGBTI persons in Latin American is precarious. If the initial perception was that only three of the constitutional texts contained a clause prohibiting LGBTI discrimination[31], the detailing of the data indicates that only two of these countries (Bolivia and Ecuador), which represent only 15% of those analysed, cover both sexual orientation and gender identity. This is because the Mexican Constitution chose to name only the term "*sexual preferences*", refraining from recognizing specific protection for trans and intersex persons.

In addition, Ecuador deserves a positive highlight. By far the most advanced and progressive constitutional text in the protection of LGBTI rights, the constitutional legislator of that country has opted to include in the list of prohibited discrimination, in article 11, section two, differential arbitrary treatment in relation to persons living with HIV (*Human Immunodeficiency Virus)*. Although this right is not addressed exclusively to

[31] The Brazilian LGBTI movement did try to include sexual orientation in the text of the constitution, although unsuccessfully. Regarding this, see: Lelis, Rafael Carrano, Marcos Felipe Lopes de Almeida, and Waleska Marcy Rosa. "Quem conta como nação? A exclusão de temáticas LGBTI nas assembleias constituintes de Brasil e Colômbia". *Revista Brasileira de Políticas Públicas* 9, no. 2 (2019): 83–109. http://dx.doi.org/10.5102/rbpp.v9i2.6047.

LGBTI people, it is a significant protective increase, since it has historically stigmatized the LGBTI population by associating it with the virus, which at the beginning of the epidemy was mistakenly named "the gay plague". Therefore, it is another way to protect LGBTI from discrimination.

Turning to the analysis of countries that have no provision, the Chilean, Uruguayan, and Argentine constitutions fall into a peculiar category. Whereas the fundamental law of the first two has chosen to provide for the prohibition of discrimination without indicating the possibilities (even if exemplarily) of protection, the latter abstained from any mention of anti-discrimination rights.

On the other hand, those placed in the third column present a list, many of them extensive, indicating hypotheses in which discrimination is prohibited. In all of them, without entering into the discussion of whether or not the possibilities are exhaustive, there is no mention that refers specifically to LGBTI persons. The clauses, in general, prohibit discrimination on grounds of ethnicity, age, sex, religion, political affiliation, socioeconomic status, national origin, health condition, among other reasons. It is pertinent to note that the Constitution of Guyana, which has the most extensive role, besides not including issues such as sexual orientation and gender identity, provides, in the constitutional text itself, several exceptions to the exercise of this guarantee, which ends up removing most of the norm's legal coverage.

Moreover, in the case of Paraguay, indicated with an asterisk, there is another singularity. Although article 46 of its constitutional text provides that "no discrimination is admitted", the grounds are only listed in the section on labour rights (article 88 of the Paraguayan Charter).

In sum, it is clear that Latin American constitutional law still needs to go a long way in the specific protection of one of the most basic rights of the LGBTI population: the right to non-discrimination, which is essential if all other fundamental guarantees relating to these individuals are to be achieved.

3. Right to Civil Union

The last of the three criteria adopted by the research refers to the possibility of civil union between couples of the same gender. In addition to being

the most difficult to gauge among all, it is also the most controversial within the LGBTI movement itself. Thus, some reservations regarding the reason of its choice are necessary.

The possibility of civil union has been considered because it is still, in the vast majority of legal systems, a requirement for access to various rights by persons who relate in a loving and affective way, such as: inheritance, taxation, access to health, property rights, pension, and adoption, among others. Thus, denying marriage or other form of civil union to LGB means denying them access to various other essential rights in their lives. And, above all, the symbolic factor that represents the legal recognition of these relationships cannot be ignored.

Nonetheless, the demand for recognition of same gender unions as legally valid by the State is a highly controversial thematic and the positions of LGBTI activists differ. At the same time that the symbolic character of this achievement and the access to the rights it provides must be taken into account: to claim this institution for gays and lesbians means to reinforce the legitimization of this State normalizing power over sexuality, including non-heterosexual couples in the field allowed by the norm and at the same time reinforcing the exclusion of several other affective configurations.

Some authors[32] classify this demand for union and, more specifically, for marriage, as a kind of assimilation of the LGBTI movement of the institutions and the rights consecrated to heterosexuals, to the detriment of advocating a deeper and structural rupture of the foundations that legitimize the system. It is again the perspective between the definition of an affirmative remedy, which would be the mere extension of the right to civil union and marriage to gays, lesbians, and bisexuals, and a transformative one, which should advocate for the dissolution of the marital institution itself and its power of legitimation/delegitimation that denies rights to individuals.

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[32] See: Miskolci, Richard. *Teoria Queer: um aprendizado pelas diferenças*. Belo Horizonte: Autêntica Editora: UFOP, Universidade Federal de Ouro Preto, 2016. And: Rios, Roger Raupp. "As uniões homossexuais e a 'família homoafetiva': o direito de família como instrumento de adaptação e conservadorismo ou a possibilidade de sua transformação e inovação". *Civilistica.com* 2, no. 2 (2013): 01–21.

In this way, what was sought with the use of this criterion is a conscious claim of the right to civil union, without forgetting the necessary reservations. In Butler's words "to keep the tension alive between guarding a critical perspective and making a politically readable claim".[33] That is, "to suggest a policy that incorporates a critical understanding – the only one that can be claimed as self-reflective and non-dogmatic"[34]. In other words, the author allows us to conjecture on how, politically, the claim for intelligibility and recognition is crucial. That is, the guarantee of rights, without which the very condition of the person is questioned. However, Butler's caveat refers to the fact that the quest for legitimacy is not excluded from the power structure and may lead to other forms of social hierarchy and a dangerous magnification of State power, thus, delegitimizing sexual practices lived out of contracts such as marriage and their presuppositions of monogamy, and, therefore, with the potential, in the words of the author, to transform "a collective delegitimation into a selective delegitimation".

Turning to the textual analysis, unlike the right to non-discrimination, a specific provision that would recognize/allow the civil union between same gender persons was not sought. It would be too naive to consider the possibility that some constitution had expressly provided for the right of homosexuals to marry. For this reason, what has been analysed is the form in which the right to marriage or to a stable union is presented in the constitutional text, that is, if the norm delimits the gender of the spouses, acting as a restriction to the constitutional right of union, excluding homosexuals from its scope of protection, or, if the clause was generic, without the demarcation of gender.

To do so, it was used a classification proposed by Virgílio Afonso da Silva, which includes three possibilities for the constitutional text: 1) no provision; 2) specific provisions regarding gender; 3) gender-neutral provisions.[35] It is important to clarify: neutral provisions would be the case of no mention of the female or male gender, as when it is said that the

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[33] Butler, Judith. "O parentesco é sempre tido como heterossexual?". *Cadernos Pagu* 21(2003): 219–260 at 230.

[34] Ibid.

[35] Silva, Virgílio Afonso da. "La unión entre personas del mismo género: ¿cuán importantes son los textos y las instituciones?". *Discusiones* 15, no. 2 (2014): 171–203.

marriage will occur between "two persons". On the other hand, a gender-specific clause translates into the provision, for example, that a stable union occurs between "a man and a woman". For didactic reasons, it was decided to analyse separately the institutions of marriage and stable union.

Thus, as can be observed in the data presented in Table 3, with regard to marriage, none of the constitutional charts examined falls within the third category. Among those analysed, the constitutions of at least six countries have no disposition about marriage, or, as in the case of Peru, indicate that the matter will be regulated by law.

In this scenario, Brazil's situation is more complex to classify. The country was allocated to the first column of the table, but could also have been included in the third. This is because Article 226 of the country's Constitution states: "Art. 226. The family, the basis of society, shall enjoy special protection from the state. §1º Marriage is civil and of free celebration". Thus, although there is mention of the marriage institution, it does not allude to the subjects that would integrate this union (unlike what happens in the case of a stable union). Hence, there is no way to fit as a gender-neutral reference if there is no allusion to individuals. For that reason, it was understood that it would be best to categorize it along with those who do not regulate the institution.

Besides Brazil, two other countries, among those categorized as "without provision", deserve prominence. In the case of the Mexican and Surinamese constitutional texts, although there is no actual disposition about marriage, Articles 4 and 35 (respectively) of the fundamental charter of those countries seem to suggest that the only family composition admitted would be heterosexual. However, the textual construction is open, leaving room for an interpretation that it only aims to ensure the need for isonomy between man and woman within the heterosexual relationship, as seen: "**Article 35** 1. The family is recognized and protected. 2. Husband and wife are equal before the law"; and "***Artículo 4º.*** Man and woman are equal before the law. It will protect the organization and development of family".

On the other hand, all the other constitutions establish that marriage occurs between "man and woman", recognizing only the heteronormative model of family composition. Curious is the systematics of the Ecuadorian Constitution, which in its article 67 provides that "family is recognized

in its various types" and, soon after, in the same article, indicates that marriage is the union between man and woman. What can be deduced from this, together with the norms that regulate the stable union, is that the Fundamental Charter of Ecuador would be recognizing the status of family to single-parenting arrangements and, perhaps, other couples than just the heterosexual ones, but limiting the institution of marriage to only the traditional heteronormative construction.

Table 3. Provisions of the Constitutions on Marriage

Classification	**No Provision**	**Gender-specific provisions**	**Gender-neutral Provisions**
Countries	Argentina, Brazil*, Chile, Guyana, Peru, Suriname, Uruguay and Mexico	Bolivia, Colombia, Ecuador, Paraguay and Venezuela	-

When the analysis turns to the legal institution of stable union (or *de facto* union), the scenario changes slightly. As shown in Table 4, the third column, previously empty, now includes Ecuador, whose constitutional text states in its article 68 that "the monogamic stable union between *two persons* (...) shall have the same rights and obligations as the families constituted by marriage". With this provision, there is no possibility to argue that the Ecuadorian Constitution would not allow civil unions, through the institution of a stable union, for homosexual couples. The textual set is very clear in that marriage occurs between "man and woman" and the stable union between "persons", besides indicating that the family is recognized in its various types. The constitutional legislator intended to include the same gender couples in this possibility of union, characterizing itself as the most progressive clause in the theme among all the countries analysed.

However, the progressive thinking of the Ecuadorian system is yet limited. In addition to making it possible to extend only the stable union (and not marriage), the Constitution, in the same article 68, expressly provides that adoption can only be performed by heterosexual

couples[36], leaving no room for a differentiated hermeneutic interpretation, which leads to a great setback in regard to the rights of LGBTI.

All other countries fall into the first two classifications and five of them expressly state that stable union occurs between men and women. Moreover, it should be noted that two countries that did not have a disposition about marriage, Brazil and Peru, explicitly indicate that this second type of union will occur between men and women.

Table 4. Disposition of the Constitutions on the Stable Union

Classification	No Provision	Gender-specific provisions	**Gender-neutral Provisions**
Countries	Argentina, Chile, Colombia, Guyana, Suriname, Uruguay and Mexico	Brazil, Bolivia, Paraguay, Peru and Venezuela	Ecuador

Thus, it is noticeable that protection of LGBTI rights, regarding the criteria of this section (which merely expects the absence of restriction with respect to civil unions), is practically nonexistent. With the exception of the Ecuadorian Constitution (and only regarding stable union), all the other charters analysed either had no provision on the matter or restricted the scope of possibilities to a heteronormative reality.

4. Other Provisions

As mentioned at the beginning of this section, in addition to examining the three criteria developed so far, a full reading of the constitutional texts was carried out in the search for other normative provisions concerning the LGBTI population, which could not be anticipated. In that sense, additional highlights can be made.

[36] The final part of article 68 of the Ecuadorian Constitution states: "the adoption will only correspond to couples of different sex".

The first of these concerns the Bolivian Constitution, which in its article 66 consolidates the guarantee of the exercise of sexual and reproductive rights. The sexual rights category has transformed throughout history, symbolically consolidating itself as a form of protection for LGBTI rights. Although it seems to have a very principiological and indeterminate nature, it is an important textual provision that can be used to protect broadly the most diverse rights of LGBTI persons.

On the other hand, the Fundamental Charter of Ecuador was a pioneer in the Latin American context, being the only one to provide a substantive specific right to this population. In this sense, its article 66, item 9, the Charter guarantees the right of free and safe choice of sexual orientation. Without entering into the discussion about the use of the word "choice", the provision establishes an unprecedented safeguard in the constitutional law of the region. In addition, Article 83, paragraph 14, of the same document consolidates the duty of Ecuadorians to "respect and recognize" others "sexual orientation and identity".

The Ecuadorian text also sustains, in its article 21, the right to aesthetic freedom, a provision that was included because of the persistence of the trans movement in the constitutional assembly. This right is another important way of protecting the LGBTI population, but especially trans persons. This is because, by ensuring aesthetic freedom, it safeguards the possibility of persons to *trans*gress traditionally imposed standards on females and males, particularly in relation to clothing and body appearance.

Finally, article 347, section IV, of the Ecuadorian Constitution establishes the right to sex education. Although this clause may be interpreted in such a way as to perpetuate only a heteronormative education, it is an important break with the taboo of sexuality.

Lastly, applying the same method of rules of inferences already described, it is possible to try to present a reason why the prediction of LGBTI rights appeared in the constitutions of Mexico, Ecuador, and Bolivia and not in the others. The thesis is that the provision is related to the date of enactment of the constitutional text. That is, only the most recent constitutions would present such a norm. In this case, the main variant would be the (most recent) date of the constitutional text, while the dependent variant would be the normative provision of LGBTI rights. Thus, as can be seen in Table 5, the most recent constitutions are

those of Ecuador and Bolivia. On the other hand, the prohibition against discrimination based on "sexual preferences" in the Mexican document was introduced by an amendment only in the year 2011. Therefore, there seems to be a relation between the date of promulgation and the progressiveness of the norm, something that was already relatively easy to foresee, since the newer the text the easier it is for it to be influenced by more progressive ideals than those prevalent in previous centuries[37].

Table 5. Date of Promulgation of Constitutional Texts

Countries	Date of Constitution Promulgation
Argentina	1853 (last reform in 1994)
Bolivia	2009
Brazil	1988
Chile	1980
Colombia	1991
Ecuador	2008
Guyana	1980
Mexico	1917
Paraguay	1992
Peru	1993
Suriname	1987 (last reform in 1992)
Uruguay	1967 (last plebiscitary reform in 2004)
Venezuela	1999

In addition, another factor that can be pointed out, specifically in relation to the Ecuadorian reality, is the protagonism of civil society. In that country, the approval and even the remembrance of most of these provisions was due to intense lobbying work in the constitutional

[37] Nonetheless, it must be noted that we are currently facing a rise of extreme-right ideology throughout the world. Thus, it is hard to say that the result would be the same if the constitutions were to be voted today.

assembly, especially by the members of the *Transgender Project*[38], who worked directly with parliamentarians.[39] However, it is possible to see that that influence has encountered certain barriers, not being able to exclude, for example, the clause of article 68, which expressly only allows adoption by heterosexual couples. Nevertheless, the Ecuadorian scenario illustrates the importance that social movements can play in norm-creation, pressing for a more dignified standard for LGBTI persons. This especial role of the social movements will be further explored in the next chapter.

IV. Developing aLGBTI constitutionalism: the view of the LGBTI latin american movement on the constitutional protection of its rights

In the previous chapter, a critical diagnosis was outlined of the current Latin American normative constitutional panorama regarding the protection of LGBTI rights. Moreover, we sought to point out the degree of (in)sufficiency of the norms found in the protection of the LGBTI population. Nevertheless, it would be too pretentious and arbitrary to label a given legal order as protective or not, based solely on the view of this researcher or merely on the literature focused on this subject. Thus, within the proposal of this work, it is essential to support the construction of a transformative constitutionalism (*desde abajo*), which acts in a counter-hegemonic way and from the perspective and protagonism of the LGBTI themselves. After all, who better than the victims of violence themselves to say whether they feel protected or not? Or, what should or should not be covered by the constitutional text in order to protect their main interests?

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[38] The organization's website can be found at: http://www.proyecto-transgenero.org/. Accessed on: 01 Apr. 2018.

[39] Lind, Amy, and Sofía Argüello Pazmiño. "Activismo LGBTIQ* y ciudadanías sexuales en el Ecuador: Un diálogo con Elizabeth Vásquez". *Revista de Ciencias Sociales* 35 (2009): 97–101.

In this sense, it is important to prioritize a bottom-up approach in the construction and interpretation of the law. Or, in the words of Santos and Rodríguez-Garavito, a "subaltern cosmopolitan legality".[40] In addition to this discussion, Boaventura de Sousa Santos asserts that in order to achieve the transformation of our present model of state and society, an appropriation would be necessary of the hegemonic political instruments by those marginalized classes and groups.[41] Thus, he classifies the counter-hegemonic use as contrary to the dominant ideology and that, in order to sustain itself, it "needs [...] a permanent political mobilization that, to be effective, has to operate from inside out in the institutions".[42] In the constitutional field, the author characterizes that such mobilization would take place in a transformative constitutionalism *desde abajo,* opposing to the modern Eurocentric and liberal constitutionalism.[43]

In this way, the perspective of subaltern cosmopolitan legality seeks to place victims in evidence, allowing them, who are excluded from the hegemonic (top-down) paradigm, to reshape institutions in order to be included and recognized, establishing a pattern that will no longer be hegemonic, but counter-hegemonic. It is to say: " subaltern cosmopolitanism calls for a conception of the legal field suitable for reconnecting law and politics and reimagining legal institutions from below".[44]

Moreover, such an approach also aims to overcome the liberal paradigm of individual autonomy by incorporating alternative forms of legal knowledge. That is, legal interpretations that extrapolate the usually authorized interpreters of law and that come to understand

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[40] Santos, Boaventura de Sousa, and César A. Rodriguez-Guaravito. "Law, Politics, and the Subaltern in Counter-hegemonic Globalization". In *Law and Globalization from Below: towards a cosmopolitan legality*, eds. Boaventura de Sousa Santos and César A. Rodriguez-Guaravito (Cambridge: Cambridge University Press, 2005), 01–26 at 5.

[41] Santos, Boaventura de Souza. *Refundación del Estado en América Latina: Perspectivas desde una epistemología del Sur*. Lima: Instituto Internacional de Derecho y Sociedad, 2010.

[42] Ibid, at 60.

[43] Ibid.

[44] Santos, Boaventura de Sousa, and César A. Rodriguez-Guaravito. "Law, Politics, and the Subaltern in Counter-hegemonic Globalization". In *Law and Globalization from Below: towards a cosmopolitan legality*, eds. Boaventura de Sousa Santos and César A. Rodriguez-Guaravito (Cambridge: Cambridge University Press, 2005), 01–26 at 15.

the legal field as constituted of "elements of struggles that need to be politicized before they are legalized".[45]

A lot of these factors were present in most of the Latin American constitutional processes. This has resulted in broadly transformative texts, especially as regards the rights of indigenous and traditional peoples, women, and the environment. However, as observed in the previous chapter, the same did not occur for the LGBTI population. And that needs to be changed through the protagonism of the affected individuals, which is illustrated in the construction of a LGBTI constitutionalism as opposed to the hegemonic heteronormative standard.

Similarly, Nancy Fraser points out that the perception of demands for justice must be analysed from the standpoint of social movements. In this sense, she affirms that the terms "redistribution" and "recognition" (this applies also to "representation") have a political reference, in addition to the philosophical one, that relates to the claims raised by political actors and social movements in the public sphere.[46] Thus, it is essential to observe the opinion of the members of these movements.

It is important to note that this counter-hegemonic action should not only occur at the time of the legislative creation of the law, but also in its interpretation. In this way, an extension is proposed of the idea of a pluralist interpretation conceived by Häberle.[47] The German author advocates for overcoming what he termed a "closed society of interpreters" (marked by the state monopoly of this function through judicial action) for an open society that would embrace a multiplicity of interpretive actors, beyond those traditionally authorized and legitimized. According to him, "everyone who lives in the context regulated by a norm (...) is indirectly, or even directly, an interpreter of this norm".[48] Therefore, all citizens that experience or, in many cases, feel their absence, would be pre-interpreters or co-interpreters of the constitutional order.

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[45] Ibid, at 16.

[46] Fraser, Nancy. "Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation". In *Redistribution or recognition?: a political-philosophical exchange,* eds. Nancy Fraser and Axel Honneth (London: Verso, 2003), 07–109.

[47] Häberle, Peter. *Hermenêutica Constitucional: a sociedade aberta dos intérpretes da constituição: contribuição para a interpretação pluralista e "procedimental" da constituição*. Porto Alegre: Sergio Antonio Fabris Editor, 2002.

[48] Ibid, at 15.

The construction of a pluralistic constitutional hermeneutics is essential for the diversification of interpretation and for the amplification of interpretative legitimacy. However, it does not seem to be enough to be characterized as a bottom-up approach. Hence, we argue that when it comes to the violation of human and fundamental rights, those who live the norm (or their absence) should not only act as co-interpreter, but as the main interpreter and the most (if not the only) legitimized for such interpretation. Thus, the State function would be to convey the interpretation of the affected individuals. And this should be not only in the arenas formally legitimized to exercise jurisdiction (through, for example, *amicus curiae* institute and public hearings[49] or even strategic litigation), but also in their interpretation in other fields, such as in scientific, doctrinal, and political debates. That is, to hear the voice of those who really should be heard, for they are juridically and materially affected by the law.

Bearing this purpose, this chapter is dedicated to the construction of the constitutional interpretation of Latin American LGBTI movements about the protection or not of their rights by the constitutional text. Thus, making use of a self-completing survey, we sought not only to draw an ideal protective pattern (to be compared with the data collected in the previous chapter), but also to understand the perception of this movement on the current LGBTI rights scenario in Latin American constitutionalism, its causes and possible alternatives for its change.

1. Method and survey analysis

Once more, in order to respect the replicability rule of empirical research, a detailed description of the data collection process is required. As already mentioned, one of the objectives of this research is to allow the construction of a constitutional bottom-up interpretation, with the leading role of LGBTI people. In this sense, considering the difficulty of delimiting the population (due to several factors, such as the condition

[49] It is important to note that these institutional means of legitimizing judicial decisions have often been used as mere formal legitimators, since there are few instances in which magistrates actually consider what has been raised by these actors.

of anonymity in relation to the non-heterosexual orientation or the non-cisgender condition), it was considered that the best way to reach the needs of this population would be through organizations that are directly engaged in this issue. In addition, the use of organizations is even more propitious due to the profile of its members, usually more accustomed to the "legal language" owing to the experience of activism, and also, to allow a more collective and less subjective perception of what the priorities of the LGBTI interests would be, while increasing the possibility of obtaining more inclusive results, attentive to the plurality of LGBTI experiences.

Regarding the instrument used to produce the data, although the survey is more usually linked to the execution of quantitative investigations, the choice was made owing to the physical and financial limitations of this investigation. As the research cut is broad, covering thirteen countries, it would not be possible to conduct interviews with representatives of each of the organizations at their headquarters. In addition, performing video-call interviews might not be acceptable to all the organizations, or might even impair the perception of information due to connection failures. Thus, the survey proved to be the best methodological option.

For its structuring, the survey was divided into four sections, predominantly open-ended questions, to enable maximum information capture and, also, a lower degree of influence on responses. The first section aimed only at obtaining general information about the organization, such as name, country, and city of headquarters, as well as contact and e-mail. Then, in the second section, it was asked what rights the organization considered that, given their importance, should be expressly provided for in the Constitution, regardless of the reality of their own countries. A gap was provided for inclusion of up to five rights and a justification for each of them, only the inclusion of at least one right being mandatory. In the next section, the only one that had a closed answer question (the options given were only "yes" or "no"), the question was: "Is constitutional protection of LGBTI rights satisfactory in your country?". Finally, the fourth section varied according to the answer given in the third, asking: why the organization considered the protection satisfactory or not; what they believed were the reasons for the protective *status*; and, in cases where an unsatisfactory protection had been identified, the question of what the means of solving the problem might be.

The organizations to which the survey was submitted were randomly selected through a Google search. Thus, to compose the sample universe, the term "LGBT organizations" was typed in the field of the Google search engine[50], followed by the name of the country in respect of which the organizations were to be found. The procedure was followed for the same thirteen countries analysed in the previous chapter. The searches were carried out in November 2017, the search being always carried out in the language of the respective country, varying between Portuguese, English, Spanish, and Dutch.

For the selection of organizations, only the first two pages of results shown by the Google search engine were always taken into account, both because they are considered the most relevant results and because, from the third page on, there were usually no results consistent with the research. As Regina Facchini points out, the profile of LGBTI organizations is quite diverse (ranging from collectives, NGOs, and other forms of structuring)[51] and this diversity has also proved true in the results found. Thus, all the organizations that had some form of virtual contact (e-mail, facebook etc.) and that, therefore, could receive the survey to be answered, were selected. It is important to note that access to an organization's website only, in many cases, ended up containing contacts from several others: these were also selected for submission. With the exception of Guyana, where only one organization was found, at least four organizations from each country under study were selected.

With regard to Brazil specifically, in the search following the abovementioned method, seven LGBTI organizations were found. Nevertheless, in order to obtain a broader sample of the country, a list of organizations working with the LGBTI cause in Brazil available in the "TODXS App", a mobile application created by the NGO TODXS[52], was also used. In the *app*, in addition to the list of organizations, there is access

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[50] LGBT was used instead of LGBTI due to the fact that the first term is still more frequent in the name of organizations.

[51] Facchini, Regina. *Sopa de Letrinhas?: movimento homossexual e produção de identidades coletivas nos anos 1990*. Rio de Janeiro: Garamond, 2005.

[52] For more information on the application and the organization, access: < https://www.todxs.org/ >.

to all the Brazilian legislation that could be useful to LGBTI persons, as well as a mechanism to report of cases of homo and transphobia.

After the selection, the survey was sent to a total of 188 organizations, from which were received a total of 26 responses. Besides Chile, there were answers from at least one organization from each country. The survey was sent in English, Spanish, and Portuguese, according to the language of each country[53]. All the e-mails with the survey were sent in January 2018, with a deadline for response by mid-February; later, they were resubmitted in February, extending the deadline for response until early March.

For the analysis of the answers, the tripartite method of qualitative analysis of empirical documentation was again applied, as proposed by Mario Cardano.[54] The segmentation followed the division of questions contained in the survey, separating the analysis into four categories: rights and justifications; the satisfactory or unsatisfactory protection in the country and the reason for this characterization; the causes of satisfactory or unsatisfactory protection; and the suggestions for overcoming the lack of protection, in the cases in which it applied. Regarding the qualification of the data, the *template analysis* elaborated by Nigel King[55] was used again, in all cases oriented inductively (*data-driven*). Finally, for the individuation of the relations, both cross-classifications and an analysis of deviant cases were performed.

(i) Rights and justifications

As already mentioned, the survey contained space to indicate up to five LGBTI rights that the organization considered essential and that should be expressly stated in the constitutional texts, each accompanied by a space to justify the reason for choosing that right. The intention was to

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[53] Due to language limitations, those sent to Suriname organizations were written in English, not in Dutch, the official language of the country.

[54] Cardano, Mario. *Manual de pesquisa qualitativa: a contribuição da teoria da argumentação*. Petrópolis: Vozes, 2017.

[55] King, Nigel. "Doing Template Analysis". In *Qualitative Methods in Organizational Research: core methods and current challenges*, eds. Gillian Symon and Catherine Cassel (London: SAGE Publications, 2012), 426–450.

create an ideal parameter of protection to be compared with that found in Latin American constitutional texts. As has also been pointed out, it was mandatory to suggest only the first right, the other four being optional.

From the analysis of the answers, the filling-in of 108 different rights was verified; 57 of them in the survey from Spanish-speaking organizations, forty-four in the Portuguese, and seven in the English one. Inductively, each of the rights suggested was embedded in 20 different categories, in some cases the answer being divided into two different categories. In Table 06, it is possible to observe the frequency of appearance of each of the categories in the survey, further divided by the application language.

Table 6. Frequency of Appearance of Rights

Right	Spanish-Speaking Countries	English-Speaking Countries	Brazil	Total
Right to non-discrimination	13	2	5	20
Right to work	3	1	1	5
Right to a dignified life/security	3	-	5	8
Equal rights and opportunities	5	-	5	10
Right to gender identity	7	-	7	14
Right to marriage and civil union	9	2	4	15
Right to health	2	1	5	8
Right to family	4	-	-	4
Criminalization of LGBTI-phobia	2	-	3	5
Right to housing	1	-	1	2
Access to justice	1	1	-	2
Right to free development of personality	1	-	-	1
Right to a plural education	3	-	3	6
Right to asylum	1	-	-	1
Right to maternity/paternity/adoption	1	-	3	4

Table 6. Frequency of Appearance of Rights

Right	**Spanish-Speaking Countries**	**English-Speaking Countries**	**Brazil**	**Total**
Right to political participation	1	-	-	1
Rights of intersex persons	1	-	-	1
Depathologization of transsexuality	-	-	1	1
Right to gender affirmation treatment	-	-	2	2
Right to information about sexuality	-	-	1	1

A quick examination of the previous table allows us to affirm that the protection currently existing in Latin American constitutions is definitely far from the ideal scenario expected by LGBTI movements. Focusing in the three most frequent rights (non-discrimination, marriage, and gender identity), it is possible to recall that only two countries guaranteed the right to non-discrimination in full; only one would open the possibility of civil union (and only through stable union and not through marriage); and none had specific provisions regarding the right to gender identity (other than the prohibition of discrimination). This shows how much these constitutional texts still need advancement for the full protection of LGBTI and their recognition as human beings and subjects of rights. Thus, these data help to advance the understanding of the problem initially raised, pointing to the confirmation of the hypothesis formulated.

For a better understanding of the reasons why organizations consider such rights to be so essential, the justifications presented for those rights with a frequency greater than 10 (in bold) have been cross-checked. In addition, we also decided to examine the justifications for the rights underlined (family rights and maternity/paternity/adoption rights) because of their proximity to (and sometimes even confusion with) the issue of marriage and civil union.

With regard to the right to non-discrimination, five groups of justifications stand out. The first characterizes this right as the basis

for the protection of all other rights and without it one cannot have access to citizenship. A second type of argument points out that the regulation of this right by merely infra-constitutional legislation would not be sufficient for its implementation. The third category of justification is based on empirical data, pointing out that, in a survey conducted directly with the LGBTI population, this was often a right that was raised as essential. A fourth type of justification is based on the history and intensity of discrimination as well as the number of LGBTI deaths. One of the organizations stresses that in their country this kind of discrimination is closely linked to religious motivations. Finally, the fifth group of justification refers to the symbolic weight and visibility occasioned by this inclusion, as well as to the legal substrate it would provide.

The next category whose justifications have been analysed ("equality of rights and opportunities") is closely linked to the right to non-discrimination, but these two rights have been categorized separately, since they appeared separately in several of the survey's answers. The second analysis of justifications has also given rise to five distinct groups of arguments. The first one identifies that, in order to be recognized as citizens, individuals must have all their rights respected. The second group emphasizes again empirical arguments. The third, on the other hand, emphasizes that this category includes all rights denied to LGBTI persons. From another angle, the fourth group asserts that this is one way of ensuring the inclusion of LGBTI in services provided by the State. And finally, the fifth set of justifications points out that this would be the way to remove the precariousness of LGBTI lives.

Moving forward to the analysis of the right to gender identity, two main justifications have been identified. The first one refers to the need to respect the autonomy of trans people to be able to identify themselves in the way they want and without impositions by society. The second group, on the other hand, reflects that gender identity is the gateway to the realization of all other fundamental rights for trans people, guaranteeing their dignity and mitigating their vulnerability before the State, which does not recognize them as citizens.

Still in relation to this category, two more highlights deserve to be made. The first refers to a very specific right pointed out by a Brazilian organization, which affirmed the need for "the right to serve a criminal

sentence according to the one's gender identity and in an environment free of discrimination".

The second point concerns the procedure for rectification of documents and State-issued identity papers to correspond one's self-defined gender identity. One of the Brazilian organizations highlighted the need for the change to take place through administrative and non-judicial channels. This is extremely important, given the difficulty of access to justice faced by LGBTI and the slowness of judicial procedures.

Finally, the analysis of the last three selected categories brings up some reflections. A common ground between the three groups of rights (right to marriage and civil union, right to family and right to maternity, paternity, and adoption) is the importance of the normative provision of these values embracing the LGBTI population. That is, regardless of the conquest of this guarantee through the judicial system, the explicit and textual provision is essential. Such concern is extremely relevant, not only because the textual inclusion of the right has considerable symbolic value, but also because it ensures a greater amount of legal certainty for these individuals, who will no longer depend on volatile judicial interpretations.

Further analysis reveals that the categories of the right to family and the right to maternity/paternity/adoption focus their justification on the need for equality of rights and recognition of the existence of a plurality of relational arrangements. On the other hand, the arguments related to the right to marriage and to civil union are more diverse, differentiating themselves into four groups. The first one repeats the pattern already illustrated in the other analysis regarding the empirical basis, indicating that this was one of the demands of LGBTI interviewed. The second justification relates to the possibility of guaranteeing visibility to same gender relationships, taking them from the private sphere and elevating them to public life. A third answer concerns the possibility of "stabilizing" this right through its prediction in the constitutional text, meaning that it could not be revoked by the mere approval an ordinary legislation[56]. Lastly, the most recurrent argument refers to the rights derived from

[56] Taking into consideration, of course, the amendment procedure of the legal systems that are in the scope of analysis.

marriage or civil union, which is a necessary step in most jurisdictions to guarantee various other civil rights.

In short, it is possible to conclude that all the justifications are based on the need to recognize LGBTI persons as lives that matter and subjects of rights. They seek to realize their dignity and guarantee access to the same rights as heterosexuals and cisgenders, rights that are historically and contemporaneously denied to LGBTI.

(II) The (lack of) constitutional protection of LGBTI rights

The second segment to be analysed also refers to the second section of the survey. It was asked whether the organizations considered the constitutional protection of LGBTI rights in their country satisfactory or not. In addition, they were asked to state the reasons why they characterized the protection as satisfactory or unsatisfactory. The examination of the responses indicated a broad positioning with regard to the lack of protection, with only two organizations (8% of the total) answering that protection was satisfactory in their country.

In view of the above panorama, it seems appropriate to start the analysis by the deviant cases. That is, the two organizations that indicated that the protection is satisfactory.

The first of the two, *Rincon Perfetti Abogados*, has a peculiarity: it is the only law firm in the list of surveyed organizations. It was selected not only for appearing in the search for selection of organizations, but also for being an office specialized in LGBTI rights. The organization, based in Colombia, indicates two reasons to consider the protection satisfactory: 1) constitutional interpretations would suffice; 2) the establishment by the Colombian Constitution of a "*bloque de constitucionalidad*".

With respect to the first reason presented, it should be noted that the precedents of the Colombian Constitutional Court (CCC) are among the most progressive of all Latin American countries regarding the guarantee of sexual rights.[57] In addition, *Rincón Perfetti Abogados* was one of the pioneers in strategic litigation that brought the issue of LGBTI rights to

[57] Ripoll, Julieta Lemaitre. "O Amor em Tempos de Cólera: Direitos LGBT na Colômbia". *SUR – Revista Internacional de Direitos Humanos* 6, no. 11 (2009): 79–97.

the CCC.[58] Thus, considering the history built by the organization and the really advanced precedents of the country's court, it is possible to understand the context that led to the positioning. Regarding the second motive pointed out by the office, it seems to base itself on the false assumption that protection under international law would be broad and extremely advanced. However, as already mentioned, protection in the international order is also extremely deficient and incomplete[59].

On the other hand, the other organization that answered "yes" to the question, based in Argentina, points out that the LGBTI population of the country would have obtained legal recognition of their rights from the "*enunciados generales*" of the constitutional text. Indeed, in terms of legislation, Argentina seems to be the most advanced Latin American country in this respect[60]. This is owing to the fact that the LGBTI movement in the country has opted for a unique approach to strategic litigation: instead of simply claiming their rights before the judiciary, judicialization was used as a way to pressure the legislative to approve laws on the subject.[61] As a result, Argentina is one of the few countries to have legislative regulations on issues crucial to the LGBTI cause, such as same-sex marriage and the right to gender identity. Nevertheless, as already stated in one of the justifications, regarding the importance of the normative constitutional provision of these rights, a legal protection based on general constitutional statements has a more precarious character, since the procedure for revocation of a non-constitutional legal norm is, generally, less onerous than that required for constitutional commands.

In the case of Argentina, there was another organization based in the country that answered the survey. *Projeto Educar en la Diversidad Sexual* identified the constitutional protection of the country as being unsatisfactory. As justification, they pointed out that, although there

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[58] Ibid.

[59] See: Lelis, Rafael Carrano, and Gabriel Coutinho Galil. "Direito Internacional Monocromático: previsão e aplicação dos direitos LGBTI na ordem internacional". Revista de Direito Internacional 15, no. 1 (2018): 278–296. http://dx.doi.org/10.5102/rdi.v15i1.5087.

[60] Corrales, Javier. *LGBT Rights and Representation in Latin America and the Caribbean: The Influence of Structure, Movements, Institutions, and Culture*. University of North Carolina: LGBT Representation and Rights Initiative, 2015.

[61] Cardinali, Daniel Carvalho. *A judicialização dos direitos LGBT no STF: limites, possibilidades e consequências*. Belo Horizonte: Arraes Editores, 2018.

have been legal advances, there are still regulatory gaps regarding issues essential to LGBTI, as in the case of the right to non-discrimination.

Turning to the cross-analysis of the motives pointed out by those who consider the protection of their country unsatisfactory, twelve different reasons have been identified. From this total, five were from Brazilian organizations, five from Spanish-speaking countries and two from English-speaking countries.

In the Brazilian scenario, the following justifications were pointed out: lack of LGBTI access to basic rights; advances in the realization of rights based only on judicial decisions or administrative measures; privileges that heterosexual and cisgender persons have in our democratic system; high rate of LGBTI deaths in Brazil; and non-criminalization of homotransphobia[62].

The second point raised refers to the risks and instabilities of predominantly judicial protection. As discussed in the previous chapter, the lack of provision of specific rights in the text of the constitution, allied to the composition of conservative legislative houses not open to the theme of sexuality and gender identity, led to a commitment of activism mainly in the Judiciary, through strategic litigation. However, this approach poses a number of risks: not only that the enforcement of the right is incomplete (owing to the lack of regulation or coverage of all the nuances of the issue by judicial decisions), but it also generates greater legal uncertainty, because it depends on the interpretations promoted by a changing judiciary. In this sense, one of the Brazilian organizations stresses that the security and protection of LGBTI "depends very much on the interpretation and goodwill of the people who operate the state machine". This reflects, once again, the precariousness of the current panorama of recognition of rights to LGBTI people.

The third point raised is the structure of the oppression carried by a cisheteronormative society, in which those who deviate from the norm tend to be marginalized and undervalued. The fourth aspect, in turn, refers to the same factor that supported the initial hypothesis of insufficiency raised by this article: the dimension of the number of acts of violence against the LGBTI population.

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[62] Answers were given before the recent judgement of the Brazilian Supreme Court on the matter of criminalization of LGBTI-phobic behaviors.

Finally, the last point, presented by another organization, concerns the non-criminalization of homotransphobia in the Brazilian legal system. The idea of using the criminal system, a means of oppression and perpetuation of structural discrimination, to protect the interests of LGBTI is a controversial issue even among LGBTI activists and scholars. While appealing to the criminal law can convey the seductive image that LGBTI lives are suddenly of importance to society, it must be borne in mind that not only this will not alter the perception of the majority of the population about such deviant identities and sexualities, but also it will act under an extremely limited and skewed scope, which already overwhelms black persons daily in Brazil. That is to say: criminalization would only serve to imprison those whom the system already frames as transgressors before even any judgment. In this way, deep reflection is needed on its application.

Continuing the analysis, the following justifications were presented in the Spanish-language survey answers: the fact that LGBTI are mentioned only in constitutional principles (raised by a Mexican organization); the lack of access to fundamental rights that are guaranteed to heterosexuals and cisgenders; the express denial of LGBTI rights (as pointed out by Ecuadorian organizations); the complete silence of the text of the constitution regarding the rights and existence of LGBTI; and the fact that the Constitutional Court is adopting a conservative stance, interpreting the rights restrictively, denying them to LGBTI individuals (as pointed out by a Venezuelan organization)[63].

Moreover, the two English-speaking organizations that answered the survey indicated that they considered the protection unsatisfactory owing to the criminalization of homosexual relations in their country and the absence of constitutional specification of the right to non-discrimination.

It is also worth mentioning a last relation between the data produced in this segment and those examined in the previous chapter. From the analysis of the constitutional texts, it was concluded that the two countries whose constitutions are most advanced in the protection of LGBTI

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[63] In some of the justifications, the organization or the country was indicated because these are issues that were specifically pointed out in relation to a particular country and cannot in principle be generalized. It should be pointed out that only those organizations which have expressly given authorization to do so are named.

individuals are Bolivia and Ecuador. However, none of the six organizations in these two countries that responded to the survey (two Bolivian and four Ecuadorians) considered the constitutional protection of LGBTI rights as satisfactory in their country. Thus, it is noted that even in those apparently more advanced arrangements, much progress still needs to be made.

(III) The causes of the constitutional protection status

In this penultimate part, it was intended to ascertain what would be the causative factors of these two different protective *statuses*: satisfactory or unsatisfactory. Again, the analysis starts from the deviant cases.

The two organizations that affirmed that the constitutional protection in their country suffices have highlighted that this is caused by the very fact of the protection of human dignity. Thus, they emphasize the constitutional guarantee of the rights to equality, liberty, and protection of the family, which extend to include marriage and equal adoption. At this point, the answers do not seem to refer, properly, to the causes of sufficient protection, but to the same reasons emphasized in the previous segment. The intention with this question was to perceive which conjunctural or structural characteristics led to the absence or presence of pro-LGBTI norms in certain jurisdictions.

However, if this diagnosis was not possible with the first two responses, the cross-analysis of the other organizations (those that had indicated the lack of protection) proved to be successful. In this sense, eight different categories of raised causes stand out, which are applied, by the answers presented, to the Latin American reality as a whole. However, they are all deeply connected, and it is difficult to trace precisely what is covered by each. These are: 1) the lack of LGBTI access to the political arena; 2) the formation of conservative legislatures; 3) the lack of political will to advance on LGBTI rights; 4) the socio-cultural heteronormative origins present in Latin America; 5) the continent's religious tradition and its distortion by fundamentalism; 6) the lack of awareness of the actors of justice of issues of gender and sexuality; 7) the lack of education of the population in gender and sexuality issues; 8) the absence of dialogue between public authorities and social movements. For a complete analysis of the factors, some of them will be grouped together for a joint

examination. In this way, we will analyse in association factors: one, two and three; factors four and five; factors six and seven; and, in isolation, the last factor pointed out.

The first three motives refer directly to the political dimension of justice and to the idea of representation. As can be seen, one of the causes of unsatisfactory protection is precisely the injustice of misrepresentation[64]. Thus, since LGBTI persons cannot be elected and have access to the parliament, the chances that their real interests will be taken into account are proportionately lower[65]. This is aggravated by the composition of eminently conservative legislative houses, whose members, in addition to not having the experience of a LGBTI person, strive not to allow the advancement of their rights. Still directly linked to this is the lack of political will, whether from the legislative or the executive, to guide LGBTI demands through public policies. Now, in a scenario in which only heterosexual and conservative individuals are elected, there are no expectations of any advance through the traditional political arenas. Thus, one can point to an institutional or structural discrimination of the LGBTI population.

The two following causes refer to the heteronormative and religious sociocultural traditions, impregnated in our continent. Although they are part of a separate group, they are directly related to the previous causes. This is because it is precisely the existence of a heteronormative cultural tradition that, to a great extent, prevents the access of LGBTI to

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[64] In this sense, Corrales points out that by the year 2014 there had only been 15 persons in the history of the legislative in Latin American and Caribbean countries, who were openly homosexual and held positions in legislative houses at the federal level. This was restricted to the following countries: Argentina, Aruba, Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico, and Peru. See: Corrales, Javier. *LGBT Rights and Representation in Latin America and the Caribbean: The Influence of Structure, Movements, Institutions, and Culture*. University of North Carolina: LGBT Representation and Rights Initiative, 2015.

[65] In an empirical research conducted on the subject, Andrew Reynolds points to the existence of an association between the (even small) presence of openly gay lawmakers and the passing of norms that advance the rights of homosexuals, since the presence of gays in the legislature has a transformative effect on the vision and voting of their heterosexual colleagues. See: Reynolds, Andrew. "Representation and Rights: The Impact of LGBT Legislators in Comparative Perspective". *American Political Science Review* 107, no. 02 (2013): 259–274.

public occupations. And it is also the great presence of religious actors in the legislative houses that ends up negatively influencing the normative production with respect to LGBTIs. What we characterize as "religious fundamentalism" is, in fact, a form of distortion of religious values to support the violation of the fundamental rights of LGBTI persons. Extremely conservative proposals have been approved based on religious arguments.[66] On the other hand, the maintenance of this reality and the difficulty of altering this mentality are directly related to the next causes examined, covered by a lack of education.

As discussed, two other causes were the lack of awareness among legal practitioners about gender and sexuality issues and the lack of education of the population on the same issues. Again, one seems to be the consequence of the other, and vice versa. At this point, a key factor for the advancement in the realization of LGBTI rights stands out: education. Without issues such as gender and sexuality being addressed from basic to higher education, there is no way to promote a profound change in the understanding of the general population about LGBTI. Prejudice, often driven by ignorance, must be countered by a broader debate and an education that deconstructs, mainly, biologically and religiously unduly naturalized and crystallized concepts in our society. With respect to legal practitioners, specifically, change can be more easily initiated by including specific subjects on the issue in the curricula of law schools.

The last group of motives is based on the same premise of this chapter: the need to (re)construct the law from the bottom-up. That is, the unprotective framework in LGBTI rights is due to the lack of dialogue of public power with social movements. This is because, as already stated, it is the affected individuals who have greater legitimacy for the aid and the very creation of public policies. In this way, it is essential that both legislative, executive and judiciary turn their attention to the LGBTI movement and the organizations that represent it.

As can be seen, the lack of dialogue tends to originate from public power itself and not from social movements. On the contrary, as identified by the survey, the LGBTI movement has endeavoured, in all Latin

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[66] Vital, Christina, and Paulo Victor Leite Lopes. *Religião e Política: uma análise da atuação dos parlamentares evangélicos sobre direitos das mulheres e de LGBTs no Brasil*. Rio de Janeiro: Fundação Heinrich Böll, 2012.

American countries, to reach out and influence public power in some way, seeking that its demands be at least heard and taken into account.

(IV) In search of alternatives

The last of the individualized segments for analysis sought to identify ways of overcoming the current paradigm of unsatisfactory constitutional protection. To that end, organizations were asked how they believed that insufficient protection could be addressed. As previously reported, this question was directed only to those entities that answered "no" in the question regarding the sufficiency of protection in their country. This is because there is no reason for wanting to change a reality in which LGBTI are supposed to be satisfactorily covered by the rules.

Exploring the answers given to the survey, it was identified that two main fields encompassed most of the suggestions presented: legislative interventions/changes and educational policies. More specifically, there are six groupings of solutions: 1) legislative proposals; 2) greater participation of LGBTI in politics; 3) elaboration of public policies; 4) changes in the educational model; 5) conducting research related to the problems faced by the LGBTI population; 6) strategic litigation; and 7) criminalization of LGBTI-phobia.

Regarding the legislative proposals, the need was pointed out to carry out advocacy with the Legislative Branch in order to affirm the fundamental rights of LGBTI persons, guaranteeing the *status* of citizens to these individuals. In addition, it was stressed the need for explicit inclusion of LGBTI rights in the constitutional text, as well as the "extensive interpretation of the principles of non-discrimination already envisaged to accommodate the protection of the LGBTI population". Directly linked to this, the need for greater participation of LGBTI in politics was presented. Although a specific form of accomplishing this objective has not been made explicit, we suggest – even if the purpose of this work does not allow us to develop the idea – an alternative to be considered: the establishment of affirmative actions (through quotas) to enable greater LGBTI representation in national congresses.

In addition to a legislative approach, the need was brought up for the executive to elaborate and implement public policies aimed at the LGBTI in order to give effect to provisions from statutes. That is to say:

just the enactment of a law or constitutional norm is not enough, if it is not accompanied by a good public policy aiming at its effectiveness and intending to raise awareness among general public.

In this sense, one of the most effective ways to change a socio-cultural cisheteronormative context is in the restructuring of the educational system. This was pointed out by almost all organizations. A pedagogical-educational approach is needed not only to better inform individuals about all issues related to gender identity and sexuality, but also as a way of sensitizing and humanizing future legislators, public managers, and judges. Without an interdisciplinary formation from basic to higher education, there is no way to completely change our homotransphobic reality.

Moreover, the need was pointed out to persist in strategic litigation, leading emblematic cases to the courts to set precedents that benefit the LGBTI population. However, as has already been pointed out, it should be borne in mind that the use of judicial channels presents several risks and should be used mainly as a palliative, while not obtaining satisfactory public legislation and policies.

The sixth proposal analysed is aligned with the objective of this article. One organization highlighted the need to carry out investigations to produce data about the reality lived by LGBTI persons. As already pointed out, scientific engagement in the theme is considered essential, not only to provide arguments about the need to change the current paradigm, but also to deepen knowledge about a reality that in many ways lacks more reliable information. This is what this research has been trying to do.

Finally, it was suggested by a Brazilian organization that the first step to change the current reality would be the criminalization of LGBTI-phobic practices. As already discussed, the issue of criminalization is extremely controversial, even among LGBTI, and should always be accompanied by a necessary critical insight with regard to solutions within criminal law. If criminalization is considered a way out (since it does not seem possible to rule it out *a priori*), one must concurrently raise the discussion about the problem of structural discrimination in the criminal justice system, as well as its use as *ultima ratio*, seeking to highlight what would be the legal situations that really deserve to be protected by this branch of law. Moreover, as Thula Pires points out, regarding the criminalization of

racism, rules aimed at combating discrimination through punishment may lack effectiveness, since punitive institutions naturalize patterns of oppression and do not regard such acts as discrimination.[67]

V. Conclusion

In the twenty-first century, many years after the end of World War II, concentration camps are still emerging, this time specifically targeting the torture of LGBTI persons. There are still legal systems that expressly discriminate against people based on their sexual orientation and gender identity. The expression of love is still criminalized, with the death penalty or life imprisonment. In the twenty-first century, LGBTI are still raped and murdered because of their mere existence, with little or no legal protection for their defence.

Concerned with this scenario, this article has sought to contribute to the reflections about the effectiveness of justice for the LGBTI population. More specifically, the objective was to gauge and understand the scope and form of constitutional protection of the rights of LGBTI persons in the countries of South America and Mexico. Thus, the research problem questioned whether or not this protection is satisfactory.

In this sense, the theoretical framework of postwestphalian democratic justice, proposed by Nancy Fraser, was adopted as a lens for understanding the dimensions of justice and the limits and possibilities of the research. Therefore, in the first chapter, Fraser's theory was developed, exploring the economic, cultural, and political dimensions of justice and their respective levels of redistribution, recognition, and representation. In this context, it was emphasized that recognition and representation have a greater influence on the lives of LGBTI. In addition, the transformative and affirmative remedies to combat injustices were differentiated.

Later, in the second chapter, the analysis of the empirical materials began. From the study of the constitutional texts of the thirteen countries which are the object of this investigation, it was possible to draw

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[67] Pires, Thula Rafaela de Oliveira. *Criminalização do Racismo – entre política de reconhecimento e meio de legitimação do controle social dos não reconhecidos*. Rio de Janeiro: Pontifícia Universidade Católica do Rio de Janeiro, Departamento de Direito, 2012.

conclusions and partial results, advancing in answering the problem. In this sense, there was a precarious scenario regarding the protection of LGBTI rights. Only two of the constitutions investigated (the Bolivian and the Ecuadorian) had an explicit prohibition on discrimination based on both sexual orientation and gender identity. Besides these, it was verified that the Mexican Constitution foresees the prohibition of discrimination only based on sexual preferences. Concerning the constitutions, it was observed that, among those that regulate marriage, no normative text was presented in an open way (with a neutral language), limiting the institution only to heterosexual couples. From another angle, with respect to the stable union, it was identified that only the Constitution of Ecuador had an open textual construction, opening the possibility for unions between two people of the same gender.

Still in relation to the constitutional charters, it was possible to point out the Ecuadorian Constitution as the most advanced in guaranteeing LGBTI rights, followed by the Bolivian one. Both, besides having stood out positively in the analysis criteria, still have additional provisions, such as safeguarding the exercise of sexual and reproductive rights in Bolivia and the right to free and safe choice of sexual orientation in Ecuador. Also emphasized was the special participation of social movements as influencers of the construction of the Ecuadorian text. In addition, from a causal inference, a relation was drawn between the date of enactment of the constitutions and the advance in the protection of the rights of LGBTI, indicating that the more recent the statute, the more likely that the tutelage will take place satisfactorily.

Finally, the last chapter of the study was devoted to an analysis of the responses of a survey applied to several organizations that work with the LGBTI theme in Latin America, favouring the perception of the right from the bottom-up. This analysis found the existence of at least twenty different essential rights to LGBTI and that should be provisioned in the constitutional text. In comparison with the scenario outlined in chapter two, the lack of protection in the Latin American constitutional scenario was confirmed, due to the absence of normative provision of almost all the rights mentioned. In addition, 92% of the organizations that responded the survey considered the constitutional protection of LGBTI rights to be unsatisfactory in their country, with only two affirming the existence of satisfactory protection.

Although the result is not entirely surprising, it is concerning to confirm that the one which should be a more inclusive constitutional tradition, owing to its more substantive constitutions, sometimes ignores and at other times rejects the existence of LGBTI persons. More than that: it denies LGBTI basic elements that characterize human dignity. Also disturbing is the fact that, even in countries where there is minimal legislative advance, the scenario is not more promising, given the ineffectiveness of norms and the reiteration of cisheteronormative culture.

Thus, owing to the various elements presented during the course of the study, it was possible to respond to the problem proposed by the investigation, confirming the initial hypothesis of the existence of a deficit in the constitutional protection of LGBTI rights in Latin America. Hence, the relevance of this observation is emphasized, not only as a denunciation of the current scenario, but also as a way of stimulating the engagement to overcome this situation.

However, once again, the limitations of a legal approach to the problem must be emphasized. The constitutional provision is essential and is characterized as a basic level in advancing the realization of justice for LGBTI. Nonetheless, simply filling this normative gap is not enough to completely overcome the oppression suffered by those people. The creation of constitutional laws and commandments breaks only superficially with the injustice suffered by LGBTI in their cultural dimension, at the level of recognition. Thus, because it is an affirmative remedy, the law is not successful in eliminating the dichotomies that establish discriminatory distinctions between homo and heterosexual or trans and cisgender. Nor can it effectively eliminate political injustices, for it depends too on the change of structural patterns that generate such inequality. In view of this, the need to explore other fields, such as education, is reinforced, with the potential for deeper transformation of the system that is in place to maintain oppression. And, above all, the need for a transformation from the bottom-up, characterized, always, by the protagonism and direct participation of LGBTI persons.

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REFORM BY LEGAL TRANSPLANTATION: AFGHANISTAN'S COUNTER NARCOTICS LAW 2006

Abstract

When the international community has engaged in efforts to assist transitions to peace in countries de-stabilized by conflict, new criminal law is often found to be imperative in order to promote the development of fair and effective justice systems, the rule of law and due process in accordance with international human rights standards. While the transplantation of readily available law can be an appealing solution, little scholarship has been dedicated to examining its effectiveness for developing post-intervention criminal law reform. Informed by empirical evidence and qualitative interviews with senior international and Afghan legal personnel, this article addresses this gap in scholarship by evaluating Afghanistan's Counter Narcotics Law 2006 (CNL). Applying a new test, it considers firstly, whether this law was a successful transplant and, secondly, whether it was reasonable for those responsible for drafting it to rely on legal transplantation as a mechanism for reform. It finds that the transplanted content of the CNL and the processes of transplantation reduced the extent to which it was accepted and achieved its objectives, and concludes by making recommendations for 'sensitive' transplantation based on knowledge of theoretical frameworks on transplant feasibility and legal adaptation, analysis of local legal traditions and collaboration with local justice professionals.

Keywords

legal transplants – criminal law – Afghanistan – law reform

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Introduction

In states where the international community has engaged in efforts to assist in transitions from conflict to peace and promote the rule of law there is a noticeable trend of reliance by reformers upon legal transplants to stimulate legal change. This is certainly the case with substantive and procedural criminal law reform, often identified as the essential starting point on the road towards establishing the rule of law.[1] The criminal law frameworks of Liberia, Angola, Bosnia, Haiti, East Timor, Kosovo, and Afghanistan[2] all underwent extensive programmes of reform following international intervention, assisted by legal transplantation. This suggests that the normative reasoning of post-intervention law reformers is that legal transplants represent a legitimate means of promoting quick and necessary modification{s?} or replacements to old or inadequate laws in criminal justice systems often typified by a neglect of international human rights standards and by political distortion. This legitimacy may be rooted in the symbolic significance of a borrowed law,[3] driven by the powerful forces of modernisation and globalisation[4] or explained by the cost-saving expediency of importing tried and tested law when

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[1] V. O'Connor, *Rule of Law and Human Rights Protections through Criminal Law Reform: Model Codes for Post-Conflict Criminal Justice*, "International Peacekeeping" 13:4, 2006, p. 527.

[2] For reform of the Liberian and Haitian criminal codes as well as the Angolan Penal Code see C. Rausch, *Combatting Serious Crimes in Postconflict Societies. A Handbook for Policymakers and Practitioners* (United States Institute of Peace 2006); for Kosovo, see UNMIK Regulations and Administrative Directions, Official Gazette, http://www.unmikonline.org/regulations/index.htm; for East Timor see, e.g., *On Transitional Rules of Criminal Procedure*, UNTAET Reg. No. 2000/30 (25 September 2000) and *On the Establishment of a Legal Aid Service in East Timor*, UNTAET Reg. 2001/24 (5 September 2001); for Afghanistan, see, e.g., Interim Criminal Procedure Code, Official Gazette No. 820, 2004; Law on the Campaign Against Bribery and Administrative Corruption, Official Gazette No. 838, 2004; Law Combatting the Financing of Terrorism, Official Gazette no. 839, 2004; Law on the Campaign Against Money Laundering and Its Proceeds, Official Gazette No. 840, 2004.

[3] L. Friedman, *Some Comments on Cotterrell and Legal Transplants* [in:] D. Nelken and J. Feest (eds), *Adapting Legal Cultures*. Hart, 2001.

[4] J. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process* "American Journal of Comparative Law", 51 2003, p. 839.

urgent new legal frameworks are required.[5] Dobbins has acknowledged the significant contributory value of legal transplants for the creation of quick-start packages of criminal laws ready for immediate application in post-intervention states.[6] O'Connor's Model Codes for Post Conflict Criminal Justice certainly give sustenance to this reasoning.[7]

This means of criminal law reform has not been without its critics. Both Drumbl and Brooks have, rightly, cautioned against neutral, formalistic and technical approaches to rule of law reform that may rely on legal transplantation and are detached from social or political consequences.[8] In a similar vein, The UN's 2004 Rule of Law report similarly advised Member States to 'eschew one-size-fits all formulas and the importation of foreign models.'[9] This instruction contrasted sharply with earlier recommendations to look to 'foreign models and foreign-conceived solutions'[10] and with the reality on the ground, as a flurry of newly transplanted laws was simultaneously being introduced in Afghanistan following significant input from international experts.[11]

The lack of real consensus amongst practitioners about the benefits to post-intervention criminal law reform of legal transplants is mirrored by similar discord amongst academics as to their significance for promoting legal change and the conditions that contribute to their success or failure. These tensions largely reflect diverging perspectives over the relationship between law and society. For Legrand, the meanings of legal rules are so culture-specific that any attempt to transplant them into another

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[5] H. Kanda, C. J. Milhaupt, *Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law* "American Journal of Comparative Law", 51 2003, p. 887.

[6] J. Dobbins, S. Jones, K. Crane, B. Cole de Grasse *The Beginner's Guide to Nation-Building*, Santa Monica, CA: RAND Corporation, 2007, p. 77.

[7] O'Connor, supra note 1.

[8] M. A. Drumbl, *Rights, Culture and Crime: The Role of Rule of Law for the Women of Afghanistan* "Colombia Journal of Transnational Law", Issue 4 2004, p. 249; R. Brooks, *The New Imperialism: Violence, Norms and the Rule of Law*, "Michigan Law Review", Issue 101, 2002–2003, p. 2285.

[9] United Nations, *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. 5/2004/616 (23.08.2004).

[10] United Nations, *Report of the Panel on United Nations Peace Operations: Comprehensive Review of the Whole Question of Peacekeeping Operations in All Its Aspects* (Brahimi Report) U.N. Doc. A/55/305-S/2000/809 (21 August 2000).

[11] *supra*, note 2.

jurisdiction renders them void of any meaning at all. The result is that legal transplantation is impossible.[12] Watson's contrasting view of legal transplants places them at the forefront of legal development. For Watson, the statements and rules that comprise legal provisions are independent of cultural concerns. Moreover, the socio-political contexts of the original and recipient jurisdictions are of limited consequence to the manner in which transplanted rules are received. Therefore, the recipient system 'does not require any real knowledge of the social, economic, geographical, and political context of the origin and growth of the original rule.'[13] In addition, given that historical analysis demonstrates that legal transplants are responsible for legal development, the issue of whether a transplant is or is not successful is of little concern.

Watson's positivist outlook on the influence of legal transplantation on legal development is counter-balanced by socio-legal assessments advanced by a number of other prominent academics. These largely acknowledge the potential of legal transplants as stimulants for legal change, while asserting that the success or failure of transplanted law – and, therefore, whether it is appropriate to develop law by legal transplantation – will be dependent upon a variety of sociological, cultural, political, and economic influences. Kanda and Milhaupt have emphasised the need to find 'the right plot' for a transplanted law.[14] Successful transplantation depends on the fit between the host environment and the adopted rules. Similarly, Brooks warns that law reformers in post-intervention states have little prospect of their new transplanted laws creating or changing intended legal rules and procedures unless they 'know the culture and take it seriously.'[15] The local context of the recipient jurisdiction is, therefore, the key determinant of success for legal development. For deLisle, also, the successful importation of legal transplants is tied to the approximation of the transplant to the legal culture of the importing country. More than this, however, close

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[12] P. Legrand, *What 'Legal Transplants'?* [in:] D. Nelken and J. Feest, (eds), *Adapting Legal Cultures*, Hart, 2001.

[13] A. Watson, *Legal Transplants and Law Reform,* "Law Quarterly Review" Issue 92, 1976, p. 81.

[14] Kanda and Milhaupt, supra note 5, at p. 887.

[15] Brooks, *supra* note 8 at p. 2334.

collaboration between the domestic and foreign legal experts involved at the time of its importation is likely to condition its reception.[16]

These contrasting theoretical views on the value, feasibility, and evaluation[17] of legal transplants, as well as conflicting recommendations amongst practitioners over their legitimacy, and a rudimentary understanding amongst international advisers as to their viability, combine to provide little reassurance to law reformers as to their potential for promoting effective post-intervention criminal law reform. Part of the problem is that there is a lack of authoritative empirical evidence and evaluative studies from which to draw reference and learn valuable lessons. The Department for International Development has acknowledged that 'many initiatives in the justice sector have not been subject to careful monitoring and evaluation.'[18] Similarly, the UN's Rule of Law report lamented the 'scant attention'[19] that has been paid to the post-conflict rule of law reform, an observation supported by Samuels, who has noted that in spite of more than twenty years of experimenting 'little is known about how to bring about legal change in developing or post-conflict countries.'[20]

Empirically informed by a wide range of sources, including data from Afghan Justice Ministries and interviews with more than 20 senior international and Afghan legal personnel, this article aims to fill an important gap in existing scholarship by shedding new light on the complex role of legal transplantation for post-intervention legal development by evaluating Afghanistan's Counter Narcotics Law (CNL),[21] passed by Presidential decree in 2005 and later replaced by new legislation in 2010.

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[16] J. deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models and Legal Change in the Post-Communist World and Beyond*, "University of Pennsylvania Journal of international Economic Law", Issue 20, 1999, p. 280–1.

[17] J. Jupp, *Legal Transplants as Tools for Post-Conflict Criminal Law Reform: Justification and Evaluation,* "Cambridge Journal of International and Comparative Law," Issue 3, 2014, p. 392.

[18] Department for International Development, *Safety, Security and Accessible Justice: Putting Policy into Practice*, (July 2002).

[19] UN, supra note 9, at para. 24

[20] K. Samuels, *Rule of Law Reform in Post-Conflict Countries. Operational Initiatives and Lessons* Learnt (Social Development Papers. Conflict Prevention and Reconstruction. Paper No. 37, 2006), p. 18.

[21] Counter Narcotics Law, Official Gazette No. 875, April 2, 2006.

The CNL provides a relevant and illuminating example of a criminal law transplanted in a post-intervention state as part of a programme of criminal law reform which, to date, has eluded any scholarly analysis. A new evaluative test is applied to the CNL in order to examine two central questions: firstly, whether the CNL was a successful legal transplant and secondly, whether it was reasonable for legislators to rely on legal transplantation to develop this law when seeking to reform Afghanistan's criminal law framework in order to promote the rule of law. In tackling these issues this article provides new insight into the impact of this transplanted law on criminal justice reform in Afghanistan and produces findings which have important ramifications for both legal reform policy in post-intervention states and for theoretical frameworks on transplant feasibility and legal adaptation.

The evaluative test that is applied seeks to balance positivist and socio-legal perspectives on legal development and considers: firstly, whether it was accepted by the local population, bearing in mind the manner in which it was applied and the extent to which it was regarded as meaningful and appropriate by those applying it and those subject to its provisions; and secondly, whether it achieved its objectives. It proposes that the greater the extent to which the CNL was accepted and achieved its objectives, the more compelling it is to conclude that it was a successful legal transplant.

To further elucidate the first of the two arms of this test, namely the acceptance of a transplanted law, this is irrevocably linked to the manner in which it is applied by local law enforcement personnel and lawyers.[22] It is more likely to be applied, and therefore accepted, if it is valued and considered to be meaningful and appropriate to those applying it. The more familiar the legal authorities of the recipient country are with the transplanted legal concepts, the more likely it is that they will be successfully adopted and applied. This reasoning acknowledges Watson's contention that law is ultimately shaped by elite legal professionals. It also resonates with Brook's work on 'norm-change' promotion in rule-of-law projects[23] and with Dezalay's premise that the success of

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[22] J. H. Beckstrom, *Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia*, "American Journal of Comparative Law", Issue 21, 1973, p. 561.

[23] Brooks, supra note 8, p. 2286.

a transplant is tied up in the extent to which local society will deem it worthy of investment.[24]

The second arm of this test considers the extent to which a transplanted law has achieved its objectives. If law reformers choose to rely on legal transplants as mechanisms for legal reform, it is reasonable to assume that they do so with specific objectives in mind which they believe the transplanted law can fulfil. An assessment of these identifiable objectives and the extent to which they have been met allows for consideration of the particular country-specific, post-intervention complexities with which law reformers are faced when drafting new law.

To achieve its aims the article introduces the CNL in Part 1 and identifies the features that confirm it to be a legal transplant. Part 2 acknowledges a number of challenges to its reception, rooted in Afghanistan's plural legal traditions and a weak centralised state justice system. Part 3 applies the author's evaluative test to the CNL and details important findings, and the article concludes with Part 4, which outlines the implications of the study's findings for theoretical debates on legal transplants and post-intervention law reform policy.

Part I

1. The Counter Narcotics Law 2006 as a Legal Transplant

The passing of the CNL was to a large extent a reaction to the failure of counter-narcotics reform initiatives undertaken by the Afghan government and its international supporters between 2001 and 2005. In May 2003 a 5-year National Drug Control Strategy (NDCS) was adopted following extensive consultation with international experts from the US, the UK, and the United Nations Office on Drugs and Crime (UNODC)[25] which contained the ambitious objective of reducing opium cultivation

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[24] G. Dezalay, *The Import and Export of Law and Legal Institutions* [in:] D. Nelken and J. Feest (eds), *Adapting Legal Cultures*, Hart, 2001.

[25] C. M. Blanchard, *Afghanistan: Narcotics and U.S. Policy* [in:] L. V. Barton (ed.) *Illegal Drugs and Governmental Policies,* New York: Nova Science Publishers, 2007, p. 116.

by 70% by 2008 and eliminating it by 2013[26], and identified judicial reform as one of five key areas on which to concentrate efforts to facilitate this.[27] In this respect it recognised 'the need for [the] establishment of an efficient and modern criminal justice system to address drug trafficking' and promised that 'proper laws would be enacted,'[28] which would include a 'national law on drug trafficking and related offences' in the drive towards establishing an 'anti-drugs legislative system that meets international standards.'[29]

The result was a new Counter Narcotics Law passed in October 2003, drafted quickly with very little input from or consultation with local representatives[30], and transplanted from a UN 'model' law with deliberate omissions in order, apparently, to make it more understandable to Afghan practitioners.[31] This represented a diversion from the previous 1991 law which, according to one international expert, was 'basic, and just imposed imprisonment for trafficking and cultivation.'[32] The new law provided for the regulation of illicit drug-related offences and the classification of drugs and precursors in accordance with internationally approved standards. However, by late 2004, according to the United Nations Assistance Mission in Afghanistan (UNAMA), there was 'a consensus that the [CNL 2003] needed revision.'[33] It failed to provide the police and prosecutors with the necessary modern mechanisms required to successfully apprehend and convict drug traffickers, particularly those

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[26] *National Drug Control Strategy 2003,* p.9*, available at online:*<www.cicad.oas/fortalecimiento…/National%20Plans/USA%2003.pdf [last accessed 19.03. 2019].

[27] Ibid. The others being institution building, law enforcement, alternative livelihoods, and demand reduction.

[28] Ibid., at annex p.v.

[29] Ibid., at annex p.vi.

[30] email correspondence, International Drugs and Development Adviser; it 'is drafted by "experts" from UNODC' who had only two visits with the Afghan delegates in order to draft the legislation. According to this source those involved with the law were required to draft it within a very short time-frame, which may have accounted for the minimal consultation with local actors.

[31] *Ibid*.; the interviewee stated that 'the 2003 law …is based on the UN "model" law, but with several omissions due to the lack of any Afghan understanding of what it is.'

[32] Ibid.

[33] United Nations Assistance Mission in Afghanistan (UNAMA), *Justice Sector Overview*, April 2007, held on file, at 7.

at the top end of the trade with international connections who were adopting increasingly sophisticated trafficking strategies. A new law could provide police and prosecutors with more modern tools to deal with counter-narcotic crime.[34] New initiatives were required.

By this stage it was clear that counter-narcotic strategies were failing. There were at least 15,000 opium traders and approximately 10% of the total population were involved in poppy cultivation.[35]. Opium production was estimated at 4,200 tons, 23 times more than that produced 20 years earlier.[36] Profits from the narcotics trade were worth $US2.2 billion a year and the industry had become deeply interwoven with not only the economic, but also the political and social fabric of the country. Opium was being cultivated in all of Afghanistan's provinces and profiteering from its production was financing insurgency, encouraging corruption, and increasing warlord power, which combined to represent a huge threat to domestic state-building and rule of law reform efforts.[37] UNODC warned that 'unless the drug problem is solved, there would be no sustainable development for Afghanistan.'[38]

The CNL was introduced as a legislative solution to Afghanistan's 'drug problem.' In recognition of the spiralling narcotics problems, the Afghan government published a Counter Narcotics Implementation Plan in February 2005, following a period of consultation with international experts, which set out eight pillar activities designed to tackle the cultivation, production, and trafficking of drugs in Afghanistan. The pillar concerned with 'criminal justice' identified a number of key targets,

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[34] According to the NDCS 2006 although the 2003 CNL 'is a major step forward compared to previous legislation …it did not address the 'working needs' of drug law enforcement officials;' see National Drug Control Strategy 2006, p. 45, available at www.fco.gov.uk/resources/en/pdf/pdf18/fco_nationaldrugcontrolstrategy [last accessed 9 March 2019].

[35] W. Byrd, C. Ward, *Afghanistan's Drug Economy. A Preliminary Overview and Analysis*, Draft Technical Annex 2, Ishington: World Bank, 2004.

[36] UNODC, *The Opium Economy in Afghanistan. An International Problem*, 2003, p. 81, *available at* reliefweb.int/w/rwb…/214e1694bbf78591c1256cc60049f953? [last accessed 9 March 2019].

[37] UNODC, *World Drug Report 2005,* p. 179, available at www.unodc.org/pdf/WDR_2005/volume_2_chap5_opium.pdf [last accessed 9 March 2019].

[38] Ibid at 210.

amongst which were the development of 'a more effective criminal justice system,' (a tacit admission that the prevailing system was inadequate), the establishment of a new Court and prison in Kabul dedicated to major drug trafficking cases, and the introduction of 'an effective counter-narcotics legal framework'.[39]

In alignment with these requirements, a centralised counter-narcotics Criminal Justice Task Force (CJTF) was established by the Afghan government in co-operation with the UK and with support from the US and UNODC, becoming fully operational in July 2005.[40] UK representatives noted that 'in a climate where counter narcotic law is largely unimplemented, … a dedicated, highly-mentored unit is essential to deal effectively with serious counter narcotic-related crime, and demonstrate to traffickers they were at real risk of prosecution.'[41] The CJTF was composed of specialist investigators, prosecutors, and judges trained to expedite significant counter-narcotics cases.[42] The result of this revised counter-narcotics programme was the creation of an integrated system of criminal justice that would exist parallel to the existing poorly functioning justice system and which would be specifically dedicated to drug-related criminal cases capable of being fast-tracked through new centralised courts, namely the Central Narcotics Tribunal (CNT) Primary and Appeal Courts, devoted solely to narcotic-related crime. A new counter-narcotics law was required, one that would be the centre-point of these new initiatives and which would also have the pragmatic significance of establishing the jurisdiction of the CNT by law and formalising the statutory powers of the Ministry of Counter Narcotics (MCN), founded in December 2004 to co-ordinate counter-narcotics activities.[43] This was to be the CNL.

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[39] The Counter Narcotics Implementation Plan, 16.02.2005, available at www.afghanemb-canada.net/en/counter_narcotics [last accessed 15.03.2019].

[40] UNAMA, supra note 33 at p. 33.

[41] *The Criminal Justice Task Force – Lessons Learned*, Conference on the Rule of Law in Afghanistan, Rome 02.07.2007, held on file, at p. 1.

[42] Its jurisdiction, defined in the CNL 2005, extends to any case where the amount of heroin, morphine, or cocaine seized exceeds 2kgs, opium exceeds 10kg, or hashish or other specified illegal substances exceeds 50kg (article 34(4)(a)-(c).

[43] Interview, International Drugs and Development Adviser. Although the MCN was formed in early 2005 and had two Deputy Ministers it had not yet been accorded any formal statutory powers.

While it was a product of collaboration between the UK, the US, and Afghanistan, the CNL was regarded locally as an internationally-led law,[44] a perception heightened by the fact that it was drafted in English as opposed to Dari or Pashto.[45] In reality, it was largely designed by the UK and the US. The UK had a larger input with the operational sections of the law, such as the provisions dealing with electronic interception and surveillance, which were new counter-narcotic legal concepts in Afghanistan.[46] The US were intent on imposing mandatory sentences for drug offences and providing for the extradition of suspects for trial abroad, both of which were included in the final draft.[47] The first draft was prepared by members of the Drugs Team from the UK Home Office stationed at the UK Embassy in Kabul in 2005.[48] They were not, however, trained lawyers[49] and the UK acknowledged that it lacked the necessary personnel to competently complete the drafting process, at which point it sought the assistance of two US Department of Justice Deputy District Attorney-Generals (who had been working alongside various retired military policemen), US Drug Enforcement Administration (DEA) agents, Norwegian judges, and lawyers employed as mentors within the CJTF.[50]

There were opportunities for Afghan involvement in the drafting process. The UK was assisted by Dr Adbul Jabar Sabet, later to be appointed Attorney-General, but who in 2005 was acting as both a legal adviser to the Ministry of Interior (MOI) and the UK Drugs Team, with which he had a very close working relationship.[51] The UK provided Sabet with a framework for the law and asked him to review it, applying his experience of domestic criminal and counter-narcotics law.[52] Some additional personnel in the Attorney General's Office (AGO) followed the legislation in its drafting stages through to its enactment. To that extent

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[44] Interview, senior member of the UK Rule of Law team.

[45] UNAMA, supra note 33, at p. 7.

[46] Interview, supra note 43.

[47] Possibly because US personnel were more involved than UK Home Office actors at the end point of the drafting process; interview, supra note 44.

[48] Ibid.

[49] Interview, senior prosecutions adviser.

[50] Interview, supra note 44.

[51] Ibid.

[52] Ibid.

Sabet and the AGO had every reasonable opportunity to approve or amend the CNL before it was passed by Presidential Decree in December 2005.

As it turned out, however, the contribution of the AGO and also the Afghan Supreme Court to the drafting stages proved to be relatively minor, confined principally to ensuring that it included a rigorous sentencing structure, which emerged as the primary concern of Afghan contributors to the process.[53] It has since been noted that any local opposition to the provisions proposed in the draft law were 'silenced' during meetings with international agents.[54] The comparatively inconsiderable role played by Afghan actors in the drafting stages of the CNL may have been due to a lack of professional capacity within the AGO and the Supreme Court. It was apparent to the international actors at the time that there is not a great wealth of legislative reform experience amongst those Afghan officials who might have been in a position to contribute to the process.[55] Additionally, there may have been a lack of willingness amongst domestic actors to contribute meaningfully to the drafting task. It would have distracted them from their other administrative responsibilities, and exposed them to criticism if the law was later construed as being flawed.[56] It is likely also that the 'lead nation' policy, installed following the Tokyo Conference[57], generated a culture of dependence by domestic officials on the experience of international actors to complete technical and demanding tasks of this nature.

It is equally possible that the potential for greater Afghan contribution was compromised by the speed with which the CNL was drafted and passed. It was, a senior prosecution adviser with the British Embassy

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[53] Interview, senior member of the UK Rule of Law team, 25.03.2008.

[54] M. E. Hartmann, A. Klonowiecka-Milart, *Lost in Translation. Legal Transplants Without Consensus-Based Adaptation*, [in:] W. Mason (ed.) *The Rule of Law in Afghanistan: Missing in Inaction*, Cambridge University Press, 2011, at p. 289.

[55] Interview, supra note 44.

[56] Ibid.

[57] The 'International Conference on Reconstruction Assistance to Afghanistan,' Tokyo, 21–22 January 2002, held at ministerial level and co-chaired by Japan, US, EU, and Saudi Arabia. See Consulate General of Japan in New York, Japan Info: Tokyo Hosts International Conference on Reconstruction Assistance to Afghanistan, available at www.cgi.org/en/c/vol_09-5/title_02.htm [last accessed 15.03.2019].

Drugs Team later reflected, 'too rushed'.[58] There was a sense of urgency about the drafting process given the recognised demand amongst the UK and international donors in particular for a new counter-narcotics law that would complement the revised strategy that envisaged a new justice system dedicated to drug crime, augmented by the CJTF, the CNPA, and new courts. But the speed with which it was prepared was, in all likelihood, also the result of political ramifications. Once Parliament returned, it would have to be considered by the *Taqnin*,[59] entailing a lengthy consultation process and inevitable postponement of the potential impact of the new counter-narcotics policy. Ultimately it was passed by Presidential decree just one day before Parliament was due to convene.[60] In fact, then, the drafting process of the CNL 2005 was similar to that of its predecessor. It was drafted quickly, based on international models and contained provisions conforming to international conventions.

Given the combination of all of these factors, the CNL 2005 contains many of the hallmarks of a legal transplant. It established internationally-funded centralised institutions. The new judges, police, and prosecutors employed by these institutions would be trained by international organisations and placed under foreign scrutiny and invigilation. There was only marginal input by or consultation with local actors during the drafting stages. It may have been a piece of Afghan legislation, but it was regarded as an international law that fundamentally includes borrowed foreign principles of acceptable counter-narcotics law, drafted in a foreign language mainly by foreign actors.

Part II. Constraints on Reception

The CNL was introduced in Afghanistan in 2005, four years into a process of international engagement in assisting in reconstructing the state justice sector. At the time, the central administration and its international donors faced significant challenges, characterised by damaged infrastructure,

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[58] interview, supra note 49.

[59] The Taqnin is the legislative drafting unit based in the Ministry of Justice.

[60] Interview, supra note 43.

uncertain knowledge of relevant applicable laws, and poor capacity amongst justice and law enforcement personnel.[61]

Legal training and capacity building programmes were undertaken by a large number of international donors, initially under a 'lead nation' strategy which saw the UK assume responsibility for counter narcotics. However, there was a lack of any real co-ordination between them, and also insufficient Afghan involvement. While the reconstruction strategy changed in 2007 to allow for greater local engagement in the reconstruction process, it remained largely controlled by international donors, and particularly by the US during the period of the CNL's existence.[62] An international emphasis on security over justice and rule of law and pervasive corruption and abuse of power within justice institutions increased local disillusionment in the state criminal justice system, driving insurgency, and in turn undermining state justice mechanisms and legislative reform. These contemporary challenges to the state justice system are likely to have challenged the application and reception of new transplanted laws such as the CNL.

It is also worth noting that the reach of the central state and its ability to impose its criminal justice system on the rural population has been challenged by a history of local reservations over its legitimacy brought about by persistent reliance by Afghan rulers on foreign assistance. Rather than gaining authority based on support from within Afghanistan, those in control of the state – and state justice mechanisms – have long been dependent on financial assistance from external powers. Abdul Rahman Khan, under British sovereignty, relied on British arms to strengthen his state system. Between 1955 and 1978 the Soviet Union provided US$2.52 billion and the US $533 million in aid to support state rulers[63] and the *mujahedeen* were later supported by the US and Saudi Arabia during Soviet occupation. The current regime, under President Karzai,

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[61] T. J. Barfield, *On Local Justice and Culture in Post-Taliban Afghanistan,* Issue 17, 2001–2002, p. 437–443.

[62] M.C. Bassiouni, D. Rothberg, *Assessment of Justice Programs and Rule of Law Reform in Afghanistan and Future Directions*, 2 July 2007, p. 5, available at www.rolafghanistan.esteri.it/ConferenceRol/Menu/Ambasciata/Gil_uffici/ [last accessed 15.03.2019].

[63] B. R. Rubin, *The Fragmentation of Afghanistan. State Formation and Collapse in the International System,* Yale University Press, 1995, p. 20.

has received unprecedented levels of foreign financial assistance. It is estimated that 90–95% of all state development costs and 69% of all government expenditure is financed by external aid, more than under any other previous regime.[64] The dependence by a succession of state rulers on foreign financial assistance to maintain power and control has resulted in a series of rentier states, particularly since 1978, propped up by external aid rather than by an internal base of support. This dependence increases doubt over whether measures introduced by the Afghan state are in the best interests of the Afghan people or are the result of manipulation by its foreign sponsors. There is considerable mistrust over the intentions of the foreign backers of the state. The collective experience of the Soviet invasion, the US abandonment of the country following Soviet withdrawal, the support provided by neighbouring countries to factions involved in the civil war, and the current intervention by international forces, which provides strategic access in the region, has created a deep suspicion that foreign powers support the Afghan state only to serve their own interests.[65]

These suspicions increase antipathy towards the state regime and its justice system, and reduce their legitimacy and reach, which continue to remain largely confined to urban areas. The formal system of justice is relevant for only 10% of the population.[66] It is, as the EU has acknowledged, 'far removed from ordinary people's everyday life'.[67] The legitimacy of the state justice system, limited by a devastated infrastructure, the corrupt practices of some of its officials whose capacity is questionable, and fluctuating regime change has contrasted unfavourably with the permanency and relevance of *Shari'a* and customary practices whose authority derives from the more meaningful sources of religion and the collective requirements of the local community. The Afghan state, Misdaq

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[64] A. Suhrke, *The Case for a Light Footprint: The International Project in Afghanistan 2010,* Anthony Hyman Memorial Lecture, SOAS, 17 March 2010, available at www.soas.ac.uk/cccac/events/anthonyhyman/file58420.pdf [last accessed 15.03.2019].%%%

[65] A. J. Their, *Re-establishing the Judicial System in Afghanistan,* CDDRL Working Paper, no.19, 1 September 2004, p. 5, available at www.cddrl.stanford.edu [last accessed 15.03.2019].

[66] European Commission, *EU Commitment to the Governance and Rule of Law in Afghanistan*, July 2007, p. 11.

[67] Ibid at 6.

reminds us, has always been 'in the shadow of the tribe.'[68] And so, state law has always lived in the shadow of *Shari'a* and customary law. Tribal, ethnic, and religious affiliations and consequent customary and Islamic practices have more resonance and greater appeal to the majority of the local population. As a result, the norms and rituals provided for in any state law in Afghanistan, are traditionally rarely 'widely shared' by the local population.

These historical issues are likely to impact on the potential reception of state laws such as the CNL. If state laws have traditionally had less appeal to Afghans, new transplanted state laws are less likely to be considered meaningful and appropriate to them, with the result that the laws are consequently less likely to be accepted and to achieve their objectives.

Given that the evaluative test that is to be applied to the CNL requires a consideration of socio-legal influences, we might also reflect on the cultural challenges to transplant reception in Afghanistan. Local resistance to foreign conquest and intrusion and to foreign promoted attempts at state modernisation might imply a cultural resistance in Afghanistan to any new transplanted law such as the CNL, dependent on foreign sources, which would impact on its application and acceptance. Cultural resistance to a transplant may adversely affect its potential reception.[69] What, however, is meant by 'culture' and indeed 'Afghan culture' by which it is possible to determine if there might be any cultural resistance to these transplanted laws? The concept of 'culture' is complex and difficult to define. According to Williams it is 'one of the two or three most complicated words in the English Language.'[70] A traditional 'natural history' anthropological approach to defining culture implies that it is handed down, preserved, fixed, and perhaps an obstacle to change.[71]

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[68] N. Misdaq Afghanistan, Political Frailty and Foreign Interference, Routledge, 2006, p. 4.

[69] L. Marafioti, *Italian Criminal Procedure: A System Caught Between Two Legal Traditions,* [in:] J. Jackson, M. Langer, P. Tilliers (eds), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Damaska*, Oxford UK: Hart Publishing, 2008, p. 81–98.

[70] R. Williams, *Keywords: A Vocabulary of Culture and Society,* Oxford University Press, 1983, p. 76.

[71] N. Dupree, *Security with a Human Face; Challenges and Responsibilities. Afghanistan National Human Development Report 2004,* UNDP 2005, p. 233.

This perspective might suggest that any legal transplant that fails to be attuned to the culture of its host country is likely to meet resistance. It is an outlook, however, that has recently been challenged. Current anthropological approaches towards culture tend to regard it not as an essential, inherited, fixed tradition, but rather as something that is flexible and capable of change. Tapper's 2008 review of Afghan culture supports this stance.[72] While Tapper maintains that it is not possible to say with any authority what culture or indeed Afghan culture actually is, it is nevertheless more likely to be 'a dynamic, changing, flexible collection of values and practices.'[73] In contrast to the natural history perspective, Tapper's view of Afghan culture would auger well for the potential receptivity of the CNL, intent on bringing about change. Rather than being fixed and inflexible Afghan culture may be capable of negotiation and alteration and therefore of absorbing new, transplanted legal concepts and procedures.

Part III. Evaluating the Counter Narcotics Law 2006

A. The Application of the Law

By February 2010 the CJTF, which applied the CNL with respect to more significant drug cases under article 34, was situated within a $US 12 million compound in central Kabul and comprised over 150 staff. These included 40 CNPA investigators from the MOI and 35 prosecutors seconded from the AGO, all of whom were selected on the basis of ability and integrity. There were also 13 Judges provided by the Supreme Court, seven of whom presided at the Primary Court and 6 at the Appeal Court.[74] A Detention Centre, staffed by personnel from the Central Prison Division under the aegis of the MOJ, was situated in the compound, containing 50 beds for detained suspects. There were also barracks for the prison

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[72] R. Tapper, *What is Afghan culture? An anthropologist reflects,* Anthony Hyman Memorial Lecture, SOAS, 13 March 2008.

[73] Ibid.

[74] Figures provided by FCO official based at the CJTF during interview on 23.02.2010.

staff and a Judicial Security Unit responsible for maintaining the security of the compound, ensuring the protection of Judges and staff and the safe transfer of prisoners on site. All of the units in the compound were built as separate entities. Therefore, police investigators worked in one building and Judges in another in an effort to preserve the integrity and independence of the departments engaged in applying the law.[75]

There were four different types of Prosecutors based at the CJTF who were applying the CNL. Investigative prosecutors conducted all the necessary investigations in relation to a drugs case which came under its jurisdiction. This involved their working closely with the police during the questioning and interrogation of a suspect, attending crime sites, and viewing drug hauls. Investigations were to be concluded within 15 days of receiving a case, although prosecutors were able to apply for an extension of time for up to 15 days on application to the Court.[76] At the end of the prescribed investigative periods, which could not exceed 30 days, the investigative prosecutor should either have released the suspect or served him/her with an indictment. This consisted of 6 to 7 pages of script detailing the case against the accused, which was served on them and filed at Court. Cases were to be timetabled with lists published and made available to the accused and defence lawyers and trial dates set down within 2 months of the service and filing of an indictment.[77] The CJTF tried to ensure that defence lawyers to whom drug cases were referred were members of the Afghanistan Independent Bar Association (AIBA) as it imposed a code of conduct and ethical standards.[78] In practice, there tended to be a select group of defence lawyers affiliated with the Bar Association to whom cases were referred on a regular basis.[79]

UK mentors worked with the prosecutors to try to change a predisposition for automatic referral of cases to trial having noted that some prosecutors, and particularly those who were trained in Moscow

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[75] Interview, supra note 74.

[76] Investigations and prosecutions were conducted in accordance with article 36 of the Interim Criminal Procedure Code, article 37(9).

[77] Interview, supra note 74.

[78] The Afghanistan Independent Bar Association was formed in September 2008 further to the Advocates Law (November 2007). A Code of Conduct was approved in January 2009.

[79] Interview, supra note 74.

or in Afghanistan under the Soviet court system, had a propensity to refer cases without proper assessment of the evidence and prospects of securing a conviction.[80] Procedural changes were introduced to ensure that cases were properly reviewed before a decision was taken to set a matter down for trial and, by 2010, it was estimated that approximately 85% of the cases received by the CJTF proceeded to trial.[81]

If an indictment was served, the case was transferred to a Primary Prosecutor who would present the case for the prosecution at the trial. At the end of the trial, Judges retired to chambers to deliberate and agree a finding. If they found the defendant guilty, they would also determine the sentence at that stage. The judgement and sentence would usually be confirmed in writing.[82]

If the matter was appealed, which according to a senior CJTF prosecutor tended to be 'inevitable,'[83] it was referred to the CNT Appeal Court. The prosecution file would be transferred to the Appellate Prosecutor, who assumed responsibility for preparing and presenting the case for the prosecution at the appeal hearing that was to be conducted within 2 months.[84] At the end of the appeal process, the accumulated prosecution case file would be passed to trial prosecutors. They scrutinised the paperwork and the procedures that had been followed, and prepared cases for trial at the Supreme Court if cases were referred for further appeal, which in practice was relatively rare.[85]

The CNL contained penalties of imprisonment that related in practice not only to cases involving the possession and trafficking of large quantities of narcotic drugs, which were referred to the CNT, but also to low-level drug offences dealt with in Provincial Courts, involving the use or possession of small quantities of drugs. There were concerns that the sentencing provisions were excessively harsh and failed to enable an appropriate degree of judicial discretion.[86] Imprisonment appeared

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[80] Interview, CNTF prosecution casework adviser.

[81] Ibid.

[82] Interview, supra note 74.

[83] Ibid.

[84] Ibid.

[85] Ibid.

[86] Ibid. Chapter IV, articles 15–33.

unavoidable under the law, even for possession of small quantities of illicit drugs. Article 27, for example, failed to define any lower limit for possession entailing imprisonment. The result was that the possession of small amounts of cannabis amounting to less than 10 grams attracted a term of imprisonment of between 3 to 6 months in addition to a fine.[87] Article 29 demanded that the Courts imposed maximum penalties in relation to offences committed by repeat offenders.[88] Furthermore, detainees sentenced to more than 5 years imprisonment were denied any right to apply for home leave[89] and drug trafficking offenders were prohibited from applying for probation or the suspension of their sentences, irrespective of the type of drug and the quantities involved or the circumstances of their offence.[90] According to UNODC, 'the principle that underlies the CNL is punishment.'[91] The punishment that was meted out was often in the form of lengthy prison sentences. Statistics published by the Supreme Court on selected decisions for the 8 month period between August 2008 and March 2009 revealed that 166 defendants were convicted of 'drugs narcotic crime' and convicted to a total of 1,756 years in prison, representing an average sentence of ten and a half years imprisonment per defendant.[92]

Drug trafficking offences resulted in mandatory prison sentences. Yet the majority of drug trafficking offenders to whom the law applied in practice were couriers, paid small sums of money to transport drugs. It would not be unreasonable, for instance, for a courier to receive approximately $500 for transporting more than 10 kilos of heroin, which carried a mandatory life sentence.[93] The draconian sentencing provisions in article 16, largely reduced to a simple consideration of the weight of

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[87] Article 27.

[88] Article 29.

[89] Article 30.

[90] Article 31(2).

[91] UNODC Afghanistan. Implementing Alternatives to Imprisonment, in line with International Standards and National Legislation, 2008, p.24, available at www.unodc.org/documents/justice-and-prison-reform/Afghanistan_Implementing_Alternatives_Imprisonment.pdf [last accessed 19.03.2019].

[92] Statistics available at www.supremecourt.gov.af/decision/decision.html [last accessed 19.03.2019].

[93] Interview, supra note 49.

the drugs that have been seized, allowed little room for prudent judicial consideration relative to the degree of criminal responsibility. There was no hope for leniency for a courier, irrespective of the extent of their involvement in the crime.

A number of interviewed experts expressed concern over the CNL's sentencing structure. A CNT judge observed that the most serious problem with the law is 'the very harsh sentences that allow the judges no discretion.'[94] A senior prosecution adviser reached the same conclusion, commenting that 'sentencing is robust and there is no real discretion.'[95] According to a senior prosecution caseworker at the CJTF, the 'massive minimum sentences' provided for in article 16 represented 'hard law [and] bad law', the practical effect of which is that couriers received lengthy prison sentences 'for effectively trying to get small amounts of money.'[96] There was no allowance for any balance between an offence and the suffering that should be imposed on an offender in order to secure justice. Ultimately, contrary to international recommendations,[97] the CNL failed to provide an adequate level of proportionality between the nature of any drug trafficking offence and the degree of punishment that should be meted out.

In addition to concerns surrounding the tough sentencing provisions of the law, problems arose with the implementation of some of the 'new' procedures the CNL introduced. Article 41 provided incentives for apprehended and convicted drug offenders to co-operate with law enforcement agents, in return for which their sentences could be reduced by up to 50% on recommendation of the prosecutor in circumstances where an offender had provided 'substantial assistance' regarding the criminal activities of other suspects. This represented a new innovation for counter-narcotic law in Afghanistan, its rationale being that it would encourage offenders lower down the criminal chain, such as drugs couriers, to provide evidence against higher ranked drug offenders. No

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[94] Questionnaire, CJTF Judge, 22.03.2009.

[95] Interview, supra note 49.

[96] Interview, supra note 80.

[97] See UN Human Rights Committee: Australia, 24.07.2000, A/55/40, paras 498–528, available at www.unhchr.ch/tbs/doc.nsf/…/A.55.40, paras498-528.En? [last accessed 15.03.2019].

similar provision existed in the applicable criminal procedure code upon which the law enforcement authorities could rely.

Officials, however, experienced difficulty in applying article 41, mainly as a result of its lack of prescription. It failed to set out any clear process for dealing with any new information provided by co-operating defendants. The reasoning of the law was undoubtedly that there should be a referral to the CNPA or international authorities so that they can make enquiries as to the authenticity of the information provided and that, if it proved to be helpful, this would be noted in the trial bundle with a recommendation for sentence reduction if the defendant was convicted. The article, however, did not prevent the information being made available to the Judge before reaching a judgement, influencing their decision-making regarding a defendant's innocence or guilt and increasing the potential for prejudicing judicial impartiality.

Article 41 also failed to provide any definition of 'substantial assistance,' leading to subjective interpretation by Primary Prosecutors. Furthermore, the English version of the law provided that the Primary Prosecutor had discretion to recommend a sentence reduction of up to 50% so that the discount would be relative to the amount and value of assistance provided. The Dari translation, however, stated that any sentence reduction should be 50% in all cases, removing any room for judicial discretion.[98] The intended application of the article was initially, therefore, lost in translation, making it susceptible to inconsistent application by the judiciary, until a ruling by the Supreme Court later clarified that sentence reductions were discretionary and up to 50%.[99]

Aside from these problems, article 41 was open to abuse by offenders who, in the quest for sentence reductions, made false accusations against entirely innocent people, leading to their arrest. A CNT Judge commented that he did 'not like the Section 41 provision on informing on others as it provides an incentive to lie about people that you do not like and to get them into trouble with the authorities.'[100] An international expert also described the consequences of article 41 as 'a problem, a massive issue.

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[98] Interview, supra note 53.

[99] Ibid.

[100] CJTF Judge, supra note 94.

The Sentencing Commission should be looking at it but do not have the personnel.'[101]

Not only did article 41 lead to the arrest of innocent people, but also the vital evidence against medium and higher-value drug traffickers that the drafters of the CNL might have anticipated also did not materialise to the extent that was hoped. In practice, applications for section 41 sentence reductions were invoked infrequently by defendants. A prosecution adviser attributed the 'uncommunicative' behaviour of defendants to a 'cultural' predisposition towards inscrutability rather than any reaction to the presence of international actors in the investigative and prosecution process.[102] It was more likely, however, to be a direct response to threats to their safety and that of their families by personnel higher up the trafficking hierarchy. Higher-end drug traffickers were well aware of the potential dangers that article 41 might have presented to them and countered them by adopting 'scare and favour' strategies, which included issuing threats of harm and offering financial rewards. The latter often involved ensuring that the courier's family were looked after and provided for during their detention. Threats of harm, on the other hand, could be far reaching, and include killing not only a courier's partner and children but also all of their blood ancestors.[103] These carrot and stick incentives were successful in frustrating law enforcement agents from benefiting from the sentence reduction incentives provided for in article 41 and, on the whole, it was not persuasive to couriers and lower-end targets (who were the most likely to be arrested and convicted) to provide vital evidence against key target large-scale drug traffickers.

Article 37 of the CNL also introduced new procedures to counter-narcotic practices in Afghanistan and was one of the key centralising provisions of the legislation. It provided that upon the arrest of an individual with a quantity of drugs which ensured that the case fell within the jurisdiction of the CNL, the arresting officer should prepare a report and hand the accused over to the primary prosecutor of the district where the arrest took place within 72 hours. The accused was then to be transported by the CNPA to its headquarters in Kabul within

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[101] Interview, supra note 44.

[102] Interview, supra note 43.

[103] Interview, supra note 44.

15 days of the arrest, where the suspect could be held for questioning for up to 72 hours. Within 15 days of the arrest the case was to be handed over to a Special Counter Narcotics prosecutor entrusted with presenting an indictment to the primary CNT or, in the alternative, a further extension of time of 15 days should be sought to do so.[104] The effect was that suspects arrested under the CNL were to be transferred to Kabul as soon as possible and no later than 15 days from their arrest.

Article 37 was designed to ensure that the administration of counter-narcotic justice would be funnelled to special Courts in Kabul, staffed with specially trained judges and prosecutors cognisant with the law. The rationale behind this centralisation process was that it would enhance the potential for successfully prosecuting major drug cases and also help to ensure uniform application of the law. Suspects could be transported quickly from provincial areas to Kabul, where their cases would be placed under the scrutiny of the Counter Narcotics Trust Fund (CNTF). Prosecution cases would be managed by a small and select group of trained individuals. Hearings would take place in the same courts and the judges presiding over them would be conversant with the law and procedure and would quickly build experience, ensuring consistency in application of the law.

In reality, however, the article 37 provisions proved very difficult to implement. Transporting suspects from provincial areas within the timescales the article prescribed presented major logistical problems. Transport infrastructure in Afghanistan at the time was extremely poor. It had no functioning rail system, a limited and unregulated air transport service and possessed one of the worst and least developed road systems in the world.[105] The potential for complying with the provisions of article 37 and securing a transfer of drug suspects within the prescribed time limits varied depending on where in the country an arrest was made. Different areas offered better or worse prospects for compliance, depending on available transport facilities. Rather than promoting the uniform application of the law in the manner that was anticipated by the drafters of the CNL, the difficult transfer requirements of article 37

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[104] Article 37(9).

[105] Afghanistan Millennium Development Goals Report, 2005, p.xviii, available at www.ands.gov.af/mdgsgroups.asp [last accessed 16.03.2019]

decreased the potential for consistency. A CNT Judge admitted that 'many times people were kept for longer than their time limits,'[106] representing worrying violations of defendants' rights to freedom from arbitrary detention as provided for in the Afghan Constitution and under international conventions to which Afghanistan was a signatory.

The CJTF, with UK mentor assistance, sought to solve the problem by airlifting prisoners from provincial areas to Kabul, often relying on assistance from the RAF.[107] This, however, proved problematic because of the infrequency of available flights and the potential limited comparative priority airlifting prisoners represented to the air force relative to ongoing military commitments. Whilst the UK and the Afghan government were understood to have been considering employing a private contractor to airlift prisoners, there were disagreements about who should meet the costs of such an arrangement. It is understood that the UK funded the transporting of suspects in the face of reluctance from the Afghan government to contribute to costs, based on a reasoning that as the UK was responsible for the law, it should be liable for consequent expenses.[108]

Difficulties in organizing safe transport were not the only problems facing officials in their efforts to comply with article 37 requirements. Other variables affecting compliance included the degree of security in the area of arrest, the capacity of the police in the locality and their propensity to corruption. Most commonly, arrests took place when drugs were discovered during police or army checkpoints. Arrested individuals were to be handed to the CNPA as soon as possible and the matter referred to the primary prosecutor within 72 hours, whereupon arrangements were to be made for the transfer of the suspect to Kabul. Many cases, however, failed to be transferred either to the CNPA or Kabul owing to police corruption.[109] There was provincial variation in compliance with the law. According to a senior member of the UK Rule of Law team interviewed in 2008 in Helmand, 'the likelihood of anything happening [in Helmand] is not great. What is more realistic…is that a bribe is paid to the policeman or [the case] is simply not progressed

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[106] CJTF Judge, supra note 94.

[107] Interview, supra note 44.

[108] Interview, supra note 43.

[109] Interview, supra note 34.

because I suspect that the police don't know what they should do next and the security situation being what it is you were not going to worry about taking a guy who has got some [drugs] all the way back to see the prosecutor.'[110] Cases involving higher profile suspects, however, demonstrated greater compliance with the provisions of the Law. On or about February 2010, for example, a policeman arrested by the CNPA in Helmand in connection with a trafficking operation was successfully transferred to the CJTF in Kabul.[111]

In fact, by 2010 85% of cases received by the CJTF related to offences committed in provincial areas,[112] so there is evidence to suggest that the authorities were overcoming logistical and security problems to comply with article 37. However, it is estimated that in approximately 30% of all cases presented to the CNT no defendants were produced.[113] In these instances drugs were found by the police, but they made no arrests or, alternatively, the police made legitimate seizures, but maintained that the suspects escaped. These alarming statistics support an analysis that compliance with the provisions of the CNL was distorted by endemic police corruption. According to a UK prosecution casework adviser interviewed in 2009, the police were known to be complicit in profiting from the seizure of drugs in the course of their duties.[114] In 2009 the CNT convicted the head of the Highway Police for assisting a drugs trafficker when he was found to have ordered his men to escort a drugs dealer.[115] In some instances police officers would stop and search vehicles, locate and seize drugs in the course of their duties and then divide the drugs haul amongst themselves and the drug traffickers before allowing the traffickers to move on. Alternatively, they would accept a bribe to release a suspect. According to a CNT judge, 'far too often, only the small fish were arrested and the big fish escape…often the police would let people go if they were paid enough money.'[116] In other instances police officers

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[110] Ibid.

[111] Interview, supra note 74.

[112] Interviews, supra notes 74 and 80.

[113] Interview, supra note 74.

[114] Ibid.

[115] CJTF Judge, supra note 94.

[116] Ibid.

were known to have simply disappeared following a seizure of drugs, taking the drugs with them or the cash equivalent value, having sold them back to the drug dealers from whom they were originally seized.[117]

To some degree the potential for police corruption was increased as a result of omissions from the transplanted content of the CNL. Article 28(3), for example, stated that vehicles seized in connection with trafficking offences could be confiscated and sold and that the sale proceeds should be deposited at the government treasury department. Yet the article failed to clarify who should be responsible for the seizure of assets and their sale or how they should account for the sale proceeds or indeed conduct a sale. This lack of prescription and clarity led to *ad hoc* practices being employed by law enforcement officials and enhanced their ability to profit without detection from corruption by disposing of seized assets and retaining the proceeds.[118]

In addition to predatory corruption by the police and law enforcement personnel, the application of the CNL was also compromised by the poor capacity of these officials and their lack of understanding of the law, particularly at the investigative phases of drug cases. Article 38 stipulated that officials conducting drugs seizures should prepare reports that included details of the type and quantity of the drug and a factual account of the seizure. Any seized drugs were to be handed over to the CNPA who gathered physical evidence of the amount and weight of the drugs and took samples that were referred for testing, following which the remaining drugs were to be destroyed.[119] The scene report on drug seizures was a vital part of prosecution evidence and the samples collected samples a key feature of police investigative work.

Cases that originated in Kabul had an improved success rate because the police in Kabul handling the initial stages of the case were more likely to have received adequate training in the conduct of the investigation of drug cases than those in provincial areas. A 2008 UNODC report recorded that the CNPA in Kabul, which it described as a 'competent, albeit small, organisation,' was then conducting police investigations 'at

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[117] Interview, supra note 80.

[118] Ibid.

[119] Article 39.

a level capable of assisting legal proceedings.'[120] Cases originating from the provinces, however, often had to be dropped because the evidential chain had been broken due to poor police practices. No witness statements would have been taken; the police would have compiled incorrectly completed or inaccurate reports of drug seizures; or samples taken from a small percentage of the haul were mislaid without any other physical evidence of the seizure having been obtained, resulting in the case being removed from CNT jurisdiction to the Provincial Courts because the amount of drugs taken from the samples was less than that required for the CNT to have jurisdiction for prosecuting the case.[121] A CNT judge confirmed that 'sometimes we have to send cases back to the provincial courts because the drug amount is too small.'[122] It was the experience of the same judge that 'the prosecutors were good at applying the law, but still need to try to investigate the case further. Sometimes pressure is put upon prosecutors to continue with bad cases because a senior person does not like the accused. The police do not send proper crime scene reports or information on the destruction of the drugs as according to the law. The police were very ignorant and lazy and do not care or obeying the provisions of the law.'[123] In some instances also the CNPA failed to destroy seized drugs after samples had been taken, in contravention of article 39, possibly as a result of insufficient funds to organise a drugs burn, but more likely owing to police corruption.[124]

Just as the poor capacity of the police, including the CNPA, could be said to have been hampering the successful application of the CNL – an issue highlighted by UNODC in a 2008 report when it described the CNPA in general as 'not yet a competent and independent police agency'[125] – the same accusation could be levelled at the criminal defence

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[120] UNODC, *Thematic Evaluation of the Technical Assistance Provided To Afghanistan By The United Nations Office On Drugs And Crime*, volume 3, 2008, Law Enforcement Programme, available at www.unodc.org/documents/evaluation/2007-afghanistan.pdf [last accessed 13 March 2019].

[121] Interview, supra note 44.

[122] CJTF Judge, supra note 94.

[123] Ibid.

[124] Interview, supra note 80.

[125] UNODC, supra note 120, at 12.

service. The CJTF in Kabul was reasonably well supported by capable defence lawyers approved by the Supreme Court and who received mentoring assistance.[126] Judges presiding over cases in the CNT in Kabul were known to be very thorough in checking whether someone was represented and they would stop a case to allow representation to be obtained if it was requested.[127] In an effort to ensure availability of defence representation some NGO's based in Kabul provided defence lawyers, operating a system similar to a duty solicitor referral scheme, so that there was a defence counsel on duty each night who could dispense advice and offer to represent a defendant charged with a CNL offence. The CJTF also endeavoured to make a telephone available to suspects when they were brought into custody in Kabul in order that they could call a defence lawyer.[128] However, the extent to which this service was available, particularly during the night, was questionable.[129]

Because of these practices it was likely to be the case that there were more defence lawyers available to represent defendants involved in drugs cases under the jurisdiction of the CNT than there were available to suspects in other criminal offences outside CNT jurisdiction, a contention confirmed by a senior prosecution adviser in 2008: 'you would probably see more defence lawyers in the drugs cases than you would elsewhere.'[130] Nevertheless, in spite of these efforts, approximately 30% of cases listed for hearing at the CNT were adjourned because defence lawyers failed to attend in order to represent their clients, contributing to a chronic backlog of cases and lengthening the period of time that defendants remained in prison awaiting trial.[131] This backlog was often exacerbated by the prison department in Kabul neglecting to produce defendants for hearing, the net result of which was that only about one third of listed cases at the Tribunals in Kabul proceeded to hearing by 2010.

The delays to proceedings caused by the unavailability of defence practitioners, or indeed by the failure of the prison service to produce

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[126] Interview, supra note 44.

[127] Ibid. and interview, supra note 80.

[128] Interview, supra note 44.

[129] Ibid.

[130] Ibid.

[131] Interview, supra note 80.

parties for trial, resulted in worrying breaches of fundamental rights enshrined in international law to which Afghanistan is a signatory.[132] Such delays to the trial process also ran contrary to Islamic law, which acknowledges the right of an accused to a trial without undue delay.[133]

B. The Extent to Which the Legislation was Considered Meaningful and Appropriate

The established legal order in terms of counter-narcotics criminal justice in Afghanistan has been influenced by an eclectic mix of customary practices, and religious and positive state law. As a consequence of the historically tenuous reach of the Afghan state, religious and customary practices were more influential than state legislation in shaping this order and local attitudes towards drugs. Therefore, the extent to which the provisions of the CNL were compatible with customary and religious approaches towards narcotics was significant in determining its potential for being welcomed as meaningful and appropriate by the local, or indeed the legal, population.

Customary and religious practices appear to be characterised by an ambivalent mixture of prohibition and toleration. According to MacDonald 'both opium and hashish were generally tolerated by Afghans, but the attitudes towards them were not written down in any way. There is quite a liberal attitude towards it.'[134] In some northern provinces opium use was considered to be an integral aspect of social existence and an acceptable form of medication and, indeed, child-care.[135] According to Lau, at the customary level 'the use of drugs is strongly condemned, but no one has the right to take steps against, or even question, a person

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[132] ICCPR, article 9(3) provides that an accused should be entitled to a trial within a reasonable period of time; article 14(3) asserts that criminal trials should be held without undue delay.

[133] Max Planck Manual on Fair Trial Standards, 2006, p. 76, available at www.mpil.de/shared/data/pdf/mpil_fair_trial_3rd_edition_engl.pdf [last accessed 19.03.2019].

[134] Interview, International Drugs and Development Adviser.

[135] UNODC, supra note 91 at p. 68.

accused of using drugs.'[136] Under Islamic principles opium cultivation has been *haram* (forbidden) while also subject to an agricultural tax (*ushur*) imposed by mullahs, allowing for interpretation by farmers as religious toleration.[137]

It is noticeable that the limitations that the CNL placed on judicial decision-making as regards sentencing were similar to the simplified rules for sentencing for *Shari'a hudud* offences, which were prescriptive and allow no discretion concerning punishment for an offence, provided that strict evidential requirements have been fulfilled. To that extent there was some degree of compatibility between the CNL and *Shari'a*. Nevertheless, the CNL's lack of tolerance towards drug cultivation, use, production, and trafficking, together with its strong emphasis on punishment as opposed to rehabilitation, were generally incompatible with customary and religious attitudes towards narcotics, which continued to influence approximately 80% of the population. Therefore, the CNL was unlikely to be considered meaningful and appropriate by the vast majority of the population who continued to refer to Islamic and customary practices rather than those imposed by the state.

According to a CNTF Judge, however, the procedures and practices laid down by the state and embodied in the CNL were much more appropriate for combating drug crime in Afghanistan than those prescribed by the country's other legal traditions. This Judge asserted that 'there is little dispute amongst the law enforcers that the only way to deal with the evil of drugs is through the laws. We need laws that people can understand to fight against the scourge of drugs. If the rule of law means everything, then the laws must be written down and [be] able to be understood by anyone who looks them up.'[138] This suggests that there was a clear understanding amongst those concerned with enforcing state law that positive laws such as the 2005 CNL were the most appropriate and meaningful method by which the State could seek to combat the drugs

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[136] M. Lau, *Afghanistan's Legal System and its Compatibility with International Human Rights Standards,* International Commission of Jurists, 2002, p.17, available at www.icj.org/IMG/pdf/doc-51.pdf [last accessed 15.03.2019].

[137] UNODCCP, *Global Illicit Drug Trends 2001*, p.33, available at www.unodc.org/pdf/report_2001-06-26_1/report_2001-06-26_1.pdf [last accessed 15.03.2019].

[138] CJTF Judge, supra note 94.

industry. Indeed, they were more appropriate than reliance on customary and religious rituals and norms. According to the same Judge, 'If there is a use for traditional justice, it should not be in narcotics because many think of drugs as a problem for foreigners. They would also be subject to pressure and bribery and make decisions based on what they know of the family.'[139] Furthermore, this Judge was clear that in his view drug crime 'should not be left in the hands of ignorant *shurahs* who make up their minds based on how they like the family of the people on trial.'[140] He also regarded the ability to punish offenders that the law provided as a much more meaningful and appropriate means of combating drug crime in Afghanistan than the toleration and reconciliation allowed for in customary practices, commenting that 'the *Pashtunwali* concentrates on reconciliation more than punishment which would not be appropriate for drugs.'[141]

While it is probable that there is a consensus amongst law enforcement personnel that state law is more appropriate and meaningful for combating Afghanistan's drug economy than the rules and norms provided by the country's other legal traditions, the question remains whether the transplanted content of the CNL was compatible with the established legal order as regards state law. This would impact on the extent to which it was likely, as a transplanted law, to be meaningful and appropriate to the practitioners applying it.

Some of the new measures the CNL transplant instigated certainly represented diversions from counter-narcotics legislative norms. Its provisions for search, seizure, and covert surveillance and its referral of more serious drug trafficking offences to the CNT's in Kabul, for example, were new to Afghan state criminal justice.[142] Nevertheless, its stipulation that investigations, prosecutions, and trials were to be conducted in accordance with the ICPC rendered it compatible with Afghanistan's formal civil law legal tradition.[143] Furthermore, its objectives were broadly similar to those contained in the 2003 law, also a legal transplant, and

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[139] Ibid.
[140] Ibid.
[141] Ibid.
[142] Article 34.
[143] Article 35.

it continued a tradition performed by Afghan state rulers, evident since the early 20th century, of reforming state criminal justice by transplanting foreign-designed law. In addition, the CNL's fairly unforgiving sentencing structure was aligned with the 2003 law's imposition of severe sentences to punish narcotic crime. Fundamentally, however, it was consistent with the 2004 Afghan Constitution, which confirms that 'the state prevents the production and consumption of intoxicants…[and] the production and smuggling of narcotics.' [144] To a large extent then, the CNL was compatible with the established legal order as regards state law and while its modernising features may have been inconsistent with previous state approaches to counter-narcotics they met a justifiable requirement for new investigative procedures to tackle increasingly sophisticated drug crime.

This compatibility should have enhanced the extent to which it was considered meaningful and appropriate by state law enforcers. However, there is evidence that this was not the case and that this impacted on the manner in which it was being applied. The robust article 16 sentencing guidelines were regarded as problematic and inappropriate by legal personnel. According to a CJTF Judge, the unfortunate result of article 16 was that 'too many people who were arrested were at the bottom of the gangs while the big traffickers get away, leaving poor people to spend 16 years in Pol-e-Charki prison.'[145] The mandatory imposition of fines under the same article was also regarded as inappropriate by the judiciary. It was rare for them to be imposed, which was perhaps not surprising, given that they were largely disproportionate to the ability of offenders to pay them. [146] The minimum fine that could be imposed for possession for personal use and drug trafficking under the CNL, for example, was 5,000 Afghanis,[147] representing more than 30% of average annual earnings.[148]

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[144] Article 7(2).

[145] CJTF Judge, supra note 94.

[146] Interview, supra note 74.

[147] Article 16(2)(i) and article 27(1)(c).

[148] Estimated at US$425 a year. $1 is equivalent to approximately 43 Afghanis; UNODC, *Corruption in Afghanistan. Bribery as reported by the Victims*, January 2010, p. 4, available at www.unodc.org/…/Afghanistan/Afghanistan-corruption-survey2010Eng.pdf [last accessed 15.03.2019].

The draconian sentencing guidelines of article 16 were not the only provisions of the CNL that practitioners struggled to find meaningful and appropriate for drugs offences. A former prosecution caseworker adviser for the CJTF observed that Judges at the CNT often relied on their own intuition instead.[149] At one trial five suspects were defending charges of possession under article 16. They had been stopped with a lorry containing 50 kilos of heroin and were facing life imprisonment if found guilty. Whereas a similar case in the UK might be expected to take a number weeks or months to complete, this trial was concluded within only 40 minutes. Three of the defendant's lawyers decided not to attend court and sent their client's defences to the Court in writing. The Judges were prepared to accept this and reached a decision on the evidence available to them.[150] This case was not unique. At another trial in November 2009, a panel of three Judges sentenced five people to a total of 55 years in prison following an investigation lasting more than six months, which included telephone intercepts and forensic reports, and a hearing lasting merely two hours in which they accepted only the opening statements from lawyers present and failed to allow for the cross examination of witnesses. The verdict was recorded the day after the trial without calling the Court into session.[151] Ruhullah Qarizada, President of the Aghanistan Independent Bar Association in 2010, also reported unsuccessfully defending a client at the CNT who was wrongly sentenced to 16 years in prison due to mistaken identity. Qarizada 'brought 50 people from [the accused's] village, the mullah, the district governor and five members of parliament who all said he is Mahmood, not Ahmad. One policeman who arrested him said he'd heard his mother call him Ahmad, so the Judge gave him 16 years in prison.'[152]

An Afghan defence expert based in Kabul confirmed that the Judges at both the CNT and the provincial courts presiding over drugs cases 'do not follow the law. They do not use the CN law. They do what they

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[149] Interview, supra note 80.

[150] Ibid.

[151] J. Starkey, *Judges Convicting To Please West, Say Striking Lawyers,* The Times, 28 February 2010.

[152] Ibid.

want.'[153] The same authority claimed that 'the judges just ignore the evidence, they don't care…for example, when they arrest a person and find 2 kilos of drugs at the time of the search of his home, they sentence him on the basis that they found 10 kilos of drugs at his home. They do not consider the evidence.'[154] In a further interview this expert stated that 'there [was] a case involving 50 kilos of sugar found at a house. A man is arrested and sentenced to 16 years imprisonment on the basis that it is 50 kilos of heroin.'[155] Judges were deliberately ignoring the provisions set down in the CNL 2005. According to an international expert, the CNL was 'counter cultural' for practitioners and, in relation to its application by judges and prosecutors, 'you were trying to introduce [the 2005 CNL] but they just don't understand it, as it goes against everything that they were used to.'[156]

Judges, it would appear, were not properly applying the law because they did not consider it to be culturally meaningful and appropriate. This was also the case with respect to police and prosecutors. Part of the rationale behind establishing the CJTF was that it would enhance the prosecution of drug cases by bringing the police and prosecution together so that they could work as an effective team to investigate and prosecute cases properly. In practice, however, fostering a working relationship between the prosecutors and the police proved to be difficult.[157] The police may conduct initial investigations and refer cases to prosecutors within the time limits set down by the law, but they would often do this irrespective of the state of the evidence that had been gathered and compliance with the provisions of the CNL. According to a prosecution casework adviser interviewed in 2008, the 'police do not understand that they need to give a caution,' which he surmised is due to a 'cultural' lack of an acceptance that it should be required.[158] Moreover, a 2008 UNODC report noted that 'many CNPA officers do not fully understand the concept of intelligence gathering, accurate recording and analysis,

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153 Interview, senior Afghan defence lawyer.

154 Ibid.

155 Interview, senior Afghan defence lawyer.

156 Interview, supra note 46.

157 Interview, supra note 44.

158 Ibid.

and referral to other units and agencies.'[159] It concluded that the proper recording and gathering of intelligence by law enforcement personnel is often frustrated 'due to cultural reasons.'[160]

An international prosecution mentor interviewed in 2008 confirmed that if the prosecution discovered a break in the evidential chain which may be fatal to the prospects of a successful prosecution, they were often reluctant to refer the matter back to the police for further investigation.[161] At the same time, the police were unenthusiastic about receiving instructions from prosecutors about how to conduct their investigations. According to a former member of the UK Drugs Team, 'it [was] very hard to break down the barrier between the two. There [was] a constant… cultural conflict…where the police and prosecutors work together.'[162] Another international expert noted that at the CJTF 'the police and prosecutors just do not get on at all and the prosecutors, once they get [a case], don't actually refer it back to the police.'[163] He concluded that 'so few cases were actually investigated properly [because] it is going against all sorts of cultural norms for the Afghans.'[164] The same expert noted that 'from the judges down, they just don't understand what the law is there for and how to use it. It is contrary to everything they have done in the past.'[165]

In the light of these findings it is probably fair to say that the extent to which the CNL was likely to be considered meaningful and appropriate to Afghans was directly associated with the reach of the formal system of justice. While the reach of the formal system remains limited to 10–15% of the population, only the same percentage of the population were likely to potentially regard the CNL as meaningful and appropriate for dealing with drug use, cultivation, production, and trafficking in Afghanistan. For the majority of the population for whom Islamic and customary approaches had more resonance than legislative rules imposed by the state, the CNL had, therefore, limited meaning. Indeed, an international

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[159] UNODC, supra note 120 at 12.

[160] Ibid.

[161] Interview, supra note 44.

[162] Ibid.

[163] Interview, supra note 46.

[164] Ibid.

[165] Ibid.

expert confirmed in 2008 that 'nationally, it is not known by many people.'[166] The punitive nature of the CNL, furthermore, should also be regarded as incompatible with customary and religious tolerance towards narcotics, and their emphasis on reconciliation and rehabilitation. This may have adversely influenced the potential for the CNL to be considered meaningful and appropriate to the sections of the population who referred to Islamic and customary practices.

Whilst acknowledging these problems, the CNL was largely consistent with the established legal order represented by formal state law. While this augured well for its potential for being considered meaningful and appropriate by Afghan legal practitioners and law enforcement agents, evidence suggests that on the contrary some police officers, prosecutors, defence lawyers, and judges struggled to apply the transplanted content of the law, because it was 'counter cultural', removed from their experience of the established legal order and the norms and rituals which they might associate with counter-narcotic justice.[167] According to an international Drugs and Development Adviser, the CNL '[went] against their [legal actors'] understanding of what is important and meaningful.'[168] This is likely to have impaired its application and the potential for its acceptance as a legal transplant.

C. The Motivations for Transplantation and Their Impact on Reception

There were significant international as well as domestic motivations for a new CNL in 2005. At the international level, the vast majority of opium being produced in Afghanistan was for consumption abroad at various

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[166] Ibid.

[167] According to Roder 'even though not explicitly, the justice institutions do exclude the prosecution of illicit drug production from their responsibility. There is a general consent that poppy cultivation is necessary for the economic survival of the provincial population and that any form of …prosecution would endanger their existence;' T. J. Roder, *Provincial Needs Assessment: Criminal Justice in Uruzgan Province*, 2010, p.11, available at www.mpil.de/shared/data/pdf/pna_uruzgan_final_1.pdf [last accessed 19.03.2019].

[168] Ibid.

American, European and Asian destinations for which the return of an opium-driven economy in the aftermath of the international intervention in 2001 had serious negative ramifications. Afghan poppy fields became the fastest-growing source of heroin in the United States.[169] Heroin-related death rates in Los Angeles increased by 75% between 2002 and 2005 and the overall US market for Afghan heroin doubled between 2001 and 2004.[170] Beyond the US, in Europe and Asia, according to the 2005 World Drug Report, opiates 'continued to be the main problem drug, accounting for 62% of all treatment demand.'[171] In addition, the UK was under pressure to produce and implement a cohesive counter-narcotics strategy to honour its lead nation role and to add justification to its continued military involvement in Afghanistan since 2001, the result of national self-interest in disrupting at source the importation of heroin into Britain.[172] The UK and her international partners were keen to prompt the Afghan government to adopt a more proactive counter-narcotic strategy, which was now embodied in the Implementation Plan, the creation of the CJTF and the new centralised courts, and which would be complemented by a new CNL. According to the former Head of the Rule of Law team at the British Embassy in Kabul in 2005:

> 'the decision that is made in consultation with the Afghan government is that we would have a Central Tribunal and a Task Force to look at the drugs issue because in great parts of the country the government [did] not have reach. It did not have a formal justice system that is working. There were some areas where there were no judges and no prosecutors and because of the scale of the drugs problem it is felt necessary to have some sort of centralised control over the Afghan side with international mentors.'[173]

On the domestic front, there was a political awareness at government level that new initiatives and procedures would be required to combat

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[169] Ibid.

[170] G. Therolf, *Afghan Heroin's Surge Poses Danger in US,* Los Angeles Times, 26 December 2006.

[171] UNODC, supra note 38 at 5.

[172] Tony Blair confirmed in 2001 that it is in the UK's interests to engage militarily in Afghanistan because it is the source of 90% of UK's heroin; see P. Oborne, *Afghanistan: Here's One We Invaded Earlier,* Channel 4, 31 May 2004.

[173] Interview, supra note 44.

drug crime and opium production.[174] Without these measures, opium cultivation, production and trafficking would remain a threat to the security of the country, represented by warlords, extremist terrorist groups, and the emerging Taliban, all of whom were continuing to profit from the industry. At the government level also, there would certainly have been an awareness of the need to co-operate with international requirements for imposing new counter-narcotics measures in order to ensure continued financial support and the prospect of new funding pledges. According to an international expert interviewed for this research 'for central institutions, what [was] more relevant [was] that this [the CNL] granted new pledges and other financial commitments…this is what does really matter.'[175]

President Karzai, who passed the CNL by decree without parliamentary approval, may well have been motivated to introduce a new CNL primarily to appease and maintain working relations with important international sponsors of the new administration, and particularly the US and the UK. The dependence on international assistance is a common occurrence for new governments installed in states seeking to emerge from conflict and intent on enhancing the rule of law. However, this dependence can create an unequal working relationship between local officials and international actors which can translate into international control of legislative reform, conducted by legal transplantation. This appears to have been the case with regard to the CNL. It was drafted principally by officials from the UK and the US who, in a similar vein to criminal justice reform programmes in East Timor[176] and Kosovo[177], chose to rely on legal transplantation as a means for promoting legal change.

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[174] In November 2004 President Karzai confirmed that tackling the drug trade would be a key priority for the new government. To underline this intent, at his election victory speech on 4 November 2004 he called on Afghans to join him on a '*jihad*' against the opium trade.

[175] Interview, Italian Legal Consultant, 17.11.2008.

[176] The United Nations Transitional Administration in East Timor (UNTAET) passed 71 regulations during its four-year mandate, during which it undertook a comprehensive amendment of East Timor's criminal procedure.

[177] The United Nations Assistance Mission in Kosovo (UNMIK) passed 257 regulations between 1999 and 2004, many of which were designed to reform Kosovo's criminal justice system.

Developing the CNL by legal transplantation would mean that it could be drafted quickly, which was considered a priority by the international donors assisting the Afghan government in counter narcotic policy-making. The former Head of the UK Rule of Law team confirmed that 'in order to deal with the drugs problem, which [was] an immediate threat to security and stability in the country, something needed to be fast-tracked in order to allow that to happen. So essentially a small criminal justice system [was] set up to deal with counter-narcotics.'[178]

It seems clear that modernisation played its part in motivating change by transplantation. There was a consensus amongst international agencies by 2004 that the 2003 law required revision.[179] According to one report, although the 2003 law had been 'a major step forward compared to previous legislation…it did not address the 'working needs' of drug law enforcement officials.'[180] It was intended that these needs would be met by modern investigative and counter surveillance techniques provided for in the 2005 law and designed to complement the new counter-narcotics strategy, enabling end-to-end centralised control of more serious drug trafficking cases. According to the former head of the UK Rule of Law team:

> 'Life had moved on and Afghan law had not. Under the formal system what they were doing was going back to their Criminal Procedure Code of the mid-to-early 1970's. The world had obviously moved on tremendously since then. So there were some elements of drug law enforcement and criminal justice that we know about in the outside world that (a) [the Afghans] had not experienced and (b) that had not been around when those laws were passed. If you go back to the Afghan law it simply did not have the tools in it to deal with the sophistication of the crime that now existed'.[181]

By modernising the counter-narcotics law, Afghanistan's international partners sought to improve the country's criminal law framework and enhance the potential for establishing the rule of law. They were also, however, motivated by the concerns of their own domestic and foreign policies, which were intent on key issues such as promoting stabilisation

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[178] Interview, supra note 44.

[179] UNAMA, supra note 31 at p. 7.

[180] NDCS, supra note 22 at p. 45.

[181] Interview, supra note 44.

in central Asia, developing counter–terrorism strategies, and reducing the domestic importation of Afghan opiates. In seeking to meet both Afghan criminal justice and their own domestic needs, the international drafters of the CNL engaged in a policy of modernisation by transplantation. However, transplanting foreign legal concepts resulted in a means of reform perhaps more concerned with conformity to international standards than with Afghanistan's dominant legal traditions. According to an International Drugs and Development adviser, 'the big thing from the international[s] is that…they want something sophisticated that mirrors their own system and covers all aspects and…meets international conventions requirements. However, [the CNL did] not really show appreciation of Afghan society and tribal norms.'[182] As noted earlier, this was a form of modernisation that, although compatible with Afghan state law, was largely incompatible with customary and religious approaches to counter-narcotics and therefore unlikely to appeal to the majority of the nation. This had implications for the acceptance of the CNL and its potential for achieving its objectives. It is difficult to assess whether the CNL promoted local antipathy towards the Afghan government, but there is evidence that it was disliked and that its objectives were viewed by certain sections of the Afghan population as disconnected from the national consciousness. An international expert confirmed in 2010 that the Afghan 'parliament does not like the 2005 law because it is brought in by Presidential decree'[183] and a CNT Judge advised for this research that 'many think of drugs as a problem for foreigners'[184] rather than for Afghans. Supporting this analysis, a former head of the UK Rule of Law team based in Kabul between 2005 and 2007 claimed that the 'impression from the Afghan side [was] that it is foreign-imposed and they would probably say that it [was] more US-imposed, perhaps because the US were more involved at the end point [of the drafting]. They feel that it [was] more international than Afghan.'[185]

Reforms such as the CNL, motivated by modernisation and instigated by means of transplantation do not come with a guarantee of success.

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[182] email correspondence, international Drugs and Development adviser.

[183] Interview, supra note 74.

[184] CJTF Judge, supra note 94.

[185] Interview, supra note 53.

With the armies of the countries who helped to draft the law still present in the country and engaged in supervising the enforcement of the law, it may also be regarded with scepticism as an externally-designed law intent on serving foreign interests, undermining its potential for being properly applied and accepted. Modernising legal reform lacking the endorsement of nationals is more prone to lack in legitimacy and will struggle to be accepted by the local population. Furthermore, historical analysis of criminal justice reform in Afghanistan reveals that attempts by previous Afghan rulers to impose modernised state justice mechanisms on the rural population have not only failed, but have also provoked considerable resentment towards the Afghan state.[186]

D. The Extent to Which the Counter Narcotics Law 2006 Achieved its Objectives

The CNL contained seven stated objectives. It was designed to prevent the cultivation of specified illicit narcotic drugs[187] and prescribe penalties for, amongst other activities, their illegal cultivation, production, and trafficking.[188] It also sought to regulate and control the production and processing of narcotic drugs, psychotropic substances and chemical precursors,[189] and to coordinate and monitor the government's counter-narcotics activities, policies, and programmes.[190] In addition, the CNL aimed to encourage the cultivation of licit crops,[191] establish treatment, rehabilitation and harm reduction services,[192] and attract national and international assistance programmes in the fight against illicit narcotic cultivation, production and trafficking.[193]

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[186] M. Tondini, *Statebuilding and Justice Reform: Post-Conflict Reconstruction in Afghanistan*, Routledge 2010.

[187] article 2(1).

[188] article 2(3).

[189] article 2(2).

[190] article 2(4).

[191] article 2(5).

[192] article 2(6).

[193] article 2(7).

The basis of the law, affirmed in article 1, and arguably its main objective, was to provide the Afghan state with a legal framework for preventing the cultivation and trafficking of illicit narcotic drugs, particularly opium poppy. During the period of its enforcement, however, drug production, cultivation, and trafficking continued to be conducted on an enormous scale and those profiting from the trade were able to operate with apparent impunity. The annual levels of cultivation and production of opium poppy in each of the years since the law was passed in 2005 up to 2008 exceeded those of any of the previous years up to 1994.[194] Indeed, the area cultivated and the amount of opium produced in the three years from 2006 to 2008 was more than that produced and cultivated during the preceding 6-year period from 2000 to 2006.[195] In 2007, 193,000 hectares of opium poppy were cultivated, more than at any other time in the recorded history of poppy cultivation and production in Afghanistan.[196] At the time of the law's introduction, Afghanistan accounted for 89% of global opium production. By 2008 it had increased to 96%[197] and it has remained at more than 90% between 2006 and 2010.[198]

There were, nevertheless, some notable successes in reducing opium cultivation. Nangarhar, the second highest opium-producing province in 2007, was declared to be poppy free by 2008. A 2010 report noted a 33% drop in cultivation over the previous 2 years.[199] Furthermore, the number of opium-free provinces in Afghanistan had increased from 6 in 2006 to 25 by 2010.[200]

It is difficult to fully assess the effect of the CNL on opium cultivation and whether production might not have increased more without it or,

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[194] UNODC, *World Drug Report 2009,* p. 34, available at www.unodc.org/unodc/en/data-and-analysis/WDR-2009.html [last accessed 19.03.2019].

[195] Ibid.

[196] UNODC, *Afghanistan Opium Survey 2008,* p. vii, available at www.unodc.org/documents/publications/Afghanistan_Opium_Survey_2008.pdf [last accessed 19.03.2019].

[197] UNODC, supra note 194 at 33–34.

[198] UNODC, *World Drug Report 2010*, p. 42, available at www.unodc.org/documents/wdr/WDR_2010/World_Drug_Report_2010_lo-res.pdf [last accessed 19.03.2019].

[199] UNODC, *Afghanistan Opium Survey 2010. Winter Rapid Assessment,* February 2010, p.1, available at www.unodc.org/documents/frontpage/Afghanistan_Opium_Survey_2010_Final.pdf [last accessed 15 March 2019].

[200] Ibid.

indeed, whether any of the inroads into poppy cultivation owed anything to its application and enforcement. A 2008 UNODC report suggested that poppy reduction was the result of 'good local leadership and bad weather,'[201] asserting that the impact of law enforcement and criminal justice initiatives on the reduction of poppy cultivation in 2008 had been negligible compared to that of religious and customary influences. It concluded that 'religious leaders, elders, and *shura* deserve credit for becoming increasingly effective in convincing farmers not to grow opium, not least because it is against Islam,' and that counter-narcotic measures to build integrity and justice, and ensure 'good governance, efficient administration and honest judiciary…have yet to gain momentum.'[202] A 2010 report maintained that market forces played the principal role in deterring farmers from opium cultivation and that in the south-western regions, where most of the country's opium was grown, low prices and low yields were the main reasons for farmers refraining from growing opium.[203] On the other hand, the same report noted that in the north-western provinces 61% of farmers refrained from growing opium in 2010 'because it is illegal,'[204] so there was some indication that the legal framework established by the 2005 CNL was becoming increasingly recognised among the rural population in more stable provinces.[205] There is, then, some evidence of the law achieving its objective of preventing poppy cultivation, although this was largely influenced by varying degrees of regional security.

There is also evidence that the legal framework set up as a result of the 2005 CNL achieved some creditable success in preventing drug trafficking. Drug traffickers were successfully arrested, prosecuted by the CJTF, and convicted at the central courts. Initially, the CNT got off to a slow start when it was established. By April 2007 the Primary Court had received 42 cases, but had only reached verdicts in 2 of them, and

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[201] UNODC, supra note 196 at p. vii.

[202] Ibid.

[203] Ibid. at p. 1.

[204] Ibid.

[205] D. Mansfield, *Sustaining the Decline?:Understanding the Changes in Opium Poppy Cultivation in the 2008/09 Growing Season*, May 2009, p. 2, available at www.fco.gov.uk/resources/en/pdf/pdf21/drivers-report-0809 [last accessed 15.03.2019].

the Appeal Court had received 60 cases, but had failed to reach any decisions at all.[206] However, there followed a period of rapid increase in case turnover and conviction, and for the 3-years between May 2005 and June 2008 the CJTF prosecuted 1,486 cases, resulting in the conviction of 587 defendants, 181 acquittals and the referral of 46 people to treatment centres. In the same period the CJTF reviewed 890 cases from other courts in Afghanistan, resulting in the conviction of a further 968 individuals. By June 2008 a total of 1,555 people had been convicted at the CNT for drug-related offences.[207] As a result of these encouraging statistics the Afghan Attorney-General announced in December 2008 that the 'CJTF has had an excellent and successful performance towards disrupting the narcotics trade and bringing drug traffickers to justice.'[208]

In 2009, 278 cases were heard at the Primary Court and 299 defendants were convicted, representing an 89% conviction rate.[209] Between March 2009 and March 2010, the CJTF convicted a further 599 drug-traffickers.[210] A further 155 convictions were secured in the first quarter of the Islamic year 1389 (March 2010-March 2011).[211] By March 2011 the conviction rate was 96%.[212]

Undoubtedly, then, some progress was made with regard to the CNL meeting its objective of preventing drug trafficking. Nevertheless, the positive achievements of the CJTF were tempered by the fact that the vast majority of the cases that it processed concerned couriers at the bottom end of the trafficking industry rather than the controllers of the drug trafficking networks who were the priority targets.[213] The first key priority of the government's 2006 NDCS was to disrupt 'the trafficking networks' by 'targeting traffickers and their backers.'[214] There were some

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[206] UNAMA, supra note 31 at p. 33.

[207] Agahee, *Afghanistan is Committed to Bringing Drug-traffickers to Justice,* Criminal Justice Task Force Communications Directorate, 2008, at p. 22.

[208] Ibid. at p. 32.

[209] CJTF statistics, available at www.cjtf.gov.af [last accessed 15.03.2019].

[210] Ibid.

[211] Ibid.

[212] Interview, senior member of Rule of Law team, ADIDU, London.

[213] Interview, supra note 43. According to his expert the CJTF is concerned 'largely with low level cases and there is not much movement up the chain from that.'

[214] NDCS, supra note 22 at p. 18.

occasional successes. According to the CJTF in 2009 'the number of cases involving middle or high-value targets ha[d] increased by over 300 percent in the last year to reach 10 percent of the total number of cases.'[215] Between March 2008 and February 2009 the CJTF successfully convicted 26 medium-value targets, classified as those people directly above the couriers in drug networks.[216] This compared with 13 convictions of similar offenders in the preceding 12-month period.[217] Furthermore, Haji Abdullah, thought to be in charge of the country's third biggest drugs network, was convicted in 2009 following the submission of telephone intercept evidence, permitted under the CNL.[218] Another leading figure in the drugs trade in Afghanistan, Haji Rashid, had his conviction upheld in the Appeal Court in 2010 and received a 20-year sentence and a US$10 million fine.[219] According to the CJTF these cases demonstrated that, equipped with the legal tools provided by the CNL, 'the Afghan government can now disrupt major networks.'[220] Progress had been made, but it was slow. Abdullah and Rashid represented the first 'high value' targets successfully prosecuted under the CNL since its enactment six years previously.[221]

In spite of these successes, the percentage of cases successfully prosecuted concerning medium to high-level targets was, in reality, minimal, given that there were estimated to be between 800–900 mid and high-level traffickers in Afghanistan.[222] Furthermore, there was also some concern amongst international observers that the number of cases that the CJTF received had plateaued by 2010. By then it was processing

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[215] UNODC, Addiction, Crime and Insurgency. The Transnational Threat of Afghan Opium, 2009, p.140, available at www.unodc.org/docs/data-and-analysis/Afghanistan/Afghan_Opium_Trade_2009_web.pdf [last accessed 15.03.2019]

[216] Interview, supra note 80.

[217] Ibid.

[218] J. Boone, *Afghan Opium Baron Gets 20 Years as UK Anti-Narcotics Strategy Pays Off,* The Guardian 11.08.2009.

[219] Interview, senior Rule of Law officer, ADIDU. She could not comment on the nature of the case on the basis that it was sub judice.

[220] Boone, supra note 218.

[221] Ibid.

[222] UNODC, supra note 215 at p. 105.

and prosecuting on average approximately 30 cases a month.[223] In the 10-month period from March 2008 to January 2009, the CJTF dealt with 334 cases and a total of 370 defendants.[224] Between March 2009 and March 2010 the CJTF received 395 cases.[225] Given the size of the opium economy in Afghanistan – estimated to be worth $2.4 billion a year[226] – it would not be unreasonable to have expected the CJTF to receive and prosecute substantially more drug cases falling under the jurisdiction of the CNL and, indeed, more cases involving higher-end drug traffickers. In fact, a 2011 UNODC report concluded, 'the impact [of the CNL] on major drug traffickers and organised criminal groups has been limited and the seizures have been small compared with the vast amount of drugs produced.'[227]

The CNL also included an objective to establish detoxification, treatment, rehabilitation, and harm reduction services for drug dependent individuals.[228] In conjunction with this, article 27 provided that addicts could be referred to detoxification or drug treatment centres following medical examination. While the intent of the CNL was to treat drug addiction and encourage the reintegration of drug users back into society, the prospect of successful rehabilitation following treatment was unlikely given a lack of social reintegration, aftercare measures and education programmes, which were not required to be provided by the law.[229]

There were estimated to be more than a million drug users in 2008.[230] Afghans were more vulnerable to becoming addicts because of the continuing conflict following 25 years of war, social and economic disruption, and resulting chronic mental health problems of its population.[231] It is arguable, ironically, that the CNL actually contributed to Afghanistan's drug addiction crisis, as the majority of the country's

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[223] Interview, supra note 80.

[224] Statistics available at www.cjtf.gov.af/en/pr/18-march-12-2009.html [last accessed 19.03.2019].

[225] Supra note 209.

[226] UNODC, supra note 198 at p. 42.

[227] UNODC, supra note 120 at p. 12.

[228] Article 1(6).

[229] UNODC, supra note 91 at p. 25.

[230] Ibid. at p. 68.

[231] Ibid. at p. 58.

addicts started their drug habits in prison and the law's tough sentencing guidelines resulted in most drug offenders being punished by imprisonment. And so, according to UNODC, 'the CNL represent[ed] a prescription to ensure an ever increasing prison population and an ever increasing number of drug addicts.'[232]

Some progress has been made in establishing drug treatment facilities. In 2002 there were only 2 drug treatment, rehabilitation, and harm reduction services in the country.[233] By 2009 this had increased to 39, offering 495 residential places.[234] The net result, however, was that less than 0.25% of Afghanistan's drug users could be treated each year given the available treatment amenities.[235] There was, then, a huge gap between treatment demand and provision, and the objectives of the CNL to ensure the provision of appropriate treatment services, the reintegration of drug users back into society, and the reduction of drug dependency were not met.

The CNL also aimed to prevent the trafficking of chemical precursors used in the refinement of morphine to heroin,[236] and to attract international cooperation and assistance to combat precursors and narcotic trafficking.[237] These objectives built on commitments expressed by the international community at a conference in Paris in 2003 to share responsibility for combating opiates trafficking from Afghanistan,[238] later reiterated at a follow-up conference in Moscow in June 2006. The resulting 'Moscow Declaration' led to the establishment of cross-border consultative groups designed to share counter-narcotic data and coordinate technical assistance relating to the trafficking of opiates from Afghanistan in order to enhance trafficking prevention. As part of this process a consensus was reached that more attention should be paid to preventing the

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[232] Ibid. at p. 25.

[233] UNODC, supra note 120 at p. 35.

[234] UNODC, supra note 91 at p. 68.

[235] Ibid.

[236] Article 2(3).

[237] Article 2(7).

[238] *The Ministerial Conference on Drug Routes from Central Asia to Europe,* Paris 2003. More than 50 countries and international organisations attended and agreed to work together to combat opiate drug trafficking deriving from Afghanistan. The partnership became known as the 'Paris Pact.'

flow of chemical precursors into Afghanistan,[239] as a result of which a Targeted Anti-Trafficking Regional Communication, Expertise, Training (TARCET) initiative was launched under UNODC guidance, aimed at targeting precursors used in the manufacture of heroin in Afghanistan. In addition, a UN Security Council resolution passed on 11 June 2008 called on Member States to step up their efforts to stop precursors being smuggled into the country.[240]

Increased cooperation between member states and also joint operations by countries within the framework of the Paris Pact and the Moscow Declaration led to successful seizures of precursors. Operation TARCET was responsible for the seizure of 47 metric tons of precursors in Afghanistan and its neighbouring countries.[241] It is doubtful whether these seizures would have taken place without the international assistance resulting from the Paris and Moscow conferences. Nor is it likely that the international community would have been so forthcoming in lending assistance of this nature unless Afghanistan had a law such as the CNL 2005 criminalizing drug and chemical precursor trafficking, providing internationally approved classification and regulation of precursors and narcotic drugs and equipping enforcement agents with more modern counter-surveillance measures. To that extent, CNL 2005 had some success in meeting its objective of preventing the trafficking of precursors.[242] The same might also be said in relation to its objective of attracting international cooperation and assistance. The UK alone spent £290 million between 2005 and 2008 supporting a number of counter-narcotics measures[243] and committed $US20 million between 2004 and 2011 specifically for the CJTF.[244]

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[239] *Moscow Declaration*, Second Ministerial Conference on Drug Trafficking Routes from Afghanistan, Moscow, 26–28 June 2006, at p. 4.

[240] S/Res/1817 SC/9352, 11.06.2008.

[241] UNODC, supra note 194 at 37.

[242] In the first 50 interdiction operations in 2011 338 kgs of chemical precursors were seized and 58 suspects arrested; UKFCO, *January Progress Report on Afghanistan*, January 2011, available at www.fco.gov.uk/en/news/latest-news/?view=PressS&id=558520482 [last accessed 19.03.2019].

[243] UKFCO statistics, available at www.fco.gov.uk/en/fco-in-action/uk-in-afghanistan/Counter-Narcotics [last accessed 19.03.2019].

[244] The UK pledged US$12 million over the three-year period from 2004 to 2007; in

These advances were not shared in relation to the CNL's objective to coordinate, monitor and evaluate the counter-narcotics activities of the Afghan government, the responsibility of the Ministry of Counter Narcotics. The Ministry consisted of a number of departments set up on thematic lines to complement the eight pillars of activity under the NDCS 2006, and six working groups were established to analyse the effect of counter-narcotic measures in relation to each pillar activity. It was, however, described by an international expert interviewed for this research as 'a huge mess.'[245] Its predecessor, the Counter Narcotics Directorate, had been reviewed in 2003–2004 and it was recommended at that stage that it would be more effective in carrying out its remit of monitoring counter narcotics policy and strategy if it was reduced in size and staffed with better quality personnel with higher salaries. Rather than following this recommendation, however, the Afghan government and the UK were responsible for creating a new Ministry that employed too many people, most of whom were on small salaries and incapable of doing their jobs.[246]

It is also the case that there was minimal communication between the various Ministry departments, which tended to focus only on their own areas of responsibility. UNODC found counter-narcotics law enforcement in 2008 to be hindered by a 'lack of trust between the various ministries [that] hinders the sharing of information.'[247] In June 2009 an international expert maintained that 'the problem is and still is that the various departments were too territorial and just concerned with protecting their own empires and areas of responsibility.'[248] In an effort to improve the capacity of the Ministry, the UK funded a £12.5 million project deploying task forces comprised of experts from the different areas with which the Ministry was supposed to be concerned. Such task forces provided technical assistance to staff involved in the various pillar activity departments. In spite of these efforts, while the Ministry

April 2007 the UK committed to funding $US 18 million from 2007–2011 for the CJTF; UNAMA, supra note 31 at p. 33.

[245] Interview, supra note 43.

[246] Ibid. It employed approximately 450 staff.

[247] UNODC, supra note 120 at p. 12.

[248] Interview, supra note 43.

remained functional, it was inefficient and viewed with some distrust by the international community.[249] It did not effectively co-ordinate the government's counter narcotic activities. Nor was it capable of properly evaluating the implementation of the NDCS. In short, the Ministry failed to carry out its mandate as set out in article 52 CNL 2005. The worrying reality by 2010 was that, while Afghanistan continued to dominate world illicit opium exportation, it still possessed no competent state institution capable of evaluating its national counter-narcotics strategies, including those for legislative reform.

Findings and Conclusion

There were compelling reasons for the development of a counter narcotics law in 2005. New legislation could provide more appropriate techniques for investigating increasingly sophisticated drug trafficking operations and complement the government's 2005 Counter Narcotics Implementation Plan and the establishment of the CJTF and the CNT. In catering for these requirements the architects of the new law chose to transplant foreign solutions. In this regard, it is arguable that this merely conformed with historical tradition in Afghanistan. Since the beginning of the 20th century Afghanistan's various rulers and regimes had attempted to create a functioning state criminal justice system to augment and uphold the philosophies upon which their rule was based, and to do this they undertook programmes of constitutional and legislative reform involving extensive legal transplantation. *Hanafi fiqh* was codified and transplanted into penal law, and western substantive and procedural laws with a civil law tradition were also borrowed and transplanted into new penal and procedural codes.[250] Transplanted legal solutions had certainly, therefore, been historically instrumental in the development of Afghanistan's state legal system.

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[249] Ibid.

[250] For example Ammanullah's 1924 Penal Code borrowed provisions from the French Penal Code, as was the case with the 1965 Criminal Procedure Law and the 1976 Penal Code; G. H. Vafai, *Afghanistan. A Country Law Study*, Library of Congress, 1988.

This justification for relying on transplantation was also supported by contemporary international recommendations for post-intervention reform advocating that post-intervention countries should be equipped with effective legal frameworks in the form of modern laws[251] consistent with international human rights norms.[252] Legal transplants could quickly assist in meeting these objectives.

What, however, of the central questions this paper seeks to address; namely, whether the CNL was a successful transplant and whether it was reasonable to rely on transplantation to develop the CNL, taking into consideration the evaluation of this law? Dealing with the first of these issues, the CNL can be acknowledged as having some successful attributes. It provided new investigative techniques for increasingly sophisticated trans-national drug trafficking operations, and transplantation led to the development of a new legal framework that helped to secure the conviction of medium and high-level traffickers.[253] It has been complimented by a CNT Judge responsible for some of those convictions, who described it as a 'good law.'[254] Furthermore, its provisions met the imperative demand of compliance with international standards of human rights and due process, without which the ideal of establishing the rule of law through law enforcement in Afghanistan would be unrealisable.

In spite of these accomplishments, this analysis finds that the CNL was not a successful legal transplant. There were significant problems as regards its application, it meaningfulness, and its objectives, many of which derived from their transplanted content. It is also apparent that the motivations for developing this legislation by transplantation and the consequent process of its development combined to moderate its reception.

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[251] United Nations, *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,* U.N. Doc. 5/2004/616, 23 August 2004, para 30, available at www.daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement [last accessed 19.03.2019].

[252] Ibid. at para 6.

[253] Blanchard has argued that the CNL 'clarifie[d] administrative authorities for counter narcotics policy and establishe[d] clear procedures for investigating and prosecuting major drug offences.' *Supra* note 23 at p. 116.

[254] CJTF Judge, supra note 94.

The transplanted content of the CNL impacted on its application. It contained an inappropriately draconian sentencing regime with limited allowance for judicial discretion relative to degrees of criminal responsibility. In addition, its insistence on the referral of cases to Kabul created logistical problems that increased the potential for inconsistent application of its provisions and the arbitrary detention of defendants. Moreover, its concentration of power in institutions and in foreign-trained professionals in Kabul contributed to the promotion of Afghanistan's centre-periphery divide and antipathy towards the central administration and its reform efforts, which have historically adversely affected the reach, legitimacy, and reception of state laws.

The transplanted content of the CNL also struggled to be considered meaningful and appropriate by those responsible for applying them and the Afghan public. The government's October 2005 Justice for All strategy had called for new legislation to include counter-narcotic measures that should comply with international standards and Islamic principles, but which should also seek ways of engaging with traditional justice systems.[255] Yet the CNL, passed 2 months later, provided no such negotiation between Afghanistan's legal traditions and conformed primarily to international expectations. Its punitive sentencing provisions were incompatible with the tolerance and reconciliation of customary and religious approaches to counter narcotic crime. Moreover, the referral of criminal matters to customary and Islamic justice authorities and the continued application by Judges of *Shari'a* in the CNT's were indicative of its lack of resonance and meaning amongst local legal practitioners. According to an international expert interviewed in 2009, the international actors responsible for drafting the law were aware of the these potential problems:

> These were the sort of things that we talked about at the time and what we very much felt at that time is [that] they won't be able to comply with this, but we shouldn't do something that is dumbed down because this is as high as they would ever go. If you keep the bar high, then at least you give them something to move towards, but what there hasn't been is the sort of

[255] Ministry of Justice *Justice for All,* 2005, available at www.cmi.no/pdf/?file=/afghanistan/doc/Justice%20for%20all%20MOJ%20Afgh.pdf [last accessed 19.03.2019].

> support to actually get it acted upon, get it done by everybody, understood by everybody. It is across the board. It is from the judges down. They just don't understand what the law is there for and how to use it…You have also got huge tribal and religious influences in there [and] they really don't want to get involved in these sort of things. They just don't understand it. It is contrary to everything they have done in the past.[256]

While academic authorities such as Tapper[257] have suggested that Afghan culture is capable of absorbing new transplanted legal procedures, it appears that those offered by the CNL failed to sufficiently connect to Afghan perceptions of 'justice' to foster the absorption that their draughtspersons might have hoped for.

The 2005 CNL also failed to meet its objectives of preventing poppy cultivation and the trafficking of narcotic drugs and chemical precursors. Some progress was certainly made. With assistance from international partners, precursors bound for heroin producing laboratories in Afghanistan were seized. Furthermore, the CJTF successfully prosecuted cases leading to the conviction of more than 1,500 drug traffickers since its establishment in May 2005 to 2010. Medium and high-level drug traffickers were convicted, their convictions made possible because of the new counter surveillance and intelligence gathering provisions the CNL introduced. However, the impact of these successes on the drug economy in Afghanistan was minimal, and the CNL 2005 did not achieve its stated goal of preventing the cultivation and trafficking of opium poppy. Cultivation and production levels of opium poppy in the first 4 years following the passing of the law exceeded those of any previous equivalent period in Afghanistan's history. Furthermore, it failed to encourage the establishment of treatment, rehabilitation, and harm reduction programmes, and by and large the MCN failed to effectively carry out its mandate under the CNL 2005 to monitor, coordinate and evaluate the Afghan government's counter narcotic policies.

Many of the problems surrounding the law relate to issues that were part of wider social and political dilemmas affecting the general rule of law reform in Afghanistan. A CNT Judge confirmed that 'the problem

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[256] Interview, supra note 43.

[257] Richard Tapper, supra note 72.

is not with the law, but with the willingness to enforce the laws as they were written.'[258] The deterioration of the security situation in Afghanistan since 2005 has affected the delivery of the counter narcotics projects.[259] There were also problems with regard to the capacity of the police, reflected in a 2008 UNODC report that concluded that 'Afghanistan has inadequate and insufficient counter narcotics law enforcement capabilities to respond to the impact of the illicit drug trade.'[260] Police corruption was endemic and thought to be the main reason why more cases were not being received by the CJTF.[261] A CJTF Judge who convicted a head of highway police in 2009 noted that in his experience 'often the police would let people go if they were paid enough money.'[262] Not only the police were corrupt.[263] According to a defence expert based in Kabul in 2010 'there is a lot of corruption in the Counter Narcotics Courts amongst the Judges and the prosecutors. They do not always follow the law. They do what they want. There is corruption in both the provincial and the Counter Narcotics Courts.'[264] In a further interview, this expert claimed that in the context of counter narcotics cases:

> The biggest people to get bribes were the police, then the judges. Judges take bribes. There were two groups of judges – one group does take bribes and the other does not. The police take the most bribes and let people go. Police, prosecution and judges collude and get together and find a way to acquit. They would work out a solution for the defendant so that a case collapses or judges were left with no alternative other than to acquit. The judges who accept bribes would back each other up if there is any questioning about their decisions.[265]

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[258] CJTF Judge, supra note 94

[259] P. Wintour, *Opium Economy Would Take 20 years and £1bn To Remove*, The Guardian, 6 February 2008.

[260] UNODC, supra note 120 at p.v.

[261] Interview, supra note 53.

[262] UNODC, supra note 215 at 140. The chief of counter narcotics police in Nimroz province was arrested in 2009 in connection with assisting drug trafficking.

[263] Interview, supra note 153. This defence expert states that 'the biggest people to get bribes were the police. The police take the most bribes and let people go.'

[264] Ibid.

[265] Interview 09.05.2010.

The Ministry of Interior was a notable source of corruption. In 2007 it was unable to account for up to 30% of foreign-donated funds and approximately 80% of its personnel were thought to be benefiting directly from the drug trade.[266] In fact, the influence of the drug trade was pervasive throughout government departments. By 2008 it was estimated that between 25%-40% of all civil servants working in the Afghan government were profiting from the illicit narcotic industry.[267] Indeed, the CJTF confirmed that between 2008 and 2009 those prosecuted under the CNL 'included a provincial deputy head of the CNPA, senior civil servants, former Russian commanders and officers in the ANA, ANP, NDS, and the Border Police,'[268] dramatically illustrating the link between state corruption and the narcotics trade. This level of corruption compromised the enforcement of the CNL, the application of which was further impeded by Afghanistan's poor travel infrastructure, insecurity and the limited reach of the state criminal justice system to provincial areas.

While recognising this, arguably some of the problems associated with the CNL were attributable to the fact that it was a legal transplant motivated by a modernising agenda largely devised and implemented by international actors. The necessity of quickly producing suitably 'modern' law resulted in a transplanted law prepared by international actors following minimal local participation with damaging consequences. Opposition by Afghan justice officials to proposals during the drafting stage was reportedly silenced and an international expert involved in the discussions was ordered by the US embassy to refrain from distributing a discussion paper he had prepared comparing the draft provisions with existing Afghan law and legal principles.[269] Moreover, President Karzai was persuaded by his international partners to invoke his Presidential powers to issue the CNL and consequently avoid debate and scrutiny by the *Taqnin*. Such law-making processes can increase legitimacy-damaging local perceptions of international imposition.

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[266] A. Kent, *Covering up for Karzai and Co.*, Policy Options, July-August 2007, p. 11.

[267] J. Goodhand, *Frontiers and Wars: the Opium Economy in Afghanistan,* Agrarian Change, Issue 5, 2005, p. 209.

[268] UNODC, supra note 215 at p. 140.

[269] M. E. Hartmann, A. Klonowiecka-Milart, supra note 54 at p. 289.

The knowledge that the architects of the CNL had of Afghanistan's criminal justice and legislative heritage is questionable,[270] a point to which the MOJ's 2005 Justice for All report was possibly alluding when it objected to the fact that 'very few foreign experts appreciate the uniqueness of Afghan law.'[271] Some historical research would have revealed that although positive codified state law was traditionally less significant to Afghanistan's rural communities than customary and *Shari'a* approaches to justice, there have been periods when the centralised state criminal justice system has been accepted even by the rural population and that this has been the case when the state legal system has absorbed all the country's legal traditions. The last legal system developed solely by the Afghans between 1964 to 1979, which witnessed the passing of the 1965 Code of Criminal Procedure and the 1976 Penal Code, was generally accepted by everyone from rural population to urban elite. The Court system was split between courts that applied religious law and those applying state law.[272] Judges in primary courts would often refer matters to tribal village elders for resolution in accordance with customary law and incorporate their findings in their own formal decisions. According to Etling this period demonstrated that 'it is possible to mix Islamic and secular laws within one legal system, and …such a system in Afghanistan increased the legal system's legitimacy and led to wide acceptance by the local population.'[273] This semi-secular system of justice was accepted because it allowed for the inclusion of all of Afghanistan's legal traditions and for interpretation of rules and procedures by the legal authorities responsible in each legal tradition. The transplanted CNL, however, failed to allow for similar negotiations between these legal traditions, resulting in negative repercussions in terms of its reception.

These conclusions suggest that it was unreasonable to develop the CNL by legal transplantation. Its creation by foreign actors (a hallmark

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[270] Interview, former senior Italian official who noted that Di Gennaro's knowledge of Afghan law 'was very limited.'

[271] Ministry of Justice, supra note 255 at p. 7.

[272] B. Etling, *Legal Authorities in the Afghan Legal System (1964–1979),* 2003, p. 11, available at www.harvard.edu/programs/ilsp/research/etling.pdf [last accessed 15.03. 2019].

[273] Ibid. at p. 12.

of legal transplants in post-intervention states), its transplanted foreign content, and the international support for enforcing it and supervising its application increased its potential for being regarded as a foreign imposition intent on promoting centralisation based on western models at the expense of local requirements. Wrongly applied transplanted procedures risked increasing local dissatisfaction with the state justice system and the appeal of alternative justice mechanisms, including those offered by the Taliban. The transplanted, international design of the law contributed to the injustices perpetrated by those supposed to be applying its provisions. According to an Afghan defence lawyer, 'the judges and prosecutors get their salaries from the UK embassy, so they just convict people [under the law] to keep them happy.'[274] In addition, a defence expert interviewed in 2010 complained that the CNL '[was] very strict. It [was] not benefitting the general public. It [was] bad for them and the country…for couriers it [was] not right.'[275] While it was introduced as part of a drive to reform Afghanistan's criminal law framework and promote the rule of law, as an unsuccessful legal transplant the CNL was applied inappropriately, becoming a vehicle for arbitrary arrest and detention, bribes and corruption, and consequently adding to frustration and discontent with state criminal justice, capable of exploitation by the Taliban. To that extent, rather than driving justice, it arguably became a catalyst for insurgency.

These findings are informative for scholarly debates on transplant feasibility and the limitations of their use as tools for legal development. They also have important implications for legal reform policy in post-intervention states. On the theoretical level, the development and application of the CNL in Afghanistan serves to refute Legrand's pessimism about the impossibility of legal transplants. Moreover, while this analysis lends some credence to Watson's contention that legal transplants are the key building blocks of legal development, tied to the actions of the professional legal community, the experience of the transplanted CNL sits more comfortably with socio-legal perspectives of legal reform that assert that local contextual issues are vital conditioning factors for the

[274] Interview senior Afghan defence lawyer.

[275] Interview, supra note 155.

reception of transplanted law than with Watson's claims about the autonomous existence of law and legal development. Ultimately, then, it casts doubt on Watson's premise of a dis-connect between 'legal transplantability' from social influences. Local factors such as corruption by legal personnel and the poor capacity of the police and defence lawyers clearly challenged the application of the transplanted rules and provisions of the CNL. Additionally, the lack of any complimentary relationship between these new imported rules and existing legal infrastructures in Afghanistan impacted on their reception, a finding which aligns with Kanda and Milhaupt's assertion that transplant success is dependent upon the 'fit' between adopted rules and host environments. The 'counter cultural' measures of the CNL were not transplanted into 'the right plot' in this instance. They were too removed from the established legal order and the norms associated with counter-narcotic justice in Afghanistan to take root. This analysis supports deLisle's contention that the successful importation of transplanted law is tied to its approximation to the legal culture of the adopting country.

In practical terms, a number of points emerge from this analysis. Firstly, there is every justification for considering that legal transplants can be engineers for developing criminal law frameworks in post-intervention states. Secondly, sources for readily-available transplantation, such as the Model Codes for Post Conflict Criminal Justice,[276] can be useful reference points for ensuring the newly introduced modern law that will comply with international human rights norms. However, the Model Codes should only be used for inspiration for legislative material that can then be assessed for 'sensitivity' rather than as tools for producing 'bolt-on' laws that ignore local legal traditions. Thirdly, law reformers should not assume that it is always reasonable to rely on legal transplantation to prepare post-intervention criminal law. The reasonableness of developing legislation in this way requires prior assessment. The cost-saving, 'quick-fix' transplant should, where possible, be avoided. In essence, if transplanted law is expected to travel to post-intervention countries, it should be marked 'handle with care.' Legal transplants are more likely to be considered effective and, indeed, reasonable mechanisms for reform

[276] O'Connor and Rausch, supra note 2.

if they are employed in ways that are sensitive to the environment of the adopting country. This *sensitive transplanting* necessitates a full understanding of theoretical discussions on legal transplants as tools for legal reform and the conditioning factors for their success; reflection on the legal traditions of the importing post-intervention state; and consideration of the potential for the law being successfully received, bearing in mind the evaluative criteria applied in this article. This requires the acknowledgement of the limits of the transplant mechanism as a reform tool; of the fact that law is not developed in isolation from the society in which it is enacted and the success of any legal transplant and the reasonableness for relying on the transplant mechanism to develop new law is tied to the way in which is it applied and the extent to which it has achieved its objectives. These variables should form the basis of collaborative work with local legal experts to review the provisions and their suitability for application in the importing country and of the development of complimentary programmes of training and support for law enforcement and criminal justice practitioners before enactment. It also acknowledges that in post-intervention states the challenges that societal influences may have on the success of a new law are likely to be greater, more expansive, and more difficult to overcome.

Recent reform initiatives in Afghanistan support the case for sensitive transplantation. A Criminal Law Working Reform Group (CLWRG) was established in 2006, partly as a reaction to the raft of legislation, including the CNL, passed by Presidential decree in 2004 and 2005 following limited engagement by Afghan legal experts. This group, comprising high level Afghan justice officials representing all the Afghan justice institutions, as well as international representatives from UNODC and UNAMA, reviewed a new draft CPC over the course of a year before its eventual approval. The review process involved weekly meetings to discuss drafted provisions and to propose revisions that were, according to Hartmann 'derived from the knowledge and experience of all its members [and] custom-designed for Afghanistan.'[277] This involved the importation of foreign legal concepts, including provisions relating to covert investigative measures and alternatives to imprisonment, though

[277] M. E. Hartmann, A. Klonowiecka-Milart, supra note 54 at p. 294.

all such transplants were only accepted following discussion and agreement by all participants.[278] Failing this, explanatory notes were drafted for the benefit of future decision-makers. This process of law reform, which had included transplantation, was praised by the chief of the Ministry of Justice as 'the best drafting … received from the international community.'[279] It involved transplantation that was sensitive to the vital ingredients of local participation, local context, and the plurality of Afghanistan's legal traditions. The same group is currently engaged with work on a new Penal Code and is also reviewing legislation relating to the support of victims of terrorism.[280] The fundamental lesson of the CNL is that while legal transplantation is likely to remain a pervasive aspect of post-intervention criminal law reform, new laws containing wholesale foreign legal provisions are unlikely to be successfully adopted in these environments. Instead, while international experts armed with foreign legal concepts may have much to offer to reform projects in post-intervention states, what is required is, as Hartmann advocates, a 'humble international approach.'[281] This demands processes of sensitive transplanting informed by comparative law analyses, research on local legal traditions, and extensive collaboration with local justice professionals and academics.

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[278] Ibid at p. 296.

[279] Ibid.

[280] email correspondence with Head of AIHRC 23.03.2017.

[281] M. E. Hartmann, A. Klonowiecka-Milart, supra note 54 at p. 295.

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RELATIONSHIP BETWEEN THE EU AND NATO BASED ON THE EXAMPLE OF DATA PROTECTION POLICY

Abstract

On 24 May 2018, the General Data Protection Regulation (GDPR) entered into force, thereby obliging all 28 national legal systems of the EU Member States to harmonize and supplement their rules on the protection of personal data. From the perspective of international law, agreements emanating from other international organizations that are binding on the EU Member States may prove to impose legal obligations inconsistently with the GDPR. Possibly, an example of such an international organization may be NATO. In such a case, the EU Member States would be confronted with an irresolvable conflict of law, as – from the horizontal system of international law – they would be obliged to abide by the rules of both Organizations. Given that as many as 22 EU Member States are Parties to NATO, this study examines whether there is a legal or a political requirement to implement the GDPR to the policy of NATO.

Keywords

conflict of law – data protection policy – EU – GDPR – international organizations – NATO – public international law

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I. Introduction

Personal data protection policy may be understood as the area of law that provides for norms regulating the processing of personal data. This includes the rules on obtaining, transferring, as well as using these data by the entities who received them. The regulation of this activity is of the utmost importance, given e.g. the risks associated with the release of personal data such as using the obtained information for malicious purposes. For example, the US Federal Emergency Management Agency accidently released private data from 2.3 million disaster survivors of hurricanes of 2017, which has been considered to be a "major privacy incident"[1]. In 2015, Northamptonshire county council accidentally published data of almost 1.500 children including names, addresses, religion, and special educational needs status[2]. In 2012, the Torbay Care Trust released personal details of over 1.000 NHS staff online, leaving them open to identity theft[3]. Even though these entities may not have intended to use the released data for malicious purposes, there is a risk that this may still happen as a result of the activities of other parties. A survey conducted by McAfee in 2018 reveals that 43% of people (out of almost 7.000) feel they do not have control over their personal information[4]. For the sake of the abovementioned, the data protection policies have been under constant development at national level[5]. It may be argued that, in

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[1] B. Kesling, *FEMA Officials Accidentally Released Private Data From 2.3 Million Disaster Victims*, available at: https://www.wsj.com/articles/fema-officials-accidentally-released-private-data-from-2–3-million-disaster-victims-11553306354/ [last accessed 26.4.2019].

[2] R. Ramesh, *Public bodies are releasing confidential personal data by accident*, available at: https://www.theguardian.com/technology/2015/jul/15/confidential-personal-data-release-accident-councils-nhs-police-government/ [last accessed 26.4.2019].

[3] Press Association, *NHS trust fined £175,000 for 'troubling' data security breach*, available at: https://www.theguardian.com/uk/2012/aug/06/nhs-trust-fined-data-security/ [last accessed 26.4.2019].

[4] G. Davis, *Key Findings from our Survey on Identity Theft, Family Safety and Home Network Security*, available at: https://securingtomorrow.mcafee.com/consumer/key-findings-from-our-survey-on-identity-theft-family-safety-and-home-network-security/ [last accessed 26.4.2019].

[5] Cf. recent changes in Brazil: Consumer Protection Code of 1990, Internet Act of 2014 regulates the protection of privacy and personal data online, General Data Privacy

general, more stringent rules offer a higher protection to data subjects, thereby ensuring their right to privacy and security. Simultaneously, however, they limit other freedoms, e.g. autonomy to shape their own policies by entrepreneurships, which are surrounded by new obligations and a fear of the imposition of fines for not complying with them.

The data protection policies have not only been governed by national legislation. Faced with possible dangers and in fear of the lack of a proper security mechanism, the European Union (EU) decided to implement necessary reforms as well. Even though the Organization had the relevant legislation in place (Data Protection Directive[6]), it was decided to repeal it by the General Data Protection Regulation (GDPR)[7]. This generally and directly applicable legislation (Art. 288 TFEU) was enacted on 27 April 2016 and entered into force on 24 May 2018. It specifies various definitions, such as personal data – any information relating to an identified or identifiable natural person[8], and processing – any operation which is performed on personal data, whether or not by automated means, such as collection, recording, storage, use, disclosure, erasure, or destruction[9]. It provides for the principles relating to the processing of personal data

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Law of 2018; Germany: Federal Data Protection Act of 2001 was replaced by the Federal Data Protection Act of 2017; Iceland: Processing of Personal Data of 2000 was replaced by the Data Protection and the Processing of Personal Data of 2018; Sweden: Personal Data Act of 1998 was replaced by the Swedish Data Protection Act and the Swedish Data Protection Regulation of 2018. See: K. Yahnke, *A Practical Guide to Data Privacy Laws by Country,* available at: https://i-sight.com/resources/a-practical-guide-to-data-privacy-laws-by-country/ [last accessed 26.4.2019].

[6] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *OJ L 281, 23.11.1995, p. 31–50* (no longer in force).

[7] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), *OJ L 119, 4.5.2016, p. 1–88*, hereinafter to be referred as 'GDPR'.

[8] Art. 4.1 GDPR.

[9] Art. 4.2 GDPR. The full wording of the provision reads as follows: "'processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use,

(Art. 5) as well as legal grounds for the processing (Art. 6). Furthermore, it prohibits the processing of "special categories of personal data", the so-called sensitive data, i.e. revealing racial or ethnic origin, political opinions, religious, or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation (Art. 9.1). The prohibition may be lifted only if the grounds listed by Art. 9.2 have been met; one of such grounds being the consent of a data subject.

The rationale behind the GDPR is the protection of natural persons (Rec. 14). Having analyzed the rules stemming therefrom, it is clear that the purpose of the Regulation is to impact both private and public sectors. In the private area, a distinction may further be made between natural persons and private establishments. Public category comprises *inter alia* public official institutions. To give an example, natural persons receive new rights and at the same time they are supposed to respect the rights of other persons; in addition to that, companies are responsible for carrying out the Data Protection Impact Assessment (Art. 35), whereas governments are to set up new bodies (such as the Supervisory Authority, Art. 51).

Having in mind the constant development in the area of public international law, it may be argued that the impact may have even further consequences. By entering new treaties, States bind themselves with new obligations. There are two implications that may occur with respect to the EU norms, once a Member State concludes a new international agreement. The new rules entered into may be in compliance or in conflict with the currently binding law of that Organization. The same finding applies to a new piece of EU legislation in relation to the already-enforced law of an international organization, to which its Member State is a party. An example of an international organization that comprises a number of the EU Member States is the North Atlantic Treaty Organization (NATO).

The aim of this study is to examine the correlations of the data protection policy between the EU and NATO. More specifically, the

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disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction".

purpose of the paper is to answer the following question: "Given the responsibilities imposed on the EU Member States, is NATO required to implement the General Data Protection Regulation, and what are the rules on accountability in the case of adopting and abiding by measures that are inconsistent with this Regulation?" To narrow down the scope of the research, for the purposes of the examination, 'NATO' shall be understood as the Joint Force Command in Brunssum (JFCBS), the Netherlands. The relevance of the examination is twofold. Firstly, as presented above, the GDPR has significantly impacted the EU Member States and many private and public sectors therein. Secondly, as of April 2019, the EU (28 Members) and NATO (29 Members) have as many as 22 States in common. Therefore, the answer to the question becomes primarily significant for NATO headquarters that – just like JFCBS – are located within the EU. Considering that the rules of NATO and EU bind their Parties equally, it is emphasized that the findings of the study may apply to any NATO headquarters located within the EU.

This paper is of descriptive and analytical nature inasmuch as it analyzes the currently binding law, jurisprudence, and legal doctrine. To this end, it is divided into three main chapters. The part following the Introduction displays an overview that is relevant for the analysis by presenting the legal nature of the EU (*II.1*) and NATO (*II.2*). Subsequently, Chapter III provides the answer to the first part of the research question. On the basis of public international law (*III.1.*) and the relevant jurisprudence (*III.2.*), it examines whether NATO is required to implement the GDPR. Based on the findings (*III.3.*), Chapter IV answers the second part of the research question. It examines possible accountability steps in the case of adopting and abiding by NATO measures that are inconsistent with the GDPR. Based on a hypothetical situation (*IV.1*), this part studies the standards of the liability of a state (*IV.2*) and of international organizations (*IV.3.*) Eventually, the paper finishes with Conclusions and Recommendation (*V.*). This is the place for a brief summary of the findings and providing the answer to the research question.

II. Place of The EU and NATO in National Legal Hierarchy

1. The European Union

The EU legal system consists of primary and secondary sources of law. The former includes the founding Treaties, i.e. the Treaty on European Union (TEU[10]) and the Treaty on the Functioning of the European Union (TFEU[11]). The secondary sources comprise among others: acts that have been enacted in the framework of a legislative procedure (e.g. ordinary legislative procedure, Art. 294 TFEU), unilateral acts listed in Art. 288 TFEU (regulations, directives, decisions, opinions, and recommendations) as well as agreements (e.g. conventions to which the EU is a party, concluded in the procedure of Art. 218 TFEU). This part of the paper primarily aims at presenting the position of EU law in the national legal hierarchy of its Member States. To this end, attention will be paid to the founding Treaties and the CJEU's interpretation thereof.

The consideration of the validity of EU law in national legal systems cannot be started without referring to the Court's decision in *Van Gend & Loos*. The Netherlands submitted a preliminary question (cf. now Art. 267 TFEU) and asked whether Art. 12 EEC Treaty (now: Art. 30 TFEU[12]) "has direct application in national law in the sense that nationals of Member States may on the basis of this article lay claim to rights which the national court must protect"[13]. The Court answered in the affirmative, thereby establishing the first criteria for producing direct effect by an EU provision (clear, unconditional, negative obligation, not qualified by any reservation on the part of a Member State, not dependent on any

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[10] Consolidated version of the Treaty on European Union, *OJ C 326, 26.10.2012, p. 13–390*, hereinafter to be referred as 'TEU'.

[11] Consolidated version of the Treaty on the Functioning of the European Union, *OJ C 326, 26.10.2012, p. 1–390*, hereinafter referred to as 'TFEU'.

[12] Art. 30 TFEU: "Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature".

[13] *NV Algemene Transport- en Expeditie Onderneming Van Gend & Loos v. Netherlands Inland Revenue Administration,* Case 26/62, Judgment of 5.2.1963, E.C.R. 1963.

national measure[14]). In the explanation thereto, the Court provided the statement, which – despite the passage of time – still applies in relation to EU law. It held that the Community constitutes "a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals"[15].

In relation to the last point, D. Chalmers reckoned that three transformational developments flowed from the analyzed decision[16]. He listed the following as the consequences of the judgment. Firstly, the central symbols and ideals of (now) EU law. In this regard, the author considered this law to resemble the authority figure of a judge (as it "symbolizes qualities of fairness, justice, and dispassion, and acts as a counterpoint to other authority figures"[17]) and a leader (as it "gets others to act on the basis of her promises as being more plausible than others"[18]). Secondly, a system of individual rights and duties[19]. This is visible in the passage that "for the benefit of [a new legal order of international law] the states have limited their sovereign rights (…) and the subjects of which comprise (…) also their nationals". The mentioned quotation implies that individuals, who have met the eligibility criteria, can invoke their rights guaranteed under EU law before their national courts. Thirdly, an autonomous legal order with more power than traditional treaties[20]. The *new legal order* manifests itself through the self-proclaimed right of 'individuality' and 'specialty' in the system of international law. This is visible in the statement that the EEC Treaty "is more than an agreement which merely creates mutual obligations between the contracting states"[21].

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[14] Ibid.

[15] Ibid.

[16] D. Chalmers, *What Van Gend en Loos stands for,* "International Journal of Constitutional Law", Issue 1, 2014, p. 105–134.

[17] Ibid. For further information on authority figures, see: A. *Kojève, La notion de l'autorité*, Paris: Gallimard, 2004, p. 66–88.

[18] Ibid. For the "political messianism" of the EU, see: J. Weiler, *60 Years since the First European Community – Reflections on Political Messianism*, "European Journal of International Law", Issue 22, 2011, p. 303–311.

[19] Chalmers, supra note 16.

[20] Ibid.

[21] Ibid.

The preceding analysis, supported by the upcoming paragraph, have explained why neither the EEC Treaty nor its later versions are to be considered as a 'typical' international agreement.

The considerations above refer to the *new legal order* of (now) EU law from the perspective of international law. Having provided the relevant information, the impact of the judgment must also be analyzed in the light of the national law of the EU Member States. In *Costa v. ENEL,* faced with a question about the conflict of domestic statutory law with the EEC Treaty, the Court explicitly said that the Treaty created its own order, which upon its entry into force was integrated with the national order of the Member States and as such, is binding upon them[22]. Furthermore, owing to the "special and original nature" of the Treaty, the law stemming therefrom cannot be overridden by domestic legal provisions[23]. This supremacy of (now) EU law correlates with the third observation of Chalmers on the *Van Gend & Loos* judgment (autonomous legal order with more power than traditional treaties). Therefore, the new legal order implies *inter alia* the primacy of (then) Community law over national legislation. It must be underlined that this finding applies to every source of national law, including the constitution (*Internationale Handelsgesellschaft*[24]). Furthermore, in the case of a conflict between national and EU laws, any national court has a power to set aside the former, which was decided in 1979 in *Simmenthal*[25]. Therefore, to ensure the proper and unequivocal enforcement of EU law, conflicting national provisions are to be disapplied.

Interestingly, in December 2018, the Court provided further elaboration in this matter. In *WRM,* it informed that only the courts designated to review the validity of a national provision have the power to invalidate the conflicting provisions (striking down[26]), whereas all national courts

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[22] *Flaminio Costa v. E.N.E.L, Case 6/64, Judgment of 15.7.1964, E.C.R. 1964.*

[23] Ibid.

[24] *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case 11/70, Judgment of 17.12.1970, E.C.R. 1970.*

[25] *Simmenthal SpA v. Commission of the European Communities, Case 92/78, Judgment of 5.3.1980, E.C.R. 1980.*

[26] *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v. Workplace Relations Commission*, Case C378/17, Judgment of 4.12.2017, E.C.R. 2017, at par. 34.

must be under a duty to give full effect to EU provisions in the exercise of their jurisdiction and thus are able to set aside any national provision that are conflicting with EU law (disapplying[27]). Furthermore, the Court confirmed that this power also applies to all State organs, including administrative authorities, if they apply EU law[28]. Taking everything into consideration, it is clear that the impact of EU law on its Member States continues. The starting point, i.e. the new legal order expanded to include the primacy of EU law over any national provision, the obligation to set aside conflicting provisions by national courts and public authorities, and even the power of the latter to disapply conflicting national rules. *De facto,* due to the impact of EU law, one can no longer talk about a Member State's national legislation *stricto sensu*. The question about exclusivity and autonomy of domestic rules may be valid if these touch upon any the field enlisted in Art. 4.2 TEU, such as national identities, albeit this is not always the case (cf. e.g. *Coman*[29]).

2. The North Atlantic Treaty Organization

Having presented the legal structure of the EU, now it is time to focus on its equivalent at the NATO level. The operation of NATO as an international organization is regulated by four multilateral agreements: the North Atlantic Treaty (NAT, 1949)[30], the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (NATO SOFA, 1951)[31], the Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (Paris Protocol to NATO SOFA, 1952)[32] and the Agreement on the Status of the North

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[27] Ibid. at par. 35.

[28] Ibid. at par. 38.

[29] *Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne,* Case C-673/16, Judgment of 5.6.2018, E.C.R. 2018.

[30] North Atlantic Treaty (Washington, 4 April 1949), hereinafter referred to as 'NAT' or 'Washington Treaty'.

[31] Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (London, 19 June 1951), hereinafter referred to as 'NATO SOFA'.

[32] Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (Paris, 28 August 1952), hereinafter referred to as 'Paris Protocol'.

Atlantic Treaty, National Representatives and International Staff (Ottawa Agreement, 1951)[33]. The Washington Treaty constitutes the legal basis of NATO. It expresses the goals and principles on which the Organization is founded[34]. NATO SOFA and the Paris Protocol thereto govern situations when forces of one Party serve in the territory of another Party. They regulate the conditions under which the employees are seconded and reside in another NATO State. Moreover, there is a possibility of concluding additional SOFAs between the Parties concerned, which are legally binding on these Parties. Lastly, the Ottawa Agreement regulates the functions of international staff.

The Agreements presented in the previous paragraph were enacted by consensus by all the States that are Parties to NATO[35] and are legally binding on all the Members. Having in mind the division of EU law between primary and secondary law, one may consider them to be primary law of NATO, since they were enacted in the first years of the operation of the Organization and provided for norms that constituted the functioning of NATO. However, in the author's view, this EU division may not be reflected at NATO level. This argument is based on two grounds. Firstly, NATO does not have a legislative competence; all decisions are made by consensus[36]. For that reason, one cannot talk about NATO *acquis* in the form of secondary law as the counterpart of *acquis communautaire*[37].

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[33] Agreement on the status of the North Atlantic Treaty Organization, National Representatives and International Staff (Ottawa, 20 September 1951).

[34] To this effect, see Preamble to NAT: "The Parties to this Treaty (…) are determined to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and the rule of law. They seek to promote stability and well-being in the North Atlantic area".

[35] NATO Office of Information and Press, *NATO Handbook; 50th Anniversary NATO 1949–1999,* Brussels: Office of Information and Press, 1999, p. 147.

[36] T. Gazzini, *NATO Coercive Military Activities in the Yugoslav Crisis (1992–1999)*, "European Journal of International Law", Issue 3, 2001, p. 391–436.

[37] The phrase can be translated into English as 'Community patrimony'. It refers to the legal heritage of the EU as well as the entities which were further transformed in the EU. See: C. C. Gialdino, *Some Reflections on the Acquis Communautaire*, "Common Market Law Review", Issue 32, 1995, p. 1089–1121. Alternatively, the secondary law may be considered to encompass SOFAs concluded between individual States-Parties (an example may be Agreement of 11 December 2009 between the Government of the United States of America and the Government of the Republic of Poland on the Status of The Armed

Secondly, legal norms enacted by a headquarters are binding only within that headquarters. To give an example, if JFCBS adopts a directive, this directive applies only to personnel of this Command. In this sense, the adopted measures may be considered as internal regulations rather than NATO (secondary) law.

The NATO Treaties do not provide for the judicial structure *sensu stricto*[38]. It seems that the lack of reference to this matter demands the search for an indirect solution, such as the one establishing the Council under Art. 9 NAT. The provision states that the Council shall "consider matters concerning the implementation of this Treaty". If the 'implementation' is accepted to include the dispute settlement stemming from the Treaty interpretation/violation, it can be concluded that the Council, implicitly, shall be a consultative place in dispute settlement. Otherwise, general public international law (e.g. the law of the treaties, the law of state responsibility) must be relied on. An illustrative example may be Art. 33 of the UN Charter, which lists the following methods of peaceful dispute settlement: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements[39]. Furthermore, it is also possible to bring a dispute before the ICJ (see:

Forces of the United States of America in the Territory of the Republic of Poland (effective 31 March 2010)). Nonetheless, these documents are binding only *inter partes;* contrary to EU secondary law, they do not apply to all NATO States.

[38] Art. 24(a) of the Ottawa Agreement provides that the Council shall establish the settlement of "disputes arising out of contracts or other disputes of a private character to which the Organization is a party". This is the provision which became the legal basis for what later became known as the Administrative Tribunal. This body however relates solely to labour-related problems, which is why it is not a proper place to seek justice e.g. when one state aims to bring a claim against another for the violation of certain NAT provisions. The matter resulting from the lack of an internal dispute settlement mechanism was subject to a case brought before the ECtHR. The applicant claimed that Belgium (the receiving State) and Italy (the sending State) had failed to ensure the creation by the Organization of an internal dispute resolution mechanism in compliance with the ECHR; the case was found inadmissible by the Court. See: *Gasparini v. Italy and Belgium*, App no, 10750/03, Judgment of 12.5.2009.

[39] Charter of the United Nations (adopted 24 October 1945) 1 UNTS 16. Cf. Art. 1 NAT: "The Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered".

Art. 34.1, Art. 35.1, Art. 35.2 and Art. 36.1 of the Statute of the International Court of Justice)[40].

Furthermore, pursuant to Art. 8 NAT, each Party "declares that none of the international engagements now in force between it and any other of the Parties or any third State is in conflict with the provisions of this Treaty, and undertakes not to enter into any international engagement in conflict with this Treaty". In accordance with H. Kelsen's opinion, the mentioned 'engagements' are said to primarily encompass international treaties[41]. Furthermore, as reckoned by K. Végh, the term may be understood to comprise any legally binding or non-binding commitments or undertakings that are incompatible with the fulfilment of the legal obligations under the Treaty[42]. Therefore, the Treaty precludes the parties to it from entering into obligations that would be harmful for the values that NATO aims to preserve, such as development of peaceful and friendly international relations (Art. 2), individual and collective capacity to resist armed attack (Art. 3), preservation of territorial integrity (Art. 4), and the principle of collective defence (Art. 5). Taking the foregoing into consideration, it is concluded that in the national legal systems of its Parties, NATO law holds the place typical for an international organization. Although it does not express its primacy as directly (judicial decisions) and as far (obligation to adjust or disapply national law in order to comply with EU law) as the EU, it still requires its Parties to comply with its law.[43]

III. NATO – Requirement to implement The GDPR?

1. EU and NATO as International Organizations with Individual Norms

The following Section will proceed with an analysis concerning the legal relationship between the EU and NATO. The findings thereof

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[40] Statute of the International Court of Justice (adopted 18 April 1946) 33 UNTS 993.

[41] H. Kelsen, *Principles of International Law*, New York: Rinehart Company, 1952, p. 150.

[42] K. Végh, *The North Atlantic Treaty and its Relationship to other 'Engagements' of its Parties – A commentary on Article 8* (forthcoming in "Emory International Law Review").

[43] For further discussion, see: P. Klein, *La responsabilité des organisations internationales*

will be significant, as only then will it be possible to find out which of the Organizations prevails in the case of conflicting international legal obligations. This will make it possible to answer the question whether NATO is required to implement the GDPR, given that the Regulation has imposed obligations on 22 Members of this Organization. The issue is very important, since the majority of the EU Member States are simultaneously Parties to NATO. Yet, not all EU Member States are parties to this Organization (e.g. Cyprus) and not all NATO States are EU Member States (e.g. Canada).

Pursuant to Art. 26 VCLT[44], serving as an example of the *pacta sunt servanda* doctrine, every treaty in force is binding upon the parties to it and must be performed by them in good faith. Accordingly, States that are simultaneously Parties to NATO and EU are obliged to act in conformity with the legal framework emanating from both Organizations.

Double international obligations do not seem to be relatively significant until a legal conflict appears. In the case of an inability to comply with the laws of two international organizations by their common member states, the following question may be rightly asked: can one organization impose obligations on the other? Analogically to Art. 34 VCLT, according to which a treaty does not create either obligations or rights for a third State without its consent, one can exclude such a possibility. As argued by J. Vidmar, in a "horizontal system of legal norms, no legal obligation is prima facie capable of trumping another obligation"[45]. This implies that the supremacy of EU law does not extend beyond its internal system. Therefore, the EU may not impose an obligation on NATO and *vice versa,* unless otherwise agreed by these Organizations. It seems that the only possibility of solving the problem of a conflict of laws is laid down by public international law. To this end, the general principles such as *lex*

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dans les ordres juridiques internes et en droit des gens, Brussels: Bruylant, 1998, p. 5; A. B. Muñoz Mosquera, *The 7 Questions on: International Law, International Organizations & SHAPE*, "NATO Legal Gazette", Issue 2, 2012, p. 5–15

[44] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, hereinafter to be referred to as 'VCLT'.

[45] J. Vidmar, *Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System*?, [in:] E. De Wet, J. Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights,* Oxford: Oxford University Press, 2012, p. 13–42.

posterior derogate legi priori may serve as a tool of conflict avoidance with regards to norms between international organizations. Nonetheless, because of the main subject of this study, this point will not be further elaborated.

The problem of conflicting laws concerns the situation of the so-called legal dilemma, i.e. a situation "when an actor confronts an irresolvable and unavoidable conflict between at least two legal norms so that obeying or applying one norm necessarily entails the undue impairment of the other"[46]. However, there are certain situations, when despite no direct obligation emanating from one organization, the other decides to accept the standards imposed by the former. In such cases, this becomes more of a political than a legal decision[47], which leads to legal consequences. One of such examples is Art. 42 TEU that refers to the Common Security and Defence Policy (CSDP). Para. 2 states that the policy of the Union shall respect the obligations of certain Member States, which see their common defence realised in NATO and be compatible with the CDSP established within the framework of the Washington Treaty. Moreover, Para. 7 adds that commitments and cooperation in this area shall be consistent with commitments under NATO, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation. In the mentioned provisions replacing Art. V of the Modified Brussel Treaty[48], the EU explicitly acknowledged that in the area of the CSDP, the norms emanating from NATO are to be abided by its Member States and respected by the EU itself[49].

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[46] V. Jeutner, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma*, "European Journal of International Law", Issue 28, 2017, p. 1423–1428.

[47] D. Bogdansky, *Legally Binding versus Non-Legally Binding Instruments*, [in:] S. Barrett, C. Carraro, J. de Melo (eds.), *Towards a Workable and Effective Climate Regime,* London: Centre for Economic Policy Research, 2015, p. 47.

[48] R. A. Wessel, *Common Foreign, Security and Defence Policy*, [in:] D. Patterson, A. Södersten (eds.), *A Companion to European Union Law and International Law*, New Jersey: Wiley-Blackwell, 2016, p. 394–412.

[49] However, the wording of Art. 42.7 TFEU was *de facto* a consequence of the conditions for the US support of the Common European Security and Defence Policy, as provided for by the Maastricht Treaty. The requirements (so-called 'three Ds') were expressed by the Secretary of State Madeleine Albright: 1) no discrimination against non-EU NATO

To refer to a more recent situation, a similar recognition occurred in 2018 with the same actors. This time, however, the acknowledgment was the reverse. In June 2018, the Supreme Headquarters Allied Powers of Europe (SHAPE) decided to base its data protection policy mostly by reliance on the EU General Regulation of Data Protection. This has been evidenced by the ACO Directive 015–026 Data Protection Policy. Soon after, the said Directive became a basis for the data protection policy within the Joint Forces Command in Brunssum (JFCBS). The Command released its version of the document in January 2019 in the form of the JFCBS Directive 025–02 Data Protection. The paper does not examine the consistency of this instrument with the GDPR. Instead, it continues with analyzing whether there had been prior requirements to implement the EU Regulation by JFCBS (*III.2.*). Furthermore, based on an imaginary problem, it examines the responsibility of the relevant entities as a result of enacting and abiding by hypothetical measures of the JFCBS Directive that are inconsistent with the GDPR (*IV*).

A. Conclusions

As established, NATO is not bound by the GDPR, since it is not a party to the EU. The only entities that are directly obliged to abide by this Regulation at NATO level are common Member States of the EU and NATO. These States are simultaneously bound by the norms emanating from both Organizations. It is reckoned that in the case of a conflict between the standards imposed by each Organization, such discrepancies are to be resolved in accordance with the general norms of public international law. The further parts of this contribution will examine the possibility of a conflict prevention technique. In other words, they aim to find out whether there may be an indirect requirement or a legal recommendation of NATO to comply with the GDPR.

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members (e.g. Turkey), 2) no diminution of NATO and thus no decoupling of European and North American security, and 3) no duplication of NATO's operational planning system and the Alliance's command structure. See: K. Larres, *The United States and the 'Demilitarization' of Europe: Myth or Reality?,* "Politique étrangère", Issue 1, 2014, p. 117–130.

2. Due account of the terms and objectives of the measures

Based on the jurisprudence, one may find another way (next to the general principles of public international law) to tackle the interplay between different organizations. Since NATO does not identify itself by a permanent judicial body relevant for the subject matter, a direct reference cannot be made to this Organization. Instead, it will be referred to the leading decision of the CJEU in the EU-UN relation – *Kadi*[50]. This is justified by the fact that the analysis will directly focus on one of the Organizations that is subject to this research. Consequently, it may serve as an example showing how to deal with situations when an international organization imposes rights/obligations on its members which are simultaneously parties to another organization.

Before moving to the said judgment, the analysis will start from the *Bosphorus* case, in which the European Court of Human Rights (ECtHR) dealt with a problem like the one of this research. Bearing in mind distinct systems established by individual international organizations, the Court recognized "the growing importance of international cooperation and of the consequent need to secure the proper functioning of international organisations"[51]. In fact, the implication *in casu* concerned as many as three international organizations: the United Nations, the European Union, and the Council of Europe. In May 1993, an aircraft leased by the applicant company from Yugoslav Airlines (JAT) was seized by the Irish authorities. This was accomplished in accordance with an EC Council Regulation which had implemented the UN sanctions regime against the Federal Republic of Yugoslavia (Serbia and Montenegro). In the course of the proceedings, the applicant's lease on the aircraft had expired and the sanctions regime had been relaxed. For that reason, Ireland returned the aircraft directly to JAT. The applicant referred to the ECtHR and based the claim under the protection of property, thereby arguing that he had

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[50] *Kadi and Al Barakaat v. Council*, Joined Cases C-402/05 *P&C* and C-415/05, Judgment of 3.9.2008, E.C.R. 2008.

[51] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, App no, 45036/98, Judgment of 30.6.2005, at par. 150.

borne an excessive burden resulting from the manner in which Ireland had applied the sanctions regime, and consequently, he had suffered a significant financial loss. The Strasbourg Court stated that member states of an international organization (such as the EU) are still liable under the ECHR for "all acts and omissions of its organs regardless of whether the act or omission in question was a consequence […] of the necessity to comply with international legal obligations"[52].

Unlike the EU and NATO, the ECtHR – emanating from the Council of Europe – is a *stricte* human rights judicial authority. However, its decision teaches two lessons relevant to the general application of international law. Firstly, international obligations imposed by Organization A and accepted by its parties remain in force even if these states enter Organization B. Secondly, the states may still be held liable for an act/failure to act, which consequently leads the violation of norms of Organization A, even as a result of abiding by norms of Organization B[53].

Another lesson may be taken from *Kadi,* which had been decided earlier by the CJEU. The UN Security Council identified Mr. Kadi as a possible supporter of Al-Qaida and imposed sanctions on him (particularly an assets freeze). Because the sanction was later adopted by the EU Regulation, Mr. Kadi challenged it before the EU. The General Court (first instance) refused to review the regulation at stake, claiming that this would be equivalent to reviewing the Security Council's measure. The CJEU (appeal), on the other hand, decided to review the Regulation, arguing that this does not amount to such an activity. The Court stated that because Mr. Kadi had not been informed about the grounds for his inclusion in the list of individuals subject to the sanctions, he could not seek judicial review of the said grounds, which resulted in the violation of his rights to be heard, to effective judicial review[54], and to the right to property[55]. As argued by J. Kokkot and C. Sobotta, "the judgment of

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[52] Ibid. at par. 153.

[53] For other cases with multiple jurisdictions of international organizations, see: *Matthews v. United Kingdom*, App no, 24833/94, Judgment of 18.2.1999; *M.S.S. v. Belgium and Greece*, App no, 30696/09, Judgment of 21.1.2011; *Avotinš v. Latvia*, App no, 17502/07, Judgment of 25.2.2014.

[54] *Kadi,* supra note 50 at par. 384.

[55] Ibid. at par. 368.

the CJEU in Kadi has been associated with a dualist conception of the interplay between the international and the Union legal order"[56]. In this case, the said conception involved the EU and the UN (the Parties of which are all EU Member States). In the final part of the judgment, the Court provided that, in drawing up the necessary measures, "the Community is to take due account of the terms and objectives of the resolution concerned and of the relevant obligations under the Charter of the United Nations relating to such implementation"[57]. In this passage, the Court indirectly expressed the primacy of the UN's resolution over EU law. As an additional note, it is emphasized that, in general, the Court is not willing to accept the supremacy of legal norms of other international organizations to which its Member States are parties. This has been evidenced by various decisions delivered by the Court.[58]

The decision was implemented unilaterally by the CJEU on the European Union. Nevertheless, it is argued that it may be considered as an example that shows grounds for which international organizations may be recommended to accept standards emanating from obligations which are not legally binding on them. If Organization A implements measures imposed on its member state that is simultaneously a party to Organization B, it is endorsed that latter takes *due account* of the terms and objectives of the measures concerned. Based on the current findings of the research, this recommendation is explained by the will to harmonize international law standards.

It must be emphasized that the Court did not provide a definition of the 'due account' that would set out its minimum requirements. In the author's opinion, the concept may be understood as a variable on a two-point scale between the acceptance of the legal framework of the

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[56] J. Kokott, C. Sobotta, *The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?*, "European Journal of International Law", Issue 4, 2012, p. 1015–1024.

[57] Ibid., at par. 296. To this effect, see also: Art. 351 *in fine* TFEU.

[58] Cf. *NV International Fruit Company and others v. Commission of the European Communities,* Joined cases 41 to 44–70, Judgment of 13.5.1971, E.C.R. 1971; *Portugal* v. *Council,* Case C-149/96, Judgment of 3.12.1996, E.C.R. 1996; *Leon van Parys v. Belgisch Interventie- en Restitutiebureau (BIRB*), Case C-377/02, Judgment of 1.3.2005, E.C.R. 2005; *FIAMM and Others* v. *Council and Commission,* Joined Cases C-120/06 P and C-121/06 P, Judgment of 9.9.2008, E.C.R. 2008; *Commission v. Rusal Armenal,* Case C-21/14 P, Judgment of 16.7.2015, E.C.R. 2015.

organization and the implementation of the law of that organization. This point of view is similar to the findings of N. Yang, who provided a comprehensive analysis of the judgment. She argued that on the one hand, the phrase may mean that "the EU should refrain from any action which could jeopardize the attainment of UN objectives"[59]. In this case, this would be no doubting the assessment made by the UN Sanctions Committee[60]. On the other hand, she reckoned a more active possibility, i.e. attaching the same importance to the objective by the EU as by the UN. *In casu*, this objective was countering terrorism[61]. In relation to this, it is argued that the requirements to be implemented shall be assessed on a case-by-case basis. This assessment shall be conducted by the organization that aims to take due account of the measures and objectives pursued (referring to the mentioned examples – this would be Organization B).

3. Conclusions

Considering the abovementioned, new findings should be underlined. They are related to the implementation of measures imposed by Organization A on its member states that are simultaneously parties to Organization B. *De lege,* Organization B is not obliged to implement the discussed measures, because norms of international organizations have the same force in the international legal order (the exception to the rule is the law emanating from the United Nations, as follows from Art. 103 UN Charter[62]). Nevertheless, the norms of Organization A remain binding on its member states. Thus, the parties to Organization A may still be held liable for a violation (by act or failure to act) of the measures, even when

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[59] N. Yang, *Constitutional dimensions of administrative cooperation: potentials for reorientation in Kadi II,* [in:] M. Avbelj, F. Fontanelli, G. Martinico (eds.), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* Abington: Routledge, 2014, p. 172–186.

[60] Ibid.

[61] Ibid.

[62] Art. 103 UN Charter: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

acting in conformity with (or: on the basis of) the law of Organization B. There is a clear correlation between the functioning of international organizations which is linked by their mutual member states. For the sake of the need to preserve a harmonized international cooperation, organizations may take into consideration each other's interests. To refer to the provided example, it may happen that Organization B implements measures imposed by Organization A, thereby taking *due account* of the terms and objectives of the measures concerned.

Subject to this research, such a relationship has occurred between the EU (example Organization A) and NATO (Organization B). Owing to the fact that the majority of NATO States fall under the jurisdiction of the EU and that there are NATO headquarters in Europe, it was decided to implement the data protection policy, as regulated by the GDPR, at NATO level. In the author's opinion, thanks to this, the harmonious functioning of international legal order has been ensured. As already mentioned, one of the headquarters that decided on the implementation of (or: was inspired by) the GDPR is the Joint Force Command in Brunssum. The subsequent Chapter aims at providing an analysis concerning a divergent implementation of the Regulation. The hypothetical situation presents a problem and legal implications of taking no due account of the terms and objectives of the GDPR by JFCBS.

IV. Possible Inconsistency between NATO and GDPR – a Question about Accountability

1. No due account and further responsibility– hypothetical situation

In relation to the previous Chapter, it seems helpful to visualize the problem of the study by drawing a hypothetical situation. For the purpose of the research, it is assumed that NATO JFCBS, by means of the newly adopted Data Protection Directive, has developed a data protection policy that is inconsistent with the GDPR. This involves an imposition of a requirement on relevant national public authorities to provide the Command with sensitive personal data of the citizens of the

Netherlands (receiving State[63]). The obligation is deprived of preventive measures in relation to this data, such as the possibility to process it only upon receiving the explicit consent from a data subject (see: Art. 9.2.a in conj. with Art. 9.1 GDPR). Since this is one of the most fundamental provisions and guarantees protection of personal data, such a norm may be considered as disobeying the *due account requirement*.

The purpose of this Chapter is to find the actor responsible for the abovementioned inconsistency. It is assumed that there are two possible options. On the one hand, the state responsibility (Netherlands) must be taken into consideration (*IV.2.*). It will be checked whether such liability could result from the activity of a national public authority, which eventually led to the breach of the relevant GDPR provisions. On the other hand, the responsibility of NATO as an international organization must also be examined (*IV.3.*). This will take into account whether the Organization may be held liable for enacting rules that are inconsistent with the GDPR based on the act (*IV.3.A.*) and imposing the obligation to act (*IV.3.B.*).

2. State liability

This part takes into consideration a hypothetical situation, in which a Dutch public authority is obliged to provide the Command with sensitive personal data of the citizens. Thus, the Section aims to find out whether the said activity may give rise to state liability. The study is based exclusively on EU law, for two reasons. Firstly, the Netherlands is a Member State of this Organization, and secondly, the violation of the GDPR (secondary EU law) is examined.

In *Francovich*, the Court listed the following grounds that give rise to state liability: 1) a breach of EU law that is 2) attributable to the Member State and 3) causes damage to an individual[64]. *In casu*, the establishment

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[63] Art. 1.1.e. NATO SOFA defines the "receiving State" as "the Contracting Party in the territory of which the force or civilian component is located, whether it be stationed there or passing in transit".

[64] *Andrea Francovich and Danila Bonifaci and others v. Italian Republic,* Joined cases C-6/90 and C-9/90, Judgment of 19.11.1991, E.C.R. 1991. at par. 73.

of the state liability was connected with the principle of loyalty enshrined in Art. 10 TFEU (ex Art. 5 EEC Treaty)[65] and the obligation to preserve the new legal order introduced in *Van Gend & Loos*[66]. However, it must be borne in mind that the case concerned the violation of a directive, whereas the instrument relevant for this research is a regulation. Do the Francovich criteria apply exclusively to directives, or does the validity of the decision extend to any source of EU law? The Court has not provided the answer to this question. *A contrario,* it is argued that the Francovich principle is universal and may also be applied to legislative acts different from directives. This is supported by the fact that, contrary to discussing the compensatory grounds for disobeying a directive[67], the CJEU referred to EU law in general while establishing the principle of state liability. For that reason, it may be argued that *Francovich* criteria apply to situations like the one in question.

Having presented the foregoing, reference should be made to another judgment, which this time directly relates to the violation of a regulation. In *Slaughtered Cows*[68], the Court ascertained that a Member State that does not give effect to a regulation has failed to fulfill the obligations imposed on that State by virtue of its adherence to the Treaty[69]. Such a violation does not give full effect to Community law and therefore is a violation of the abovementioned principle of loyalty[70]. Failure of a State to give effect to a regulation results in disrupting "the equilibrium between advantages and obligations flowing from its adherence to the Community" and creates discriminations at the expense of the nationals[71]. Furthermore, as held in *Russo*[72], a Member State shall be liable for damages caused by an infringement of directly applicable Community law if that State would

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[65] Ibid. at par. 35–36.

[66] Ibid. at par. 31.

[67] Ibid. at par. 39–40.

[68] *Commission of the European Communities v. Italian Republic,* Case C-39/72, Judgment of 7.2.1973, E.C.R. 1973.

[69] Ibid. at par. 25.

[70] Ibid.

[71] Ibid. at par. 24.

[72] *Carmine Antonio Russo v. Azienda di Stato per gli interventi sul mercato agricolo* (AIMA), Case C-60/75, Judgment of 22.1.1976, E.C.R. 1976.

be liable under a similar provision of national law[73]. At this point, it must be added that the notion of a 'state' encompasses "[a] body, whatever its legal form, which has been made responsible (…) for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals"[74]. Therefore, a 'state' also comprises national public authorities if damage results from the exercise of their official functions.

For the sake of the foregoing, it is concluded that if a Dutch public authority provided JFCBS Command with sensitive personal data of the citizens, as required by the hypothetical provision of the JFCBS Data Protection Directive, this activity would lead to the liability of the Netherlands. The finding is based on the fact that the Francovich criteria would be met. Firstly, in the light of the GDPR, the sensitive data are not governed by the general principles for lawful processing; instead, the Regulation requires additional precautionary measures while processing this kind of personal information, one of them being the consent of a data subject[75]. Disrespecting this rule would be a clear violation of secondary EU law. Furthermore, the activity at stake would disturb the previously mentioned equilibrium between advantages and obligations emanating from EU law (*Slaughtered Cows*). Secondly, the breach would be attributable to the Netherlands, since it would be conducted by a public authority in the exercise of their official functions (*Foster*). Simultaneously, it would violate Sec. 22 of the Dutch Implementing Act of the GDPR[76],

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[73] Ibid., at par. 8–9. Cf. for interpretation J. E. Hanft, *Francovich and Bonifaci v. Italy: EEC Member State Liability for Failure to Implement Community Directives*, "Fordham International Law Journal", Issue 15, 1991, p. 1237–1274.

[74] *Foster and Others v. British Gas,* Case C-188/89, Judgment of 12.7.1990, E.C.R. 1990.

[75] Cf. Art. 9 *in fine* GDPR.

[76] Act of 16 May 2018 houdende regels ter uitvoering van Verordening (EU) 2016/679 van het Europees Parlement en de Raad van 27 april 2016 betreffende de bescherming van natuurlijke personen in verband met de verwerking van persoonsgegevens en betreffende het vrije verkeer van die gegevens en tot intrekking van Richtlijn 95/46/EG (algemene verordening gegevensbescherming) (laying down rules for implementing Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

thereby meeting the requirement expressed in *Russo* (infringement of a directly applicable law, see: Art 288 TFEU). In relation to this judgment, the Netherlands would be liable for damages caused by an infringement of directly applicable EU law. Thirdly, it would cause harm to individuals (violation of the right to privacy) and their rights guaranteed under the GDPR that are related to the processing of their personal data.

All things considered, it is clear that even though the public authority would abide by the obligations imposed by NATO, this would still amount to the violation of EU law. This is additionally strengthened by the fact that the obligation would emanate from an internal rather than legal instrument of the Command (JFCBS Directive). This finding is in conformity with the decision of the ECtHR (*Bosphorus*). Having in mind that this Court is an organ of the Council of Europe, one may argue that the examined activity could also be considered as a breach of the right to privacy enshrined in Art. 8 ECHR.

3. Responsibility of international organization

A. Responsibility arising from an act

The possibility of holding NATO (JFCBS) accountable for adopting norms inconsistent with the GDPR will be assessed on the basis of the Articles on the Responsibility of International Organizations of 2011 (ARIO). The ARIO were adopted by the International Law Commission[77]. Even though they are deprived of a legally binding force, they may be considered as an indicator of responsibility of international organizations, in that being a soft law. Art. 1.1 of the document provides for its *ratione materiae*. It states that the framework applies "to the international responsibility of an international organization for an internationally wrongful act". This Section examines whether the responsibility could arise from adopting measures by NATO that would be inconsistent with the GDPR. To this end, Art. 4 is analyzed along with other provisions, which are relevant to it.

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[77] 'Resolution on the report of the Sixth Committee (A/66/473) Responsibility of international organizations' adopted by General Assembly (New York, 9 December 2011), A/RES/66/100.

In the understanding of Art. 4, an 'internationally wrongful act' is conduct consisting of an action or omission that is attributable to that organization under international law and constitutes a breach of international law. With regards to the forgoing, in order to examine the probability of NATO's responsibility, an answer to the following questions is necessary: (i) Was there an action or omission?; (ii) If so, is it attributable to NATO?; (iii) Does it constitute a breach of international law?

(i) Was there an action or omission? The answer to the first question is affirmative, since the measures inconsistent with the GDPR would be adopted by NATO by means of the JFCBS Data Protection Directive.

(ii) Is the action attributable to NATO? Pursuant to Art. 2.a, the responsibility could arise from 1) an international organization, if 2) it has been established by a treaty, and 3) possesses its own international legal personality. The first two requirements giving rise to international responsibility would be met: NATO is an international organization established by the Washington Treaty (NAT). The problems may arise in relation to the last requirement, as the opinions concerning the legal personality of NATO diverge. One group of authors argues that NATO has legal personality[78], which is "grounded in the international legal instruments agreed to by the states that create them and in the implied powers exercised and functions carried out by those organizations"[79]. In this sense, the Organization is claimed to be independent of its members[80]. The other group of authors claims that NATO has no legitimacy to act on its own[81]. This argument is supported by the fact that the Organization acts by consensus and therefore has no legal autonomy[82]. Nevertheless,

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[78] H. G. Schermers, N. M. Blokker, *International Institutional Law: Unity Within Diversity, Fifth Revised Edition,* Leiden: Martinus Nijhoff Publishers, 5th ed, 2011, p. 992.

[79] J. E. Hickey Jr., *The Source of International Legal Personality in the 21st Century*, "Hofstra Law Faculty Scholarship", Issue 2, 1997, p. 1–18.

[80] M. Zwanenburg, *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations*, Leiden: Martinus Nijhoff Publishers, 2005, p. 82.

[81] J. d'Aspremont, *Abuse of the Legal Personality of International Organizations and the Responsibility of Member States*, "International Organizations Law Review", Issue 4, 2007, p. 91–119.

[82] Gazzini, supra note 36, p. 391–436.

as emphasized by D. Nauta, international legal personality is presumed once an organization "performs acts that can only be explained on the basis of international legal personality, which – in the case of NATO – must be presumed"[83]. Therefore, for the purpose of the analysis, the legal personality of NATO is accepted.

Additionally, in order to answer the question of whether NATO could be held responsible for adopting a/the data policy that is different from the GDPR, it is important to analyze Art. 10 and Art. 11 ARIO. The former provision states that a breach of an international obligation by an international organization occurs "when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned". Art. 11 adds that "[a]n act of an international organization does not constitute a breach of an international obligation unless the organization is bound by the obligation in question at the time the act occurs". Yet, it must be asked if there was a prior *obligation* for NATO to implement the GDPR. Based on the previous finding of the research – the answer to this question is negative. There is no legal obligation for NATO to implement the law of any other international organization. As presented in *Chapter III*, the lack of the obligation could nevertheless be mitigated by practical implications. The examples of cooperation between international organizations were presented by the reference to the jurisprudence of the ECtHR (*Bosphorus*) as well as of the CJEU (*Kadi*). The mentioned judgments presented the rationale behind the legal collaboration between different international organizations. Nevertheless, since they were imposed unilaterally by the Courts of the Council of Europe and the European Union, respectively, they are not legally binding on the states or entities which are not parties thereto (such as NATO). Taking everything into consideration, the answer to the second question is negative.

(*iii) Does the action constitute a breach of international law?* Since the premises of the responsibility of international organizations are cumulative and the previous requirement has not been met, the analysis could already be finished. Nevertheless, for the purpose of the research, it is

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[83] D. Nauta, *The International Responsibility of NATO and its Personnel during Military Operations*, Leiden: Martinus Nijhoff Publishers, 2017, p. 107.

worth adding that the third condition giving rise to responsibility would not be met either. This follows from the fact that the GDPR amounts to a secondary source of EU law. Therefore, it does not give effect to international obligations; it only imposes the rules to be applied within the European Union. Taking the foregoing into consideration, it is concluded that JFCBS would not be held responsible for the adoption of norms inconsistent with the GDPR.

B. Responsibility arising from Imposing an Obligation to act

The part above analyzed whether NATO could be held accountable for imposing data protection norms that diverge from the GDPR. As demonstrated, such accountability would not arise, since NATO is not bound by the (secondary) legislation of the EU. Nevertheless, even though the GDPR norms do not extend to NATO, they remain binding on the Parties to the Organization that are simultaneously the Member States of the European Union. In the hypothetical case, NATO would impose an obligation on the Dutch authorities to conduct activities that would violate EU law, if those activities were to be performed by the Netherlands. This Section aims to examine whether NATO could be held responsible for the imposition of this obligation.

To this end, Art. 16 ARIO must be referred to. The provision states that an international organization which directs and controls a state in the commission of an internationally wrongful act by that state is internationally responsible for that act if the following requirements are met: (1) the organization does so with knowledge of the circumstances of the internationally wrongful act; and (2) the act would be internationally wrongful if committed by that organization. Based on the foregoing, in order to examine whether responsibility could arise, the following questions must be addressed: (i) Does NATO direct and control the Netherlands in the commission of an internationally wrongful act? (ii) Does NATO do it with knowledge of the circumstances of the internationally wrongful act? (iii) Would the act be internationally wrongful if committed by NATO?

(i) Does NATO direct and control the Netherlands in the commission of an internationally wrongful act? JFCBS would direct the public authorities of the Netherlands to provide it with sensitive data of the citizens. It is assumed

that the Command would also control the authorities in the commission of this activity, as it would verify whether the relevant data has been delivered. As has been explained in the previous part (*IV.2*), the term 'national public authorities' falls within the definition of a 'state'. For that reason, the answer to the first part of the question would be affirmative. Nevertheless, as explained in the previous part, the action at stake would not constitute an 'internationally wrongful act', since the premises of Art. 4 would not be fulfilled. For that reason, the first requirement giving rise to responsibility is not met. The grounds giving rise to accountability as a result of directing and controlling a state to commit an internationally wrongful act are also cumulative. For that reason, it is not necessary to continue with an analysis of subsequent premises in order to conclude if such responsibility could arise. Nevertheless, for the sake of the further discussion and academic purposes, the remaining requirements will be addressed as well.

(ii) Does NATO do it with knowledge of the circumstances of the internationally wrongful act? The ARIO are silent when it comes to specifying what should be understood under the notion 'knowledge'. In the author's opinion, it should be established that the *bona fide* standard has been disregarded. To give an example, there should be a differentiation between a wrongful implementation caused e.g. by a mistake (like error of fact) and one resulting from the motivation to breach the rule emanating from the other organization. From among these two, the latter situation is more likely to be considered as 'knowledge' in the meaning of ARIO. Since NATO is not bound by EU law, it may be assumed that it would not impose the obligation on a Member State with knowledge that this would lead to the violation of law by that State.

(iii) Would the act be internationally wrongful if committed by NATO? As established in *IV.3.A.*, the act would not be internationally wrongful if committed by NATO, since the premises of Art. 1.1 in conjunction with Art. 4 would not be met. There is no legal obligation for NATO either to implement the GDPR or to introduce measures consistently with this Regulation, which is why the answer to this question would be negative. In the light of the foregoing discussion, it is concluded that NATO would not be responsible for imposing the obligation to act.

4. Conclusions

In relation to the findings, it may be argued that in situations such as the one which is the subject of this study, the problem should be analyzed beyond the standards of the ARIO, at least for two reasons. Firstly, the GDPR is a binding law for as many as 22 NATO States. Imposing rules that are inconsistent with the norms emanating therefrom would place these Member States in a difficult situation. In the example of the Netherlands: on the one hand, the State aims at abiding by the JFCBS Data Protection Directive. On the other, however, this would mean that the Netherlands would disregard the GDPR, which is legally binding within this State. The consequences thereof have been elaborated in *IV.2*. Secondly, in the current era of digitalization and technological development, privacy constitutes a very important and sensitive value. This value can be sufficiently preserved *inter alia* by data protection policies at national and international levels. The GDPR, along with other international conventions such as the European Convention of Human Rights (ECHR) or the International Covenant on Civil and Political Rights (ICCPR) may be considered as another means on the road to strengthen this protection.

For the sake of the foregoing, it may be said that NATO – as well as other entities, be they national or international – is advised to take *due account* of the terms and objectives of other data protection regulations. In such cases, the rules would not encompass exclusively the EU, but also other organizations such as the United Nations or the Council of Europe. This 'due account requirement', which was unilaterally imposed by the CJEU (*Kadi*) on the EU, is an example that explains why it is recommended to derive norms from documents which are not legally binding on a given entity. As presented in the previous Chapters, NATO is an international organization with a horizontal internal structure. For that reason, it is in its interests to see (i.e. to take due account of) what actions are undertaken by other organizations in given areas. This is even more understandable in the field of personal data protection, since the primary purpose of NATO is to regulate matters in the area of security and defence.

It must be emphasized that the aim of the discussion is not to present NATO/its Parties as being internationally accountable or as acting

inconsistently with the legal norms of other organizations. The primary aim is to strengthen the effectiveness and reduce the fragmentation of international law. It is argued that if the 22 common Member States do not have to deal with the struggle concerning the application of incomprehensive legal norms imposed on them by different international organizations, they will be able to focus on the primary purposes of those Organizations. This may be ensured by a harmonious and consistent legal framework provided by the Organizations. In this regard, the GDPR could be an example that sets standards of the data protection policy. If these standards were reflected at NATO level, this would resemble the situation of the EU's acceptance of the NATO norms in the area of the CDSP. This, in turn, would be evidence of the enhanced legal cooperation between the Organizations.

V. Final Conclusions and Recommendations

The research provided an analysis of the relationship between two significant international organizations operating in Europe. Firstly, it demonstrated that the structure and internal functioning differ between them. The EU is characterized by a clear distinction between primary and secondary sources. Thanks to the developed internal dispute mechanism as well as the binding force of the CJEU's judgments, doctrines such as direct effect or supremacy over national law could be developed. This internal structure has ensured that many obligations have been met by the Member States. The legal construction of NATO is not similar. There is no division between primary and secondary legislation; there are only four multilateral documents that regulate the operation of NATO as an organization. Furthermore, there is no established judicial body and therefore no internal dispute mechanism. The lack of a crystal-clear legal system for NATO may be explained by the fact that the nature of the Organization is different as compared to the EU. The original goals vary between co-operation to maintain the necessary security and defence structure – autonomy which the states would probably not be eager to hand over to NATO and the assistance-like relations of the Member States in a more general scope of collaboration (EU). Nevertheless, despite the lack of a judicial structure *stricto sensu*, NATO has been a strong and

prominent Organization for 70 years and the Founding Treaties thereof are of the same value as those of other international organizations.

It was found out that there are certain areas of cooperation between the Organizations of interest. According to the EU Treaty, the Union shall respect the obligations of the Member States who are parties to NATO in the field of the CDSP. It can be said that in this way the door towards their cooperation has been opened. The question raised in this research concerned an obligatory collaboration between these International Organizations, in the sense of setting up a requirement that one Organization implement the norms of the other. It was found that an international organization may not impose obligations on another. Thus, NATO is not bound by the EU measures and *vice versa*, unless otherwise agreed by these Organizations. Referring to the problem of the study, there is no legal obligation for NATO to implement the GDPR. Nonetheless, the Organization decided to consider the EU Regulation as a source of inspiration while working on its own data protection policy. As a result, there are many GDPR-like solutions in the relevant directives of the Supreme Headquarters Allied Powers Europe and the Joint Force Command in Brunssum.

The later part of the research studied the consequence of enacting the data protection rules by the JFCBS that would be inconsistent with the GDPR. This was based on a hypothetical situation. The imaginary circumstances concerned the obligation imposed on the Dutch public authorities to disclose sensitive personal data to the JFCBS without ensuring safety measures. The findings were established in relation to the state liability and the responsibility of international organizations. With regards to the former, the research was based on EU jurisprudence. It was demonstrated that the situation would make the Netherlands accountable, because the activity would constitute a violation of EU law. The breach would be attributable to the Netherlands, since it would be conducted by a public authority in the exercise of its official functions. Moreover, it would cause harm to an individual and his/her rights related to the processing of their personal data.

In relation to NATO, the analysis was based on the Articles on Responsibility of International Organizations (ARIO). It consisted in checking the accountability on two different grounds. The first possibility included the enactment of an internationally wrongful act. It was

concluded that the responsibility would not arise, since NATO has not been bound by the GDPR; moreover, the latter does not amount to international law, but rather secondary law of the EU. Therefore, there would be no breach of international law attributable to NATO. Secondly, the question was examined as to whether liability could arise from the directing of a state in the commission of an internationally wrongful act by an international organization. Nonetheless, the accountability would not take place either, as the similar requirements for internationally wrongful act attributable to NATO would not be established.

Although the EU and NATO have different policies (or regulations within the same policy) and there is no legal obligation to take into consideration each other's legal solutions, there is a strong need for collaboration between them. As established, this is explained by the necessity of harmonious international cooperation. This, in turn, is connected with the achievement of goals relevant for well-functioning within Europe, such as security and economic prosperity. As may follow from this paper, a very significant reason for cooperation proved to be the mutual Member States of these Organizations. The equal regulations between the Organizations would help in the more efficient achieving of their purposes, inasmuch as the Members would not have to seek solutions for the application of the conflicting norms. To come back to the research problem – even though NATO is not obliged to implement the GDPR, this Regulation is still binding on 22 of its Parties. Therefore, even though there is no legal obligation to implement or take into consideration the GDPR, it is advised "to take due account of the terms and objectives of the resolution concerned" for the purposes of practical and efficiency needs. Although the passage stems from the unilateral decision of the CJEU, and NATO was not included in the proceedings, the CJEU's decision may be considered as a universal guideline for third parties. In the author's view, the issue at stake amounts to a situation where due account of the terms and objectives of the GDPR should be taken. For that reason, it is also recommended to NATO headquarters other than JFCBS to implement, or at least be inspired by, the GDPR. Perhaps one day, along with clear collaboration in the area of the CDSP, the EU and NATO will share a common framework in the field of data protection policy?

ARTICLES
AND SHORTER NOTES

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Michał Balcerzak*

THE 'ACQUIS' OF THE COUNCIL OF EUROPE IN THE SPHERE OF DISASTER PREPAREDNESS AND RESPONSE

Abstract

The article discusses institutional and standard-setting initiatives of the Council of Europe aimed at enhancing the effectiveness of its members states' actions when responding to natural or man-made disasters. Although the Statute of the Council of Europe itself is silent on tasks in this regard, the organization's agenda in disaster preparedness and response was developed inter alia through the EUR-OPA Major Hazards Agreement of 1987 (a so-called 'enlarged partial agreement'), as well as soft-law standards and the jurisprudence of the European Court of Human Rights on the positive obligations of states under Article 2 of the European Convention on Human Rights (the right to life). The article studies the Council of Europe's activities in this sphere, while noting – in a comparative perspective – the most important developments in international co-operation aimed at disaster prevention and response within the European Union, the Organization of Security and Co-operation in Europe, as well as the United Nations and the International Federation of Red Cross and Red Crescent.

Keywords

Council of Europe — partial and enlarged agreements — disaster preparedness — disaster response — international disaster law — EUR-OPA Major Hazards Agreement — European Court of Human Rights

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Introduction

Multiple international organizations – both global and regional – have undertaken initiatives in order to better co-ordinate response to natural and man-made disasters. In fact, the first two decades of the XXI century could be considered as an "awakening" of the international community which recognized the need to develop and strengthen the legal framework of disaster prevention, preparedness, and response. On the global level, some notable developments have taken place within the International Federation of the Red Cross and Red Crescent, with the adoption of standards known as *International Disaster Response Laws*[1]. Within the United Nations, the International Law Commission (ILC) has elaborated the *Articles on the protection of persons in the event of disasters*[2], which were submitted to the Sixth Committee of the General Assembly of the United Nations. The *Articles* constitute an important point of reference in establishing the duties of states in times of disasters, as well the corresponding rights of those affected. The ILC recommended that states consider the *Articles* as a basis for a future hard-law instrument, i.e. a treaty. The reactions of UN member states to this proposal were diverse, although there is no doubt that the ILC's *Articles* serve as a vital orientation point in identifying the basic norms of international disaster law as it stands today.

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[1] See the *Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance (IDRL Guidelines)* adopted at the 30th International Conference of the Red Cross Movement. These Guidelines form an important, albeit not the one and only, point of reference as regards the standards of disaster law response elaborated by the IFRC. See also C. Clement, *International Disaster Response Laws, Rules, and Principles: A Pragmatic Approach to Strengthening International Disaster Response Mechanisms* In: D. Caron, M.J. Kelly, A. Telesetsky (eds), *The International Law of Disaster Relief*, Cambridge University Press 2014, pp. 67–88.

[2] *Draft Articles on the protection of persons in the event of disasters* (2016). Report of the International Law Commission of its sixty-eighth session. A/71/10. United Nations: New York, pp. 13–17.

The interest of the United Nations in co-ordinating disaster preparedness and response goes widely beyond being a law-making exercise and involves procedures and activities aimed at providing immediate relief and assistance to those in need. Of particular importance in this regard are the activities of the Office of Coordination of Humanitarian Assistance (OCHA), the Emergency Response Coordinator (ERC), and the Inter-Agency Standing Committee (IASC), which are the principal parts of the UN system in leading, coordinating and facilitating humanitarian assistance[3]. It is also noteworthy that apart from practical action and field operations in a disaster context, there has been much debate within the UN and academia about the human rights-based approach to post-disaster assistance. By way of example, in 2015 a research-based report of the Human Rights Council Advisory Committee on best practices and main challenges in the promotion and protection of human rights post-disaster and post-conflict was submitted to the attention of the UN member states[4]. There has also been a plethora of interesting academic concepts on how to approach the axiological underpinnings of the humanitarian system, including in times of disasters[5].

While the initiatives undertaken at a global level in the sphere of disaster prevention and response attract understandable attention, one should not overlook that some regional international organizations are also appropriate fora for elaborating standards and addressing situations identified as disasters. One of the most visible example from outside the European continent are the activities of the Association of South-East Asian Nations (ASEAN), which adopted an Agreement on Disaster

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[3] Their mandate originates in the resolution of the General Assembly no. 46/182, adopted on 19 December 1992 ('Strengthening of the coordination of the humanitarian emergency assistance of the United Nations').

[4] See the *Final research-based report of the Human Rights Council Advisory Committee*, document no. A/HRC/28/76. The report was requested by the Human Rights Council in its resolution 22/16, adopted on 21 March 2013.

[5] See an interesting proposal for recognizing the principle of "humanitarian subsidiarity" in order to ensure a better effectiveness of the humanitarian actions: P. Gibbons, D. Roughneen, R. McDermott, S. Maitra, *Putting Affected People at the Centre of Humanitarian Action: An Argument for the Principle of Humanitarian Subsidiarity*, "Disasters" 2019 (accepted for publication, https://doi.org/10/1111/disa.12386).

Management and Emergency Response in 2005[6]. In the European context, there exists an elaborated legal mechanism for providing support in case of disaster among member states of the European Union[7]. Also the Organisation for Security and Co-operation in Europe noted the challenges posed by natural disasters in the area of security, and decided to strengthen the organization's activities with regard to disaster risk reduction[8].

Against this background, the activities of the Council of Europe – the oldest regional European organization with 47 member states – with respect to disaster prevention and response may seem to be less in the mainstream of what is known as "international disaster law". However, it is worth recalling that apart from the institutional and standard-setting initiatives referred to below, an important part of the Council of Europe's *acquis* in the sphere of disaster preparedness and response could be identified within the human rights law standards developed by this organization. They include also quite significant developments in the case-law of the European Court of Human Rights, which pronounced on the concept of the positive obligations of state-parties to the European Convention on Human Rights (ECHR) in the area of the right to life (Article 2) and protecting individuals from life-threatening hazards.

EUR-OPA Major Hazards Agreement

The Statute of the Council of Europe stipulates that the actions required to further the aim of the organization may be considered and undertaken by

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[6] ASEAN Document Series 2005, p. 15. For further examples of regional and subregional co-operation in this regard see A. de Guttry, *Surveying the Law*, w: A. de Guttry, M. Gestri, G. Venturini (red.) "International Disaster Response Law", Springer: Berlin 2012, p. 17 *et seq.*

[7] See in particular the Decision No. 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism (OJIL L 347/924); EU Council Decision 2014/415 on the arrangements for the implementation by the Union of the solidarity clause (OJEU L 192/53), as well as the EU Council Regulation 2016/369 on the provision of emergency support within the Union (OJEU L 10/1).

[8] See the decision no. 6/14 of the Ministerial Council of the OSCE, adopted on 5 December 2014 ('Enhancing Disaster Risk Reduction').

the Committee of Ministers via *the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters*[9]. According to Article 15.b of the Statute, *the conclusions of the Committee may take the form of recommendations to the governments of members, and the Committee may request the governments of members to inform it of the action taken by them with regard to such recommendations.* Thus, the list of types of legal instruments adopted within this organization to achieve its aims is not long and includes classic international conventions, common policies as well as soft-law instruments, i.e. recommendations[10].

The list referred to above is not exhaustive as the practice of the Council of Europe has developed also other forms of co-operation, and notably 'partial' and 'enlarged' agreements. These are not legal instruments *per se* but rather modalities of joint actions undertaken by part of the organization's member states, sometimes opened also for non-members ("enlarged partial agreements") or by all member states with one or more non-member states ("enlarged agreements"). The Committee of Ministers of the Council of Europe adopted certain basic rules on setting up partial and enlarged agreements very soon after establishing the organization itself: the resolution 51(62) allowed member states to abstain from participating in a course of action advocated by other states, without prejudice to the validity of such action for those in agreement. But it was not until 1993 that a statutory resolution 93(28)[11] was adopted which clarified the rules of establishing partial and enlarged agreements, and provided that following an authorisation of the Committee of Ministers, a partial agreement or enlarged agreements can be established with a resolution containing the statute of the agreement, adopted only by those states that wish to do so[12].

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[9] See Article 15 of the Statute of the Council of Europe, CETS no. 1.

[10] See on the soft-law instruments in the area of humanitarian assistance: D. Cubie, *An Analysis of Soft Law Applicable to Humanitarian Assistance: Relative Normativity in Action?*, "International Humanitarian Legal Studies", vol. 2, 2011, pp. 177–215.

[11] Statutory resolution (93)28 on partial and enlarged agreements, adopted by the Committee of Ministers on 14 May 1993 at its 92nd session.

[12] Some further criteria for establishing partial or enlarged agreements were set forth in Resolution (96)36, as amended by Resolution CM/Res(2010)2. According to the latter resolution, a new partial agreement requires the participation of at least one third of the member states of the Council of Europe.

As of 2019, the list of partial agreements includes only two such initiatives[13], a further two with an 'enlarged' status[14], and ten qualified as 'enlarged partial' ones[15]. The Council of Europe's initiative which is central from the perspective of disaster preparedness and response is the enlarged partial agreement known as *Co-operation Group for the Prevention of, Protection Against, and Organisation of Relief in, Major Natural and Technological Disasters*. It was established by the resolution (87)2 of the Committee of Ministers, adopted in 1987 with eight founding member states,[16] and a current total number of participating CoE members amounting to twenty-two, plus several non-CoE member states and international organizations[17]. The Agreement of 1987 set up a group 'to make a multidisciplinary study of the co-operation methods for the prevention of, protection against, and organisation of relief in, major natural and technological disasters', acting through meetings at ministerial level and also through 'permanent correspondents'. Among the forms of activities of the Group the resolution mentions the organisation of relief (doctrines, information, simulation, assistance, etc.), as well as training and research.

Contemporarily, the agreement establishing the Co-operation Group has transformed into a 'European and Mediterranean Major Hazards Agreement (EUR-OPA)', but in legal terms its basis has remained the

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[13] I.e.: European Pharmacopoeia (see the Convention on the Elaboration of a European Pharmacopoeia, ETS No. 050) and a 'forsaken' agreement on an European Card for Substantially Handicapped Persons.

[14] Including the very recognizable European Commission for Democracy through Law (the Venice Commission) and the Group of States against Corruption (GRECO).

[15] This list includes: Council of Europe Development Bank, Co-operation Group to Combat Drug Abuse and Illicit Trafficking in Drugs, Co-operation Group for the Prevention of, Protection Against, and Organisation of Relief in Major Natural and Technological Disasters, European Support Fund for the Co-Production and Distribution of Creative Cinematographic and Audiovisual Works "Eurimages", European Centre for Global Independence and Solidarity (North-South Centre), Partial Agreement on Youth Mobility through the Youth Card, European Audiovisual Observatory, European Centre for Modern Languages, Enlarged Partial Agreement on Sport (EPAS), Enlarged Partial Agreement on Cultural Routes.

[16] France, Greece, Italy, Luxembourg, Malta, Portugal, Spain, and Turkey.

[17] Non-CoE members include Algeria, Lebanon, and Morocco. One non-CoE state has an observer status (Japan). The European Union, the International Federation of Red Cross and Red Crescent Societies, the UN Office for Co-ordination of Humanitarian Assistance, UNESCO, and the WHO have the status of participants.

same since 1987. It is supposed to facilitate 'co-operation in the field of major natural and technological disasters between Europe and the South of the Mediterranean'. Institutionally, the Agreement is enforced by Ministerial Meetings held every four years, with the assistance of the Committee of Permanent Correspondents who meet yearly. The heart of the Agreement involves a network of twenty-six Specialised Euro-Mediterranean Centres which are supposed to conduct research, improve awareness, and provide scientific and technical feedback aimed at disaster risk reduction, preparedness, and response[18]. The meetings of the directors of Specialized Euro-Mediterranean Centres are held yearly, together with the Committee of Permanent Correspondents.

With respect to the outcomes of EUR-OPA's activities, it should be mentioned that they are reflected in the resolutions and recommendations of the Committee of Permanent Correspondents, as well as other sorts of practical initiatives aimed at enhancing the member states' disaster preparedness and response. The resolutions are in fact not very numerous and they mainly set out the political aims of the agreement, as well as adopt medium term plans which are later confirmed by ministerial meetings[19]. The recommendations however focus on specific issues, such as inclusion of migrants, asylum seekers, and refugees, as well as people with disabilities, in disaster preparedness and response[20]; ecosystem-based disaster risk reduction[21], or information to the public on radiation risks[22].

EUR-OPA's Ethical Principles relating to Disaster Risk Reduction and contributing to People's Resilience to Disasters

One of the most curious – though somehow controversial – examples of EUR-OPA's activities in the area of standard-setting are the 'Ethical

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[18] For the full list see: www.coe.int/en/web/europarisks/specialised-centres.

[19] See the resolution 2016(1) of the Committee of Permanent Correspondents.

[20] See, respectively, the recommendations of Committee of Permanent Correspondents 2016(1) and 2013(1).

[21] See the recommendation 2012(1).

[22] See the recommendation 2011(1).

Principles relating to Disaster Risk Reduction and contributing to People's Resilience to Disasters'. Prior to analysing these sets of principles, a couple of words are necessary to explain their genesis and legal character. To deal with the latter first, one should refer to Resolution 2011(1) of the Committee of Permanent Correspondents, which considered the appended text of the principles (prepared by Professor Michel Prieur) as 'a compilation of existing ethical principles related to disaster risk reduction and as an evolutionary text without a normative character'[23]. Further, in the same resolution, the CPC invited the member states of the Agreement (i.e. EUR-OPA) to 'take account as appropriate of the appended ethical principles' and 'update the document regularly'[24]. In essence, the text of the 'Principles' seems to have been recommended by the CPC of the Agreement in extremely cautious terms ('inviting to take account of').

Also, the resolution described the text as a 'compilation of existing ethical principles (…) without a normative character'. This description in itself requires a short commentary. What was probably meant here was that the text of 'principles' has no binding force rather than lacks any normativity. It is essential that binding force is not to be confused with normative character. In fact, ethics is a normative system, though its norms are neither formally binding, nor are they necessarily a matter of a common consent. Also, one cannot assume that ethical norms are always transformed into the language of legally binding norms. But irrespective of these considerations, the very attempt to 'compile existing ethical principles' applicable in the sphere of disaster preparedness and response seems to be an extremely ambitious task. The whole area of international disaster law *sensu largo* – i.e. norms referring to international co-operation on every phase of the so-called 'disaster-cycle' as well as the rights and duties of affected states, groups and individuals – obviously does include certain axiological underpinnings. Providing humanitarian assistance is also governed by certain principles of a theoretical or axiological provenance. However, very few – if any – international standard-setting initiatives in the area of international disaster law have attempted to

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[23] See the resolution of CPC 2011(1), adopted at the 60th meeting of the CPC in Strasbourg, on 15 April 2011.

[24] *Ibidem.*

deal with the ethical or moral obligations of various parties involved in providing or receiving assistance in a disaster context. An assessment of whether or not the 'principles' do indeed constitute a compilation of ethical norms, will be provided below. But prior to that, some further explanations are required as to the legal status and genesis of the text.

From a purely formal or technical perspective, the text of the 'Principles' was elaborated by the Executive Secretariat of EUR-OPA,[25] while the CPC's resolution 2011(1) indicated the principal author who drafted the text (Prof. Michel Prieur). Commissioning external opinions, drafts, or compilations is not uncommon within the Council of Europe's standard-setting activities. In this case however, it appears that the draft text was not the subject of deliberations or negotiations between the member states of the Agreement. A somewhat different practice exists with soft-law instruments such as the recommendations of the Committee of Ministers of the Council of Europe. Although also not formally binding, such recommendations are usually firstly drafted and discussed in inter-governmental working groups and/or steering committees, to be subsequently reviewed and adopted by the Committee itself. Without prejudice to their content and value, the 'Principles' discussed in this sub-section do not have the same status as recommendations of the Committee of Ministers. They should rather be considered as an auxiliary proposal of standards endorsed by Committee of Correspondents of EUR-OPA, while not elaborated by the states themselves.

As to the genesis of the 'Principles': their introduction refers to the Parliamentary Assembly of the Council of Europe's Recommendation 1862(2009)[26] as the primary source of inspiration. The said recommendation concerned environmentally induced migration and displacement –

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[25] Prior to adoption by the CPC, the text of the 'Principles' was considered a draft. Its full text has been included in document AP.CAT(2011))02 Rev., dated 7 April 2011. The 'Principles' were subsequently published as M. Prieur, *Ethical Principles on Disaster Risk Reduction and People's Resilience,* European and Mediterranean Major Hazards Agreement (EUR-OPA), Council of Europe 2012, with a caveat: *The opinions expressed in this work are the responsibility of the author(s) and do not necessarily reflect the official policy of the Council of Europe*. The publication is available in public domain: www.coe.int/en/web/europarisks/publications.

[26] Recommendation 1862(2009). Environmentally induced migration and displacement: a 21st century challenge.

i.e. issues having close affinity with consequences of natural disasters. The text of this recommendation actually does not include any 'invitation to prepare an ethical charter on resilience to disasters', as suggested by the introduction to the 'Principles', but irrespective of the above, the state parties of EUR-OPA expressed interest in elaborating on 'ethical principles' during the 12th Ministerial Session of the EUR-OPA Major Hazards Agreement held in St. Petersburg in 2010.

With respect to the contents of the 'Principles', one should start by observing that naming them 'Ethical principles' is somewhat confusing, mostly because the 'principles' compile legal rather than ethical standards and one cannot escape an impression that the term 'ethical' was either used as a synonym to "non-binding" and/or as a way to achieve consensus and ensure that the text would not raise major objections on the part of the states. Regardless of the motivation, the choice of the term 'ethical principles' seems to be a very unorthodox one. The terms 'guidelines' or 'recommended standards' would be better options, as the term 'ethical principles' simply does not properly reflect the contents. A considerable number of the 'principles' are legal, with some referring to ethical and general issues as well as recommended good practices. The 'Foreword' to the 'Principles' states that they should *give rise to the a culture of resilience associated with a systematic consideration of human rights, everywhere and at all times, thus contributing to the development of a 'moral code' applicable just as well to disaster prevention as to emergency situations during the disaster itself*[27]. Once again, it should be observed that the aims of this document were particularly ambitious.

The text is divided into an introduction and four parts: general principles (part I) and the 'ethical principles' applied prior (II), during (III), and after disasters (IV). Under the 'general principles' heading, the drafters included several concepts and/or principles, some of which are universally recognized as general principles of humanitarian assistance (humanity, impartiality, neutrality), some are widely known principles of human rights law (non-discrimination) or international law (territorial sovereignty), and some reflect basic ideas of international relations (solidarity). Certain concepts could be regarded as particularly important

[27] M. Prieur, *Ethical principles…*, p. 9.

in the area of disaster awareness and response: 'prevention' and 'the role of the media'. In general, the concepts referred to above are part and parcel of universal standards regarding disaster response law and many of them could be also characterized as having legal and not (only) ethical provenance.

The further parts of the document – concerning the different phases of the 'disaster cycle' – constitute a collection of guidelines and good practices. With respect to the principles applied during disasters, the document refers *inter alia* to humanitarian assistance, information and participation during disasters, compulsory evacuation of populations, respect for dignity and personal rights, emergency assistance for the most vulnerable persons, the importance of rescue workers, and measures to safeguard and rehabilitate the environment as well as to safeguard and restore social ties. The last part of the 'principles' – applicable in the post-disaster phase – emphasises the protection of all categories of rights: economic, social, and cultural as well as civil and political. These 'reminders' have in fact a strictly legal rather than ethical dimension, as they concern the binding international obligation of states affected by disasters to ensure the protection of human rights. This protection does not cease in times of disaster, notwithstanding the difficulties in fulfilling some treaty obligations due to extraordinary circumstances.

Summing up, the 'principles' are a compilation of guidelines, good practices, as well as references to the duties of states and particularly sensitive areas of disaster management. While being rather general and imprecisely referring to the sphere of ethics, the compilation does have a certain informative and educational value. Apparently the member states of EUR-OPA did not intend this text to be a result of inter-governmental works in order to expand it and/or detail its contents. The 'principles' are therefore less detailed and authoritative than, for instance, the *Operational Guidelines on the Protection of Persons in Situations of Natural Disasters* adopted by the UN Inter-Agency Standing Committee[28] or the *IDRL Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance*[29]. But irrespective of the above, the

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[28] See *Operational Guidelines on the Protection of Persons in Situations of Natural Disasters*, The Brookings – Bern Project on Internal Displacement 2011.

[29] See footnote no. 2.

'principles' can be regarded as a first step towards a more elaborated set of standards. It is also noteworthy that the references to standards applicable in times of disasters are sometimes included in recommendations of the Committee of Ministers of the Council of Europe concerning climate changes and cultural heritage[30]. Further, the risks of environmental disasters were also a subject of debate within the Parliamentary Assembly of the Council of Europe[31].

Case-law of the European Court of Human Rights

This brief review of the Council of Europe's *acquis* concerning disaster preparedness and response needs to be supplemented by some remarks on the case-law of the European Court of Human Rights (ECtHR). Its judicial activity constitutes one of the most vital points of reference in discussing European human rights law, even though the Court itself is not a statutory body of the Council of Europe, but an international court established under the European Convention on Human Rights of 1950 (ECHR)[32]. In fact, neither the Convention nor its Protocols include any specific provisions referring to the obligations of states, and the corresponding human rights in times of disasters and events of this kind do not alter the scope of responsibility of state parties. However, in theory, a disaster reaching the threshold of a 'public emergency threatening the

[30] See the recommendations: CM/Rec(2018)3 of the Committee of Ministers to member States on cultural heritage facing climate change: increasing resilience and promoting adaptation, as well as CM/Rec(2017)1 on the European Cultural Heritage Strategy for the 21st century. The latter recommendation stipulates under the 'General Framework' heading: *Demographic and climate changes, the spread of mass tourism at global level, the growing number of natural or man-made disasters, the temptation of community isolationism, intergenerational divisions, the economic crisis and the emergence of challenges to or serious violations of the values of freedom, tolerance, and democracy on which our societies are based: all these challenges call for coherent, comprehensive, and inspiring responses.*

[31] See the Recommendation of the Parliamentary Assembly no. 1823(2008) on global warming and ecological disasters, adopted on 22 January 2008.

[32] Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, European Treaty Series no. 005.

life of the nation' in the meaning of Article 15 of the ECHR could be a basis for derogating certain human rights obligations under the so-called 'derogation clause'[33]. Fortunately, so far no invocation of Article 15 in this context has ever happened following a disaster on the territories of state parties to the ECHR.

A reference to 'service exacted in case of an emergency or calamity threatening the life or well-being of the community' forms part of the 'negative' definition of 'forced or compulsory labour' enshrined in Article 4 of the Convention[34]. In other words, the notion of compulsory labour (which in itself is prohibited under Article 4(2) of the ECHR) does not include service required after a disastrous event that constitutes a threat to the life or well-being of the population. There has not been any case at the European Court of Human Rights which would concern this particular 'exception'. Instead, the Court had an opportunity to adjudicate certain cases in which a loss of life following a disaster was considered as attributable to the respondent state and as a violation of the latter's obligation under Article 2 of the Convention (right to life).

Two judgments of the ECtHR are particularly relevant in this regard: *Öneryıldız v. Turkey*[35] and *Budayeva and others v. Russian Federation*[36]. The first one concerned deaths of the applicants' close relatives and destruction of their property following a methane explosion in 1993 at a municipal rubbish tip. The second case followed from a mudslide in a Russian town of Tyrnauz which caused eight fatalities in 2000. Both cases were adjudicated in the light of the positive obligation of state parties to the ECHR under Article 2 of the Convention. Having recalled that the protection of the right to life under this provision does not concern solely deaths resulting from the use of force by state agents, but also lays down a positive obligation on states to take appropriate steps to safeguard the lives of those under its jurisdiction, the Court went on to stress that this obligation

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[33] See more on this issue: E. Sommario, *Limitation and Derogation Provisions in International Human Rights Law Treaties and Their Use in Disaster Settings*, [in:] F.Z. Giustiniani, E. Sommario, F. Casolari, G. Bartolini (eds) *Routledge Handbook on Human Rights and Disasters*, Routledge: London–New York 2018, pp. 98–118.

[34] See Article 4(3)(c) of the ECHR ('Prohibition of slavery and forced labour').

[35] Judgment of 30 November 2004, application no. 48939/99.

[36] Judgment of 20 March 2008, applications no.: 15339/02, 21166/02, 20058/02, 11673/02, 15343/02.

> *(i.e. the positive one under Article 2 of the ECHR) indisputably applies in the particular context of dangerous activities, where, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of potential risk to human lives.* (…)[37].

In the particular circumstances of the *Öneryıldız* case the Court found that there had been a violation of Article 2 of the Convention on account of the lack of appropriate steps to prevent the accidental death of nine of the applicant's close relatives. Further, the Court held that the above provision of the Convention had been violated also owing to inadequate protection by the law safeguarding the right to life, i.e. under the 'procedural' limb of Article 2.

In the *Budayeva and others* judgment the Court generally followed its case-law on 'dangerous activities' in the context of natural or man-made disasters, reaffirming *inter alia* that:

> *in the sphere of emergency relief, where the State is directly involved in the protection of human lives through the mitigation of natural hazards, these considerations should apply in so far as the circumstances of a particular case point to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use.* (…) *The scope of the positive obligations imputable to the State in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation.*[38]

Also in *Budayeva and others* the Court ruled in favour of the applicants as regards the violation of their rights under Article 2, i.e. with respect to Russia's failure to discharge its positive obligations to protect the right to life as well as on account of the lack of an adequate judicial response as required in the event of alleged infringements of that right[39]. However,

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[37] See § 90 of the *Öneryıldız* judgment. In the same paragraph the Court observed that (…) *particular emphasis should be placed on the public's right to information, as established in the case-law of the Convention institutions. The Grand Chamber agrees with the Chamber (…) that this right, which has already been recognised under Article 8 (…), may also, in principle, be relied on for the protection of the right to life, particularly as this interpretation is supported by the current developments in European standards (…).*

[38] See § 137 of the *Budayeva* judgment.

[39] See §§ 1 and 2 of the dispostitive part of the *Budayeva* judgment.

the conclusion of the two judgments referred to above, *Öneryıldız* and *Budayeva,* differed as regards the allegations under Article 1 of Protocol no. 1 (the right to peaceful enjoyment of possessions). The ECtHR found a violation of this provision only in the Turkish case, whereas examining the Russian one in part concerning the destruction of the applicants' flats, the Court held that:

> *in a situation where lives and property were lost as a result of events occurring under the responsibility of the public authorities, the scope of measures required for the protection of dwellings was indistinguishable from the scope of those to be taken in order to protect the lives of the residents. Treatment of waste, a matter relating to industrial development and urban planning, is regulated and controlled by the State, which brings accidents in this sphere within its responsibility. Accordingly, the Court concluded that the authorities were required to do everything within their power to protect private proprietary interests* (…)
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> *In the present case, however, the Court considers that natural disasters, which are as such beyond human control, do not call for the same extent of State involvement. Accordingly, its positive obligations as regards the protection of property from weather hazards do not necessarily extend as far as in the sphere of dangerous activities of a man-made nature*[40].

Distinguishing between natural and man-made/industrial disasters in the context of the protection under the Convention has been criticised by some authors[41] as being erroneous and not taking into account that modern disaster research offers a different view on these type of events through social concepts of vulnerability, resiliency, and risk rather than the distinction between 'natural' and 'non-natural'. This criticism was based on solid grounds, although it appears that this differentiation matters for the Court in particular as regards the obligation of states with respect to the protection of property. It does not seem that the positive obligations stemming from Article 2 of the Convention are necessarily different or weaker in the case of protection against natural hazards as

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[40] See §§ 173–174 of the *Budayeva* judgment.

[41] See. K.C. Lauta, J.E. Rytter, *A Landslide on a Mudslide? Natural Hazards and the Right to Life under the European Convention on Human Rights*, "Journal of Human Rights and the Environment", vol. 7, issue 1, 2016, pp. 111–131.

juxtaposed to anthropogenic or industrial ones. Nevertheless, there is much sense in the quoted authors' argument that it is not the origin of the hazard that should determine the scope of the preventive obligations of states, but the foreseeability, gravity, and mitigability of the threat[42].

In any event, the ECtHR established some rules on assessing the positive obligations of states as regards protecting life and well-being in times of disasters, including with respect to the protection of property. These rules are part of a continuously expanding number of adjudicated cases concerning the environment and its implication for the rights and freedoms enshrined in the Convention. A compilation of these cases was included in a 'factsheet' prepared by the Registry of the Court[43]; a more expanded publication (a 'manual') summarizing the Council of Europe's *acquis* in the sphere of environment and human rights was also elaborated within the Steering Committee of Human Rights (CDDH)[44].

Conclusions

Even if not in the centre of the Council of Europe's contemporary agenda, the issues related to disaster preparedness and response, as well as international co-operation in disaster prevention and providing relief, can be considered as an area of interest for at least half of the member states who participate in the activities of the EUR-OPA Major Hazards Agreement. The standard-setting initiatives of EUR-OPA are relatively modest, but they can potentially develop into more elaborate legal acts. One should appreciate the efforts of EUR-OPA, particularity in the domain of awareness raising and of networking between the twenty-six Specialised Euro-Mediterranean Centres. Other important elements of the Council of Europe's *acquis* in this sphere are the recommendations

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[42] *Ibidem*.

[43] See the factsheet 'Environment and the European Convention on Human Rights", dated November 2019, available at: www.echr.coe.int/Documents/FS_Environment_ENG.pdf (visited: November 2019).

[44] See 'Manual on human rights and the environment', Council of Europe Publishing 2012, available at: www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf (visited: November 2019).

of the Committee of Ministers and of the Parliamentary Assembly, as well as the case-law of the European Court of Human Rights in cases involving pre- or post-disaster context.

At present there seems to be no intention on the part of the member states of the Council of Europe to proceed with any more far-reaching legal instruments concerning disaster prevention and response. One should bear in mind however that there already exist quite a number of bilateral treaties on mutual assistance in times of emergency, so there is no need to suggest a multilateral treaty under the auspices of the Council of Europe in this regard. Instead, it is of primary importance that the organization's indisputable achievements in the sphere of human rights are adequately taken into account in the discussions on the protection of human rights in times of disasters. One of the opportunities for including this perspective arises in the works of the International Law Association's Committee on Human Rights in Times of Emergency established in 2017[45]. This committee is due to present its final report at the ILA's conference in Lisbon in 2022.

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[45] See the mandate of the ILA Committee on Human Rights in Times of Emergency, available at ILA's website: www.ila-hq.org/index.php/committees (accessed: November 2019).

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TRANSITIONAL JUSTICE AND THE EFFECTS OF LIMITED TRANSITIONS: THE SPANISH AND CATALAN CASE**

Abstract

In this paper I want to analyze the process of transition to democracy, particularly in relation to two points: the lack of solution to the problem of autonomous government and the lack of lustration in the judicial system, leaving extremely conservative judges who are now at the top of the Spanish judiciary and who seem to be pushing for a hard response to any attack against the unity of Spain, using an old category of criminal offence, that seemed to have been left out from European criminal justice systems: that of political crimes.

Keywords

Secession – political crimes – right to self-determination – transition to democracy – criminal justice

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Introduction

The events of 1 October 2017 in Catalunya showed a level of state violence that had not been seen since the times of the dictatorship[1]. The movement for the independence of Catalunya was met with police violence and with the use of the criminal justice system as a mechanism to solve what can be considered a political problem. On 2 October 2018, the Spanish prosecutor presented its accusation and defined the actions of Catalan politicians as a crime of rebellion. The prosecution decided to use this category at time that the current socialist government refused to recognize the political character of their actions. Other categories, such as terrorism, were used in the public debate, but were off the legal table.

The government of the Popular Party (21 December 2011–2 June 2018) decided to deal with a political situation as if it was merely a criminal one. This choice has left little room for manoeuvre for the Socialist government, because it cannot be perceived as giving in to the claims of the independentist block. On the 31 October 2018, in the Parliament Control debate, one of the MPs, Albert Rivera of the right-wing political party *Ciudadanos*, asked Prime Minister Pedro Sánchez if he was willing to commit publicly to not granting any pardon to the imprisoned leaders of the Movement (hereinafter *El Proces*). The question was, of course, not answered, but it shows the intentions of the rightwing parties to keep using Catalunya as an instrument of propaganda for the next elections. The question is asked in almost every Parliament Control debate, and it is met with the same response: silence.

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[1] On October 1st 2017 the Catalan people went out to decide in a referendum whether they wanted to be independent from Spain. Many irregularities in the process toward the referendum made it illegal. The Spanish government knew this and in its official rhetoric discarded the referendum as an invalid way to decide the political fate of this region. However, the day people went out to vote a referendum that could not be binding, Mariano Rajoy's government sent the police to prevent people from going to the polls. They wanted to close the electoral colleges, and, in that process, they used unnecessary and disproportionate violence, which amounted to police abuse, as human rights organizations have recognized. Despite this violence, many people voted, and the day ended with the images of the police preventing the exercise of democracy in Catalunya.

According to Javier Perez Royo, the Spanish Constitution has gone through two crises that have created the conditions for a radical reform: the economic crisis of 2008 and the decision of the Constitutional Court with regards to the Catalan Statute. These two events have shown the weakness of the current political system and its inability to deal with these radical challenges[2].

The Spanish government could not have responded worse to these two crises. The economic crisis has been faced with a neoliberal reform that little by little has been dismantling the Spanish welfare state. And the crisis of the model of the *autonomías* have been responded to with a hard fist aimed to crush the model, elevate the tension, and destroy any possibility of dialogue. Pedro Sanchez' government has been working with Quim Torra's Catalan government to reduce the tension, but within a context of increasing criticism from the right wing which, in order to appeal to its constituency, has moved closer to extreme and exclusionary ideas. Within this context, Rajoy's administration decided to use the criminal justice system to scare activists, and to do so it has used the accusation of terrorism, but originally appealed to an accusation of rebellion, even against the literal definition of the crime[3].

El proces (the process for the independence of Catalunya) has showed the limits of the Spanish transition to democracy, one that was characterized by many Spanish politicians as a model. In this paper I want to analyze the process of transition to democracy, particularly in relation to two points: the lack of solution to the problem of autonomous government and the lack of lustration in the judicial system, leaving extremely conservative judges who are now at the top of the Spanish judiciary and who seem to be pushing for a hard response to any attack against the unity of Spain, using an old category, that seemed to have been left out from European criminal justice systems: that of political crimes.

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[2] J. Pérez Royo, A. Losada, *Constitución: la reforma inevitable: Monarquía, plurinacionalidad y otros escollos,* Madrid: Roca, 2018.

[3] Rebellion is a crime that requires the use of armed violence against the state. It was understood in that way, in the trial of the only person convicted of the crime. The Guardia Civil colonel, Antonio Tejero, who attempted to overthrow the government in 1981.

I. Transitions to Democracy and Transitional Justice

Transitional justice is a new field of international law and international relations that can be dated back to the 1990s, when the first books were published. Originally it was a series of mechanisms to guarantee a just transition from an authoritarian regime to democracy[4]. In this section I want to focus on the policies of transition to see how they are connected to transitional justice.

1. The Policies of Transition

Transition policies are characterized by developing a series of mechanisms that allow the stability of the emerging democracy or peace, even in the absence of justice. There is a fundamental difference between transition policies and transitional justice: the concern for stability in the first case and for justice in the second.

The world has witnessed various waves of democratization. The first is the one that occurred in the first half of the nineteenth century, when several states gained their independence and liberal constitutions were passed. The second wave, after World War II, when several countries in Europe undertook a democratic path and when many of their former colonies, particularly in Africa and Asia, became independent. But it is the third wave of democratization that gives rise to the study on how transitions occurred, which agents made it possible, and what are the obstacles to a successful transition. From this field it is recognized that the modes of the transition are important to determine the success or failure of democracy and the rule of law[5].

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[4] N. Kritz (ed.), *Transitional Justice. How emerging democracies reckon with former regimes,* Washington: United States Institute for Peace, 1995; R. Teitel, *Transitional Justice,* Oxford: Oxford University Press, 2000.

[5] R. Teitel, *Transitional Justice Genealogy,* "Harvard Human Rights Journal", Vol. 16, 2003, pp. 69–94. See also Kritz, supra note 4; Teitel, supra note 4.

One of the questions in the field is about the conditions that make the transition to democracy possible. That is, why do those who hold power decide to leave it and call elections? These conditions depend on the design of the new democracy and, above all, its ability to differentiate itself from the old regime. However, the conditions that have made democracy possible are not necessarily the same conditions that have made it stable.

The transition modes can be divided as follows: transitions from above or from below, depending on the actors that have played a more important role in the promotion of democracy; transitions from within and from outside, depending on the role played by the international community in the pressure for a country to democratize[6].

The different modes of transition are determining factors in establishing the quality of democracy. Thus, for example, the political transitions of Venezuela and Colombia at the end of the fifties of the last century established limited democracies with little access to democratic participation that gave rise to the emergence of guerrilla groups in the 1960s and 1970s. This is a typical top-down transition model in which the elites who leave power agree with the incoming elites not only the content and limitations of the new democracy, but they also pass amnesties and self-amnesties for crimes committed in the past[7].

Next to the cases of Colombia and Venezuela we find the cases of Spain, Brazil, and Poland, where the elites agreed to the pardon of all their crimes and even, as in the Spanish case, a "Pacto del Olvido" that made it impossible to publicly discuss these crimes and their culprits, leaving to other areas, such as film and literature, the discussion about truth and memory. In these types of transitions, the discussion of justice and the rights of the victims is almost non-existent, since the elites do not care that their crimes are exposed or that their role within the deposed

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[6] B. Ackerman, *The Future of Liberal Revolution,* New Haven: Yale University Press, 1994; C. Bell, *Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-field'*, "International Journal of Transitional Justice", Vol. 3, 2009, pp. 5–27; F.S. Benavides Vanegas, *Justicia en Épocas de Transición: Conceptos, modelos, debates,* Barcelona: ICIP, 2011.

[7] F.S. Benavides-Vanegas, *¿Tiene futuro la justicia transicional?* "Revista Derecho Penal", No 58, 2017, pp. 5–44; R. Karl, *Forgotten Peace. Reform, Violence, and the Making of Contemporary Colombia,* Oakland: University of California Press, 2017.

regime is questioned, a regime which is often called ancient or old regime but is not labelled a dictatorship[8].

But transitions to democracy can also be the result of the struggles of social movements, which organize to press for democratic change. The cases of Argentina and the former Czechoslovak Republic (now the Czech Republic and the Slovak Republic) are good examples of these two forms of transition. In Argentina, the transition was the result of internal forces and external factors such as the defeat in the conflict against the United Kingdom in the Malvinas / Falkland War.

Given the defeat of the Armed Forces and their loss of prestige, and given the overwhelming triumph of Raúl Alfonsín, it seemed possible that those responsible for human rights violations would be tried. However, the economic crisis that Alfonsín was already facing, the division of society, and the relative strength of the Armed Forces, led to the impossibility of bringing the perpetrators to justice immediately. The laws of due obedience and full stop prevented the Argentine judicial system from bringing to justice those responsible for serious crimes.

In Czechoslovakia the so-called Velvet Revolution occurred, so described because it was a peaceful revolution, very similar to the Prague Spring in 1968, which resulted from the government's repression of the demonstrations in November 1989. The daily demonstrations and the general strikes were the forces that led to the government leaving power and being forced to call for democratic elections. Although the elites negotiated the new political pact, it was the social movements that drove the change with their demonstrations for democracy. In this case, the non-intervention of the Soviet Union was very important, since in this transition it was feared that the USSR would send in the tanks, as it did in Hungary in 1956 and in Czechoslovakia itself in 1968.

The nature and extent of repression determine the type of transition that is possible. If the actors that leave power have been responsible for serious violations of human rights, it is very likely that amnesty arrangements or mechanisms that prevent the investigation and prosecution of those responsible will be developed. The Spanish case is illustrative of this type of transition. During the civil war the nationalists

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[8] J. Tamarit, *Historical Memory and Criminal Justice in Spain. A case of Late Transitional Justice,* Cowley Road: Intersentia, 2013.

committed serious crimes against the populations loyal to the Republic. Once the republicans were defeated, the Franco government initiated an unprecedented repression against them and began a dictatorial regime that lasted almost 37 years. At the time of transition, opponents and supporters of the regime agreed on a pact of oblivion that prevented them from digging up the past and judging those responsible for the crimes[9]. In this case, a policy of clemency and forgiveness and forgetfulness seemed necessary, since members of the old regime kept power and there was still fear of a new civil war and the horrors that the last had brought. The question then is whether it is possible to ignore the past, either because it is very distant, or because the crimes are so serious as not to allow their oblivion[10].

It is convenient to ask then about the necessity of justice (criminal, civil, constitutional) to account for the past and to establish the new democratic regime. Are wasted energies those that are used to deal with the crimes of the past? Should we rather focus on the design of the new state and try not to awaken sleeping demons? What is the quality of a democracy that is built on oblivion and impunity? The future of the transition depends on the ability and courage of military and civilian leaders to devise agreements on rules and mutual guarantees that go beyond the extremes of impunity or legal revenge. Transitional justice is supposed to deal precisely with the design of the best and most appropriate scenarios to face those challenges imposed by political transitions.

2. What is transitional justice?

The political transitions that occurred during the third wave of democratization left many questions about what to do with the crimes of the past. The questions were aimed at establishing responsibility for the crimes, on what basis, and the moral authority to do so. In the

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[9] J. Guillamet (ed.), *Las Sombras de la Transiciòn. El relato crítico de los corresponsales extranjeros (1975–1978),* Valencia: Universidad de Valencia, 2016.

[10] S. Julia, *Transición. Historia de una política española (1937–2017),* Barcelona: Galaxia Gutemberg, 2017.

discussion of these problems, moral imperatives, such as justice, and issues of political prudence, related to the protection of democracy from attacks by the rulers of the outgoing regime, were discussed.

Transitional justice is an academic and public policy field that is constantly expanding. It has been applied in various regions of the world and in countries with different ideologies in order to face a past of authoritarian governments and serious violations of human rights and international humanitarian law[11]. However, it is a concept that is loaded with ambiguity, since it applies equally to situations of transition from authoritarian governments, forming part of the studies of transition to democracy; as well as situations of passage from a situation of armed conflict, international and non-international, to a situation of peace, thus forming part of peace studies.

The term transitional justice began to be used in the mid-1990s and as an academic field it only came to be consolidated as of the year 2000. It emerged for the first time with reference to the processes of transition to democracy in South America and Central America that took place between the late 1980s and the first part of the 1990s[12]. The debates regarding the punishment of those responsible for serious crimes in Central America and in the Southern Cone – especially the Pinochet case in Chile – fed the discussions of the field and the need to account for the past through criminal justice in times of transition.

The debate about the nature of transitional justice must be placed in the contexts in which it occurs. The current framework of international criminal law prevents the development of policies of forgiveness and forgetting, because there is a series of international instruments that make it mandatory for States to find out the truth and punish those responsible for serious violations of human rights and international humanitarian law. This means that when we talk about justice for times of political transition, we do not refer exclusively to the policies of forgiveness and forgetfulness, or to truth commissions, or criminal justice, since all of them are mechanisms with which States face a past of abuses and violations and therefore all fall within the field called "transitional justice".

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[11] Bell, supra note 6.

[12] Kritz, supra note 4.

Transitional justice is then considered a field of practices and studies to account for the past and to prevent the repetition of a past of human rights or international humanitarian law violations. As such, it looks at the past, to have a better future. The main goal of TJ measures is to guarantee the non-recurrence of violations. That is, to not let the past pass.

The toolkit of TJ has focused on measures such as criminal or restorative justice; truth commission; some sort of institutional reform; reparations to victims; and recently a focus on the memory of the past. These TJ mechanisms are supposed to help in the process of building a democratic society, or to be an important part of peacebuilding strategies.

There have been crises and criticism in TJ[13]. Some criticize its liberal matrix and the fact that it does not deal with distributive justice or the root causes of conflict. It is also criticized for its dependency on the liberal transitional paradigm. The idea of models of TJ also leads to the idea of a normative fallacy, that is, from empirical facts they deduce normative consequences.

Alexander Hinton writes about the imaginary of transitional justice, to show an orientalist and developmentalist view of societies. The imaginary presents a world in chaos or distress that is put right after TJ interventions, being the goal of a liberal society. Time and Space are important in these measures: they usually focus on the acts of violence, but causes are left outside[14]. Laplante analyzes this with regard to Truth Commissions, but other mechanisms such as criminal justice are more limited[15]. But these critiques have ended up in broadening the field and including those missing elements that the critics pointed out[16].

The official narrative of transitional justice focuses on what it considers its positive effects, such as the alleviation of the pain that results from participation in its mechanisms, such as the Truth and Reconciliation

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[13] E. Posner, A. Vermeule, *Transitional Justice as Ordinary Justice,"Chicago Unbound"*, 2003, pp. 762–825.

[14] A. L. Hinton, *The Justice Facade. Trials of Transition in Cambodia,* Oxford: Oxford University Press, 2018.

[15] L. Laplante, *Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework*, "The International Journal of Transitional Justice", Vol. 2, 2008, pp. 331–355.

[16] Bell, supra note 6.

Commission. Negative feelings are also part of the transition process and the normative claim of transitional justice which is achieved is the imposition of the ideal victim, the one who forgives and who submits to the dictates of the State. The victim who does not forgive, the one who refuses to accept official policies is subjected to ostracism and is isolated from public discussion[17]. Hinton calls attention to the creation of a neoliberal subject: and bearer of rights who heals through TJ interventions[18].

The official story is characterized by four distinctive notes: tragedy has a resolution; pain and suffering have a social value, that is, victims have not suffered in vain; the confrontation with the past is inescapable, it cannot be simply forgotten; knowledge is equated with transformation[19]. By standardizing the descriptive accounts, the model of transitional justice produces an exclusion of many subjects and creates what is called an epistemic violence in the field, this is the presentation of what is merely local – western conceptions of justice- as if it were universal.

II. The Spanish Transition: A Model of Transitions?

In November 1975, Francisco Franco died. This was the end of his 36 years of dictatorship, but it did not mean the beginning of democracy in Spain. As Pere Ysás has shown it, the Spanish transition was possible for the activism of social movements and for the crisis in the dictatorship, that had started with the death of Admiral Carrero Blanco, who was assassinated in 1973 by a command of ETA, leaving Franco and his followers without a fit successor who came from those who participated in the civil war[20]. To Ysás, the factors that made possible the transition are to be found in the 1960s: the social and economic transformations and the opening of

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[17] S.I. Dube, *Transitional justice beyond the normative: towards a literary theory of political transitions,* "International Journal of Transitional Justice", Vol. 5, 2011, p. 186.

[18] Hinton, supra note 14.

[19] Dube, supra note 17 at p. 185.

[20] P. Ysás, *La crisis de la dictadura franquista*, [in:] Carme Molinero (ed.), *La Transición, treinta años después. De la dictadura a la instauraciòn y consolidaciòn de la democracia*, Barcelona: Península, 2006.

Spain to foreign influences, due to increasing tourism and to the changes in the Church's doctrine, with the Second Vatican Council. A central role was played by workers' mobilization and their ability to create a situation of social conflict that forced the regime to be more open to demands for democratization[21].

According to Santos Juliá, there were two projects of transition: a reformist, that just wanted to make some changes in the law without questioning the legitimacy of the regime, and the other project, called *rupturista* because it wanted to radically break with the past, and it counted amongst its members people who were dissidents of the regime, and who at some point had supported the dictatorship, but who had grown disappointed with it; and those who were in the illegal opposition from the very beginning, and who wanted a radical transformation of the political system. According to Juliá, the *rupturista* project was the one that was finally realized, but without any constituency to make it happen. This led to a limited application and to a sort of reform within the process of breaking with the past[22].

The Spanish transition to democracy was considered as a model to be exported, since the elites in power negotiated their exit with members of the opposition, including the Communist and the Socialist parties, thus changing a vision of politics and the transition that was common during the years 1940 to 1950. In fact, the idea of a transitional government was not new in Spanish politics: what was new was the will to negotiate with all the political forces and the recognition of the Communist Party and its leader, Santiago Carrillo, as legitimate parties in the negotiations to bring democracy to the country[23].

The fact that the Spanish Socialist Workers Party PSOE and the Communist Party took part in the elections and in the drafting process

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[21] Ysás, supra note 20 at p. 41.

[22] S. Juliá, *En torno a los proyectos de transición y sus imprevistos resultados*, [in:] R. Carme Molinero (ed.), *La Transiciòn, treinta años después. De la dictadura a la instauración y consolidación de la democracia*, Barcelona: Península, 2006; N. Sartorius, A. Sabio, *El Final de la dictadura: la conquista de la democracia en España: noviembre de 1975 – Junio de 1977,* Madrid: Temas de Hoy, 2007.

[23] S. Juliá, *Transición antes de la Transición*, [in:] S. Juliá, *Hoy no es ayer. Ensayos sobre la España del siglo XX*, Barcelona: RBA, 2010; J.M. Baquero, *El país de la desmemoria. Del genocidio franquista al silencio interminable,* Barcelona: Roca Editorial Libros Ltda., 2019.

of a new Constitution is seen as a model of openness and political participation. However, a price had to be paid: forgiveness and, above all, forgetfulness.

On the 23 October 1977, Josep Tarradellas, the last president of the Generalitat, after long and difficult negotiations with Suarez, returned to Catalunya. In his speech in the Palace of the Generalitat, he said his now famous words: "Ciutadans de Catalynya, ja sòc aquí (Citizens of Catalunya, I am finally here)"[24]. Tarradellas brought representatives of all the political parties to his government, in order to express and reach unity in Catalunya[25].

In 1977 the Spanish Parliament passed an amnesty law that allowed members of ETA to leave prison, given that they had an intention to reestablish public freedoms or to revendicate the autonomies in Spain. The model that Spain approved was one based on decentralization of the government, not only in Catalunya and the Basque Country, but in the rest of the country. However, the Constitution did not include a regulation of how autonomies would work, but a general clause that let this definition to an infra-constitutional norm: The Statute of Autonomies. There was a clear understanding of Autonomies in Spain. Catalunya got its own Statute that would regulate the relations between the central government and the government of the Generalitat. As Javier Pérez Royo holds, there was no problem in this development, until the Popular Party decided to challenge the constitutionality of the Statute, and the Constitutional Court, a political body rather than a juridical one, decided to declare some norms of the Statute against the Constitution in its decision STC 31–2010[26].

The Spanish transition to democracy is characterized by a total lack of criminal trials, or any kind of accountability. The memory of the civil war, the bloody repression during the first part and the last part of the

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[24] Gillaumet, supra note 11, at p. 219.

[25] The first elections showed that political parties did not have an overwhelming majority to control the process by themselves, so all of them needed to find points in common with all the other parries in order to reach consensus in the most important topics. In Catalunya the socialist party in coalition with the PSUC – the historical socialist party of Catalunya – won the election, and Jordi Pujol's party was in second place with Adolfo Suarez' UCD. Guillaumet, supra note 11, at p. 188.

[26] J. Perez Royo, *El parche autonómico y la solución federal. El Estado de las Autonomías no es una forma de Estado: no está definida en sede constituyente*, *Ara*, November 8th, 2017, p. 1.

dictatorship made it advisable that the transition be negotiated and that a broad amnesty be granted to members of the government and perpetrators of grave crimes. A strong critic of the transition has written that the pact between Franco's supporters and anti-Francoists was to the benefit of the members of the authoritarian regime. By appealing to the motto "national reconciliation", members of the government took advantage of the process of transition and made sure that no trial or truth commission or revision of the past was made. In the words of Franco himself, everything in this field was tied and very well tied[27].

The Spanish transition has been presented as a peaceful transition, but Paloma Aguilar shows that it was not the case. Between 1975 and 1980 there were more than 460 deaths and in a period of six years there were more than 400 hundred people killed in terrorist[28] attacks. The Pact of Forgetting was made in a context of extreme confrontation, especially between members of ETA and members of the military; and of moderation, especially on the part of parties like the PSOE and the Communist Party and the faction led by Adolfo Suarez in the government. The reformist approach and the pact of forgetting is the result of memory, but also of the extreme radicalization of some sectors, and the existing tensions in Spanish society. Parties in the opposition feared that the military would take power again and that democracy would not be achieved. They moved from demanding a radical transformation and retrospective justice, to a humbler reform, one wherein Spain could have democracy and in exchange the past was going to be thrown into oblivion. Unlike other transitions where "never again" meant the non-repetition of atrocities, in Spain this "never again" pointed at the civil war, the transition was made to never again have another civil war or another dictatorship[29].

As a result, critics stress the limitations of Spanish democracy and the permanence of violence due to unresolved issues such as the Basque

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[27] J.M. Colomer, *La transición a la democracia: el modelo español,* Barcelona: Anagrama, 1998.

[28] A. Barahona de Brito, P. Aguilar (eds), *Las políticas hacía el pasado. Juicios, depuraciones, perdón y olvido en las nuevas democracias,* Madrid: Istmo, 2002, p. 147.

[29] P. Aguilar Fernández, *Políticas de la memoria y memorias de la política. El caso español en perspectiva comparada,* Madrid: Alianza Editorial, 2008.

question and the presence of different nations within the Spanish state. The Spanish Congress passed a law granting amnesty to those who took part in the civil war, in order to consolidate what they saw as a process of reconciliation with the past and with those who fought on the opposite side. But the law granted amnesty to perpetrators of grave abuses and human rights violations too. In that way, the Pact of Forgetting threw into oblivion the crimes committed during the civil war and during the dictatorship. Historians could do research on these topics, but public discussion on these topics was closed, the pact granted that the public would not know about the past, and that only experts would be able to talk about it.

Spain and Catalunya have passed laws of memory, in order to open public discussion on the legacy of the war and the dictatorship. Despite the fact of this commitment, the fact remains that Spanish society in general is unable to deal with the past. When Baltasar Garzón tried to bring Franco and his supporters to justice, right wing critics mocked him for bringing to trial dead people, or for even attempting to bring into public discussion Spain's past of torture and human rights violations. Extreme right-wing groups have made attempts to prevent the search into the past. They have accused Garzón of violating the law or of politicizing justice; the only charge they make is Garzón's attempts to bring the past into public life, to finally discuss the legacy of violence and torture that many rightwing politicians share. So far, he has failed, and the pact of forgetting is still very much alive[30].

But another element that remains without reform is the Police and the judiciary. Without a significant reform to these institutions, the transmission of an authoritarian view of the past is still possible, as the situation in Catalunya clearly shows. In the following section I want to focus on the question of political crimes and the crime of terrorism, considering that the former expresses a remnant of the past, whereas the latter shows the new understanding of democracies in Europe.

In 2014, the Special Rapporteur on the Promotion of Truth, Justice, Reparations, and Guarantees of Non-Recurrence released a report on the

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[30] M. Davis, *Is Spain recovering its Memory? Breaking the Pacto del Olvido*. "Human Rights Quarterly", Vol. 27, No 3, 2005, pp. 858–880.

Spanish case. The Special Rapporteur found that in Spain many human rights violations were committed in the 40 years dictatorship. Analyzing the transition to democracy, he states that the measures adopted during this time "have not corresponded to a consistent, comprehensive, and overall State policy in favor of truth, justice, reparation, and guarantees of non-recurrence". With regards to the Armed Forces, the report states:

> 24. In Spain there were no formal trials to clean up the Armed Forces. In view of the violations committed during the period of the Civil War and the dictatorship, this is a notable shortcoming. Alongside the reform process, however, an effort was made to promote generational renewal and the gradual change of attitudes less in tune with the values of the transition. Examples include the lowering of the retirement age from 70 to 65, reforms in the career and promotion system, and steps to encourage voluntary retirement, opening up opportunities and powerful incentives to bring about the rejuvenation of the top command.
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> 25. At the same time as the numbers of armed forces staff were reduced, especially among the top echelons, and entries to military academies were curtailed, changes were initiated in military training and education, including curricular alterations, as well as renovation, rotation, and improvements in the conditions of employment of teachers, and a closer integration of military courses with other disciplines and with the regular educational system.

The report shows some advances in reform in terms of education and institutional changes. However, in the case of the judiciary, the report also shows that it is the branch of the state that has undergone the least structural reforms which affect the quality of democracy and the protection of human rights since the transition. A Recent decision of the European Tribunal of Human Rights, in the Otegi case, questions the impartiality of the Spanish judiciary. This has also been the case in the process against Catalan leaders investigated for the crime of rebellion, as a result of the referendum of October 1st.

III. The Question of Political Crimes

The concept of political crimes is based on the idea of the existence of a repressive regime opposed by the political offender. Its basis can be

found in two sources: civil disobedience and the category of combatant in international humanitarian law[31]. Next to the political crime we find the category of terrorism, as the correlate of political violence in a State based on the rule of law (*Estado de Derecho)*. That is, in regimes that lack legitimacy, the validity of the category of political crime seems to be recognized, while in those that have democratic legitimacy the existence of a political justification for a benign treatment of political violence disappears and that is why the category of terrorism supposes the exclusion of the subject from the community of subjects respectful of the law[32].

The Spanish tradition of giving privileged treatment to the acts of terrorism saw a change during Franco's dictatorship. During these times, political opponents were treated as enemies of the state, that is as terrorists[33]. From 1938 to 1944 there was a construction of the enemy in the law, especially in judicial cases against the defenders of *La República*, that is, the legitimate government of Spain that Franco and his allies overthrew. This legal construction of the enemy resembles the one that is produced in the conflict between Catalunya and Spain for the former's independence.

Tébar has shown that during the early years of the dictatorship there were two kinds of criminal law: on the one hand, the one used for the repression of those who supported *la República,* and whose guarantees were eliminated, and, in many occasions, they just disappeared or were killed. This is what the author calls a "combat criminal law" (*derecho penal de combate*)[34]. At the beginning of the civil war, the state of exception was declared in the areas that were falling under rebel control. The Francoist army ruled these regions via Bandos, that is, military regulations. In these *bandos,* they declared a state of war, a special military jurisdiction, and a speedy trial to those who were accused of sabotage, rebellion,

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[31] I. Orozco Abad, *Elementos para una fundamentación del delito político en Colombia: una reflexión a partir de la Historia*, "Análisis Político", No. 9, 1990, pp. 30–51.

[32] G. Jakobs, M. Cancio, *Derecho Penal del Enemigo, 2a ed,* Madrid: Civitas, 1996; J.R. Serrano-Piedecasas, *Emergencia y Crisis del Estado Social. Análisis de la Excepcionalidad Penal y Motivos de su Perpetuación,* Barcelona: PPU, 1988.

[33] I. Tébar Rubio-Manzanares, *Derecho Penal del Enemigo en el Primer Franquismo,* Alicante: Publicaciones de la Universidad de Alicante, 2017.

[34] Ibid., p. 12.

or sedition. Freedom of expression and reunion were prohibited and promoting or carrying out a strike were tantamount to sedition[35]. Those who defended the legitimate order were accused of rebellion, and the penalty was death. Before the end of the war (9 February 1929), Franco's regime passed the so-called *Ley de Responsabilidades Políticas* that punished those who collaborated with the *República* and they had to go through a sort of cleansing process, that in many cases involved economic sanctions and even losing their nationality, to be able to be part of the new society. This law was applied retroactively to cover the beginning of the republican government. Some of the acts that were considered criminal were the following:

c) Being a member of political parties and worker's unions.
(…)
f) To call elections, be part of the Government or work in a high position; or being a candidate of the government; or candidate, representative or controller of any of the parties in the Popular Front; or being a convention delegate.
h) Being a member or having been a member of the Masonry.
(…)
l) To have opposed actively the Movimiento Nacional[36].

On the other hand, we find that the criminal law was implemented in order to discipline society into the new regime. In Spain, at the time, there was a dual state: a prerogative state that was arbitrary and did not work within the limits of the rule of law; and the normative state, that kept the appearances of being a legitimate state[37]. As a result of the former, several institutions were created such as the *Tribunal de Responsabilidades Políticas* and the *Tribunal Especial para la Represión de la Masonería*[38]. These two tribunals, especially the first one, were used to attack political opposition and to eliminate any kind of resistance towards the new dictatorial regime.

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[35] Ibid., p. 32.

[36] Ibid., p. 41.

[37] Ibid., p. 15.

[38] G. Portilla Contreras, *La Consagración del derecho penal de autor durante el franquismo: el Tribunal Especial para la Represión de la Masonería y el Comunismo,* Granada: Comares, 2010.

José Ramón Serrano-Piedecasas analyzed the relationship between political crimes and the crime of terrorism several years ago. This analysis is important, since it is done at the time of the political crime crisis and the consolidation of the category of terrorism to account for the dissidence and to deal with those who opposed the State. From now on, there is a criticism of what would later be called the criminal law of the enemy and the political use of criminal law. Serrano already discusses the political use of the category and its instrumental use to deal with the crisis of legitimacy that occurred in the 1970s in Europe and the United States. For Serrano, the difference between the national liberation movement and terrorism lies in the means used and in the context in which the activities take place[39].

The classification of a conduct as a political crime depends on a political decision, which can be given in the context of a request for extradition or within the context of the trial of those who oppose the State by violent means. García Valdés analyzed in 1984 the three historical phases of political crime. These are:

a) The absolutist state model, which extended until 1786, which identifies the political crime with the *crime of lesa majestad*. Therefore, it is punished more harshly than ordinary crime;
b) With the triumph of the French Revolution, political crimes are assimilated to the romantic figure of the hero who fights for the freedom of the people;
c) The triumph of the Rule of Law, which does not admit the existence of political crimes, since the exercise of political activity is lawful, unless it is done with violent means, in which case it will be given the treatment of terrorism[40].

Margalida Capellá analyses political crimes in international law[41]. She questions the possibility of accepting political crimes in a democratic state. She shows the state practice used to determine the elements of

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[39] Serrano-Piedecasas, supra note 32 at p. 30.

[40] Ibid., p. 149.

[41] M. Capella i Roig, *¿Qué queda del delito político en el derecho internacional contemporáneo? (Observaciones en los ámbitos de la extradición y del asilo),* "Revista Electrónica de Estudios Internacionales", No. 28, 2014, pp. 1–43.

political crimes. Her conclusion is that political crimes are those crimes that are politically motivated, are committed in a political context, or have political consequences. At the same time, she distinguishes between pure political crimes and relative political crimes, and complex and connected political crimes. In her analysis, she shows how state practice has moved from the recognition of political crimes to its exclusion in some cases, when extradition is possible, due to the nature of the act or to the nature of the criminal justice system. For instance, terrorism is one of the acts excluded. To overcome the lack of definition of terrorism, states have used the attack against a Chief of State clause and the anarchist clause. In any case, the depoliticization of these acts have led to consider them as common crimes, therefore as excluded from the possibility of asylum.

One of the most interesting cases is when the commission of political crimes by the rulers is considered an act of rebellion. One sector affirms that the acts of those in power must be sanctioned, since it supposes the respect of the rule of law. Others suggest that the democratic principle must be respected and therefore the rulers must act in some cases with dirty hands. The leaders in the Popular Party, the party in government at the time of the referendum, understood that the leaders of *el process* had committed a crime of rebellion, since they were disobeying the law. But those who supported the referendum understood that it was a political act and that it was made in accord with the constitution, but, that in any case, majority rule should prevail over formalities in the law.

IV. The Catalan Case

As mentioned before, the new Constitution granted the right to autonomous government to regions in Spain. The Constitution led the determination of powers and roles to the statute of the autonomy, a sort of regional constitution, a step below the 1978 Constitution. In 2006 the citizens of Catalunya voted for the statute and approved the content determined by the Spanish Parliament. Political parties such as Esquerra Republicana did not like the whole content of the statute, but stilly decided to support it. This was not the case with the Popular Party that decided to take the case before the Constitutional Tribunal of Spain to see if it was in accord with the Constitution. We have to take into account

that the way the Tribunal is constituted leaves room for partisan politics, and for that reason, given the preeminence of the Popular Party and the Socialist Party at the national level, this is a very conservative court.

The Constitutional Tribunal took almost 4 years to decide the case, and finally on 28 June 2010 released their decision, curtailing several competences that were approved by the Catalan Parliament and ratified by the referendum of the Catalan people in 2006. As a result of this, a movement for independence started to grow, giving more votes to political parties such as Esquerra Republicana. Another political party, right wing Convergencia I Unió, saw the opportunity to get votes in the movement for independence and it decided to include it in its political agenda.

After the massive protest on 11 September 2011, the idea of independence has been present in the political discussion of Catalunya. But it is the massive mobilization of 2012 that led the political parties to use independence as the main argument in the elections, either because they were in favour or because they were against independence. In the 2012 elections, Convergencia I Unió won the election including a call for independence. In the 2012 Parliament, the political parties for independence had the majority of the votes, and they approved a document that contained some of the steps to advance in the movement toward independence. This document, entitled *Declaració de Sobirania I del Dret a Decidir del Poble de Catalunya*, called for a referendum to ask the Catalan people about independence from Spain. From the very beginning these political parties called for a negotiated referendum, and even some members of the Catalan political parties went to Madrid to ask the Spanish Parliament for their support for this referendum. Of course, they refused to give this support, and for that reason the referendum of 9 November 2014 was just a non-binding consultation for independence in Catalunya, similar to those organized by Esquerra Republicana in several towns in the country. It was no surprise that those who were pro-independence won the referendum with almost 2 million votes, but with a small participation of those who were against it.

In the new elections, that were treated as if they were a plebiscite, the political parties that were pro-independence won the election, although not with an overwhelming majority, which showed the division of Catalan politics. In 2017 the Catalan Parliament approved, through an irregular

procedure, the Law of the Referendum and the Law of the Transition to the Republic. From different sectors these laws were criticized, not only for their content, but also for the irregular procedure used to approve them.

The Spanish reaction under the Socialist Party was one where Zapatero paid lip service to the statute, but without really doing anything to support it. When the Popular Party won the election, they used irregular means to fight the Catalan process of independence. In July 2016 it was discovered that the police were spying on those politicians who were in favour of independence, all of that being done without a judicial order. At the same time, since 2015, the Spanish government has intervened in the Catalan administration by ordering that their expenditures be approved by the Spanish government.

During the year, the Spanish police and the prosecution investigated Catalan politicians who promoted the referendum, without a clear public explanation as to the crimes that they thought were being committed. On September 20th, the Police arrested several members of the government with the purpose of stopping the referendum. Some of the charges of rebellion came from the protests people in Catalunya made to attack what they thought to be an illegal act. From that day on, every day there was a *cacerolazo* to show support for the government of Catalunya and to protest against the use of the police and the judiciary in what was clearly a political debate. In the investigation against the organizers of the referendum, the Spanish judge held that the *cacerolazo* was a form of violence that created stress in an apparently vulnerable police force. Those who criticized the police were threatened with accusations of terrorism or hate crime.

But despite these attempts at stopping the referendum, this was anyway celebrated on 1 October 2017. That day many people went very early in the morning to be ready to guard the electoral colleges and vote in what they deemed a valid referendum. But once the colleges opened, the Police charged against voters in some of the electoral colleges, in what is now widely considered police abuse and a violation of human rights. This level of violence was unprecedented in Catalunya, and what was more surprising was the level of hatred with which the Police and the Spanish government acted. In some regions of Spain, people said goodbye to the Police with chants that recalled those used before going

to war. People were chanting "go for them", as if people in Catalunya were the enemies of the state.

Around noon, the Police ceased to attack electoral colleges, but the image of an aggressive police force remained. In the following days, given the positive result of the referendum, the Puigdemont government was supposed to declare independence, which it did, but suspended it to open the channels of dialogue with the Spanish government. This brought about disappointment in the supporters of independence, and it did not prevent the Rajoy government from suspending the *Autonomía* in Catalunya and from trying to use this temporary intervention to re-shape Catalan society.

In the aftermath of the referendum, Spanish judges prosecuted and persecuted several Catalan citizens for the mere fact of expressing their opinions online or on the streets. Members of the Committees for the Defence of the Republic were interrogated and investigated for crimes of terrorism, in what was clearly a strategy to scare them and to prevent them from organizing. But curious enough, these were not the charges brought against the leaders of *el process.* They were accused of the crime of rebellion. The judge who investigated the case held that the element of violence required in the crime of rebellion was met (because there was violence in the actions of the protesters). He found violence in the fact that people protested in the streets and in the *cacerolazo.* No judicial body in Spain has officially attacked or criticized these decisions, despite the fact that human rights organizations and democratic lawyers and judges have expressed their opinions on the illegality of the charges and on the disproportionate use of prison for people who do not present any risk of running away, or any danger to society, or to the integrity of the trial, the only reasons why a person can be held in prison.

V. Conclusion: The Risks of Limited Transitions

Transitional justice is a series of mechanisms that exist with one goal in mind: the guarantees of non-recurrence. To do so, there must be a real transformation of society and not just a timid application of the transitional justice liberal toolbox. This has been the case in countries

such as Colombia, Morocco, and Sierra Leone[42]. But in Spain we do not even see the limited liberal toolbox. The kind of measures used to deal with the past have been limited to memory and memorialization, but justice, truth, and a real transformation are absent.

The Catalan case shows the dangers of limited transitions, because in times of turmoil, political decisions were avoided, and the same forces that were used in the authoritarian regime to stop opposition are now used during democracy. The Popular Party refused to have any open dialogue with the Catalan government, and in its stead used the idea of the protection of the constitution to criminalize the movement for independence in the county, even though it was a peaceful one. The Police and the judiciary, two institutions criticized for their lack of transformation after the end of the dictatorship, were used as instruments for the depoliticization of the situation, and in that way a clearly political issue became a judicial one.

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[42] F.S. Benavides-Vanegas, B. Camps, O. Mateos. *Los retos de la Justicia Transicional en las nuevas transiciones: un estado de la cuestión a partir de los casos de Colombia, Marruecos y Sierra Leona*, "Revista de Relaciones Internacionales de la UAM", No. 38, 2018.

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ILLIBERAL JUDICIALIZATION OF POLITICS IN POLAND**

Abstract

The judiciary currently plays an important role in any political system or kind of constitutionalism, regardless of the adopted system of constitutional review (judicialization of politics). The most important purpose of the constitutional court seems to be the protection of human rights against the arbitrary interference of state authority in individual interest. The key incentive is the protection of an individual against the constitutionally unauthorised and arbitrary intervention of the parliamentary majority. In the context of democratic decay and the development of other than liberal constitutional democracy versions of constitutionalism (authoritarian, autocratic, populist, illiberal), the question arises: what is the role of constitutional courts within these so-called democracies with adjectives. Applying this question into Polish reality, since 2015, the Polish constitutional court is described as politicized. Against this wording, the Author claims that the court is not only politicized but that we can talk about the illiberal judicialization of politics as best describing the Polish situation.

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Keywords

judicialization of politics – constitutional court – politicization of judiciary – judicial activism

I. Introduction

Without any doubt, the judiciary currently plays an important role in any political system or kind of constitutionalism, regardless of the adopted system of constitutional review. In the US, basing itself on Marbury v. Madison and a Kelsenian or constitutional dialogue, the most important purpose of the constitutional court seems to be the protection of human rights against the arbitrary interference of state authority in individual interests. The key incentive is the protection of the individual against the constitutionally unauthorised and arbitrary intervention of the parliamentary majority. Therefore, the need of neutral control of the actions of public authorities (above all Parliaments) arises. The judiciary, and most notably constitutional courts, are perceived as such a neutral arbiter. Nevertheless, courts are expected to be independent and impartial and, thus, trustworthy. In consequence, we can note the meaningful transfer of power from Parliaments to courts. At the same time, there is the temptation among judges to adjudicate actively. This active approach differs in relation to the independence and impartiality of courts in certain systemic settings. In this area, the paper aims, as its contribution, to define the broad problem of the judicialization of politics and empowering courts.[1]

In the context of democratic decay and the development of other than liberal constitutional democracy versions of constitutionalism (authoritarian, autocratic, populist, illiberal), the question arises: what is the role of constitutional courts within these so-called democracies with adjectives. Applying this question into Polish reality, since 2015,

[1] The problem has been noted and partly addressed by Armen Mazmanyan, *Judicialization of politics: The post-Soviet way*, 13 I-CON 1 (2015) or Daniel M. Brinks, Abby Blass, *Rethinking judicial empowerment: The new foundations of constitutional justice,* 15 I-CON 2 (2017).

and especially since 2017, when the capture of the CT was accomplished, the Polish constitutional court is described as politicized. Against this wording, I claim that the court is not only politicized, but that we can talk about the illiberal judicialization of politics as best describing the Polish situation. This article addresses this problem.

Firstly, the definition of illiberal democracy will be provided to give proper context to the functions of the CT in Poland (II). Then, the concept of the judicialization of politics and the growing need for neutral arbitration in the scope of political decision-making by Parliaments to prevent the constitutionally unauthorised intervention of the parliamentary majority in the status of individuals will be described (III). Acting as a neutral mediator, the constitutional court has to be independent and impartial. Thus, the position of the constitutional court in relation to political authority is strengthened. Courts (or judges) lacking the virtue of self-restraint may be tempted to take over political decision-making (regarding the whole community) from Parliament and, as a result, become politicised (IV). There is also another possible scenario, especially in non-consolidated or non-fully-fledged democracies, which involves the degradation and subordination of courts to a political body. Such a situation is described as a post-Soviet judicialization of politics (V). In the scope of illiberal democracy, another specific kind of judicialization of politics can be identified, which is similar to what happens in post-Soviet states. As a result of the struggle, a constitutional court becomes subordinated to the political will and authority so as to provide legal/constitutional justification for the decisions already taken or those to be taken in future at the exclusion of opposite views (VI). The distinctive characteristic of illiberal judicialization is the constraint of public power. Finally, I will conclude briefly my thoughts (VII).

II. Illiberal Constitutionalism

Even though in most of the literature the term "illiberal constitutionalism" is not generally accepted: current comparative research[2] indicates that illiberal constitutionalism has been established and consolidated in

[2] Timea Drinóczi, Agnieszka Bień-Kacała, *Constitutions and constitutionalism captured:*

Hungary and Poland since 2010 and 2015 respectively. It seems that the transformation was not accidental. It had its basis, partly, in the emotional and historical trajectories of the Hungarian and Polish nations, some aspects of which, at a particular moment of economic and political crisis, have been successfully triggered by populist politicians.[3] Nevertheless, the illiberal constitutional setting was formed on the basis of a constitutional democracy, and it still has its contours.

Illiberal constitutionalism is the result of a peaceful constitutional development in which the three pillars of constitutional democracy – the rule of law (promoting, at least, a limited government), democracy (promoting, at least, equal representation and public discourse on issues), and human rights (of individuals and groups) – are not respected in the same way as they were before, that is, in Hungary and Poland, during the 20 years following the period of transition. Another significant characteristic of illiberal constitutionalism is the selective and arbitrary application of the constitution, and the non-inclusive and abusive character of the constitution- and law-making processes. The dictatorship of the majority in decision-making and the connected sense of belonging to the same uniform "family", which does not acknowledge minority views, are features of illiberal constitutional democracy too.

Illiberal constitutional democracy can be differentiated from other types of constitutionalism, especially those with "authoritarian" or "autocratic"[4] references. The Hungarian and Polish settings seem to be different from both Tushnet's authoritarian constitutionalism[5] and Landau's abusive constitutionalism.[6] In authoritarian constitutionalism

shaping illiberal democracies in Hungary and Poland, "German Law Journal" (2019, under publication).

[3] Timea Drinóczi, Agnieszka Bień-Kacała, *Extra-legal particularities and illiberal constitutionalism. The case of Hungary and Poland,* "The Acta Juridica Hungarica", Vol. 59, No 4, 2018, pp. 338–354.

[4] Kim Lane Scheppele, *Autocratic Legalism*, "The University of Chicago Law Review" 85/2018, pp. 545–583.

[5] Mark Tushnet, *Authoritarian Constitutionalism*, "Cornell Law Review", Vol. 100, Issue 2, January 2015.

[6] David Landau, *Abusive Constitutionalism*, "University of California Davis Law Review", Vol. 47/189, 2013, pp. 189–260.

(exemplified by Singapore, according to Tushnet), liberal freedoms are protected at an intermediate level, elections are reasonably free and fair, and there is 'a normative commitment to constraints on public power'.[7] Such a 'normative commitment to constraints on public power', however, seems to be missing in Poland and Hungary on a constitutional level and in constitutional practice. Such constraints stem from European Union values and commitments. They are expected to be effective to a certain extent on political (art. 7 of the EU Treaty procedures) and legal (the CJEU competences) grounds. Political measures, however, have failed so far. David S. Law uses the term 'illiberal constitutional democracy' to describe Singapore.[8] Nevertheless, the distinction we have made concerning the 'normative commitment to constrain public power' still applies. Abusive constitutionalism is apparently a manner in which a constitutional democracy is transformed into something else: in our case, illiberal constitutionalism. As far as populist constitutionalism is concerned, we would not consider it a legal concept, but mainly a sociological phenomenon.[9] As such, it forms the sociological base for either an illiberal or an authoritarian system. The worldwide populist attitude of rulers is a tool towards gaining popular support for them to govern. Nevertheless, populists still need to transform the system towards illiberalism or authoritarianism through legal measures, such as by adopting a new constitution, and by introducing retrograde abusive amendments and clearly unconstitutional legislation. Without transformation, populism is only a shadow on politics in still liberal democratic settings.[10]

The illiberal democracies emerging in Eastern Europe seem to be, to a certain extent, constitutional democracies, which are being transformed peacefully by populist politicians from a more substantial form of constitutional democracy that prioritised liberal constitutional values.

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[7] Tushnet, supra note 6 at p. 438.

[8] David S. Law, *Alternatives to Liberal Constitutional Democracy* (December 13, 2017), "Maryland Law Review", Vol. 77, 2017, p. 223 et seq.; Washington University in St. Louis Legal Studies Research Paper No. 17–10–02; University of Hong Kong Faculty of Law Research Paper No. 2018/004. Available at SSRN: https://ssrn.com/abstract=3087244 [last accessed 1.09.2019.

[9] Paul Blokker, *Populism as a constitutional project*, "International Journal of Constitutional Law", Vol. 17, Issue 2, April 2019, pp. 536–553.

[10] Jan-Werner Muller, *What is populism?*, University of Pennsylvania Press 2016.

These states seem to be constitutional democracies in a formal sense. In an illiberal constitutional democracy, there is a written constitution, but the provisions on the rule of law, human rights, and democracy have been defectively worded, and are poorly implemented and enforced. Both the Polish and Hungarian constitutions formally maintain the rule of law and formal democracy in the majoritarian sense, but these states misuse the language of fundamental rights. Both constitutions still provide for the constitutional protection of fundamental rights, but they either offer a lower level of protection than previously (in Hungary, as regards family, the right to social security and the right to assembly, which can be restricted by the right to privacy, family life, and home) or contradict international and European human rights standards (in Hungary, regarding the right to religion, rules on migration, and the right to assembly; in Poland, regarding the right to privacy and the right to assembly – a preference for so-called 'cyclical assemblies' being exhibited). These issues, however, are politically important. Therefore, Hungarian and Polish events are described as a pretence of democracy and labelled as new authoritarianism.[11] Nevertheless, there is no, or considerably less, depletion of constitutional protection of those rights that have no or few political implications.

This systemic reality affects the functions of the Constitutional Tribunal and shifts them from the constitutional protection of the individual against the arbitrary decisions of authorities to the justification of the unconstitutional actions of those in power with constitutional means (using the powers of the CT).

III. Judicialization of Politics

The very broad term "judicialization of politics" is used to describe judicial involvement in politics. It is composed of three interrelated processes. According to Ran Hirschl,[12] at the most abstract level, judicialization refers to the spread of legal discourse, jargon, rules, and procedures

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[11] Gabor Attilla Tóth, *Constitutional Markers of Authoritarianism*, "Hague Journal of the Rule of Law", September 2018, pp. 10–14.

[12] Ran Hirschl, *The Judicialization of Politics*, [in:] R. E. Goodin (ed.), *The Oxford*

into the political domain and policymaking fora and processes. A more concrete dimension of the judicialization of politics is the expansion of the jurisdiction in determining public policy outcomes (e.g. through administrative review). A third class of judicialization is the reliance on courts and judges for dealing with "mega-politics": core political controversies that define entire polities (e.g. results of elections).

Such proliferation of judicial importance is based on essential features of courts and judges. The judiciary plays the role of independent and impartial arbiter, as theorised by Martin Shapiro.[13] These features are interrelated: the more independent the court, the more impartial the judges.[14] In order to fulfil this purpose properly, however, the judiciary has to be trustworthy. Trust constitutes an essential value for being a neutral arbiter.[15] There must be trust that judges will deliver decisions based on the constitution and not in order to meet the demands of the governing party. From this point of view, the judiciary is not a political power, but it still plays a crucial role in the determination of important state policies and in the resolution of key controversies. For achieving such a position, the judiciary should be normatively framed by four major grounds of legitimation: separation of powers, the rule of law, independence, and impartiality of arbitration.

The literature notes that judicialization is an unavoidable and constantly expanding process. As Tomasz Tadeusz Koncewicz observes, courts interpret increasingly more laws to meet the growing expectations of the parties involved.[16] This process applies in particular to constitutional courts operating under the centralised system of constitutional review,

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Handbook of Political Science, pp. 4–6. Online Publication Date: Sep 2013 DOI: 10.1093/oxfordhb/9780199604456.013.0013 [last accessed 1.09.2019].

[13] Martin Shapiro, *Courts: A Comparative and Political Analysis*, University of Chicago Press, 1981.

[14] Daniel M. Brinks and Abby Blass, *Rethinking judicial empowerment: the new foundations of constitutional justice,* 15 I-CON 2 (2017), p. 308.

[15] D. Smilov, *Judiciary: The Least Dangerous Branch?,* [in:] M. Rosenfeld, A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford 2012, pp. 869–871.

[16] Tomasz T. Koncewicz, *"Mechanical jurisprudence" under strain? Eastern Europe judiciary under the European influence*, [in:] M. Zubik (ed.), *Human rights in the contemporary world*, Warszawa 2017, p. 113.

such as exists in Poland. This way, a politically neutral, independent and impartial organ is expected to assess the activity of the political body. The assessment is made from the perspective of conformity with the constitution that mainly aims at checking whether political actions are arbitrary or not. What is important is that the activity of courts is based on trust and that its decisions are politically neutral.

Nevertheless, judicial involvement may lead, in Ran Hirschl's words, to 'juristocracy'.[17] According to Hirschl, every political system has witnessed a profound transfer of power from representative institutions to judiciaries. Moreover, the transformation of courts and tribunals worldwide into major political decision-making loci has been perceived as an important trend. The transformation is supported by judges actively employing their competences and by politicians seeking to adjudicate conflicts. Judicial activism, however, is rarely welcome because it may undermine trust in the decisions taken by the judiciary.

Several types of activism may be distinguished. First, legal/constitutional activism is connected to expanding the competences of the courts (juristocracy).[18] Second, ideological activism (politicization)[19] and third, servile activism (post-Soviet and illiberal judicialization) are also distinguished. The first and second kinds of activism are connected to the independence of the courts and the impartiality of judges. The features allow judges to be active. Legal and ideological activism can be described as positive because is connected to the exceeding of competences.[20] The

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[17] Hirschl, supra note 13 at p. 19.

[18] E.g. the Polish CT derived from the rule of democratic state ruled by law more than twenty other rules, among others: separation of powers. More on this: Iwona Wróblewska, *Zasada państwa prawnego w orzecznictwie Trybunału Konstytucyjnego RP*, Toruń 2010, pp. 201–242.

[19] E.g. the Polish CT (decision of 29 May 1997, K 26/96) adjudicated in relation to the Act of 30 August 1996 r. on the amendment to the Act on family planning, protection of the human foetus and conditions for the admissibility of termination of pregnancy, and on the amendment of certain other acts (Dz. U. Nr 139, poz. 646).

[20] Wojciech Włoch, Agnieszka Bień-Kacała, *Cnotliwi sędziowie: kilka słów o powściągliwości sędziów Trybunału Konstytucyjnego* [*Virtuous judges: a few words about the self-restraint of judges of the Constitutional Tribunal*], [in:] M. Serowaniec, A. Bień-Kacała, A. Kustra-Rogatka (eds.), *Potentia non est nisi ad bonum: księga jubileuszowa dedykowana profesorowi Zbigniewowi Witkowskiemu,* Toruń 2018.

courts do more than just what could be derived from the essence of judging. Servile activism occurs in a situation of the limited independence and impartiality of the judiciary and is characterized by deficits in the exercise of the judicial functions. This issue will be discussed below. The distinction between types of activism indicates the different nature of the active behaviour of judges depending on their personal attributes and the current political system.

IV. Politicization of Judiciary

Since the capture of the Constitutional Tribunal in 2017, when the President of the CT was replaced having reached their end of term, the CT has been described as a politicized court. This description, however, may be misleading. The idea of a politicized court is, in my view, connected to an independent and impartial court that extends its position according to a certain ideology. As noticed in the literature, politicization means making decisions according to ideological rather than legal factors.[21] Politicization also refers to a phenomenon in which a judiciary increasingly resembles other inherently political bodies, namely the legislative and executive branches.[22] The judiciary acts in a partisan manner concerning policy. Independence and impartiality allow a court to become an active political actor. Lacking the virtue of self-restraint, judges may be tempted towards politicaization by taking, to some extent, political (community-wide) decisions away from parliament. We can then identify political activism in adjudication. In such a situation, the judges are politically involved by presenting their own worldview in the decisions made. As such, from a constitutional point of view, certain views may be excluded or duly considered. This situation may result in lack of trust in the neutrality of court decisions.

The most important element here is that politicization is a mode of behaviour of an independent court and impartial judges who adjudicate

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[21] David L. Weiden, *Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia*, "Political Research Quarterly" XX(X) 2010, pp. 1–13.

[22] David Russell, *Politicization In The Federal Judiciary And Its Effect On The Federal Judicial Function*, "N.Y.U. Journal of Legislation and Public Policy Quorum", Vol. 19, 2018.

using their own ideological views or political ambitions. The Polish case shows that it is not like that. The CT acts as an agent of a certain political party without forcing a certain ideology.

There is only one understanding of politicization of the judiciary that might fit into the Polish reality. Politicization can also describe an outcome whereby parties "capture" the state by party patronage. Party patronage is defined as 'the allocation of jobs in the public and semi-public sectors at the discretion of political parties'.[23] In illiberal constitutionalism such "capture" is connected to the CT and the CT judges and, further, the judiciary. Courts, however, have not yet been captured in Poland. In relation to the CT, partisan adjudication is visible in certain decisions of the Polish constitutional court. Nevertheless, the Tribunal does not act as an independent organ, but employs the partisan agenda of the ruling party and justifies its political actions. The CT has become façade body and not a strong political player. Therefore, the CT cannot be recognised as politicized. Even more, the CT is not just a façade institution, but, rather, plays a crucial role in the overall scheme of the captured state. It is used by the ruling party as one of the most important guarantors of the illiberal system. It is a tool rather than a partner in politics. Therefore, I claim that a more precise and accurate description of this behaviour of the Polish Constitutional Tribunal operating within an illiberal system is: illiberal judicialization of politics.

V. The Post-Soviet Way of Judicialization of Politics

Before explaining the illiberal judicialization of politics, I would like to refer to Armen Mazmanyan's findings based on the post-Soviet countries.[24] He noted that research on judicialization is built on the observation that there is substantial transfer of political power from democratically

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[23] Ingrid van Biezen and Petr Kopecký, *The cartel party and the state: Party-state linkages in European democracies*, "Party Politics", Vol. 20, Issue 2, 2014, p. 7.

[24] A. Mazmanyan, *Judicialization of politics: The post-Soviet way*, 13 I-CON 1 (2015), pp. 200–218.

accountable decision-makers to empowered courts and judges. Countries of the post-Soviet region, however, range from fragile democracies to outright authoritarian states. As A. Mazmanyan argues, none of them has emerged as a consolidated democracy.[25] Consequently, courts are not fully independent and impartial, and these features seem to be essential for the political empowerment of the judiciary.

As Armen Mazmanyan explains further, in the post-Soviet world, courts make politically important decisions acting as agents of politicians who exploit them for different strategic purposes. The captured and packed courts refuse to act as impartial arbiters, but confirm the political actions of the day. Consequently, judicial involvement in politics is often a product of direct political instruction or manipulation, especially when deciding on politically sensitive cases. This implies that the meaningful transfer of power from politicians to judges cannot be detected.

What is more, the judiciary cannot be trustworthy. It is not politically neutral. It does not have the attribute of independence. In such a case, the judiciary makes decisions mainly to strengthen the supreme authority.[26] In the context of the post-Soviet region and in relation to constitutional courts, this is usually the head of state (president)[27]. In this way, the decisions made reflect the views of the autocratical power, and are aimed at the constitutional justification of the actions taken. The authority here is not limited by internal (constitutional) and external (supranational or international) commitments, and does not even pretend to be fully democratic. Under these conditions, the judiciary is not politically involved, in the sense that it does not base its decisions on ideological grounds. The worldview of individual judges is indifferent. Their loyalty to those in power, however, is significant.

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[25] Ibidem, p. 207.

[26] Jacek Zaleśny, *Sądownictwo konstytucyjne w państwach poradzieckich. Analiza porównawcza. Część II* [*Constitutional justice in post-Soviet countries. Comparative Analysis. Part II*], "Przegląd Prawa Konstytucyjnego" Vol. 49, No 3, 2019, pp. 34–35.

[27] Ibidem, pp. 149–160.

VI. The Polish Way of Judicialization of Politics

Under illiberal democracy, we can identify a specific type of judicialization of politics that is similar to the situation in post-Soviet states. The court is subordinated to those in power to justify the actions of the legislator already undertaken or to be taken in future, and in need to exclude certain views. At the same time, the court must balance itself between a approach suitable for the ruling party, and the values or laws of the supranational community (the European Union). The European values and laws may be understood here as a certain constraint on public power. Consequently, the CT pretends to deliver independent decisions based on impartial constitutional interpretation. The gap between the constitutional functions of the CT and its day-to-day practice is clearly visible.

What is important in the case of Poland is that the constitutional characteristics of the CT have not changed, even if we take into consideration the informal constitutional change of many statutes concerning the Constitutional Tribunal.[28] Formally then, the CT is still meaningfully empowered and could be perceived as one of the most powerful constitutional courts in Central and Eastern Europe. What has changed is the personal selection of judges. The main prerequisite of selection is personal loyalty to the party and its leader. In consequence, the CT acts as a partisan agent providing legal and constitutional justification for unconstitutional political actions. As Tomasz Tadeusz Koncewicz observes, the Polish constitutional court ceases to fulfil the functions of constraint of political power and the protection of individuals' rights. The CT adjudicates fewer cases than previously and it is described as a supplement to Parliament confirming its unlimited power.[29] Limits on

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[28] Agnieszka Bień-Kacała, *Polish Constitutional Tribunal: a systemic reform or a hasty political change*, 1 DPCE online (2016), Agnieszka Bień-Kacała, *Informal constitutional change. The case of Poland*, "Przegląd Prawa Konstytucyjnego" Vol. 6, 2017, pp. 199–218.

[29] Tomasz T. Koncewicz, *From Constitutional to Political Justice: The Tragic Trajectories of the Polish Constitutional Court*, "VerfBlog", 2019/2/27, https://verfassungsblog.de/from-constitutional-to-political-justice-the-tragic-trajectories-of-the-polish-constitutional-court/, DOI: https://doi.org/10.17176/20190324-205438-0 [last accessed 19.08.2019].

public power, however, can be found in the European Union values, law and practice.

In another paper, the cases of the constitutionally questionable behaviour of the CT have been described and systematized.[30] Three different decisions have been selected to explain how the illiberal judicialization of politics functions in Poland. At the same time, these three cases show three different patterns of servility. All of the cases are politically sensitive as they refer to core illiberal concerns: freedom of assembly, judicial independence, and state–individual relations. The first is connected to the selection of loyal judges to sit in the bench (adjudication panel). The other two provide a new reading of the constitutional provisions: *ex ante* and *ex post* political decisions.

Firstly, the decision delivered on 16 March 2017 (Kp 1/17, cyclical assemblies) was described.[31] This case is politically important for the sake of the substantive argumentation of the constitutional court dealing with "cyclical assemblies". This kind of assemblies was created by Parliament to grant „monthenaries" to the "Smoleńsk catastrophe" (plane crash in 2010), which prevailed over other events. At the time of adjudication, the CT was not fully captured, as there were persons selected before 2015 among the judges. Therefore, the crucial concern was the selection of loyal judges to the adjudication panel, who would authorize the unconstitutional legislation. On the motion of the Prosecutor General (PG), judges who joined the CT in 2010 were excluded from the adjudication due to flaws in their selection. At the same time, another judge (selected in 2017) was not excluded despite his own motion, in which he expressed concerns connected to his impartiality. Under these circumstances, it is clear that the guiding idea of adjudication was the political loyalty of the judges. Therefore, one may assume that the judgment (Kp 1/17) is a mere acceptance of the political agenda of the majority in power. This assumption has been confirmed by the substantive decision of the Tribunal.

On 20 April 2017 (K 5/17), the CT delivered a legal basis for the reform of the National Council of the Judiciary (NCJ). What is important is that

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[30] Agnieszka Bień-Kacała, *Constitutional court within illiberal constitutionalism. Polish experience*, (under publication).

[31] See also Agnieszka Bień-Kacała, *Gloss to the judgment of Constitutional Tribunal of 16 March 2017 (Kp 1/17)*, "Przegląd Prawa Konstytucyjnego" Vol. 4, 2017, pp. 255–262.

the new interpretation was needed before the reform started.[32] Therefore, the political will justification *ex ante* can be identified as a pattern of adjudication. The reform had been criticized by various bodies, including the Ombudsperson. The concern was the politicization of the Council and, thus, the judiciary as a whole branch of government. Therefore, it was important to gain a judgment of the CT that would close the disagreement in favour of the parliamentary majority. In consequence of the CT's reasoning, the new National Council of the Judiciary was selected by the political body in a politicized procedure. The case launched a massive reaction from the European Commission[33] and the European Network of Councils for the Judiciary.[34]

The Constitutional Tribunal, in its third, relevant here, judgment delivered on 17 July 2018 (K 9/17), created the new interpretation of the Constitution and explained why a presidential pardon regarding the cases closed without a final judgment is in conformity with the Constitution. The decision was essential to justify political action *ex post*. The clue here is that the CT selectively employed constitutional provisions to justify the action of the Polish President and set aside previous understandings of the pardon based on the 1997 Constitution. The point of concern here is that the pardon was granted to one of the most prominent politicians of the ruling party. The grantee then became a member of government. Therefore, the CT judgment was crucial to assuring that the President acted in conformity to the Constitution.

This recent case is important not because of the judgment of 26 June 2019 (K 16/17) itself, but because of its background. The circumstances of the case involve the freedom of religion and conscientious objection, as the situation was described by the Minister of Justice in his motion.

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[32] Marcin Matczak, *How to Demolish an Independent Judiciary with the Help of a Constitutional Court*, "VerfBlog", 2017/6/23, http://verfassungsblog.de/how-to-demolish-an-independent-judiciary-with-the-help-of-a-constitutional-court/, DOI: https://dx.doi.org/10.17176/20170623-103309 [last accessed 11.08.2019].

[33] Art. 7 procedure against Poland, https://europa.eu/rapid/press-release_IP-17-5367_en.htm https://europa.eu/rapid/press-release_IP-17-5367_en.htm [last accessed 11.08.2019].

[34] Krajowa Rada Sądownictwa (the National Council of the Judiciary) is suspended by decision of the ENCJ General Assembly of 17/9/2018.

A Polish printer refused to make posters for an LGBT foundation because of his religious beliefs. In consequence, he was sentenced by a penal court due to refusal of service without justifying that the reason was based on discrimination. Courts, including the Supreme Court, applied binding legal provisions. In the opinion of the Minister of Justice, the printer should not have been convicted because workers have a right to act according to their conscience. The CT's decision, however, does not involve the freedom of religion and discrimination issues when adjudicating. The Tribunal narrowed its concerns only to the freedom of economic activity and the penalty connected to the refusal of service without justifying the underlying reason. In the opinion of the CT, such penalty limits the freedom of economic activity to such an extent that cannot be accepted as conforming with the Constitution. What is important here is that the individual case of the printer was concluded and he could use his right to lodge a constitutional complaint. The printer, however, decided not to refer it to the CT.

In this case, the courts' decisions were not politically welcome. Therefore, the Minister of Justice referred the case to the CT with a legislative justification. The main arguments involved freedom of religion and conscientious objection. In such an ideological disagreement dividing society,[35] it is the parliament who should act instead of the constitutional court. In this case, the CT closed the disagreement without deliberation, but with the exclusion of opinions different to the governmental ones. The undisclosed intention is to produce such legal justification as will allow the intentions of those in power to be put into practice (exclusion of the LGBTQ community as a useful tool during election campaigns). This is possible thanks to the instrumentalist use of the function of protecting the Constitution as a superior act in a hierarchically constructed system of sources of law by the CT. The Tribunal's arguments are consistent with the wording of selectively chosen provisions of the constitution (freedom of economic activity) and previous rulings, but at the same time these arguments contradict other constitutional principles and values (e.g. protection of minorities and prohibition of discrimination). Basically, we deal with the justification of partisan actions. In fact, the CT acts as

[35] Similar cases were adjudicated in the USA and the UK.

a partisan court. While the Tribunal is formally independent, there are doubts in relation to the impartiality of judges selected in violation of the constitution. As a result, it is difficult to trust in the neutrality of the decisions taken by loyal judges.

Distrust in judicial neutrality, and doubt in relation to the independence and impartiality of the Constitutional Tribunal in Poland are closely associated with the post-Soviet way of judicialization of politics. Why is it illiberal then? It is so, because judges in Poland operate under the paradigm of illiberal constitutionalism, which means that both the actions of the rulers and the constitutional court are not entirely arbitrary. They must be taken within the acceptable scope of compliance with European values, laws, and from the point of view of EU procedures. For example, in the case of the printer and the LGBT foundation, it is relevant that the prohibition of discrimination is an EU value and, consequently, the CT judgment potentially justifying discrimination against minorities on religious grounds could be reasonably questioned. This is one of the motives why the Constitutional Tribunal's reasoning was placed outside the scope of equality, non-discrimination, and religious freedom. The Tribunal adjudicated only in the scope of the less controversial economic activity freedom. Such a behaviour of the CT shows at the same time that the EU can be perceived as a kind of constraint on public power in the scope of illiberal constitutionalism.

VII. Conclusion

This paper contributes to our better understanding of the judicialization of politics within an illiberal democracy. The Polish Constitutional Tribunal can be described as a non-trustworthy body whose independence and impartiality may be questioned. Rulings since 2017 in politically sensitive cases show that the court acts as an agent of the political will of the ruling party. Such behaviour can be recognized as servile activism. It allows the development of illiberal transformation and is a stabilising factor for the illiberal constitutional system.

Finally, it is worth asking about the future of this political transformation taking place in Poland. One may see at least two scenarios: a pessimistic and an optimistic one. According to the pessimistic, the path

to the authoritarian system will become open if the constraints on public power disappear when the EU realises art. 7 of the EU Treaty or when Poland formally exits the EU. The optimistic solution, in turn, requires a change in the Poles' value system and the grounding of the system on the virtue of self-constraint in the scope of political activity.

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SOME REMARKS ON THE PROTECTION OF LEGITIMATE EXPECTATIONS IN INTERNATIONAL INVESTMENT LAW

Abstract

This article examines the nature of legitimate expectations in international investment law. The author considers international investment case law to suggest that legitimate expectations consist of four basic elements: specific representation or promise made by the host State, legitimacy, reasonability, and objectivity of expectations, reliance (trust) the investor had in the representation made by the host State and the substantive benefit received by the investor by way of representation or promise made by the host State. After briefly explaining the basics of the protection of legitimate expectations, the article addresses each element, including the criteria of effective representations or promise made by the host State that is capable of creating legitimate expectations. It also shows that the focus should be placed on the reliance element.

Keywords

legitimate expectations – investor – investment – fair and equitable treatment

I. Introduction

We all have certain expectations with respect to the behaviour of others in our social group. These expectations are based on experience, the

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conscience of that group and assumptions as to the conduct of other members of the group in the future. Similar expectations are present in the economic life of nations. Also, a foreign investor possesses such expectations while making an investment in the host State. The protection of legitimate expectations under the fair and equitable treatment (hereinafter: FET) remains unquestionable in contemporary arbitral case-law. However, since it is a conception conceived of and developed by international tribunals and not by treaty law, the scope of the protection and the elements of legitimate expectations continue to be unclear. It creates a certain room for abuses on the part of foreign investors and even functions as a deterrent discouraging the host State from withdrawing, amending, or introducing new rules of law which are likely to have an adverse impact on foreign investments. These issues have been noticed by investment tribunals,[1] which still fail to explain the basis and the scope of the protection of legitimate expectations relying instead quite leniently and comfortably on the previous arbitral decisions.

The protection of legitimate expectations is linked to a treaty clause providing FET.[2] According to such clause the host State is obliged to treat foreign investors fairly and equitably. As an element of the fair and equitable treatment standard, the most broad and far-reaching exposition of the concept of legitimate expectations was given by *the Tecmed* v. *Mexico* tribunal in the following terms:

> "[FET], in light of the good faith principle established by international law, *requires the Contracting Parties to provide to international investments treatment*

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[1] See e.g. *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 533. „Legitimate expectations … are susceptible to a certain easy circularity of argument; investors normally have expectations in relation to a wide range of contingencies, great and small, and it is often relatively easy for a claimant to postulate an expectation to condemn the very conduct that it complains of in the case before it. An example from the current case is Claimant's assertion that the delay of two months leading up to the opening of three border duty free stores by reason of additional requirements of the fire inspection authorities breached Claimant's legitimate expectations."

[2] For example, S. Schill opines that arbitral awards and, in particular, decisions on FET, form the basis of expectations. S. Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law*, [in:] *International Investment Law and Comparative Public Law*, S Schill (eds.), Oxford University Press, 2010, at 156–157.

that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. *The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.* The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor's ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle."[3]

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[3] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 154. The *Tecmed* formula was subsequently accepted in *MTD Equity Sdn. Bhd. and MTD Chile S.A.* v. *Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 114. However, see critically in part: *MTD Equity Sdn. Bhd. and MTD Chile S.A.* v. *Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 67: „the TECMED Tribunal's apparent reliance on the foreign investor's expectations as the source of the host State's obligations (such as the obligation to compensate for expropriation) is questionable. The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have." *Suez, Vivendi*, par. 224. The „standard" developed in *Tecmed i*s high. It is argued that "[t]he *Tecmed* 'standard' is actually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain." Z. Douglas, *Nothing if Not Critical for Investment Treaty Arbitration:* Occidental, Eureko *and* Methanex, 2006 AI 22, at 28. The *White Industries* tribunal came toa conclusion that *Tecmed* formula is subjected to „valid criticism." *White Industries Australia Limited* v. *India*, UNCITRAL, Final Award, 30 November 2011, para. 10.3.5.

Prima facie, it seems that the protection of legitimate expectations derives from and refers only to a treaty and not any other sources of law. In general, it requires to provide to international investments a treatment that does not affect the basic expectations that were taken into account by the foreign investor when making the investment to make the investment[4] as long as these expectations are reasonable and legitimate[5] and have been relied upon by the investor when making the investment.[6] Their content differs and depends upon the facts of a given case. Expectations may be more general or more concrete. The following examples may be given of legitimate expectations claimed by the investor before arbitral tribunals to show how they may vary in content and the level of specificity:

- the development of a 27-hole golf course and condominiums[7];
- the lack of invalidation of investor's patents on the basis of a radically new utility requirement;[8]
- the honest and lawful conduct of the host State as the administrator of the tender process; the compliance with its statutory and regulatory duties and obligations; assurance that the host State had obtained accurate information about the financial position of the investment and its prospects and taking decisions regarding the investment with the interests of future shareholders in mind;[9]

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[4] For example: *CME Czech Republic BV* v. *Czech Republic*, UNCITRAL, Final Award, 14 March 2003, para. 611; *Waste Management* v. *Mexico (No. 2)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paras. 98, 305; *Saluka* v. *Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras. 63, 164.

[5] *Waste Management* v. *Mexico (No. 2)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 305; *Saluka* v. *Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 525.

[6] *Waste Management* v. *Mexico (No. 2)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98. See also: *Biwater Gauff (Tanzania) Ltd.* v. *Tanzania,* ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 602.

[7] *Ansung Housing Co., Ltd.* v. *People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017, para. 96.

[8] *Eli Lilly and Company* v. *The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017, paras. 261, 380.

[9] *WNC Factoring Limited* v. *The Czech Republic*, PCA Case No. 2014–34, Award, 22 February 2017, para. 212.

- the lack of interference by the host State courts in the unanimous decision of the general shareholders meeting as to the personal changes in the management board[10];
- on a general level, the expectation that the host State regulatory system for the broadcasting industry would be consistent, transparent, fair, reasonable, and enforced without arbitrary or discriminatory decisions. On a more specific level, the expectation that a local radio station, which at the time was only a local station in the capital of the host State, would be allowed to expand on its own merits, in parallel with the growth of the private radio industry in the host State;[11]
- no changes to the currency convertibility regime of Argentina, so that free transfer would be maintained, existing dollar-denominated securities and deposits would not be compulsorily transformed into pesos at a below-market rate and their terms would be respected; there would be no interference in the bank deposits;[12]
- reasonable return on investment[13];
- feasibility of the investment in respect of localization[14];
- no interference with the contractual relationship between the investor and a local company[15];
- the enjoyment of an exclusive right to exploit a mine for an initial period of twenty years, which could be extended for two ten-year periods, if the investor fulfilled its contractual and regulatory obligations for the issuance of a permit[16];

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[10] *OAO*, para. 379.

[11] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 69.

[12] *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, paras. 251–252.

[13] *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. The Kingdom of Thailand,* UNCITRAL (formerly *Walter Bau AG (in liquidation) v. The Kingdom of Thailand*), Award, 1 July 2009, paras. 11.4, 12.1.

[14] *Ibid.*, para. 11.4.

[15] *Alpha Projektholding GmbH* v. *Ukraine*, ICSID Case No. ARB/07/16, Award, 8 February 2010, para. 422.

[16] *Crystallex International Corporation* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 502.

- the expectation that the process for the issuance of the environmental permit would be a technical process, i.e. the investor would be granted the permit if it fulfilled all of the technical requirements set out in the domestic framework and thus received approval for such technical requirements;[17]
- a secure legal framework to operate a duty free store in leased premises at an airport[18];
- an entitlement to open duty free stores at five named border locations and the cooperation of the host State in this regard;
- the compliance by the host State with a concession contract throughout the thirty-year life of the concession[19];

The instances of the (alleged) frustration of the legitimate expectations may be as follows:

- the radical departure from the consistent case law by domestic courts (patent law)[20];
- the presentation of false information regarding a viability and profitability of a company during the privatisation process, i.e. without providing bidders with warnings about the significant financial losses that were forecast in the company's project portfolio[21];
- the lack of possibility to open and operate the duty free shop in leased premises at an airport within secure legal framework.[22]

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[17] *Ibid*., para. 502.

[18] *Mr. Franck Charles Arif* v. *Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 541.

[19] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.* v. *Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 231. See: *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A.* v. *The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 30 July 2010.

[20] *Eli Lilly and Company* v. *The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017, paras. 314–337, 380, 389.

[21] *WNC Factoring Limited* v. *The Czech Republic*, PCA Case No. 2014–34, Award, 22 February 2017, para. 212.

[22] *Mr. Franck Charles Arif* v. *Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 547.

These examples show that expectation should be content-specific. It is the investor's reliance on a promise of a host State which may promote a decision to invest and proceed with the investment, which makes the expectation worthy of legal protection. Otherwise, the investor's expectations are only pure hopes not protected by an investment treaty. Therefore, this article will try to show that the conception of the protection of legitimate expectations consists of the following elements:

a. the specific representation or promise made by the host State;
b. the legitimacy, reasonability, and objectivity of expectations;
c. the reliance (trust) the investor had in representation made by the host State;
d. the substantive benefit received by the investor by way of representation or promise made by the host State.

Legal protection should be granted only if all above elements are fulfilled. Each of them will be dealt with below under the separate heading.

Against this background, the purpose of this contribution is to analyse the current elements of legitimate expectations in international investment law. To this end, this article explores the representation, promise, or commitments made by the host State to the investor that might create expectations (section 2). This is followed by a separate section devoted to the objectivity and reasonability of expectations. In section 4 this article describes the concept of reliance/trust the investor should have in the host State's representation. Section 5 provides an analysis of the substantial benefit. Finally, a set of concluding observations is presented in Section 6.

II. Representation or Promise Made by The Host State

The investor should cite specific representations made by the host State that would be capable of creating legitimate expectations. A legitimate expectation of an investor must have a solid basis. It may not simply reflect figments of the investor's imagination. Such a position is supported by plentiful arbitral jurisprudence. In particular, the *PSEG* v. *Turkey* tribunal declared that:

> "[l]egitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed."[23]

Likewise, in *Arif* v. *Ukraine* case the arbitral tribunal found that:

> "a claim based on legitimate expectations must proceed from the exact identification of the origin of the expectation alleged, so that its scope can be formulated with precision."[24]

The more specific the declaration to the investor, the more credible the claim that such an investor was entitled to rely on it for the future.[25] For instance, in *Tecmed* v. *Mexico*, the expectation were based on individualized communication (letters) and an agreement between the investor and Mexico.[26] In *MTD*, a private contract gave rise to expectations.[27]

It should be deemed uncontroversial that finding no specific representation or promise automatically and unconditionally amounts to a lack of legitimate expectations. For instance, the *Total* v. *Argentina* tribunal stated that the lack of specific assurances created no legitimate expectations:

> "[i]n the absence of some "promise" by the host State or a specific provision in the bilateral investment treaty itself, the legal regime in force in the host country at the time of making the investment is not automatically subject to a "guarantee" of stability merely because the host country entered into a bilateral investment treaty with the country of the foreign investor. The expectation of the investor is undoubtedly "legitimate", and hence subject to protection under the fair and equitable treatment clause, if the host State has explicitly assumed a specific legal obligation for the future, such as by

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[23] *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, para. 241.

[24] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 535.

[25] *Total S.A.* v. *The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 121.

[26] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003,, *passim*, in particular para. 36.

[27] *MTD Equity Sdn. Bhd. and MTD Chile S.A.* v. *Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, *passim*, in particular paras. 49–50.

> *contracts*, *concessions* or *stabilisation clauses* on which the investor is therefore entitled to rely as a matter of law …

Representations made by the host State are enforceable and justify the investor's reliance only when they are specifically addressed to a particular investor."[28] Such approach demanding the specificity of representation is also endorsed by eminent authors.[29]

To summarize this point, only specific representation is capable of creating legitimate expectations as it allows for the precise formulation of the scope of such expectations. Investment law jurisprudence generally demands that specific commitments are at stake, to wit, administrative or contractual undertakings directed at or agreed with the investor, on the basis of which and in reliance upon which the investor has actually made its investment. Therefore, any statements by an investor that "do not exhibit the level of specificity necessary to generate legitimate expectations"[30] do not substantiate its claim for frustration of its legitimate expectations.

Moreover, it is submitted that a specific representation or promise of the host State must fulfill additional criteria. An important element of such representation or promise is the legal intention of the host State to create a commitment that would subsequently form the essence of a legitimate expectation. A commitment would not be legally binding unless it is intended to have this effect. It is a very basic principle of international law and even a general conception of law that a valid assumption of legally binding commitment demands an intention to this effect. This basic principle comprises both unilateral acts such as promises and mutual undertakings such as contracts or agreements. In this regard, it needs to be observed that representations or promises of the host State

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[28] *Total S.A.* v. *The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, paras. 117, 119. *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 394.

[29] A. Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment* (2012), at 399.

[30] *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para. 468; see also: *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014, para. 193.

creating legitimate expectations should be regarded as unilateral acts of that State under international law and therefore the law of unilateral acts of States should be, *mutatis mutandis*, applicable to the representations and promises made by the host state vis-à-vis the investor. In one of the seminal cases, the ICJ observed that intention is a condition *sine qua non* for the creation of obligation. It reasoned that:

> "[w]hen it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration."[31]

The general rule would therefore appear to be that the creation of legitimate expectation by way of representation or promise made by the host State requires that State to have the intention to create a legally binding commitment vis-à-vis the investor. The Respondent notes that investment tribunals underscore this element.[32] They are also correct in stating that political or commercial declarations generate no legally binding commitments as there is no intention to this effect. In particular, the *Continental Casualty* v. *Argentina* tribunal admitted that "political statements have the least legal value, regrettably, but notoriously."[33] Also, any instruments such as leaflets, promotional presentations, and similar documents, as well as encouraging talks to prospective investors aiming at attracting investment cannot generate legitimate expectations.[34]

The findings of the Tribunal in *El Paso* v. *Argentina* provide valuable guidance. The host State sought to attract foreign investors and, to this end, it organised seminars and other promotional meetings ("road shows") in the United States, in Europe, and in South-East Asia. Potential investors were led to assume that prices would be determined by market

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[31] *Nuclear Tests (Australia* v. *France)*, para. 43; *Nuclear Tests (New Zealand* v. *France)*, Judgments, 20 December 1974, I.C.J. Reports 1974, para. 46.

[32] *Total S.A.* v. *The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 121.

[33] *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 261(i).

[34] *Charanne and Construction Investments v. Spain,* SCC Case No. V 062/2012, Award, 21 January 2016, paras. 95, 102, 496.

mechanisms and that costs and capacity payments would be denominated in dollars.[35] According to the claimant, road shows were organized to explain the main features of the energy regulatory framework and to give assurance to investors that their rights would be protected. It asserted that strong legal value should be attached to such unilateral declarations of Argentina, comparing them to those made by France in the *Nuclear Tests* cases.[36]

However, the tribunal disagreed with the claimant and observed that:

> "such political and commercial incitements cannot be equated with commitments capable of creating reasonable expectations protected by the international mechanism of the BIT."[37]

What is more, the *El Paso* v. *Argentina* tribunal considered the message of the President of the Republic made jointly with the Minister of Economy delivered at the National Congress regarding the Electricity Regulatory Framework Law. It was held that:

> "a declaration made by the President of the Republic clearly must be viewed by everyone as a political statement, and this Tribunal is aware, as is every individual, of the limited confidence that can be given to such political statements in all countries of the world. It might well be that these representations contributed to inducing potential investors to invest in the sectors concerned, as many of them – including El Paso – actually did. But it is one thing to be induced by political proposals to make an economic decision, and another thing to be able to rely on these proposals to claim legal guarantees."[38]

A maiori ad minus, if the Presidential message to the Congress is only a political statement not amounting to a legal representation, then also statements of ministers and under-secretaries during telephone call or on a meeting with an investor may not be equated to a representation capable of creating legally binding commitments.

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[35] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 84.

[36] *Ibid.*, paras. 390, 392.

[37] *Ibid.*, para. 392.

[38] *Ibid.*, paras. 393, 395.

In addition to the arguments set out above, a representation or promise, be it explicit or implicit,[39] must be unconditional, clear, and definitive. There is a wealth of authorities to confirm that criterion. In *Marvin Roy Feldman Karpa* v. *Mexico*, the tribunal opined that assurances should be "definitive, unambiguous, and repeated."[40] The *Mamidoil Jetoil Greek Petroleum Products* v. *Albania* tribunal also endorsed the view that "[a] representation, even by conduct, must therefore amount to a clear and identifiable commitment, which is attributable to the person who makes the representation, and which is reasonably conveyed to the addressee."[41] In the same vein, the *Total* v. *Argentina* tribunal held that "[n]o less relevant is the clarity with which the authorities have expressed their intention to bind themselves for the future."[42] Last, but not least, the *Crystallex* v. *Venezuela* tribunal observed that:

> "[t]o be able to give rise to .. legitimate expectations, [a] promise or representation – addressed to the individual investor – must be sufficiently specific, i.e. it must be precise as to its content and clear as to its form."[43]

Therefore, if statements of State officials are vague, ambiguous or, at best, imprecise, then they do not exhibit the necessary level of clarity in order to be regarded as representations capable of creating legitimate expectations. In such circumstances, the investor fails to demonstrate that the host State made identifiable representation that allows for the

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[39] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L.* v. *Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 669; *Parkerings-Compagniet AS* v. *Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 331; *Cargill, Incorporated* v. *United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 669.

[40] *Marvin Roy Feldman Karpa* v. *United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 148, referring to *Metalclad Corporation* v. *The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, paras. 28–41.

[41] *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, para. 643.

[42] *Total S.A.* v. *The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 121.

[43] *Crystallex International Corporation* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 547. See: *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, para. 152(3)(ii).

determination of a legally binding commitment. In this regard, the *Crystalex* v. *Venezuela* tribunal made again an apt remark, which warrants quoting them *in extenso*:

> "no legitimate expectations protected under the Treaty could arise from the statements as they are reported in the minutes of the National Assembly meeting held on 4 October 2007. According to these minutes, the only representative from the Ministry of Environment that participated in that meeting, its then Planning Director … merely "referred, in general, to environmental aspects. He also agreed with the matters related to the participation of Community Councils in the Projects to be developed". In the Tribunal's view, such vague statements do not meet the level of specificity required to create legitimate expectations which, if later frustrated, are relevant for a finding of an FET breach.[44]

Such statements resemble the facts in *White Industries* v. *India*, prompting the tribunal in that case to observe that:

> "[a]s regards White's alleged legitimate expectations based on the range of representations said to have been made to Mr Duncan (e.g., that it would be treated fairly, that India was a safe place to do business etc.), the Tribunal agrees with India that the alleged representations suffer from vagueness and generality, such that they are not capable of giving rise to reasonable legitimate expectations that are amenable to protection under the fair and equitable treatment standard."[45]

Certainly, the statements of the investors and their representatives should be of little or no relevance when they are not supported by any documents and statements of State officials. Thus, investor's statements that have been virtually unsupported by any official or non-official instruments should not amount to a representation or promise made by the host State. The bare statements of high-ranking investor's officials only, unaccompanied by any other evidence, cannot conclusively prove a representation or promise made by the host State. Evidence of a legally

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[44] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 555.

[45] *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011, para. 10.3.17.

binding representation or promise must be compelling. The establishment of a representation capable of generating a legal commitment vis-à-vis a foreign investor is a matter of grave importance and such representation is not easily to be presumed. Investment case law points to the conclusion only official documents such as letters, decisions, concessions, or contracts may account for a representation or promise which could create legitimate expectations.

Moreover, as in the *Cargill* v. *Poland* case,[46] the State officials' favourable attitude towards an investor's project usually does not meet the above threshold. Nor could a positive or friendly attitude expressed in informal conversations to encourage investor's plans create binding representation or promise by the host State. Likewise, neither a telephone/video call or a conversation on a conference between the investor and a State official can prove such representation or promise. These events should be treated at best as acts of courtesy and diplomacy at the very general level, and not as a legal commitment creating the host State's obligations. Such events are rather regarded as a business or political discussion held between the investor and a State official on the commercial and political side of investment. International investment law knows of no precedent in which a representation was made during a telephone call or at a business summit. Also, a meeting with a State official held to discuss possible plans to invest cannot be regarded as assurances as to positive outcome of, for instance, tax reduction or concession/license proceedings. If such evidence is presented by the investor, then as a matter of law a tribunal should state that it failed to prove the existence of representation made by the host State.

If, however, the investor presents official documents, as, for example, a letter from high-ranking State officials, then a careful examination must be placed as to the content of such documents. First of all, those documents should point to clear and unambiguous specific representation. If the document in question does not promise, for instance, a tax reduction or concession/license, but only discusses them, the investor may not rely on the letter to protect its expectation to be granted tax reduction

[46] *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, UNCITRAL, Award of 28 February 2008, paras. 486, 490.

or concession/license. A mere (full) support for investment plans of the investor or a distant and vague discussion of a tax reduction in a distant future are far from a representation capable of creating legitimate expectations.

To conclude, the facts of a given case must clearly indicate that there has been a representation or promise upon which legitimate expectations could be based. When there is no representation nor promise, then investor's expectations are not expectations at all; they are simple mere hopes or wishes generated by the investor alone.

III. Objectivity and Reasonability of Expectations

It is commonly accepted that only expectations that may be referred to as legitimate are protected by the fair and equitable treatment. Subjective hopes should not be covered by legal protection. At no point in time may they be classified as legitimate expectations. The question thus remains: what is the difference between legitimate expectations and subjective hopes.

International investment jurisprudence provides a plethora of cases in which tribunals have underscored the element of objectivity.[47] The *Saluka* v. *Czech Republic* tribunal, when discussing the concept of legitimate expectations, endorsed the view that „the scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations."[48] Similarly, as observed in *Arif* v. *Moldova*, "[w]here these expectations have an objective basis, and are not fanciful or the result of misplaced optimism, then they are described as 'legitimate expectations'."[49]

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[47] *Glamis Gold, Ltd.* v. *The United States of America*, UNCITRAL, Award, 9 June 2009, para. 627; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, para. 152(3)(ii); *Eli Lilly and Company* v. *The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017, para. 301; *EDF (Services) Limited* v. *Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 219.

[48] *Saluka* v. *Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 304.

[49] *Mr. Franck Charles Arif* v. *Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 532.

The tribunal in *El Paso v. Argentina* noted that "the notion of "legitimate expectations" is an objective concept, that it is the result of a balancing of interests and rights, and that it varies according to the context."[50] Finally, in *Charanne v. Spain,* it was observed that "a finding that there has been a violation of an investor's expectations must be based on an objective standard or analysis, as the mere subjective belief that could have had the investor at the moment of making of the investment is not sufficient."[51]

Having in mind the above case law, the following question should be posed: what would have been the legitimate and reasonable expectations of a reasonable investor, at the time it made its investment, in view of the investment's legal framework and bearing in mind host State's history and its political, economic, and social circumstances?[52] Any response must reflect the reality prevailing at the time the investment was made.

The first part of the answer to that question should be that only objective expectations may come within the scope of legitimate and reasonable expectations.[53] Such expectations should have contributed in a significant way to the investor's readiness to commit risk capital and effort.[54] Besides, the obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty, and not from any set of expectations investors may have or claim to have.[55] Therefore,

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[50] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award of 31 October 2011, para. 356.

[51] *Charanne and Construction Investments v. Spain,* SCC Case No. V 062/2012, Award of 21 January 2016,para. 395.

[52] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A.* v. *The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 228.

[53] *Metalclad Corporation* v. *The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 627; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, para. 152 (3) (ii); *Mr. Franck Charles Arif* v. *Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013; para. 532. See also the Canada's statement: *Eli Lilly and Company* v. *The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017, para. 301.

[54] *Separate Opinion of T. Wälde*, *International Thunderbird Gaming Corporation* v. *United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, para. 21.

[55] *MTD Equity Sdn. Bhd. and MTD Chile S.A.* v. *Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 67.

the subjective state of mind is not relevant.[56] If it were relevant, it would necessarily mean that the investor's legitimate expectation would be equal to its own understanding of the rights as they are protected on the basis of the contract governing its investment.[57] Therefore, the *EDF* v. *Romania* Tribunal aptly stated that: "legitimate expectations cannot be solely the subjective expectations of the investor. They must be examined as the expectations at the time the investment is made, as they maybe deduced from all the circumstances of the case, due regard being paid to the host State's power to regulate its economic life in the public interest."[58] Thus, objective expectations can be deduced from the circumstances and with due regard to the rights of the State[59] and, in particular, the right to regulate. Taking all those observations into consideration, another tribunal felt obliged to state that:

> [h]owever, in keeping with the BITs' basic goal of fostering economic cooperation and prosperity, one must not look single-mindedly at the Claimants' subjective expectations. The Tribunal must rather examine them from an objective and reasonable point of view. It must ask a fundamental

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[56] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A.* v. *The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 30 July 2010, para. 228. See also: *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 356: „[T]he notion of "legitimate expectations" is an objective concept, that it is the result of a balancing of interests and rights, and that it varies according to the context." *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Award, 21 January 2016, para. 395: „[a] finding that there has been a violation of investor's expectations must be based on an objective standard or analysis, as the mere subjective belief that the investor could have had at the moment of making of the investment is not sufficient." *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L.* v. *Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 671: „[t]hat is not to say that a subjective expectation will suffice; that subjective expectation must also have been objectively reasonable."

[57] Por. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, para. 616. The tribunal further added that: "this is not what corresponds to the meaning and the scope of protection of a fair and equitable treatment clause."

[58] *EDF (Services) Limited* v. *Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 219.

[59] See: *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 358.

> question: What would have been the legitimate and reasonable expectations of a reasonable investor in the position of the Claimants, at the time they made their investment in 1993, about a proposed water and sewage concession investment that was to continue over a period of thirty years in Argentina, in view of the concession's legal framework and bearing in mind that country's history and its political, economic, and social circumstances?[60]

Therefore, a violation can be found even if there is a mere objective disregard of the rights enjoyed by the investor under the FET standard, and even if such a violation does not require bad faith on the part of the State.[61] The effective fulfillment of the expectations is thus relevant and not a mere intention to pursue them. The above case law also indirectly indicates that the casual relationship must be proved between the State conduct and the expectations derived therefrom on the one side, and the investment made in the host State on the other.

IV. Reliance (Trust) The Investor Had in Representation Made by The Host State

In addition to the above, it is well-established in investment case law that the investor must act in reliance (trust) upon a representation or promise of the host State in order to derive the legitimate expectations. For instance, the *Merril and Ring Forestry* v. *Canada* tribunal stated that "for [legitimate] expectation to give rise to actionable rights requires there to have been some form of representation by the state and reliance by an investor on that representation in making a business decision."[62] In other words, the decision to invest was the trust-inspiring action stimulated by the conduct of the host State.

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[60] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A.* v. *The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 30 July 2010, para. 228.

[61] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 357.

[62] *Merrill and Ring Forestry L.P. v. Canada,* ICSID Case No. UNCT/07/1, Award, 31 March 2010, para. 151.

For example, the *Metalclad* tribunal came to the conclusion that the investor had been entitled to rely on the representations of federal officials and to believe that it was entitled to continue its construction of the landfill.[63] In *Thunderbird* v. *Mexico*, the tribunal decided that the conception of legitimate expectations relates: "to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages."[64] The act of reliance was expressly underlined by the *Suez/Vivendi* tribunal which stated that:

> investors, deriving their expectations from the laws and regulations adopted by the host country, *acted in reliance upon those laws and regulations and changed their economic position as a result*. Thus it was not the investor's legitimate expectations alone that led tribunals to find a denial of fair and equitable treatment. It was the existence of such expectations created by host country laws, coupled with the act of investing their capital in reliance on them, and a subsequent, sudden change in those laws that led to a determination that the host country had not treated the investors fair and equitably … In view of the central role that the Concession Contract and legal framework placed in establishing the Concession and the care and attention that Argentina devoted to the creation of that framework, the Claimants' expectations that Argentina would respect the Concession Contract throughout the thirty-year life of the Concession was legitimate, reasonable, and justified. It was in reliance on that legal framework that the Claimants invested substantial funds in Argentina.[65]

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[63] *Metalclad Corporation* v. *The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 89. Zob. również: *CME Czech Republic BV* v. *Czech Republic*, UNCITRAL, Final Award, 14 March 2003, para. 611; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 260; *Total S.A.* v. *The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 118, 310; *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L.* v. *Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 672.

[64] *International Thunderbird Gaming Corporation* v. *United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, para. 147.

[65] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.* v. *Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, paras. 226, 231 [italics in the original].

In another case, arbitrators noted that, in order for legitimate expectations to give rise to actionable rights, there had to have been some form of representation by the State and reliance by an investor on that representation in making a business decision.[66] Equally, various benches of arbitrators in the *Waste Management* v. *Mexico*, *LG&E* v. *Argentina* and *Duke* v. *Ecuador* made similar statements, adding that the investor must have reasonably relied on the conduct of the host State.[67] Certain tribunals decided to underscore the element of reliance/trust when a host State frustrated legitimate expectations to indicate that the element of reliance/trust is necessary to the determination of a FET breach. Hence, the *CME* v. *Czech Republic* tribunal opined that:

> [t]he Media Council breached its obligation of fair and equitable treatment by evisceration of the arrangements *in reliance upon* which the foreign investor was induced to invest.[68]

There is no investment protection when the investor fails to prove that it relied on any representation whatsoever allegedly made by the host State. Especially, the investor should explain how it "relied" on the host State's representation and how "the act of reliance" appeared when the investment was decided on. Influence and encouragement by State officials are not equal to a legal concept of reliance inherent in the notion of legitimate expectations. Also, it is not possible to speak of legitimate

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[66] *Merrill & Ring Forestry L.P.* v. *The Government of Canada*, UNCITRAL, ICSID Administered Case, Award, 31 March 2010, para. 150.

[67] *Waste Management* v. *Mexico (No. 2)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 128. „Similarly, the tribunal in *Waste Management, Inc. v. The United Mexican States,* interpreting the fair and equitable treatment standard under NAFTA Article 1105(1) concluded that in applying the fair and equitable treatment standard, "it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."" *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 340. „In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have *relied upon* them when deciding to invest."

[68] *CME Czech Republic BV* v. *Czech Republic*, UNCITRAL, Final Award, 14 March 2003, para. 611.

expectations, when there was no specific representation or promise by the host State.

While this point is rather obvious and is not subject to any polemics, there are other *obiter dicta* that seem to be controversial, for certain investment tribunals accept that the awareness element must also be proved by the investor when referring to the reliance element. In this vein, the *Urbaser* v. *Argentina* tribunal stated that:

> [w]hen the host State's representatives *were aware or must have been aware* that certain specific commitments or guarantees were decisive for the investor's decision to proceed with the investment, the disregard or violation of such undertakings are generally to be considered as triggering the State's responsibility under the fair and equitable treatment standard[69].

The awareness as a crucial criterion for issuing specific commitments was for *Urbraser* v. *Argentina* tribunal a necessary element required for ascertaining the FET breach and, consequently, for granting protection to the investor's legitimate expectations. Perhaps the arbitrators were inspired by the recent *Nuclear Zero* case adjudicated by the International Court of Justice, in which the Court recognized that "a legal dispute exists, when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were "positively opposed" by the applicant."[70]

It is particularly difficult to accept such line of reasoning. First, it seems as if the *Urbraser* v. *Argentina* tribunal were introducing the element of fault into the construction of an internationally wrongful act in international investment law. Second, it raises particularly high the evidence threshold. Third, the host State may always plead that its State official was not aware of issuing specific commitments to the investor and may thus avoid the responsibility. Fourth, the role of investment tribunal

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[69] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, para. 627.

[70] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India) (Marshall Islands* v. *Pakistan) (Marshall Islands* v. *United Kingdom)*, Judgments, 5 October 2016, I.C.J. Reports 2016, para. 41 (*Marshall Islands* v. *United Kingdom*). See: M. Kałduński, *Pojęcie sporu prawnego w prawie międzynarodowym. Uwagi na tle sprawy Wysp Marshalla przeciwko niektórym potęgom jądrowym*, PWPMEP 2017, vol. XV, at 7–28.

is certainly not to analyse the subjective and psychological processes of host States, their organs, and officials. Fifth, legitimate expectations must be objective, whereas the above decision suggests otherwise. In this regard, both the investor and the host State should be equally treated without burdening one or the other with a greater evidence threshold.

The *Urbraser* v. *Argentina* case might be opposed to the *Qatar* v. *Bahrain* case decided by the ICJ in 1994, where the jurisdiction of the Court was one of the issues under consideration. Bahrain argued that the signatories to the Protocol never intended to conclude an international agreement. Bahrain submitted a statement made by the Foreign Minister of Bahrain and dated 21 May 1992, in which he stated that "at no time did I consider that in signing the Minutes I was committing Bahrain to a legally binding agreement". The Minister further indicated that he would not have been permitted to sign an international agreement taking effect at the time of the signature owing to the Bahrain constitutional provisions. More importantly, he was aware of that situation, and was prepared to subscribe to a statement recording a political understanding, but not to sign a legally binding agreement.[71]

The ICJ rejected the above argument and stated as follows:

> [t]he Court does not find it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain or, for that matter, those of the Foreign Minister of Qatar. The two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister of Bahrain is not in a position subsequently to say that he intended to subscribe only to a "statement recording a political understanding", and not to an international agreement[72].

Accordingly, the inner intentions of a State official are not relevant for ascertaining the existence of legally binding agreement. By the same token, the subjective element should not be required in cases of legitimate expectations based upon the representation made by the host State vis-à-vis the investor. The exigencies of the conduct of State official are what

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[71] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)*, Judgment of 1 July 1994, I.C.J. Reports 1994, para. 26.

[72] *Ibid*., par. 27.

matter only when the reliance act of the investor is examined for the determination of its alleged legitimate expectations.

V. Substantive Benefit Received by The Investor by Way of Representation or Promise Made by The Host State

The last element poses no particular difficulties. Not only must a specific representation be capable of creating a legitimate expectation, but also such representation must bring about substantial benefit to the investor. This point was raised and subsequently accepted by the tribunal in *Crystallex* v. *Venezuela*:

> [a] legitimate expectation may arise in cases where the Administration has made a promise or representation to an investor as to *a substantive benefit*, on which the investor has relied in making its investment, and which later was frustrated by the conduct of the Administration."[73]

The element of substantive benefit must be capable of precise identification and cannot remain unidentifiable. Such identification should be made on the basis of the conduct of State organs. The examples of substantive benefit include the granting of a concession/license or an administrative decision sought by the investor, the introduction of a tax reduction or its abolishment, the extension of permission to conduct certain economic activity etc.

VI. Concluding remarks

This article has examined the proposition that the protection of legitimate expectations is based on the representation made by the host State to the investor when acted on in reliance on that representation in an objective way. As it turns out, international investment case law virtually supports and distinguishes certain basic features of legitimate expectations.

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[73] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 547 [emphasis added].

The examination of those cases primarily shows that the protection of legitimate expectations in investment law consists of certain basic elements that must be cumulatively met in order to create legitimate expectations. What is striking, is that these elements resemble the creation of international obligations between States under international law. This is so because:

1. there must be a representation or promise made by the host State;
2. the expectation must be objective and reasonable in order to be labeled as legitimate;
3. the investor must rely (trust) in the representation made by the host State;
4. a substantive benefit must be received by the investor by way of representation or promise made by the host State.

Additionally, the investor should act in good faith in order to claim the protection of its expectations.

To recapitulate, the protection of legitimate expectation in international investment law forms a dominant part of the fair and equitable treatment standard. However, the threshold is relatively high for the investor to successfully defend its claim for legitimate expectations. In particular, the determination of representation and the objectivity of expectations remain of crucial importance. These elements might be most difficult to prove as it largely depends upon the circumstances of a given case (while the host State and its officials might be unwilling to testify otherwise!). The host State may defend itself in a number of ways, but when a promise had been given and when an act of reliance had occurred, the balance tilts against the host State which may bear serious consequences for changes in its decisions that inflict harm on the investment by frustrating its expectations. Therefore, one point is clearly visible: the concept of legitimate expectation protects the investor against unexpected and unwelcomed changes in State's policy and decisions and, as well, ensures the legal stability and security of the investment.

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REVOLUTION OR EVOLUTION? CHALLENGES POSED BY AUTONOMOUS VESSELS FOR THE NATIONAL AND INTERNATIONAL LEGAL FRAMEWORK***

Abstract

The emergence of autonomous vessels raises considerable challenges from the legal perspective. Questions relate, inter alia, to their status (whether they can in fact be considered as a vessels), the possibility of their registration under respective flags, and the fulfillment of the requirements posed by international maritime law. This article commences with a short presentation of the current technological development of autonomous vessels. It discusses terminology issues, commenting on the assessments made on the International Maritime Organization's forum. It continues with an attempt

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to accommodate autonomous vessels under the current legislative landscape, providing an analysis of chosen national laws as well as the international conventions.

Keywords

autonomous vessels – maritime law – UNCLOS – maritime code – international conventions

I. Introduction

It is the subject of autonomous vessels that has recently dominated maritime law doctrine. There have been multiple conferences and even more papers relating to the prospect of unmanned shipping. Why has that topic raised so much activity? Our answer to that question is the challenges it bears for maritime law, which is traditional in its nature.

Since the dawn of time, man has been navigating, first on rivers and then at sea, near coasts and then transoceanically. The interest in safe navigation was due to the growing importance of sea trade in the economies of ancient empires. This economic aspect set the direction of maritime law development for many millennia. The merchant's axiology and profit have become a determinant of the evolution of maritime law institutions since the earliest times and have led to the fact that the ship's safety issues have turned out to be, in a sense, a tool for economic goals, not the main purpose of maritime law.

The traditionality of maritime law is understandable if you realize that – contrary to other modes of transportation – when the XIXth century technological revolution arrived – private maritime law rules had already been developed[1]. On the other hand, public law norms are more dynamic. We have witnessed the explosion of maritime safety and security, as well as environmental protection norms in the XXth century and nowadays the volume of maritime public law norms exceeds private maritime law regulations[2]. Examples of maritime law resistance to changes can be seen

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[1] J. Łopuski, *Maritime law in the second half of the 20th century*, Toruń: Wydawnictwo Naukowe UMK, 2008, p. 323.

[2] J. Łopuski, *Tradycja i nowoczesność: czynniki wpływające na kształt współczesnego prawa morskiego* (*Tradition and modernity: factors influencing the shape of current maritime law*),

for instance in the institution of limitation of liability. Nowadays it lacks moral justification. One of the underlying reasons for the institution of limitation of liability is that there is no actual control by the shipowner or ship operator over the vessel. Today however, this is no longer true. Thus, risks borne by parties involved in maritime carriage are not so different in kind from risks borne by parties in other modes of transportation and there is no special need for the preferential position of the former. Obviously, the firm position of the traditional institutions of maritime law is due to the strong interests of the shipping world supporting them. However unsuccessful attempts to change the normative reality of maritime regulation, as happened in the case of the Rotterdam Rules, indicate how difficult it is to change the legislative landscape of the maritime world and how maritime law may struggle to adapt its settled rules to challenges posed by autonomous vessels. Nevertheless, one thing has not changed – owing to the international character of shipping, new rules need to obtain an international acceptance.

II. Autonomous ships: future or present?

Whether autonomous ships become common reality depends on economic calculation[3]. It appears that they have a potential to be profitable, although, initially new technology will be quite expensive. There are potentially several savings that ought to be reconsidered, not limited merely to crew wages. As there is no need for bridge, deck house, crew quarters, ventilation, heating, or sewage systems, more space is opened for additional cargo. Moreover, vessels will be lighter and more aerodynamic which will impact their fuel consumption and make them more environmentally friendly. Additionally, they are thought to be more

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[in:] A. Nowicka, M. Kępiński (eds), *Prawo prywatne czasu przemian: księga pamiątkowa dedykowana profesorowi Stanisławowi Sołtysińskiemu* (*Private law of the time of change: essays in honour of professor Stanisław Sołtysiński*), Poznań: Wydawnictwo Naukowe UAM, 2005, p. 976.

[3] R. Veal, M. Tsimplis, *The integration of unmanned ships into the lex maritima*, "Lloyd's Maritime and Commercial Law Quarterly", 2017, p. 303.

pirate-resistant with no crew or fewer crew on board and a design which will make boarding more difficult than in the case of conventional vessels[4]. Finally, it may be expected that unmanned ships will be involved in fewer accidents as the statistics show that from 75% to 96% of marine accidents can be attributed to human error[5]. As nowadays collecting good crew is a difficult task, unmanned vessels seem to be an interesting alternative[6]. The above indicates that autonomous ships have a lot of benefits and they have the ability to revolutionize shipping as we know it. Paul Pritchett claims that this new technology has the potential to change the maritime landscape like no other advancement since the first engine was placed in a vessel[7]. What is more, that revolution seems to be just around the corner. In early December 2018 Finland Rolls-Royce together with Finferries performed the first autonomous voyage of the Falco ship in the Turku archipelago. Falco, with no crew on board, used sensors and artificial intelligence for collision avoidance, as well as an autonomous navigation system[8]. In Norway, the container ship, Yara Birkeland[9], is expected to be launched in 2020, reaching full autonomy gradually in 2022[10]. Both in Norway and Finland, there exist test areas for autonomous and unmanned ships. Also, in other parts of the world,

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[4] P.W. Pritchett, *Ghost Ships: Why the Law Should Embrace Unmanned Vessel Technology*, "Tulane Maritime Law Journal" vol. 40:197, 2015, p. 210; F. Cain, M. Turner, *Autonomous ships: are we ready?*, "Maritime Risk International", 14 May 2018.

[5] Allianz Global Corporate & Speciality, *Safety and shipping. 1912–2012. From Titanic to Costa Concordia. An insurer's perspective from Allianz Global Corporate & Speciality*, 2012, p. 7, available at: https://www.agcs.allianz.com/content/dam/onemarketing/agcs/agcs/reports/AGCS-Safety-Shipping-Review-2012.pdf [last accessed 1.07.2019].

[6] M. Chwedczuk, *Analysis of the Legal Status of Unmanned Commercial Vessels in U.S. Admiralty and Maritime Law*, "Journal of Maritime Law and Commerce", vol. 47 no 2, 2016, p. 124.

[7] Pritchett, supra note 4 at p. 199.

[8] Finferries, *Finferries' Falco world's first fully autonomous ferry*, 2018, available at: https://www.finferries.fi/en/news/press-releases/finferries-falco-worlds-first-fully-autonomous-ferry.html [last accessed 1.07.2019].

[9] The ship will operate within Norway's territory, thus it is designed for a cabotage purposes. As a consequence Yara Birkeland will operate within the limits of the national jurisdiction.

[10] Yara, *Yara Birkeland press kit*, 2018, available at: https://www.yara.com/news-and-media/press-kits/yara-birkeland-press-kit/ [last accessed 1.07.2019].

autonomous ships technology is being developed. Advanced projects are being proceeded with in China (also accompanied by a "test field" for first operations). The Japanese shipping company, NYK Line plans a demonstration of remote-controlled a vessel across the Pacific in late 2019. The Korean companies – Samsung and Huyndai – are developing smart ships' operation systems[11].

III. Terminology

Preliminary deliberations ought to start with the definition of the concept of an autonomous vessel. Specifying its characteristics allows for verification as to whether it can be assimilated with conventional vessels or does it constitute another category of navigable objects. The terminology may be confusing. There are multiple proposals on the classification of different types of autonomous vessels. Recently, the International Maritime Organization (IMO) has taken up the issue of autonomous technology on its agenda. This should not be surprising, as the IMO's task is to enable the advancement of shipping while addressing challenges of developments in technology and world trade. In 2018 the Maritime Safety Committee (MSC) commenced its regulatory scoping exercise to consider the suitability of extant IMO instruments for remotely controlled and autonomous ships, aiming at – inter alia – providing uniformity in the understanding of the important concepts[12]. The scoping study aims at the identification of current provisions in certain IMO conventions and the assessment of their application to autonomous ships[13]. As a second step an analysis will be conducted to determine the most appropriate way to address the operation of the autonomous vessels. A general term has been proposed to encompass all types of ships which, to a varying degree, can operate independently of human interaction – MASS standing for Maritime Autonomous Surface Ships. As it follows, the above definition is quite general. Behind the idea of taking such a general definition

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[11] Cain & Turner, supra note 4.

[12] R. Veal, *Unmanned ships on the IMO work agenda,* "Lloyd's Shipping & Trade Law" vol. 17 no. 5, 2017.

[13] *IMO moves on autonomous vessel*, "Maritime Risk International", 20 July 2018.

an assumption stands of taking under consideration a broad variety of possible technological solutions. Attached to it are four degrees of autonomy that are included under the MASS term:

I. *A ship with automated processes and decision support*. Seafarers are on board to operate and control systems and functions. Some operations may be automated.
II. *A remotely controlled ship with seafarers on board*. The ship is controlled and operated from another location, but seafarers are on board.
III. *A remotely controlled ship without seafarers on board*. The ship is controlled and operated from another location. There are no seafarers on board.
IV. *A fully autonomous ship*. The operating system of the ship is able to make decisions and determine actions by itself[14].

As that broad definition of MASS is acceptable for the purpose of the scoping study, the cautious categorization has already raised considerable concerns[15]. This April, France and Finland issued a document[16] in which they alerted the MSC to mistakes inherent in the proposed categorization. They claim, *inter alia*, that the adjective "autonomous" – as included in MASS – ought to be reserved for degree 4 only (a fully autonomous ship). Indeed, looking closely we may see a different level of control over the vessel in the cases of degrees 1 to 3 (on board or being remotely controlled). Thus, France and Finland propose to use "automated" in the general definition, instead of autonomous. Also, a reasonable argument is given by R. Veal who notes that the difference between degree 2 and 3 may be illusory, as it all depends on the role of seafarers on board the ship as their mere presence without any possibility of influencing the operation of the ship does not render them less autonomous[17]. Moreover, one should realize that technology might develop so as to allow hybrid versions of

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[14] MSC 100/20/Add.1, 12 December 2018, Annex 2, p. 1.

[15] H. Ringbom, *Regulating Autonomous Ships – Concepts, Challenges and Precedents*, "Ocean Development & International Law" vol. 50, Issue 2–3, 2019, p. 149; R. Veal, *Maritime Autonomous Surface Ships: autonomy, manning and the IMO*, "Lloyds' Shipping and Trade Law", vol. 18 no. 5, 2018, p. 1.

[16] MSC 101/5/4, 2 April 2019.

[17] Veal, supra note 14 at p. 2.

the above categories, for example degree 4 "a fully autonomous" vessel changing into degree 3 – remotely controlled vessel – when difficulties at sea arise. Having made these observations, we will continue to use the term "autonomous vessel" as a general category in this paper and specifically relate to remotely controlled or fully autonomous vessel if necessary, for further deliberations.

IV. Accommodation of autonomous vessels under the current legislative landscape

The ship continued to be the key focus of maritime law, being a specific link between civil (commercial) maritime law and much more recent public maritime law. Therefore, traditionally the sea itself was not the subject of maritime law regulation; it was the ship as a tool for navigation. The sea, as a subject of the legal regulations, appears for the first time in an area that we define as the Law of the Sea being part of public international law. The birth of the Law of the Sea should be dated to the seventeenth century, when the issues of state power and freedom of navigation became the subject of regulations and legal treatises. Until then, however, the common maritime law was a kind of *ius gentium,* the law of the seas, which, because of its similarities, was common to all the people of the sea. It was not until the eighteenth and nineteenth centuries that these common sea customs, similar in their foundations, lost their significance. Thus, as a first step of analysis devoted to autonomous shipping one should concentrate upon the concept of a ship as well as the legality of autonomous shipping in the area of the law of the sea.

Whether autonomous ships may sail through the seas depends on their legal qualification and, following that, their fulfilment of the requirements presented by the law to that kind of crafts. UN Convention on the Law of the Sea (UNCLOS) does not contain a definition of a ship (in fact, the terms "vessel" and "ship" are used interchangeably in the convention).

It does however oblige States to determine conditions for registration of such a ship under their respective laws and demands the existence of a genuine link between State and the ship. Most problematic from the perspective of autonomous ships are the manning requirements.

UNCLOS provisions[18] 4b that refer to the manning of a vessel do not make it an absolute condition, as long as safety at seas is guaranteed. It might be more difficult to assess the suitability of autonomous vessels to the requirement of rendering assistance of UNCLOS article 98(1)(a). It is difficult to establish now, how the technology of autonomous ships will develop and whether it will be possible for such ships to render assistance. However, also that provision is conditional – requiring assistance from the master as long as he can do so without seriously endangering the ship and only as far as it can be reasonably expected form him. There is a broad consensus that it is crucial to make sure that the duty to assist people in distress is applied also to unmanned ships. Under the Polish legal system, no vessels are discharged from providing the assistance to people in distress. However, the scope of assistance depends of circumstances as well as the risk that the assistance might cause for the vessel itself. That could be applied also to a special nature of unmanned ships and possibly reduce the scope of assistance, however, as was emphasized above, an unmanned vessel should be obliged to provide assistance.

Since UNCLOS referred qualification of a vessel to national law it is necessary to investigate whether under national legislation any restrictions exist that could potentially preclude registration of autonomous vessels[19]. It follows from the answers to the questionnaire of the Comité Maritime Internationale (CMI), attached to an MSC document, that out of 19 responses by national maritime law associations, none undermined the status of autonomous vessels as ships under respective national law[20]. However, a number of associations raised concerns as to the possibility of registration of such ship under their laws. As in some instances registration is dependent on accordance with maritime safety norms, concerns were expressed as to possibility of registration. Answering whether a remote controller or pre-programmer of an autonomous ship

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[18] Art. 94(3) and 94(4)(b) and (c).

[19] R. Veal, M. Tsimplis, A. Serdy, A. Ntovas, S. Quinn, *Liability for operations in Unmanned Maritime Vehicles with Differing Levels of Autonomy*, available at: https://www.academia.edu/38566149/Project_title_Liability_for_operations_in_Unmanned_Maritime_Vehicles_with_Differing_Levels_of_Autonomy_Deliverable_Final_Report, p. 13 [last accessed 10.07.2019].

[20] MSC 99/INF.8 13 February 2018, Annex 1, p. 1.

(or other designated person not immediately involved with the operation of the ship) could be assimilated into the notion of a master under national laws, maritime law associations also were divided, noting often that the national definition of a shipmaster requires his presence on board of the ship. It is also suggested that a potential inconsistency between domestic requirements flows from the UNCLOS article 94 provision on manning and the operation of unmanned vessel can be resolved through measures adopted by the IMO as the article 94 of UNCLOS establishes a general obligation aimed at avoiding conflicts between international and national legislations, while the precise safety (including manning) standards are to be developed by instruments adopted by the IMO. Such an interpretation seems to be justifiable in the light of article 94(5) of UNCLOS according to which States are obliged to conform to generally accepted international regulations, procedures and practices.

Against that background, the Polish Maritime Code of 2001[21] also adopts a definition wide enough to encompass autonomous ships. Its article 2 contains a definition of a seagoing ship, which is defined as any floating structure appropriated for or used in, maritime shipping. The above definition indicates that it is enough for the floating structure to fulfil one of the mentioned prerequisites to be qualified as a ship. Qualification therefore depends either on the intention and will of the ship's operator to exploit a ship on the sea or on the fact that a ship is used in such way. It does not mention manning or other requirements that would render autonomous vessels not ships under the Polish Maritime Code. Nor does the Code (or its executive acts) require any information on the crew on board a vessel for the registration under the Polish flag. Similarly, a project of a new Polish Maritime Code, delivered by the Codification Commission for Maritime Law to the proper Ministry in 2017 does not preclude autonomous vessels.

There is however a number of provisions that would require modification. For example, the Polish Maritime Code requires keeping documentation of the ship on board. That norm, if interpreted literally, is difficult to obey in the case of autonomous vessels. On a different

[21] Act of 18 September 2001 Kodeks morski (Maritime code) (Consolidated text in Polish O.J. 2018 item 2175).

note, a proposal for a new maritime code prepared by the Codification Commission for Maritime Law mitigates that obligation, providing that this requirement may be waived by specific provisions and thus seems be better equipped for the emergence of autonomous vessels. It is proposed that a remote controller might be identified with a shipmaster and thus, national norms regulating the role of a shipmaster ought to be applied to a remote controller, who – being in a controlling centre instead on board a vessel – controls the navigation of a ship. However, currently the Polish norms on the shipmaster could not be applicable to a remote controller and their modification would be required. Article 58 of the Polish Maritime Code of 2001 prohibits the shipmaster from leaving a ship which is at sea, with the exclusion of moments when the ship is on the roadstead. There is no possibility of interpreting that norm as applicable to a controlling centre on land from where the controller operates the ship remotely. Moreover the ability of a remote controller to fulfil the master's obligation to render assistance to any person found in danger at sea is uncertain. This obligation is an individual obligation of a shipmaster and as such it seems to be pertinent for him. At the moment it is unclear how the technology will develop to allow a remote controller to render such assistance. Even more so, if we analyse a fully autonomous vessel navigating by means of the operational system, neither the pre-programmer of the vessel, nor any other designated person could be recognized under Polish law as a master. The norms of the Polish Maritime Code on the position of a shipmaster – drafted in mind for conventional master – express the idea that a shipmaster is personally involved in the navigation of the vessel. Moreover, it is unlikely that other remote controllers could constitute a crew under the Polish legal system, which stipulates that a crew consists of mariners who are employed "on the ship"[22].That wording prevails in acts regulating the employment and qualification of the crew and thus, excludes remote controllers from the ambit of a crew as understood in Polish law.

It follows from the above that generally national laws are ready to accommodate an autonomous vessel under the idea of a ship. However,

[22] Act of 5 August 2018 o pracy na morzu (on labour at sea) (Consolidated text in Polish O.J. 2018 item 616).

often national laws have to be amended to allow for the registration of such vessels. Also, applying national norms of a shipmaster to a remote controller, or – even more so – to a pre-programmer of a vessel would be impossible without changes.

Assuming that autonomous vessels are eligible for registration, to be able to navigate internationally they ought to fulfil legal requirements designed for ships[23]. One of the issues that needs clarification is whether the national laws implementing the safe manning requirement established under the International Convention for the Safety of Life at the Sea (SOLAS) can be interpreted as satisfying the international safety standards in respect of unmanned ships, if the equal level of safety is ensured. According to the answers given by the national maritime associations collected by the CMI, most of the domestic legal orders are oriented towards onboard crew. However, the opinion that it may be possible for a national authority to allow unmanned operations prevails in most of the States. Nevertheless, it is crucial to notice that SOLAS safety requirements are premised on personnel manning the bridge[24]. As a consequence, the solutions adopted for an autonomous vessel require minor changes for ships operated by a reduced crew or operated from the shore, while the operation of fully autonomous vessel would demand significant changes. Under Polish law two legal acts regulate the issue of safe manning requirements: the Polish Maritime Safety Act 2012[25] and the Regulation on the proper manning of a ship of 2015[26]. None of the mentioned acts, precisely describe the exactly number of crew required on board. The Maritime Safety Act refers to the requirements set in chapter V SOLAS (in relation to proper manning) and the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers (STCW). According to articles 61 and 62 of the Maritime Safety Act, a ship

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[23] Veal & Tsimplis, supra note 3 at p. 314.

[24] A. Chircop, *Testing International Legal Regimes: The Advent of Automated Commercial Vessels*, "German Yearbook of International Law", vol. 60, 2017, p. 130.

[25] Act of 18 August 2011 o bezpieczeństwie morskim (on maritime safety) (Consolidated text in Polish O.J. 2019 item 1452).

[26] Regulation of the Ministry of Maritime Economy and Inland Navigation of 9 December 2015 w sprawie bezpiecznej obsługi statku (on proper manning on ship) (Polish O.J. 2015 item 2104).

is not allowed to operate if it is not properly manned. However, the Act refers to SOLAS, STCW, STWC – F and the Maritime Labour Convention (MLC). Thus, in the case of working out an international compromise, it is possible that the Polish courts would follow the internationally harmonized interpretation. Also, it should be noted that according to article 80 of the Maritime Safety Act and the Regulation on proper manning, the director of the Maritime Office (which is a first instance of the Polish maritime administration) is obliged to take into account the level of automatization of a ship, while determining the composition of the crew. This also obviously refers to SOLAS. Nevertheless, it seems not possible to interpret the mentioned authority as applying to unmanned ships.

As to the requirement referring to the presence of the crew on the bridge under the regulation 15 of chapter V SOLAS and the watchkeeping duty under part 4 of Section A-VIII/2 STCW, the question arises whether the remote control of ship's operation would satisfy the mentioned requirements by using the equivalent shore-based facility with a visual and aural stream of the ship's vicinity. In other words, one of the questions that requires clarification is whether the shore-based bridge can be assumed as a "bridge" under SOLAS. The opinion among States is varied and often self-contradictory. National provisions that require the physical presence of the shipmaster as well as the literal "onboard bridge" are indicated as denying such a possibility. Nevertheless, there are also opinions that the developments of the remote-controlled tasks of ship's daily operation require a new interpretation of the traditional rules and in the case of the functional equivalency of the shore base bridge, the relevant requirements of SOLAS can be assumed as satisfied[27].

It should be noted that chapter V of SOLAS, regulation 3(2) grants relevant national maritime authorities the ability to prescribe exemptions from and equivalence to the standards established in chapter V, as long as their introduction is not "unreasonable or unnecessary". Polish law does not precisely regulate the issue of "equivalent means". As the Maritime Safety Act refers to SOLAS, the Polish legal system would follow the changes or uniform interpretations adopted under international law. If

[27] Veal & Tsimplis, supra note 3 at p. 321.

a more precise compromise in relation to „equivalent safety means" were to be adopted and full technological equivalency were achieved, it seems that there would be no obstacles under Polish law to considering them as satisfying regulation 15 of chapter V SOLAS. It should be emphasized that in reference to "functional" or "equivalent" means, the new risk-based approach adopted by the IMO within the goal-based standards of safety offers space for the adaptation of the current safety regime to new technological solutions[28].

Similar difficulties also arise in reference to the STCW requirements of watchkeeping, according to which officers ought to be physically present on the bridge and engine room control room. As the STCW applies to seafarers serving on board of seagoing ships, it seems not possible to apply conventional rules to the personnel on shore or personnel responsible for remote control. The Polish Maritime Safety Act, implementing STCW, requires the physical presence of the watchkeeping officers on the bridge. In the Authors' opinion the similarities between watchkeeping duty in case of poor visibility and the activities of the remote controller on shore are not enough to satisfy the requirements of Part 4 of Section A-VIII/2. The situation would be interpreted differently in a case of reduced manning according to the IMO categories of MASS 1 and 2. According to Polish law, it is possible to reduce the number of the crew adequately to the level of the ship's automatization (article 80 of the Maritime Safety Act). The decisive question herein would be how to fulfil the MLC requirements dealing with the working hours of seafarers.

Similar objections were articulated by most of the States in the CMI Unmanned ships questionnaire. Only a few national maritime associations stated that the STCW convention could be applicable to shore-based personnel in circumstances where there was no new specific legislation. For most of the States it seems obvious that the requirement of the physical presence of watchkeeping officers on the bridge cannot be satisfied in the case of fully unmanned ships. In a few cases, the need of a new definition of a "seafarer" was raised, allowing the inclusion of personnel on shore.

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[28] J. Nawrot, *Międzynarodowe prawo bezpieczeństwa morskiego* (*International law of maritime safety*), Warsaw: C.H. Beck, 2019, pp. 355–356.

Having in mind that the ship's definition and the status of personnel on shore are important issues, navigational safety seems to be crucial for a new regulatory approach. This matter is closely connected with the level of autonomy of unmanned ships and the decision making in case of the appearance of navigational threats. The basic collisions avoidance norms are contained in the Convention on the International Regulations for Preventing Collisions at Sea (COLREG) and they presume human involvement in decision making by referring to the "good seamanship" standard[29]. As COLREG itself does not refer to "crew" or "shipmaster", but to "vessel", it seems possible to apply COLREG to the "good seamanship" requirement in the case of an unmanned ship with a shore-based vessel controller. Polish law requires that a shipmaster is obliged – before departure and during the voyage – to take care that the vessel complies with (among others) the principle of good seamanship (article 57 of the Polish Maritime Code). As such – it seems that under the Polish law, operation of an unmanned ship with a remote controller would not necessarily be contrary to the duty of "good seamanship" under COLREG, if the controller on shore is in a position to respond and control the operation of a vessel and if he is assigned the shipmaster's responsibility.

As to the unmanned vessel with no human supervision, the question should be raised as to whether nautical skills can be applied to "software". At the moment it seems that it should be considered as contrary to the principle of "good seamanship" under COLREG.

According to the answers of the national maritime association given to the CMI questionnaire, similar opinions prevail in most of the cases, stating that COLREG's principle of "good seamanship" may be satisfied by unmanned vessel operation if such a ship would be at least as safe as a conventional ship with crew onboard. More diverse opinions appear in relation to fully autonomous ships. The variety of answers exposes the need for clarification of terminology, and a clear distinction between two terms: "automatization of ships" and "autonomous ships". The possibility of human intervention into navigational decisions seems crucial for future changes in maritime law. A high level of autonomy

[29] Ringbom, supra note 14 at p. 145.

of the operational system is associated with reducing possibilities of human intervention. As a consequence, new regulatory challenges will arise, as traditional navigational practices will not be able to respond to autonomous decision–making systems, with no human interaction[30].

It is suggested in the literature that maritime liability conventions seem to be well-fitted for the operation of autonomous vessels[31]. The definition of a ship under private law instruments does not refer to a crew on board of the vessel, and so conventions would be applicable to unmanned vessels[32]. Concerns are expressed as to suitability of the seaworthiness concept in relation to an unmanned ship.[33] Whether there is a need for a whole new liability regime in respect of autonomous vessels owing to the fact that the current legal framework has been drafted with conventional (manned) ships in mind,[34] seems questionable. Obviously, many particular provisions become obsolete or will require modification. However multiple liability instruments (the International Convention on Civil Liability for Oil Pollution Damage, CLC; the International Convention on Civil Liability for Bunker Oil Pollution Damage, BOPC or the Nairobi International Convention on the Removal of Wrecks) rely on the strict liability of the shipowner (also bareboat charterer, manager, and operator of the ship in the case of the BOPC). Thus, primarily they are suitable for attaching liability for damage caused by even fully autonomous vessels, where no human interference is involved in a ship's operation. The question arises whether in the case of a fully autonomous vessel, greater exposure to liability of the pre-programmer or manufacturer of the autonomous ship should be considered. Despite channeling provisions of the CLC, in *Commune de Mesquier v. Total*

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[30] H. Ringbom, *Regulating Autonomous Ships – Concepts, Challenges and Precedents,* "Ocean Development & International Law", vol. 50, 2019, pp. 141–169.

[31] E. Van Hoydoonk, *The law of unmanned merchant shipping – an exploration*, "Journal of International Maritime Law", vol. 20, 2014, pp. 418–422.

[32] J.P. Rodriguez-Delgado, *The Legal Challenges of Unmanned Ships in the Private Maritime Law: What Laws would You Change?*, [in:] M. Musi (ed.), *Port, Maritime and Transport Law Between Legacies of the Past and Modernization*, Bologna: Bonomo Editore, 2018, p. 499.

[33] Ibid. at p. 521; T. Karlis, *Maritime law issues related to the operation of unmanned autonomous cargo ships*, "WMU Journal of Maritime Affairs" vol. 17, 2018, p. 124.

[34] As seemed to suggested by J.P. Rodriguez Delgado in J.P. Rodriguez-Delgado, supra note 29, p. 499.

France[35] the Court of Justice of the European Union held that when the compensation limits of the International Fund for Compensation for Oil Pollution Damage are exceeded, claimants should have a chance to demand liability on the basis of the European law instruments in order to be fully compensated. Thus, a precedent exists where claimants were allowed to reach for parties protected by channeling provisions on the basis of the national laws implementing the European Union directive[36]. In relation to manufacturers of autonomous vessels the relevant legal provision would be product liability directive 85/37[37], however its applicability as basis for compensation of oil pollution damage raises considerable concerns. The most significant doubt relates to the scope of damage under the directive as it regards mainly death or personal injury, while damage to property is limited to private property used in private consumption. Additionally, although it provides for strict liability, it does require a plaintiff to prove a defect in a product.

V. Concluding remarks

The answers gathered in the CMI questionnaire, despite the discrepancies, demonstrate that it is possible to achieve a broad consensus to enable operation of autonomous ships within the current regulatory regime. The law of the sea framework, namely UNCLOS, does not prevent the operation of unmanned ships. It can be interpreted functionally and makes it possible to accommodate unmanned ships within the existing legal framework. A major obstacle results from the lack of a possibility to adapt current safety requirements, with a special attention to SOLAS and COLREG. There will also be a challenge to find common ground

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[35] *Commune de Mesquer v. Total France SA, Total International Ltd.*, Case C-188/07, Judgment of 24 June 2008, E.C.R. 2008.

[36] F. Collin, *Maritime Product Liability at the Dawn of Unmanned Ships – the Finnish Perspective*, "UTULAW Research Paper Series" 2/2018, p. 15; available at: https://pdfs.semanticscholar.org/93b7/b87852779305a32c66c8113377de6470f8fc.pdf [last accessed 1.12.2019].

[37] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, *OJ L 210, 7.8.1985, p. 29–33*.

for a further regulatory approach, as it should be globally accepted. Considering the variety of economic interests of States (i.e.: seafarer supply countries), differences in technological development, social dimension, and the consequences of autonomous ships usage, it will take a lot of time and work to develop regulatory guidance for the use of autonomous ships.

A check upon liability conventions ought to take into account the need for prompt and full compensation of victims, but also the preventive function of the liability instrument. Also, in the area of liability rules, the level of human intervention in the decision-taking process ought to be considered and reflected in the liability scheme. It seems that in the case of fully autonomous vessels with no human interference, greater exposure to liability of the manufacturer or pre-programmer ought to be considered. In cases of large damage it is perceived that victims will seek outside the scope of liability conventions to obtain full compensation. Thus, they could turn to product liability rules to seek compensation from the vessel's manufacturer or programmer. Due to the current scope of the product liability directive there is no uniform European solution allowing product liability claims for compensation of property damage other than to private property used in private consumption.

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ELECTRONIC EVIDENCE IN THE LIGHT OF THE COUNCIL OF EUROPE'S NEW GUIDELINES

Abstract

This paper aims to analyse the significance of the "Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings" adopted by the Council of Europe on January 30, 2019. The authors examine the practical aspects of the specific guidelines following from this soft law instrument. They make an in-depth analysis of metadata as an essential element of electronic evidence. The authors also present the fundamental principles of electronic evidence, as presented in the Guidelines, along with an explanation of their meaning, including the principle on the protection of human rights and rule of law. The paper ends with the authors' conclusions regarding treatment of electronic evidence in the courts, the practical significance of the Guidelines and the importance of IT law in legal education.

Keywords

Electronic evidence – guidelines – metadata – cyberlaw – law of new technologies

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I. Introduction

Today's world is subject to constant changes affecting how legal disputes are resolved. Traditional procedural solutions are transformed by modern technologies. The aim of this process is to increase efficiency, effectiveness, and safety of justice. Procedural laws play an important role in the ongoing technical, technological or civilization progress. The science and practice of law correlates with hitherto unknown possibilities of current development. There are many examples of this state of affairs, such as: artificial intelligence[1], smart contracts[2], cryptocurrencies[3], e-health[4].

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[1] The literature analyses examples of the use of so-called artificial intelligence in legal practice, e.g.: A. Silverman, *Mind, Machine, and Metaphor. An Essay on Artificial Intelligence and Legal Reasoning*. *Boulder*, Colorado: Westview Press, 1993, p. 1; J. Searle, *Is the Brain's Mind a Computer Program?*, "Scientific American" 1990, vol. 262(1) pp. 26; K. Bowrey, *Ethical Boundaries and Internet Cultures*, [in:] L. Bently, S. Maniatis (ed.), *Intellectual Property and Ethics*, London: Sweet & Maxwell, 1998, p. 36; D. Partridge, *A New Guide to Artificial Intelligence*, New Jersey: Intellect Books 1991, p. 1.

[2] The possibilities and advantages of using smart contracts in legal transactions are presented by: P. Venegas, *Guide to smart contracts. Blockchain examples*, Cambridge: Economy Monitor, 2017, p. 5–7; J. Garcia-Alfaro, G. Navarro-Arribas, H. Hartentein, J. Hierrera-Joancomarti, *Data Privacy Management, Cryptocurrencies and Blockchain Technology*, Oslo: Springer, 2017, p. 297–411; J. Alferes, L. Bertossi, G. Governatori, P. Fodor, D. Roman, *Rule Technologies. Research, Tools and Applications*, New York: Springer, 2016, p. 151–199; B. Kelly, *The bitcoin big bang. How alternative currencies are about to change the world*, New Jersey: Wiley, 2015, p. 149–163; Ch. Dennen, *Introducing ethereum and solidity*, New York: Apress, 2017, p. 89–111; I. Bashir, *Mastering Blockchain. Distributed ledgers, decentralization and smart contracts explained*, Birmingham: Packt Publishing, 2017, p. 21–23, 43–44.

[3] Cryptocurrencies are gaining significance not only in the financial market: M. Miller, *The Ultimate Guide to bitcoin*, Indianapolis 2014, s. 12; European Central Bank, *Virtual Currency Schemes*, Frankfurt am Main, 2012, p. 13; The Financial Action Task Force Report, *Virtual Currencies Key Definitions and Potential AML/CFT Risks*, Paris, 2014, p. 4; European Banking Authority, *EBA Opinion on „virtual currencies"*, London 2014, p. 11; A. Sieroń, *Czym jest Bitcoin* [*What is Bitcoin*] "Wrocław Economic Reviev" 2013, vol. 19(4), pp. 31.

[4] The issue of digital medicine is widely discussed in the literature, where it is no longer treated in terms of technological innovations, but as a necessity: M. Sosa-Iudicissa, *History of Telemedicine*, [in:] O. Ferrer-Roca, M. Sosa-Iudicissa (ed.), *Handbook of Telemedicine*, Amsterdam-Berlin-Oxford-Tokyo-Washington: IOS Press, 1998, p. 1; K. Lops, *Cross-border telemedicine. Opportunities and barriers from an economical and legal perspective*, Rotterdam: Erasmus University Institute of Health Policy and Management

It also affects changes in the substantive law. Nevertheless, ubiquitous digitization will also lead to changes in procedural law. An example of this is the electronic evidence constituting the research problem in question.

On January 30, 2019, the Council of Europe adopted the "Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings" (hereinafter: the Guidelines).[5]. It showed that contemporarily the use of electronic evidence is a matter of international interest. This is important because at the national level, courts and administrative bodies are increasingly resolving cases based on electronic evidence that have been submitted by the parties and other persons involved in civil or administrative proceedings[6]. Furthermore, electronic evidence also is gaining importance in criminal proceedings owing to the phenomenon and the forms of prevention of cybercrime[7].

Master Health Economics Policy and Law, 2008, p. 7; M. Maheu, P. Whitten, A. Allen, *E-Health, Telehealth, and Telemedicine: A Guide to Startup and Success*, San Francisco: Jossey-Bass, 2001, p. 2–4; M. Äärimaa, *Telemedicine Contribution of ICT to Health*, [in:] I. Lakovidis, P. Wilson, J. C. Healy (ed.), *E-Health Current Situation and Examples of Implemented and Beneficial E-Health Applications*, Amsterdam-Berlin-Oxford-Tokyo-Washington: IOS Press, 2004, p. 112.

[5] The Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings (Adopted by the Committee of Ministers on 30 January 2019, at the 1335th meeting of the Ministers' Deputies), 30 January 2019, CM (2018)169-add1final.

[6] M. Biasiotti, J. Bonnici, J. Cannataci, F. Turchi, *Introduction: Opportunities and Challenges for Electronic Evidence*, [in:] M. Biasiotti, J. Bonnici, J. Cannataci, F. Turchi (ed.), *Handling and Exchanging Electronic Evidence Across Europe*, Cham: Springer, 2018, p. 4.

[7] It should be noted that the issue of criminal procedural law and cybercrime correlation is widely analysed in the literature: A. Kigerl, *CAN SPAM Act: An Empirical analysis*, "International Journal of Cyber Criminology" 2009, vol. 3/2, pp. 566–589; B. Wible, *A Site Where Hackers are Welcome: Using Hack-In Contests to Shape Preferences and Deter Computer Crime*, "The Yale Law Journal" 2003, vol. 112/6, pp. 1577–1623; C. Coleman, *Security Cyberspace – New Laws and Developing Strategies*, "Computer Law and Security Report" 2003, vol. 19/2, pp. 131–136; I. Walden, *Harmonising Computer Crime Laws in Europe*, "European Journal of Crime, Criminal Law and Criminal Justice" 2004, vol. 12/4, pp. 321–336; J. Reidenberg, *Technology and Internet Jurisdiction*, "University of Pennsylvania Law Review" 2005, vol. 153/6, pp. 1951–1974; M. Gercke, *Europe's Legal Approaches to Cyber crime*, "ERA Forum" 2009, vol. 10, pp. 409–420; M. Nuth, *Taking Advantage of New*

There are already established broad standards in this area[8]. The title of the Guidelines explicitly explains that they apply only to civil and administrative proceedings. Nevertheless, the adopted standards of electronic evidence have been defined in a general way. Therefore, their

Technologies: For and Against Crime Computer Law and Security Report, "Computer Law & Security Review" 2008, vol. 24, pp. 437–446; P. Swire, *Elephants and Mice Revisited: Law and Choice of Law on the Internet*, "University of Pennsylvania Law Review" 2005, vol. 153/6, pp. 1975–2001; S. Brenner, J. Schwerha, *Introduction-Cyber crime: A Note on International Issues*, "Information Systems Frontiers" 2004, vol. 6/2, pp. 111–114; S. Hilley, *Pressure Mounts on US Senate to Pass Cyber crime Treaty*, "Digital Investigation" 2005, vol. 2, pp. 171––174; S. Moitra, *Developing Policies for Cyber crime*, "European Journal of Crime, Criminal Law and Criminal Justice" 2005, vol. 13/3, pp. 435–464; S. Wang, *Measures of Retaining Digital Evidence to Prosecute Computer-based Cyber-crimes*, "Computer Standards and Interfaces" 2007, vol. 29, pp. 216–223; W. Chung, H. Chen, W. Chang, S. Chou, *Fighting cyber crime: a review and the Taiwan Experience*, "Decision Support Systems" 2006, vol. 41, pp. 669–682.

[8] For example: A Simplified Guide to Digital Evidence, available on the site: http://www.forensicsciencesimplified.org/digital/Digital Evidence.pdf [last access: 2.06.2019]; Défense et sécurité des systèmes d'information. Stratégie de la France, available on the site: https://www.ssi.gouv.fr/uploads/IMG/pdf/2011-02-15_Defense_et_securite_des_systemes_d_information_str ategie_de_la_France.pdf [last access: 2.06.2019]; DOD Dictionary of Military and Associated Terms 2017, available on the site: https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf [last access: 2.06.2019]; Draft Convention on Electronic Evidence, "Digital Evidence and Electronic Signature Law Review" 2016, vol. 13, available on the site: http://journals.sas.ac.uk/deeslr/article/viewFile/2321/2245 [last access: 2.06.2019]; Electronic evidence – a basic guide for First Responders: Good practice material for CERT first responders, available on the site: https://www.enisa.europa.eu/publications/electronic-evidence-a-basic-guide-for-first-responders [last access: 2.06.2019]; European Competition Network Recommendation on The Power to Collect Digital Evidence, Including by Forensic Means, available on the site: http://ec.europa.eu/competition/ecn /ecn_recommendation_09122013_digital_evidence_en.pdf [last access: 2.06.2019]; Explanatory Report to the Convention on Cybercrime, available on the site: https://rm.coe.int/16800cce5b [last access: 2.06.2019]; Good Practice Guide for Computer-Based Electronic Evidence, available on the site: https://www.digital-detective.net/digital-forensics-documents/ACPO_Good_Practice_Guide_for_Digital_Evidence_v5.pdf [last access: 2.06.2019]; P. Grimm, *In the United States District Court for the District of Maryland. Memorandum opinion*, 2007, available on the site: https://www.gpo.gov/fdsys/pkg/USCOURTS-mdd-1_06-cv-01893/pdf/USCOURTS-mdd-1_06-cv-01893-0.pdf [last access: 2.06.2019]; Forensic Examination of Digital Evidence: A Guide for Law Enforcement, available on the site: https://www.ncjrs.gov/pdffiles1/nij/199408.pdf [last access: 2.06.2019].

implementation in the field of the criminal process is methodologically possible. This remark is important because it shows the authority of the Guidelines that can be considered as a general international principle of electronic evidence. This is because there are few provisions on the international, European, and national levels that facilitate proceedings with the use of electronic evidence in this area[9]. Both in law and in court practice there is a legal loophole concerning the key technological rules of dealing with electronic evidence[10]. For this reason, the adoption of the Guidelines is important. Their aim is not to establish binding legal standards. They provide a practical toolbox for Member States to adapt judicial and other dispute resolution mechanisms using electronic evidence. The Guidelines aim to facilitate the use and management of electronic evidence within legal systems and in court practices. It is necessary to pay attention to the specificity of electronic evidence.

The Guidelines deal with number of specific issues, such as oral evidence taken by a remote link, use of electronic evidence, collection, seizure and transmission of evidence, relevance, reliability, storage and preservation, archiving, awareness-raising, review, training and education. They contain definitions, fundamental principles and detailed guidelines. The guidelines cannot be interpreted as prescribing a specific probative value for certain types of electronic evidence. They can be applied only insofar as they are not in conflict with national legislation.

As regards the applicability of the Guidelines to Polish court practice taking into account the current provisions of the Code of Civil Procedure, it should be clarified that the Guidelines are fully aligned with the Code.

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[9] For example, the UNCITRAL Model Laws: The Model Law on Electronic Commerce adopted on June 12, 1996, at its 85th meeting plenary meeting December 16, 1996, including an additional article 5 as modeled on July 31, 2001. The Model Law on Electronic Signatures was adopted by the Commission on 7 July 2001.

[10] The use of electronic evidence in civil and administrative law proceedings and its effect on the rules of evidence and modes of proof. A comparative study and analysis. Report prepared by Stephen Mason assisted by Uwe Rasmussen. Strasbourg, 27 July 2016, CDCJ (2015)14 final; J. Albert, Study on possible national legal obstacles to full recognition of electronic processing of performance information on construction products (under the construction products regulation), notably within the regimes of civil liability and evidentiary value, Final General Report, 30-CE-0517177/00-3630-CE-0517177/00-36.

Moreover, as both the authors of this paper have supported the Council of Europe in the preparation of the guidelines, a number of the Guidelines are directly inspired by the Polish provisions of the Code of Civil Procedure and its decrees (e.g. regarding video- and teleconferences). We are of the opinion that the Polish Code does not require any legislative changes or specific interpretation with respect to the new forms of evidence discussed in the Guidelines.

II. Definitions of electronic evidence, trust services, and court adopted in the Guidelines

For the purpose of the Guidelines, the definition of specific terms was adopted. However, the proposed meanings go far beyond this document. They have a wide range of objectives and correctly reflect the specificity of cyberlaw. In the law of new technologies, narrow, closed, or casuistic definitions should not be created. The point is that technology changes quickly. For example, what we consider electronic evidence tomorrow may cease to exist, and the day after tomorrow a new type of electronic evidence will be created. It is important that the Guidelines do not just concentrate on the technology. They are technology neutral. For this reason, the inclusion of these definitions in the Guidelines should be assessed positively.

The guidelines have adopted a broad definition of "electronic evidence" (also called "digital evidence"[11]). According to this, electronic evidence means any evidence derived from data contained in or produced by any device, the functioning of which depends on a software program or data stored on or transmitted over a computer system or network. Thus, they can have a different form. It may be the content of the

[11] Z. C. Schreuders, T. W. Cockcroft, E. M. Butterfield, J. R. Elliott, A. R. Soobhany, *Needs Assessment of Cybercrime and Digital Evidence in a UK Police Force*, 2018, p. 34, available on the site: http://eprints.leedsbeckett.ac.uk/5076/1/Needs%20Assessment%20of%20Cybercrime%20and%20Digital%20Evidence%20in%20a%20UK%20Police%20Force.pdf [last access: 11.06.2019].

message or conversation and related metadata[12]. Most often, these will be messages sent via e-mail boxes, mobile phones (SMS/MMS messages) or messaging applications. Electronic evidence can also be stored in the system or on electronic data carriers. So, electronic evidence includes, for instance: 1) registry files (they contain data collected by computer system monitoring devices, which may take the form of: Internet Protocol, Universal Resource Locator, user ID, connection acquisition and end time, warning about unsuccessful attempts to obtain access or list of operations carried out, including running programs, downloaded or sent files, and referenced documents); 2) electronic documents (digital version of traditional documents); 3) billing data (they contain information on the subscriber's station number, subscriber's address, number of billing units counted for a given station in the adopted billing period, numbers with which the subscriber has received the call, date of obtaining and duration of the call and its type (internet, international, national or local)); 4) records of devices recording payment transactions (they contain data on the numbers of payment cards used (both physical and digital) as well as information on the date, place and size of transactions made); 5) recordings of service cameras (e.g. this technique allows recognizing a person's face and comparing it with data contained in the system, e.g. photographs of criminals)[13]. In conclusion, electronic evidence can be in the form of text, video files, photos, or sound recordings[14]. Data can come from various sources, such as mobile phones, websites, computers, or GPS recorders[15]. This also includes data stored remotely within cloud computing. Electronic messages are a typical example of electronic

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[12] E. Caseya, *Digital Evidence and Computer Crime*, Amsterdam-Boston-Heidelberg-London-New York-Oxford-Paris-San Diego-San Francisco-Singapore-Sydney-Tokyo: Elsevier, 2011, p. 49–81.

[13] A. Lach, *Dowody elektroniczne* [*Electronic evidence*], Toruń: Dom Organizatora, 2004, p. 41–51.

[14] J. Bonnici, M. Tudorica, J. Cannataci, *The European Legal Framework on Electronic Evidence: Complex and in Need of Reform*, [in:] M. Biasiotti, J. Bonnici, J. Cannataci, F. Turchi (ed.), *Handling and Exchanging Electronic Evidence Across Europe*, Cham: Springer, 2018, p. 189–234.

[15] G. Weir, S. Mason, *The sources of electronic evidence*, [in:] S. Mason, D. Seng (ed.), *Electronic Evidence*, London: University of London School of Advanced Study Institute of Advanced Legal Studies, 2017, p. 14–17.

evidence. This is evidence from an electronic device (computer or similar computing device) that contains the appropriate metadata[16].

Another defined concept is trust services that play a key role in the identification, authentication, and security of online transactions. Trust service means an electronic service which consists of: a) the creation, verification and validation of electronic signatures, electronic seals or electronic time stamps, electronic registered delivery services, and certificates related to those services or, b) the creation, verification, and validation of certificates for website authentication or, c) the preservation of electronic signatures, seals or certificates related to those services. It should be noted, that this definition of "trust service" adopted in the Guidelines was based on Article 3 (16) of Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (eIDAS regulation)[17]. In addition, the Guidelines also address individual trust services related to ordinary, advanced, or qualified electronic signatures and certificates[18]. This means that it is possible to use other definitions adopted in eIDAS regulation when applying the Guidelines.

The concept of court used in the Guidelines includes any competent authority with adjudicative functions in the performance of which it handles electronic evidence. This includes all authorities with competences to adjudicate legal disputes between parties to civil and administrative proceedings. It is about courts and tribunals and even administrative authorities.

The definitions of cloud computing and blockchain have not been introduced into the final version of the Guidelines, despite the fact that the final draft included them. In the case of the first concept, the proposed definition has been deleted, because this term does not appear in the final version of the Guidelines (it is used only in the Explanatory

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[16] Supra note 15.

[17] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, p. 73–114).

[18] S. Mason, *Electronic Signatures in Law: Fourth Edition*, London: University of London School of Advanced Study Institute of Advanced Legal Studies, 2017, p. 149–167.

memorandum to the Guidelines[19]). Regarding the second concept, the attempt to define it proved to be too much of a challenge. It is possible that this will change with the future update of the Guidelines related to technological development. Especially, that prepared definitions reflect the sense of new technologies, have a wide range, and are technologically neutral.

The Guidelines also refer to terms such as "simple" or "qualified" electronic signature, which means that it is possible to apply other definitions adopted in eIDAS regulation. According to these principles, an electronic signature is defined data that is inserted, connected, or logically linked with other data for the authentication of the latter and/or identification of the signatory. The certificate is an electronic certificate that links the signature verification data with the signatory and confirms or allows the identification of the signatory. A secure electronic signature, created using a secure signature-creation device and certified by an important, qualified certificate, has the same legal effect as a signature

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[19] According to The Explanatory Memorandum: Blockchain is an emerging technology which has the potential to provide increased trust and security in electronic evidence. It can be defined as a distributed ledger that refers to the list of records (blocks), which are linked and secured using cryptography and are recorded in a decentralized peer-to-peer network. By design, a blockchain is inherently resistant to modification of the data. Once recorded, the data in any given block cannot be altered retroactively without the alteration of all subsequent blocks, which requires collusion of the network majority. This makes blockchain suitable for evidencing purposes. In USA, § 1913 of the Vermont Rules of Evidence reads: (1) A digital record electronically registered in a blockchain shall be self-authenticating pursuant to the Vermont Rule of Evidence 902, if it is accompanied by a written declaration of a qualified person, made under oath, stating the qualification of the person to make the certification and: (a) the date and time the record entered the blockchain; (b) the date and time the record was received from the blockchain; (c) that the record was maintained in the blockchain as a regular conducted activity; and (d) that the record was made by the regularly conducted activity as a regular practice. In China, the Hangzhou Internet Court confirmed on June 28, 2018 that blockchain-based electronic data can be used as evidence in legal disputes. The usage of a third-party blockchain platform that is reliable without conflict of interests provided the legal ground for proving an intellectual infringement; According to The Explanatory Memorandum: Data sharing (clouds) is the storage of different parts of a database across various servers that might be located in different physical locations. It has become a common security technique. The global nature of the internet and the growing use of cloud services make it increasingly difficult to assume that access to data is strictly domestic in nature.

in written documents and is an admissible means of evidence in court. The electronic signature administration functions are performed by an appointed governmental institution.

As we see there are no fundamental discrepancies between the definitions adopted in the Guidelines and the Polish legislation. Both the Guidelines and Polish legal acts use definitions developed in international practice, which were then introduced to EU law (e.g. in the eIDAS or GDPR Regulations). The fact that this fact is not clearly explained in the Guidelines is owing to the simple fact that the Council of Europe wants to avoid the accusation of extending EU law to the Member States of the Council of Europe that are not EU members.

III. The importance of metadata

The concept of metadata and related standards is the key to the Guidelines[20]. For this reason, considerations regarding metadata must be presented separately. According to the adopted definition, metadata refers to electronic information about other electronic data, which may reveal the identification, origin, or history of the evidence, as well as relevant dates and times. In other words, metadata are structured or semi-structured information that enables the creation, registration, classification, access, preservation, and disposition of records through time and within and across domains (ISO 23081–1)[21]. In practice, they are called the "digital fingerprint" of electronic evidence. Metadata are usually not directly available. For example, they are of key importance to judicial investigations, including criminal cases, regardless of the accepted divisions of cybercrime[22]

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[20] B. Schafer, S. Mason, *The characteristics of electronic evidence*, [in:] S. Mason, D. Seng, *Electronic Evidence*, London: University of London School of Advanced Study Institute of Advanced Legal Studies, 2017, p. 28.

[21] ISO 23081–1, available on the site: https://www.sis.se/api/document/preview/906833/ [last access: 07.06.2019].

[22] K. Bremer, *Strafbare Internet-Inhalte in internationaler Hinsicht, Ist der Nationalstaat wirklich uberholt?* [*Punishable internet content internationally, is the nation state really outdated*?], Frankfurt am Main: Peter Lang GmbH, Internationaler Verlag der Wissenschaften, 2000, p. 60–64; I. Vassilaki, *Multimediale Kriminalität, Entstehung, Formen und rechtspolitische Fragen der Post-Computerkriminalität* [*Multimedia crime, origins, forms and legal issues of post-*

(e.g. illegal access[23], system interference[24] or offences related to child pornography[25]), because the perpetrators want to hide all traces of their crime.

The term "record" is directly related to the metadata (there are many Guidelines regarding only metadata[26]). Records are a special

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computer crime], "Computer und Recht" 1997, vol. 5, pp. 296–300; A. Płaza, *Przestępstwa komputerowe* [*Computer crimes*], Rzeszów, 2000, p. 6–9, available on the site: http://vagla.pl/skrypts/mgr_a_plaza.pdf [last access: 11.06.2019]; U. Sieber, *Computerkriminalität und Informationsstrafrecht* [*Computer Crime and Information Criminal Law*], „Computer und Recht" 1995, vol. 2, pp. 100–101; U. Sieber, *Der strafrechtliche Schutz der Information* [*The criminal protection of information*], "Zeitschrift fur die Gesamte Strafrechtswissenschaft" 1991, vol. 103, pp. 778–788; S. Hoeren, *Trapattoni und das Ende des Computerrechts* [*Trapattoni and the end of computer law*], „MultiMedia und Recht" 1998 vol. 4, pp. 169–171.

[23] S. McQuade, *Encyclopedia of crime*, London: Greenwood 2009, p. 46; J. Clough, *Principles of cybercrime*, New York: Cambridge University Press 2010, p. 50; O. Kerr, *The problem of perspective in Internet law*, "Georgetown Law Journal" 2003, vol. 91, pp. 60.

[24] M. Jakobsson, Z. Ramzan, *Crimeware. Understanding new attacks and* defenses, Boston: Addison-Wesley Professional, 2008, p. 3; I. Walden, *Computer Crimes and Digital Investigations*, New York: Oxford University Press, 2007, p. 19

[25] J. Steward, *International Policing of Child Pornography on the Internet*, "Houston Journal of International Law" 1997, vol. 20 pp. 205.

A. Gillespie, *Child protection on the Internet – challenges for criminal* law, "Child and family Law Quarterly" 2002, vol. 14, pp. 410–413.

[26] For example: UMass Amherst Libraries Metadata Guidelines, available on the site: https://www.library.umass.edu/assets/Digital-Strategies-Group/Guidelines-Policies/Metadata-Guidelines-v4.pdf [last access: 4.06.2019]; Guidelines for Statistical Metadata on the Internet, available on the site: https://www.unece.org/fileadmin/DAM/stats/publications/metadata.pdf [last access: 4.06.2019]; Descriptive Metadata Guidelines for RLG Cultural Materials, available on the site: https://www.oclc.org/content/dam/research/activities/culturalmaterials/RLG_desc_metadata.pdf [last access: 4.06.2019]; INSPIRE Metadata Implementing Rules: Technical Guidelines based on EN ISO 19115 and EN ISO 19119, available on the site: https://inspire.ec.europa.eu/documents/Metadata/INSPIRE_MD_IR_and_ISO_v1_2_20100616.pdf [last access: 4.06.2019]; Guidance on the Structure, Content, and Application of Metadata Records for Digital Resources and Collections, available on the site: https://archive.ifla.org/VII/s13/guide/metaguide03.pdf [last access: 4.06.2019]; State Records Guideline No 5 Recordkeeping Metadata, available on the site: https://www.informationstrategy.tas.gov.au/Records-Management-Principles/Document%20Library%20%20Tools/Guideline%2005%20Recordkeeping%20Metadata.pdf [last access: 04.06.2019]; U.S. National Archives and Records Administration (NARA) Technical Guidelines for Digitizing Archival Materials for Electronic Access: Creation of Production Master Files – Raster Images, available on the site: https://www.archives.

form of recorded information. According to the definition included in the international standard ISO 15489–1, record is information created, received, and maintained as evidence and information by an organisation or person, in pursuance of legal obligations or in the transaction of business[27]. Its primary role is to document decisions, actions, activities, and communication to tell the whole story. It means that record is real information about data, but metadata are significant in supporting record management[28]. It is often claimed that metadata are data about data[29]. However, from a technical point of view, metadata are data or information about the records, for example, the context of creating records, systems, and processes that generate and manage them, and the actions supported by records. Metadata are an adhesive that combines various record components and link the record to other records that are relevant to their understanding and use. According to the international standard ISO 23081–1 metadata support records management processes by: protecting records as evidence and ensuring their accessibility and usability through time; facilitating the ability to understand records; supporting and ensuring the evidential value of records; helping to

gov/files/preservation/technical/guidelines.pdf [last access: 04.06.2019]; Basic Guidelines for Minimal Descriptive Embedded Metadata in Digital Images, available on the site: http://www.digitizationguidelines.gov/guidelines/GuidelinesEmbeddedMetadata.pdf [last access: 04.06.2019]; Composition Metadata Guidelines, available on the site: https://isdcf.com/papers/ISDCF-Doc6-Composition-Metadata-Guidelines.pdf [last access: 04.06.2019]; Queensland Recordkeeping Metadata Standard and Guideline, available on the site: https://www.forgov.qld.gov.au/glossary/recordkeeping-metadata [last access: 04.06.2019].

[27] ISO 15489–1, available on the site: https://www.sis.se/api/document/preview/920396/ [last access: 05.06.2019].

[28] Digital Preservation in Lower Resource Environments: A Core Curriculum, available on the site: https://www.ica.org/sites/default/files/Metadata%20Module.pdf [last access: 07.06.2019].

[29] Z. Ambrus, *Applied Technology in Litigation Proceedings (The Electronic Discovery Reference Model)*, [in:] M. Kengyel, Z. Nemessányi, Electronic Technology and Civil Procedure. New Pats to Justice from Around the World, Dordrecht-Heidelberg-New York-London: Springer, 2012, p. 288; W. Lawrence Wescott II, *The increasing importance of metadata in electronic discovery*, "Richmond Journal of Law & Technology" 2008, Vol. 14(3), pp. 1; R. Gartner, *Metadata Shaping knowledge from Antiquity and to the Semantic Web*, London: Springer, 2016, p. 2.

ensure the authenticity, reliability, and integrity of records; supporting and managing access, privacy, and rights; supporting efficient retrieval; supporting interoperability strategies by enabling the authoritative capture of records created in diverse technical and business environments and their sustainability for as long as required[30]. Metadata are a powerful tool to help find records, understand them, and use them for many purposes, including evidence. Metadata are needed to track, store, protect, and maintain records and manage them over time. They enable the authentication and verification of information contained in records, as well as capture important technical details that enable the rendering of records. We are dealing with three basic types of metadata, which have significant probative value:

1) Descriptive metadata – data about finding or understanding the resource. They describe the work for the purposes of discovery and identification (e.g. creator, title, and subject);
2) Administrative metadata (include technical metadata, preservation metadata, rights metadata) – data about decoding and rendering files, file management, and intellectual property rights related to content;
3) Structural metadata – Data showing how compound objects are structured[31].

The Guidelines do not address all the problems that courts may face when dealing with electronic evidence (metadata). Instead, it has been emphasized that courts should be aware of the probative value of metadata and of the potential consequences of not using it (guideline No. 8). Courts should not always demand metadata when dealing with electronic evidence, because metadata can be important, but they are not necessary in every case. The Guidelines contain a recommendation to take care of metadata by storing them in a manner that preserves readability, accessibility, integrity, authenticity, reliability and, where applicable, confidentiality and privacy (guideline No. 25). For example, from the metadata point of view, the paper version of the document is

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[30] Supra note 21.

[31] Understanding Metadata What is Metadata, and What is it for?, available on the site: https://groups.niso.org/apps/group_public/download.php/17443/understanding-metadata [last access: 07.06.2019].

not equal to the digital copy of the document. Printouts of documents (web browser screens) do not contain metadata. Printing an electronic document may eliminate some or all of the metadata associated with the electronic version of the document. Threats related to the printouts of electronic documents have been discussed in US case law[32]. Additionally, electronic evidence should be stored with standardised metadata so that the context of its creation is clear (guideline No. 26).

The above does not mean that an amendment to the Polish regulations, including the Code of Civil Procedure, is required in order to regulate the status of metadata in Polish law. The issue of the proper treatment of metadata by courts should be the subject of the proper education of judges and legal professionals in the use of information technology. In other words, this issue belongs rather to the technical area of the handling of evidence, which is part of the judicial practice.

IV. Fundamental principles

The final version of the Guidelines includes just three fundamental principles. However, four such principles were included in the final draft presented to the Council of Ministers for adoption. During the plenary discussion the principle relating to the protection of human rights was removed. It should be underlined that the change is of formal and not substantive significance. The issue of protection of human rights in the context of the use of electronic evidence is too complex to be included in such a short principle.

The deleted principle referred to the rule of law and the admissibility of electronic evidence that was received unlawfully. An example is the confiscation of an electronic device, without a court order as required by law, as well as evidence obtained by the party by hacking the IT

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[32] C. Ball, *Beyond Data About Data: The Litigator's Guide to Metadata*, 2005, p. 2: "*A hard copy of a document might give one person as the last individual to modify a document and the date of that modification while the metadata attached to the document might give an entirely different person and date for a later modification because the later modifier did not record the later modification on the document itself*", available on the site: http://www.craigball.com/metadata.pdf [last access: 05.06.2019].

system. Another example is well known: the fruit of the poisonous tree doctrine[33]. The fundamental problem in formulating this principle was related to the determination of exceptions. It was proposed that they cover situations in which it is necessary in a democratic society, in the interests of national security, public safety, for the prevention of disorder or crime, for preventing the disclosure of information received in confidence, and for the protection of the reputation or rights of others. For example, the case law of the ECtHR shows that evidence obtained as a result of an employer's violation of the principles of protection of employee privacy may be unacceptable due to violation of the proportionality principle[34]. We are of opinion that the removal of this principle is justified. It is impossible to include the protection of human rights in one short principle. Each Member State of the Council of Europe to which the Guidelines are addressed is also a party to of Convention of Human Rights and Fundamental Freedoms[35]. This act of international law in the case of using electronic evidence is then fully applicable.

The first of three finally adopted principles explains that it is for the courts to decide on the potential probative value of electronic evidence in accordance with national law. This means that although the role of experts in assessing electronic evidence is important, ultimately the courts decide on the potential probative value of electronic evidence. In doing so, courts may be bound by the applicable law (e.g. providing specific probative value for a certain type of electronic evidence). This does not deny the existence of a boundary for the free appraisal of evidence, for example related to the use of qualified electronic signatures. The assessment of the

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[33] M. S. Bransdorfer, *Miranda Right-to-Counsel Violations and the Fruit of the Poisonous Tree Doctrine*, "Indiana Law Journal" 1986, vol. 62, pp. 1061–1100; R. M. Pitler, *The Fruit of the Poisonous Tree Revisited and Shepardized*, "California Law Review" 1968, vol. 56, pp. 579––651; J. M. Bain, M. K. Kelly, *Fruit of the poisonous tree: recent developments as viewed through its exceptions*, "University of Miami Law Review" 1976, vol. 31, pp. 615–650; V. P. Singh, *Poison Tree Principle: It's Applicability in India*, "International Journal of Advanced Research and Development" 2018, vol. 3(1) pp. 370–375; M. A. Lemley, *The Fruit of the Poisonous Tree in IP Law*, "Iowa Law Review" 2017, vol. 103, pp. 245–269.

[34] *Bărbulescu v. Romania*, Application no, 61496/08, Judgment of 5.09.2017.

[35] Convention of Human Rights and Fundamental Freedoms, available on the site: https://www.echr.coe.int/Documents/Convention_ENG.pdf [last access: 06.06.2019].

credibility and power of electronic evidence is a fundamental task of the court. It constitutes the essence of judgment. This means that disputable issues should be settled on the basis of independence, the judge's own belief, considering all the collected relevant evidence[36]. The situation is complicated when the court analyses the extensive evidence. Therefore, the case law indicates that the conviction of the court about the credibility of some pieces of evidence and the unreliability of others remains under the protection of procedural law. This holds true when the conviction of the court is preceded by the disclosure in the course of the entirety of the circumstances of the act in a way dictated by the duty to seek the truth[37]. This conviction is the result of considering all the circumstances that both favour and disadvantage the party of the proceedings and is comprehensively and logically justified in the justification[38]. In this justification, the court must indicate an analysis of the evidence, showing the premises on the basis of which, out of a wide range of different discrepant evidence, it based its findings and conclusions[39].

The second principle explains that electronic evidence should be evaluated in the same way as other types of evidence, in particular regarding its admissibility, authenticity, accuracy, and integrity. This requires that electronic evidence should not be discriminated against or favoured over other types of evidence. In this respect, courts should adopt a technology-neutral approach. This means that any technology that allows the authenticity, accuracy, and integrity of the data to be established should be accepted: "While Article 6 of the Convention of Human Rights guarantees the right to a fair hearing, it does not lay down

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[36] The judgment of the Polish Supreme Court of 16 February 1996, II CRN 173/95, LEX No. 1635264.

[37] J. Jackson, *Two methods of proof in criminal procedure*, „The Modern Law Review" 1988, vol. 51, pp. 554; M. S. Nieuwland, A. E. Martin, *If the real world were irrelevant, so to speak: The role of propositional truth-value in counterfactual sentence comprehension*, "Cognition" 2012, vol. 122(1), pp. 102–109; F. P. Ramsey, *Truth and probability*, p. 21–45, available on the site: https://core.ac.uk/download/pdf/7048428.pdf [last access: 11.06.2019].

[38] The judgment of the Polish Supreme Court of 8 November 2005, SNO 52/05, LEX No. 569005; The judgment of the Polish Supreme Court of 3 February 2005, SNO 2/05, LEX No. 471932.

[39] The judgment of the Polish Supreme Court of 3 October 2005, IV KK 190/05, LEX No. 200391.

any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts"[40]. It also means that there is the possibility of using such recognized tests as the Daubert[41] or the Grimm test[42].

The third principle explains that the treatment of electronic evidence should not be disadvantageous to the parties or give unfair advantage to one of them. It refers to the equality of arms and equal treatment of parties to proceedings. A trial with electronic evidence should not be detrimental to the parties of the proceedings. For example, a party should not be denied the opportunity to challenge the authenticity of evidence. If the court requests from the party deliveries of electronic evidence, such party should not be deprived of the opportunity to submit relevant metadata. The case law of the European Court of Human Rights (hereinafter: the ECtHR) remains valid, from which it follows: "The principle of the equality of arms implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent"[43].

In accordance with these principles, the improvement of court proceedings in Poland should be based on: 1) proper use of experts to evaluate electronic evidence, 2) non-discrimination against electronic evidence, as well as the abandonment of unreflective acceptance of such evidence, which unfortunately also could be observed in the Polish judicial practice, 3) equal treatment of parties with regard to the use of electronic evidence, which, in particular, should lead to a gradual departure from the current practice of presenting it in the form of printouts.

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[40] *García Ruiz v. Spain*, Application no, 30544/96, Judgment of 21.01.1999, at par. 28.

[41] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), available on the site: https://supreme.justia.com/cases/federal /us/509/579/case.pdf [last access: 05.06.2019].

[42] P. Grimm, *In the United States District Court for the District of Maryland. Memorandum opinion*, 2007, available on the site: https://www.gpo.gov/fdsys/pkg/USCOURTS-mdd-1_06-cv-01893/pdf/USCOURTS-mdd-1_06-cv-01893-0.pdf [last access: 05.06.2019]; B. Esler, *Lorraine V Markel: Unnecessarily Raising the Standard for Admissibility of Electronic Evidence*, "Digital Evidence and Electronic Signature Law Review" 2007, vol. 4, pp. 80–82.

[43] *Letinčić v. Croatia*, Application no, 7183/11, Judgment of 03.05.2016, at par. 48.

V. Final remarks

In our opinion, the adoption of the Guidelines by the Council of Europe should be of great importance for improving court proceedings with the use of electronic evidence. Specific examples were presented above. It, however, heavily depends on the correct implementation of the Guidelines. We express hope that the Guidelines will be both recognized and used in practice by attorneys, prosecutors, judges, and IT specialists. We note that IT education in law should be an important part of legal education as such.

To sum up, the whole of the above analysis leads us to the following conclusions:

We are witnessing huge technical, technological, and civilizational progress. Many legal solutions are transformed under the influence of modern technologies. The aim of this process is to increase the efficiency, effectiveness, and safety of traditional tools. Procedural law as a multi-threaded analytical area is a participant in this because it plays an important role in the ongoing progress.

Currently, the use of electronic evidence is a matter of international interest. The main actors impacting international law are beginning to pay attention to the employment of modern technologies for practical use. This applies to artificial intelligence, cryptocurrencies, clever contracts, e-health, and electronic evidence.

The Guidelines can be considered as a general international constitution for electronic evidence. What we see is a lack of legislation at international, European, and national level. Both in law and in judicial practice, there is a legal loophole concerning the key technological principles of proceeding with electronic evidence.

The purpose of the Guidelines is not to establish binding legal standards. They amount to only as much as a practical toolbox for the Member States. The Guidelines are intended to facilitate the use and management of electronic evidence in law.

The proposed definitions of electronic evidence, trust services, and metadata can be used also beyond the scope of the Guidelines. They are technologically neutral and are not narrow, closed, or casuistic.

It is possible to use definitions adopted in the eIDAS regulation when applying the Guidelines. It results from the accepted definition of trusted services, which is synonymous with that in the indicated regulation.

Metadata are fundamentally significant for electronic evidence. The concept of metadata and related standards is the key to the Guidelines. Metadata are a powerful tool to help find records, understand them, and use them for many purposes,. Metadata tell a complete story. They enable the authentication and verification of information contained in records, as well as capture important technical details that enable the rendering of records. Understanding metadata and their proper storage allows for the effective use of electronic evidence capabilities.

Fundamental principles presented in the Guidelines have a different value from detailed guidelines. They show the path that Member States should follow. They can be taken into account as much as possible. In some sense{s?}, it is possible to apply Alexi's concept here[44].

An interdisciplinary approach is required for all professionals, including lawyers and judges working with electronic evidence. This requires practical training. A good example of training documents is the U.S Courts Guidelines for Editing Metadata[45].

In conclusion, we hope that electronic evidence is the future of court proceedings. Only with the help of electronic evidence will it be possible to improve the efficiency of today's justice system. We believe that electronic evidence is an emanation, extension, and fulfilment of such important values as equity, the rule of law, fair trial, and truth.

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[44] M. Bohlander, *Radbruch redux: the need for revisiting the conversation between common and civil law at root level at the example of international criminal justice*, "Leiden Journal of International Law" 2011, vol. 24(2), pp. 393–410.

[45] U.S Courts Guidelines for Editing Metadata, available on the site: http://www.njd.uscourts.gov/sites/njd/files/EditMetaDataGuidePublic.pdf [last access: 07.06.2019].

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CONSTIUTIONAL COURTS AND REPRESENTATIVE DEMOCRACY– A KELSENIAN PERSPECTIVE***

Abstract

In the presented article we develop the thesis that constitutional courts may be treated as one of the key elements guaranteeing the proper functioning of representative democracy if they secure the democratic "chain of delegation". Following the theory of Hans Kelsen, we employ a normative concept giving the answer to how a constitutional court should act to fulfil such a role. According to Kelsen's perspective, the main threat to representative democracy is the "alternative legislative procedure", a non-constitutional form of legislation based solely on the political will and in consequence deconstructing the constitutional chain of delegation. The guarantee of constitutionality means the restoration of an equal representation in the legislative procedure based on the majority-minority rule. As the guardian of the democratic legislative procedure, the constitutional court should be a ground for the "virtual representation" of all the parties to a democratic dispute. In result it prevents the transformation of representative democracy into majority democracy.

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Keywords

representative democracy – constitutional court – Kelsenian models – control of delegated law-making power – Polish constitutions

I. Introduction

Political changes taking place in recent years in the so-called Western and Central European democracies affect basic elements of their current constitutional identity. One of them is the role of the constitutional court in representative democracy. This problem is not new, especially on a theoretical level. In our article we shall advance the thesis that constitutional courts may be treated as an element guaranteeing the proper functioning of representative democracy if they secure the democratic "chain of delegation". Following the theory of Hans Kelsen, we develop a normative concept that answers the question of how a constitutional court should act so that it actually fulfils such a role. The starting point of our considerations is the concept of representative democracy (Paragraph 2) and Kelsen's models of constitutional guarantees (Paragraph 3). It follows from our deliberations that the model containing a centralized controlling body protects best against so-called alternative legislation (Paragraph 4). This solution cannot be considered entirely reliable, as is also reflected in the development of Polish constitutionalism (Paragraph 5). The sine qua non condition is the social legitimacy of the constitutional court, which would refer to the concept of democracy as a majority-minority system (Paragraph 6).

II. Delegation and democracy

From a theoretical point of view, the concept "democracy" expresses the idea of self-government of the people, while the adjective "representative" indicates that governing happens indirectly, namely through the involvement and actions of representatives[1]. The idea of representative

[1] On the theory of representative democracy see e.g. R. A. Dahl, *On Democracy*,

democracy is implemented in a specific form of law making. Democratic legislation must be based on the will of the people and represent a contrast to the particular will. The principle that legislation comes from the common will "obligates every legislator to pass laws in such a way that they *would have been able* to arise from the united will of an entire people and to regard every subject, insofar as it wishes to be a citizen, as though it has given its assent to this will"[2]. Legislative institutions should "represent the people", i.e. act on its behalf and according to its will. The people are the superior (principle), and legislation is its representative (agent). H. Kelsen specifies the concept of representative democracy (in the form of parliamentarianism) in such a way that it means "creation of the will of the state" "by a collegial organ democratically elected by the People based on universal, equal suffrage and the principle of the majority"[3]. "Creation of the will of the state" means the creation of a universally binding system of norms[4] by the "body of the delegated" to which the creation of the will of the state is entrusted by the nation. It is assumed that there is a certain bond between the representatives and the represented, and that all delegates can participate in the elaboration of a "representative common will". The legislative procedure expressed in a constitution of a democratic state would have to implement, even in an imperfect form, the aforementioned challenging idea.

According to K. Strøm, W. C. Müller, and T. Bergman a delegation under democratic politics is understood as a process of delegating. The process within a representative democracy creates a specific "chain of

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New Haven-London: Yale University Press, 1998; B. Manin, *The principles of representative government*, Cambridge-New York-Melbourne: Cambridge University Press, 1997; A. Przeworski, *Democracy and the Limits of Self-Government*, New York: Cambridge University Press, 2010.

[2] I. Kant, *On the Common Saying: This May Be True in Theory, but It Does Not Hold in Practice*, [in:] I. Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, trans. D. L. Colclasure, New Haven-London: Yale University Press, 2006, p. 51.

[3] H. Kelsen, *Das Problem der Parlamentarismus*, [in:] H. Kelsen, A. Merkl, A. Verdross, *Die Wiener rechtstheoretische Schule*, ed. H. R. Klecatsky, R. Marcic, H. Schambeck, Wien: Franz Steiner Verlag, 2010, p. 1361; H. Kelsen, *The Essence and Value of Democracy*, trans. B. Graf, Lanham-Boulder-New York-Toronto-Plymouth: Rowman and Littlefield Publishers, INC., 2013, p. 48.

[4] H. Kelsen, *The Essence and Value of Democracy*, p. 52–53.

delegation" beginning with the delegation of powers from voters to their representatives[5]. In the model approach, the nation (all citizens) delegates its source legislative competence to representatives, who constitute the normative framework for the functioning of other authorities. In other words, democratic legislation takes the form of a special representative body – the Parliament. The nation is the first, and the Parliament – the second, element of the chain of delegation. Thus, the existence of the Parliament as a representative body is necessary for the proper functioning of the chain of delegation. Democratic law-making may only be considered as an element of "a chain of law-making delegations". According to the theory of democracy, the original law-making competence ascribed to a nation (*demos* – people or citizens)[6] is realized through a number of law-making acts – from general norms to the execution of an individual decision. The notion of representative democracy means that the sovereignty of the people is realized through its delegation onto political representatives (individual politicians or parties) with the citizens entrusting representatives with their original law-making competences. In this context, a democratic constitution can be interpreted as an act of particular legal force giving legal form to the delegation chain.

A concept that distinguishes between "ordinary" law and the constitution, is described by Bruce Ackerman as dualistic[7], distinguishing between "ordinary" and "higher" legislation. Political and state authorities are bound by a higher law, which should be interpreted as the will of the sovereign body (the people), and any change to this law requires special procedures. Constitutionalism is therefore connected with a certain legal regulation of the functioning of state bodies, thus limiting

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[5] See K. Strøm, W. C. Müller, T. Bergman, *Parliamentary Democracy: Promise and Problems*, [in:] K Strøm, W. C. Müller, T. Bergman (eds), *Delegation and Accountability in Parliamentary Democracies*, Oxford-New York: Oxford University Press, 2006, pp. 3–32.

[6] The term 'nation' is used here to denote the most important subject of democratic legitimacy.

[7] B. Ackerman distinguishes between so-called *higher lawmaking* and *normal lawmaking* – see B. Ackerman, *Constitutional Politics/Constitutional Law*, "The Yale Law Journal", Vol. 99, No. 3, 1989, p. 461 et seq.; see. B. Ackerman, *We the People. Foundations*, Cambridge-London: The Belknap Press of Harvard University Press, 1995, p. 6 et seq.

the arbitrariness of their operation[8]. It also means the introduction of a hierarchy[9]: the constitution is a *lex superior* and its provisions are not subject to the chronological rule of conflict of laws *lex posterior derogat legi priori*[10]. Assuming that the role of the constitution within a representative democracy is to determine the proper functioning of the whole delegation chain, it is particularly important to ensure a system of institutions or procedures guaranteeing the proper functioning of each link in the chain. In general, the question of constitutional guarantees means "securing the legality of the state's functions"[11], which can be clarified by the postulate that the law-making activity of state authorities is in line with the constitution. This applies in particular to the activities of the legislator.

III. Three models for constitutional guarantees[12]

The basic assumption of Kelsen's theory is that there can be no conflict between higher and lower level norms, because the conformity between levels creates the legal order as a whole, i.e. it allows the assigning of certain norms to a given legal system[13]. Therefore, the application and observance of the constitution by the legislator is crucial for the identity

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[8] See G. Sartori, *Constitutionalism: A Preliminary Discussion*, "The American Political Science Review", Vol. 56, No. 4, 1962, p. 860.

[9] See D. Grimm, *The Achievement of Constitutionalism and its Prospects in a Changed World*, [in:] M. Loughlin, J. P. McCormick, N. Walker (eds.), *The Twilight of Constitutionalism?*, Oxford: Oxford University Press, 2012, p. 9.

[10] See H. Dreier, *Gilt das Grundgesetz ewig? Fünf Kapitel zum modernen Verfassungsstaat*, München: Carl Friedrich von Siemens Stiftung, 2009, p. 25.

[11] H. Kelsen, *The Nature and Development of Constitutional Adjudication*, trans. L. Vinx, [in:] L. Vinx, *The Guardian of the Constitution. Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Cambridge: Cambridge University Press, 2015, p. 22.

[12] The considerations contained in the above and part of the next point are based on W. Włoch, *Problem gwarancji konstytucyjności legislacji w ujęciu czystej teorii prawa Hansa Kelsena*, „Przegląd Konstytucyjny", No 1, 2018, p. 65–91.

[13] H. Kelsen, *Pure Theory of Law*, trans M. Knight, Clark: The Lawbook Exchange, Ltd., 2005, p. 194–195. See O. Weinberger, *Normentheorie als Grundlage der Jurisprudenz und Ethik. Eine Auseinandersetzung mit Hans Kelsens Theorie der Normen*, Berlin: Duncker und Humblot, 1981, p. 130.

of this order, and so, it is expedient that constitutional guarantees exist. "Guarantees of the constitution are therefore [...] nothing but means for the prevention of unconstitutional statutes" [14]. Kelsen distinguishes three models of guaranteeing that statutes conform with the constitution[15].

(1) *Model 1*: "if the constitution contains no provision concerning the question of who authorized the examination of the constitutionality of statues, then the organs competent to apply statutes, that is, especially, the courts, have the power to perform this examination"[16]. Such bodies would have to answer the question as to whether certain acts called statutes correspond to the constitution, i.e. that 'being a statute' is the objective sense of a given act. "The law-applying organs cannot reasonably be authorized to apply as a statute everything that presents itself subjectively as such. A minimum of power to examine the constitutionality of the statutes to be applied must be granted to them"[17]. The 'minimum of power' concerns only formal issues (e.g. whether a given act was published in the promulgation journal) and concerns only the issue of the application of the statute in a given case. The 'maximum of power' in this case would mean the possibility of not applying a certain act considered as unconstitutional by the body applying the law, but it would not involve rescinding it[18].

(2) *Model 2*: when the constitution does not specify the entity authorized to control the constitutionality of statutes, and also excludes

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[14] Kelsen, supra note 11 at p. 30.

[15] We use the term "model" in the sense of M. Weber's ideal type. "An ideal type is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified analytical construct", M. Weber, "*Objectivity" in Social Science and Social Policy* [in:] M. Weber, *The Methodology of the Social Sciences*, trans. E. A. Shils and H. A. Finch, Glencoe: The Free Press, 1949, p. 90. An ideal type is an intellectual construct. "It has the significance of a purely ideal limiting concept with which the real situation or action is compared and surveyed for the explication of certain of its significant components; such concepts are constructs in terms of which we formulate relationships by the application of the category of objective possibility. By means of this category, the adequacy of our imagination, oriented and disciplined by reality, is judged", ibidem, p. 93.

[16] Kelsen, supra note 13 at p. 272.

[17] Ibidem, p. 272.

[18] See H. Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, "The Journal of Politics", Vol. 4, No. 2, 1942, p. 185 et seq.

such a possibility in the case of bodies applying laws, "only the legislative organ itself is authorized to decide whether the statute passed by it is constitutional"[19]. In such a case, the act of passing the statute itself is an act confirming its constitutionality, i.e. everything that the legislative authority passes as a statute "has to be considered as a statute within the meaning of the constitution"[20]. If the legislative authority itself decides on the validity of a legislative act, it may theoretically "establish" a legislative procedure other than that provided for in the constitution, and consider the acts established in accordance with that procedure as statutes. The constitution, which authorizes only the legislative authority to determine the constitutionality of statutes, introduces two possibilities for their adoption: (a) as contained in the constitution and (b) as recognised by the legislative body as a legislative procedure[21]. The consequence of not establishing a body controlling the constitutionality of statutes other than the legislative body is therefore the alternativity of ways of legislation. The method contained in the constitution would then be only one out of many possible. The alternativity described above does not result directly from the provisions of the constitution, nor does it need to occur in practice, but if a body that controls constitutionality is not established, the theoretical existence of an alternative legislative procedure is then possible.

(3) *Model 3*: "the constitution confers upon an organ different from the legislative organ the power to examine the constitutionality of statutes and authorizes this organ to repeal a statute considered as »unconstitutional«"[22]. Such a body may be empowered to repeal a statute declared "unconstitutional", not only for the purposes of its application in a particular case, but in all the cases to which the statute refers, that is to say, repeal the statute as such. The statute shall remain in force until its invalidity has been declared by the competent authority. This means that the constitution, when establishing the bodies, the legislative procedure, and to some extent the content of future statutes, states that those acts which do not fully comply with the provisions of the constitution are to be regarded as binding as long as they are not declared unconstitutional

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[19] Kelsen, supra note 13 at p. 273.

[20] Ibidem, p. 273.

[21] Ibidem.

[22] Ibidem.

by the competent authority. "The so-called unconstitutional statutes are constitutional statutes which, however, may be rescinded in a special procedure"[23].

IV. Danger of alternative forms of legislation

The guarantee of the constitutionality of statutes is intended to ensure that the legislature respects constitutional procedural and substantive standards. *Model 1* is limited to formal issues only, and does not address the issue of the validity of the law, but only its application. *Model 2*, in which the legislator itself states the constitutionality of laws, allows for the actual possibility of amending the constitution in terms of both the legislative procedure and the regulated matter, without changing its provisions. *Model 3*, which provides for a body examining the constitutionality of laws other than the legislator, "gives precedence" to the legislative procedure regulated in the constitution – it provides for the procedure of invalidating the so-called unconstitutional statute. The justification for establishing an "independent controlling body" does not consist in the fact that it would have to be "better" at recognizing and interpreting the constitution than the legislature, but that it has the right of veto over legislation that violates the norms of the constitution. Ultimately, the mechanisms of "constitutional guarantee" are to ensure the proper functioning of the entire delegation chain established by the constitution. And one of the most serious threats to it is the realization of the "alternative legislative form", because it is connected with the fact that it is not the constitution that determines the functioning of the delegation chain, but the legislative authority that does it on its own. In other words, in such a situation, it is the legislative authority as a representative body that will decide about "whether to" and "how to" represent the represented.

The materialization of "alternative legislation" (*model 2*) in fact means the primacy of political power over the constitution – the primacy of the authorities creating their "alternative legal order", not based on "higher law", but on political will. The lack of an "independent body examining

[23] Ibidem, p. 274.

constitutionality" facilitates the process of reducing the formal constitution to a "sheet of paper"[24]. In a case when the political forces dominating in a given system subjugate the institutions of the constitutional state and have them at their disposal, at their own discretion, one can speak of the primacy of the real constitution (a real relationship of political forces existing in a given society)[25] over the legal one. The dualism of "higher law – ordinary law" is replaced by the primacy of political will over the law. The existence of an independent body in a sense "limits" the legislator[26], but this must be understood as limiting his political will, which could go beyond the constitutionally defined framework. However, it cannot be said in any way that it restricts the legislative functions of the legislator derived from the constitution.

Accepting the general definition of the constitutional state as a state whose fundamental institutions and bodies are constituted and bound by a positive "higher law", it is also argued that any attempt at unconstitutional expansion of the scope of political power constitutes a step towards the abolition of that state. Thus, if the primary function of the constitutional guarantee is to safeguard the stability and coherence of a legal system based on a specific constitution, it also safeguards the political system based on it. Thus, it can be said that the body performing the guarantee function has not only a purely legal, but also a political justification, because it constitutes a security for the political and systemic identity of a given state. Thus, when the political lawmaker of the constitutional system establishes the democratic form of the state, the guarantee of the democratic legislative procedure would at the same time be the guarantee of the democratic nature of the system. Modern representative democracy is largely procedural in nature: it is a specific method of law making which ensures citizens' participation in the law making procedure[27]. The

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[24] See F. Lassalle, *Über Verfassungwesen*, Berlin: Buchhandlung Vorwärts, 1907.

[25] Ibidem.

[26] As M. Eberl puts it, a 'controlling body' can interfere in a political process with the help of substantive guidelines, while other supreme state bodies cannot deprive it of its control competences. See M. Eberl, *Verfassung und Richterspruch. Rechtsphilosophische Grundlegungen zur Souveränität, Justiziabilität und Legitimität der Verfassungsgerichtsbarkeit*, Berlin: De Gruyter, 2006, p. 4.

[27] H. Kelsen, *Foundations of Democracy*, "Ethics", Vol. 66, No. 1, 1955, p. 4 et seq.

controlling body, being a guardian of the legislative procedure, secures democracy[28].

In this context, two meanings of the political can be distinguished. The first meaning would be about striving to realize ideals and to fulfil objectives of political actors, by using all the available means of political power, which often conflict with the ideals and objectives of others[29]. The second meaning of the political would imply adopting the basic systemic principles of a given country as a determinant of conduct and interaction between political actors[30]. In a constitutional democracy, the first type of the political is limited by the political principles of the second type, which are expressed in the constitution[31]. Therefore, the implementation of specific ideals and political aspirations in the form of universally binding legislation (that is the first meaning of the political) must take place in the form provided for in the constitution. It establishes such rules of political rivalry so that all the actors may view the course and outcome of a democratic procedure as fair and just (that is the second meaning of the political). The role of the controlling body, i.e. a constitutional court, would be to guarantee compliance with the principles and rules of the political of the second meaning. However, one could not become an active political actor as far as the first meaning of the political is concerned.

From Kelsen's perspective, this type of body would limit the activity of political actors in order to guarantee constitutional norms, that is the political in the second meaning. Therefore, if the activity of the controlling body was within such a framework, this activity would fulfil a political role which could be legitimized within representative democracy. However, the very existence of such a body does not determine whether the guarantee of the constitution (the political in the second meaning) will be effective, or whether such a body will not be involved in a political dispute defined in the first meaning.

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[28] Kelsen, supra note 11 at p. 71–72.

[29] See the concept of the political in Ch. Mouffe, *The Democratic Paradox*, London-New York: Verso, 2000.

[30] See the concepts of political values and political conception in J. Rawls, *Political Liberalism*, New York: Columbia University Press, 1993.

[31] See W. Włoch, *Pomiędzy czystym prawem a ideą polityczną. Pojęcie konstytucji w doktrynach Hansa Kelsena i Johna Rawlsa*, Toruń: Wydawnictwo Uniwersytetu Mikołaja Kopernika, 2018, pp. 133–137.

V. Guarantee of constitutionality in Polish constitutionalism

Against the background of the presented theory, one can refer to two practical problems related to the lack of real guarantee over the constitutionality of legislation. Such a lack occurs both when it is the result of a conscious decision of the lawmaker of the constitutional system, as well as when by virtue of political will there is a neutralization or instrumental use of the body established for this purpose.

Both of these situations can be found in the history of Polish constitutionalism. In the interwar period, during the legislative work on the Constitution of 1921, Edward Dubanowicz, who was a deputy, stated that the American model of controlling constitutionality could be acceptable on the other side of the Atlantic, but not on the continent[32]. In the discussion there were also opinions voiced that a separate tribunal would become the "most effective brake" on the dynamic legislative activity of the parliament[33]. One of the drafts, signed by Kazimierz Lutostański, a priest and a deputy of the Popular National Union (ZLN), which provided for the possibility for second instance courts to apply to the Supreme Court for recognition of the statute as unconstitutional, was rejected[34]. Ultimately, Article 81 was added to the constitution[35], which reads as follows: "Courts have no right to examine the validity of statutes duly promulgated', while Article 38 introduced the principle that no statute may be in conflict with the constitution or violate its provisions. The first cited provision made of the second a *lex imperfecta*, a norm that was not subject to sanction. This solution was replicated, among others in the provision of Article 1(3) of the Act on the Supreme

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[32] R. Jastrzębski, *Konstytucyjność aktów ustawodawczych w judykaturze II Rzeczypospolitej*, „Przegląd Sejmowy", 2 (97) 2010, p. 78.

[33] A. Gwiżdż, *O Trybunale Konstytucyjnym w Drugiej Rzeczypospolitej* [in:] J. Trzciński, A. Jankiewicz (eds.), *Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci prof. Janiny Zakrzewskiej*, Warszawa: Wydawnictwa Trybunału Konstytucyjnego, 1996, s. 63.

[34] Jastrzębski, supra note 32 at p. 78.

[35] The Constitutional Act of 17 March 1921 (Journal of Laws of the Republic of Poland no. 44, item 267).

Administrative Court[36], excluding "the examination of the validity of acts duly promulgated" from its jurisdiction. An isolated case was the voices of some representatives of the doctrine, the outstanding criminal law expert Wacław Makowski among them, who all allowed the constitutionality of laws to be examined by the courts. They believed that the constitution could not be just perceived as a set of programme norms[37].

On the occasion of the amendment to the Constitution of 1926[38], the draft statute on the Constitutional Tribunal was rejected. It is pointed out that the drafts unanimously removed legislative acts of the president from the jurisdiction of the constitutional court. On the one hand, the president was seen as a special guardian of the constitution; on the other hand, it was pragmatically assumed that if the president had issued a decree that contradicted the constitution, the conflict would have moved 'into the political field, where the lawyer is helpless', so stated W.L. Jaworski. He also stated that the idea of a tribunal is denied by those whose opinion is of "the view that Parliament is called upon to control, but that it cannot be controlled itself"[39].

The discussion on the appointment of a tribunal, being very lively in the face of the renewal of the process of amending the constitution in the early 1930s, also failed to reach a consensus on that matter. The group which opposed the idea of a tribunal in particular was the Sanation that had come to power as a result of the May 1926 "Coup d'État" and was afraid of eroding the newly formed, strong legislative position of the president[40]. National Democracy (ND) and other conservative circles supported the appointment of a tribunal. The Constitution of 1935[41], which expressed authoritarian trends and rejected the separation of powers

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[36] The Law on the Supreme Administrative Tribunal of 3 August 1922 (Journal of Laws of the Republic of Poland no. 67 item 600).

[37] M. Pietrzak, *Państwo prawne w Konstytucji z 17 marca 1921*, „Czasopismo Prawno-Historyczne", Vol. XXXIX, 2, 1987, p. 115.

[38] Journal of Laws of the Republic of Poland no. 78, item 442.

[39] W. L. Jaworski, *Projekt konstytucji*, Kraków: Skład Głowny w Księgarni Leona Frommera, 1928, p. 181, 179 (There is also a text of the aforementioned draft on p. 182–184).

[40] Kazimierz Świtalski presented, among others the possibility of the "guillotining" of the president's decrees by the Tribunal owing to its political composition or "due to exaggerated legal puritanism", as cited in Jastrzębski, supra note 32 at p. 83–84.

[41] Journal of Laws of the Republic of Poland. no. 30, item 227.

which was key to the systemic role of the president, maintained the ban on examining the constitutionality of statutes as well as presidential decrees equivalent with them. At the same time, the lack of a constitutional court was so important in practice that there were cases of decisions on unconstitutionality issued by the Supreme Court and the Supreme Administrative Court, despite the prohibition expressed in the constitution and in the aforementioned Act on the Supreme Administrative Court[42].

After 1976 in the communist period, the task of ensuring compliance with the constitution was formally entrusted to the Council of State[43]. The separate controlling body, i.e. the Constitutional Tribunal, was established at the end of the communist era in 1985[44]. It began to play a special role after the political changes of 1989. The amendment to the constitution of the Polish People's Republic, introducing the principle that "the Republic of Poland is a democratic legal state implementing the principles of social justice"[45], in fact established a system different from authoritarianism which is based on the hegemony of one party. The above-mentioned clause constituted the basis for the Constitutional Tribunal to introduce a number of norms characteristic for contemporary representative democracy[46]. The legislative procedure

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[42] Cf. D. Malec, *Najwyższy Trybunał Administracyjny 1922–1939 w świetle własnego orzecznictwa*, Warszawa-Kraków: Wydawnictwo Naukowe PWN, 1999, p. 93–96; Jastrzębski, supra note 32 at p. 86–91.

[43] Art. 30, para 1, point 3) of the Constitution of the Polish People's Republic after the amending of 10 February 1976 (unified text of Constitution published Journal of Law{s?} 1976 no 7, item 36). Cf. Z. Witkowski, *Zagadnienie zgodności aktów Sejmu z Konstytucją PRL w świetle doktryny*, „Ruch prawniczy, ekonomiczny i socjologiczny", Year XLIII, 1, 181, pp. 37–49; S. Bożyk, *Pozycja ustrojowa Rady Państwa w konstytucji PRL z 22 lipca 1952 r.*, „Miscellanea Historico-Juridica", VIII, 2009, pp. 161–174.

[44] Law on the Constitutional Tribunal of 29 April 1985 (Journal of Laws no. 22, item 98).

[45] Act of 29 December 1989 amending the Constitution of the Polish People's Republic (Journal of Law{s?} no. 75, item 444).

[46] The activity of the Constitutional Tribunal, especially in the period until the establishment of the new Constitution of the Republic of Poland in 1997, was criticized for being too activist. Cf. e.g. B. Banaszak, *Aktywizm orzeczniczy Trybunału Konstytucyjnego*, "Przegląd Sejmowy", No 4, 2009, pp. 75–91; L. Morawski, *Zasada trójpodziału władzy. Trybunał Konstytucyjny i aktywizm sędziowski*, "Przegląd Sejmowy", No 4, 2009, pp. 59–74; I. Wróblewska, *Zasada państwa prawnego w orzecznictwie Trybunału Konstytucyjnego RP*,

provided for in the constitution was of special importance for the Tribunal[47].

As it is worded in one of the rulings, "The Constitutional Tribunal is of the opinion that the need to respect the constitutional principles of the legislative procedure is completely independent from the substantive content of the adopted statue. Compliance with these principles is to protect the basic values of the system based on the principles of constitutionalism and democracy. In its Ruling of 23 November 1993, the Constitutional Tribunal emphasized the significance of the function of each stage and activity of the legislative process determined by the parliamentary law. The Tribunal put emphasis on the fact that the legislative power of the Parliament, that is its chambers, and the related powers of other entities, are all implemented by the means of formalised legislative law consisting of separate stages (phases) in which every participant in this process has the right to take specific actions that affect the content or form of the statue. In the course of the legislative process, each of these actions (activities) has a specific purpose, and its use brings certain legal consequences. The misuse of any action, or the action used in the wrong phase of the legislative process, may also destroy basic values integral to the parliamentary way of creating law (The Ruling of the Constitutional Tribunal of 1993, K. 5/93, Part II, p. 389)"[48]. A violation of the legislative procedure is a serious case of great importance because it also means a violation of the basic principles of democracy (the political in the second meaning). Regardless of what matter a given statue concerns or to what extent it is or is not right and rational, non-compliance with the legislative procedure means a violation of the democratic way of creating the "representative common will". It strikes at the very heart

Toruń: TNOiK, 2010, pp. 213 et seq; Z. Witkowski, M. Serowaniec, *Wykładnia zasady demokratycznego państwa prawnego a problem (nad)aktywizmu sędziowskiego,* (in print).

[47] For more detailed information on the case-law of the Constitutional Tribunal regarding the legislative procedure, see *Proces prawotwórczy w świetle orzecznictwa Trybunału Konstytucyjnego. Wypowiedzi Trybunału Konstytucyjnego dotyczące zagadnień związanych z procesem legislacyjnym*, opracowanie Biura Trybunału Konstytucyjnego, Warszawa: Wydawnictwa TK, 2015; J. Szymanek, *Wpływ orzecznictwa Trybunału Konstytucyjnego na kształtowanie się prawa parlamentarnego*, "Przegląd Sejmowy", No 4, 2009, pp. 145–175.

[48] The Ruling of the Constitutional Tribunal, K 14/02.

of representative democracy. Therefore, "The Constitutional Tribunal considers it justified to first consider [...] the procedural allegations. If they lead to the conclusion that this law came into effect in breach of the provisions of the procedure, then it will be sufficient grounds for the recognition of its unconstitutionality and there will be no grounds for adjudicating on any substantive content"[49]. In the course of its work, the rulings of the Tribunal referred to political issues in the sense of the first meaning of the political, for instance abortion, vetting, the pension system, or ritual slaughter. In all of these fields the rulings could arouse political criticism and provide a basis for a critical reflection on the legitimacy of the Tribunal[50].

The Constitutional Tribunal seemed to be permanently inscribed in the standards of the rule of law that were expected from Poland after the transformation. It was anchored in the Constitution of 1997[51], and yet its role was minimized after the elections in 2015 when the President refused to swear in five judges elected by the outgoing Parliament. The Constitutional Tribunal ruled that the law enabling the earlier election of two of them was unconstitutional[52], while the President's decision on the three others was fully arbitrary. The new parliamentary majority adopted a number of regulations concerning the Tribunal and chose judges to replace the three judges mentioned, whom the critics called "judge-doubles" in turn, the Tribunal, which still had a majority of judges elected in previous terms, considered some of the new regulations unconstitutional. The Prime Minister refused to promulgate these judgments, which ultimately happened under pressure

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[49] The Ruling of the Constitutional Tribunal, K 3/98.

[50] See e.g. L. Garlicki, *Niekonstytucyjność: formy, skutki, procedury*, „Państwo i Prawo", No 9, 2016, pp. 3–20; W. Gromski, *Legitymizacja sądów konstytucyjnych wobec władzy ustawodawczej*, "Przegląd Sejmowy", No 4, 2009, pp. 11–23; R. Małajny, *Trybunał Konstytucyjny jako strażnik Konstytucji*, „Państwo i Prawo", No 10, 2016, pp. 5–22; K. Kaleta, *Legitymizacja sądownictwa konstytucyjnego w świetle teorii demokracji*, „Państwo i Prawo", No 5, 2018, pp. 3–21; A. Sulikowski, *Trybunał Konstytucyjny a polityczność. O konsekwencjach upadku pewnego mitu*, „Państwo i Prawo", No 4, 2016, pp. 3–14; J. Zajadło, *Wewnętrzna legitymacja sądu konstytucyjnego*, „Przegląd Sejmowy", No 4, 2009, pp. 129–144.

[51] Journal of Laws no. 78, item 483.

[52] The Ruling of the Constitutional Tribunal of 3 December 2015 (K34/15, Journal of Laws 2015, item 2129).

from international bodies. The published judgments were accompanied by a bizarre clause which refused them the nature of a binding decision[53]. Also, the new president of the Constitutional Tribunal, who has recently been found to have had close social relations with the leader of the ruling party, was elected in breach of procedural rules. These circumstances have caused the authority of the Tribunal to collapse, and authorized bodies rarely file motions to the Tribunal, fearing that the decisions will be in favour of the ruling majority[54]. The effectiveness of the Tribunal's work has significantly decreased, with only a little more than ten rulings recorded in the first half of 2019, while by 2016 the rule had been to issue between 100 and 190 rulings per year. Ultimately, therefore, the Tribunal has become a facade body that legitimises controversial laws. We are unanimous in our assessment that the state has indeed been deprived of a key supervisory body, the guarantor of the constitution.

VI. The need for democratic legitimacy

The case of Polish constitutionalism indicates that just as the lack of a constitutional court can be interpreted as facilitation on the way towards authoritarianism, the existence of such a court does not fully protect against this threat. The risk that the constitutional legislative procedure may be replaced by an "alternative procedure" does not eliminate the mere fact of the existence of a controlling body. The events that took place after 2015, resulting in the weakening of the Constitutional Tribunal

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[53] The Ruling of the Constitutional Tribunal of 9 March 2016 (K 47/15), 11 August 2016 (K 39/16) and 7 November 2016 (K 44/16), published in Journal of Laws 2018, items 1077, 1078, 1079, with the explanation that "The decision issued **in violation of the provisions** of the Act of 25 June 2015 on the Constitutional Tribunal concerned a normative act that has lost its binding force".

[54] On the subject of changes after 2015 see e.g. H. Dębska, T. Warczok, *Sakralizacja i profanacja. Trybunał Konstytucyjny jako struktura mityczna*, „Państwo i Prawo", No 5, 2018, pp. 63–74; A. Kustra, *Poland's Constitutional Crisis. From Court-Packing Agenda to Denial of Constitutional Court's Judgments*, "Studi Polacco-Italiani do Toruń", No XII, 2016, pp. 343–366; W. Sadurski, *Poland's Constitutional Breakdown*, Oxford: Oxford University Press, 2019; M. Zubik, *A.D. 2015/2016. Anni horribili of the Constitutional Tribunal in Poland*, "Przegląd Konstytucyjny", No 2, 2018, pp. 46–57.

as a guarantor of constitutionality, did not meet with social opposition strong enough to limit the activities of the political power. It can be argued that the weakening of the Tribunal is related to negative tendencies regarding compliance with the legislative procedure[55], yet it does not involve any political consequences that could hinder the re-election of the ruling majority. It can be assumed that one of the factors of the lack of a strong and broad social response is the lack of democratic legitimacy of the Tribunal, however, not on a purely theoretical level, but on the basis of the perception of its role by all the citizens. This would mean that the Tribunal's role as a guarantor of the "chain of delegation" provided for in the constitution, the chain which should undoubtedly result in appropriate law making by the representatives of all the citizens, is invisible. If we want to subject the state principles to specific guarantees, the problem of securing the "chain of delegation" seems to be of particular importance. The political in the second meaning that we distinguished earlier would have to prevail over the political in the first meaning, both in civic attitudes and in political solutions.

The problem of perceiving the importance of the political in the second meaning is related to the very understanding of representative democracy and the normative theory related to it on how a controlling body should function. Representative democracy should work in accordance with the majority-minority principle: "By dividing the entire body of subjects into essentially two large groups, this principle has already furnished the possibility for compromise in government, since the final integration into a majority, as well as a minority, itself necessitates compromise"[56]. The law-making procedure should ensure that a dispute and a dialogue between opponents can be conducted, and it should not remain a tool for dominance. Therefore, the procedure must be designed so that it does not exclude any minority. Otherwise, some citizens would not be represented

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[55] See A. Bień-Kacała, A. Tarnowska, W. Włoch, *The Sejm as delegated power – still a representative body?* (in print).

[56] Kelsen, supra note 11 at p. 70. On the relationship between the pure theory of law and theory of democracy see S. Baume, *Hans Kelsen and the Case for Democracy*, trans. J. Zvesper, Colchester: ECPR Press, 2012, H. Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen*, Baden-Baden: Nomos Verlagsgesellschaft, 1986; Włoch, supra note 31 at p. 189–211.

in the legislative body. In this approach, the chain of delegation would amount to the delegation of a majority only.

The existence of the guarantee of constitutionality of laws would ensure the majority-minority nature of representative democracy. "Insofar as it makes sure that statutes come into existence in conformity with the constitution, and in particular also that their content is constitutional, constitutional adjudication serves the function of an effective protection of the minority against assaults on the part of the majority, whose rule becomes tolerable only by virtue of the fact that it is exercised in legal form. The specific form of constitution which typically consists in the fact that a constitutional amendment is tied to the requirement of a heightened majority, ensures that certain fundamental questions can be resolved only with the participation of the minority. [...] The mere threat of making an appeal to the constitutional court may well turn out to be a sufficient instrument in the hands of the minority to prevent unconstitutional violations of its interests on the part of the majority, and thus, in effect, to prevent a dictatorship of the majority that is no less dangerous to social peace than the dictatorship of a minority"[57]. Maintaining the constitutionality of the legislative procedure is to provide the minority with guarantees of their political subjectivity and autonomy. It protects them against becoming only the subject of the majority's decision without taking into account the minority's interests[58]. Democracy

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[57] Kelsen, supra note 11 at pp. 71–72.

[58] W. Sadurski criticizes the strategy of defending the legitimacy of constitutional courts by presenting them as defenders of minority rights since it is difficult to indicate that a constitutional court is of a priori pro-minority nature, and similarly it is difficult to show that the majority is always particular and does not follow any concept of justice, see W. Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Dordrecht: Springer, 2008, p. 58 et seq. However, Sadurski points out that "the argument that, in a democratic system, there must be a protector of minority rights against majoritarian abuse, and that constitutional courts are well suited to perform such a role, *might* be a good legitimating argument to support the existence of strong constitutional courts – but [...] it fails to perform that role satisfactorily in the discourse on the legitimacy of judicial constitutional review", ibidem,. p. 62. The role of a constitutional court or a similar controlling body mentioned by us earlier is a normative thesis, i.e. it answers the question of how such a body should operate in the theory of representative democracy.

thus becomes a system representing the whole complex society, not just its dominant part.

A normative concept of the role of a constitutional court resulting from representative democracy perceived in this way would be a "representation-reinforcing approach to judicial review", according to which (a) a constitution contains certain procedural conditions for developing its provisions in the political process of law-making, (b) a court or courts, depending on the model, guarantee the basic assumptions of representative democracy by focusing on procedural issues in their activities, (c) limiting their actions mainly to these issues, they make use of specific legal competences[59]. Then, the constitutional court would avoid getting involved in legislative disputes at the level of the political in the first meaning, while it would guarantee that legislative disputes

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[59] J. H. Ely, *Democracy and Distrust. A Theory of Judicial Review*, Cambridge-London: Harvard University Press, 1980, pp. 87–88. The procedural legitimacy means recognizing the validity of a specific decision taking into consideration the legitimacy of the procedure. As J. Waldron points out, the theory of legitimacy is to answer the questions of "who" makes decisions and "what arguments prevail". The democratic legislative procedure is legitimized by the principle of equality: everyone has a formal equal right to participate in a democratic procedure. Regarding a constitutional court, the question of "who makes decisions" can be answered that the persons elected by a representative body, the question of "what arguments prevail" can be answered that this is resolved by the majority principle. Why, however, would the decision of several judges outweigh the legislative decision? In the view of Waldron, the legitimacy of constitutional courts in relation to the principles of democracy is not strong: they do not directly implement the democratic principle of equality (because not everyone has a formal equal right to participate in the judicial procedure), and the principle of majority weakens the perception of constitutional courts as the embodiment of the public reason (since the "best" arguments do not necessarily prevail). See J. Waldron, *The Core of the Case against Judicial Review*, "The Yale Law Journal", Vol. 115, No. 6, 2006, pp. 1386–1393. However, in the view of R. H. Fallon, with respect to the protection of fundamental rights, the legitimacy of constitutional courts is not that it would have a "better" way to recognize and interpret rights than the legislature, but that it has the right of veto over legislation which violates these rights. It does not assume a qualitative advantage of the constitutional judiciary over the legislature, but only establishes an additional safeguarding institution, R. H. Fallon Jr., *The Core of an Uneasy Case for Judicial Review*, „Harvard Law Review", Vol. 121, No. 7, 2008, p. 1695 et seq. Similarly, in the case of an audit for the legislative procedure, the controlling body would be a "point of veto" enabling the correction of "errors" of the democratic process.

would be resolved in the manner expressed by the procedure defined in the context of the political in the second meaning[60]. The legislative procedure is not simply a procedure: "…procedural democracy does not mean simply voting computation or institutional correctness, but also using free speech and freedom of the press and of association in order to make the informal or extra-institutional domain an important component of political liberty. Democracy is a combination of decisions and judgement on decisions: devising proposals and deciding on them (or those who are going to carry them out) according to majority rule. [...] Democratic proceduralism is in the service of equal political liberty since it presumes and claims the equal right and opportunity that citizens have to participate in the formation of the majority view with their individual votes and their opinions; it is what qualifies democracy as a form of government whose citizens obey the laws they contribute to making, directly or indirectly"[61]. In other words, the values and principles fundamental to democracy are reflected in the legislative procedure. As a guardian of procedures, a constitutional court would also be the guardian of the values on which these procedures are based.

In the case of a violation of the legislative procedure by a majority, a minority may restore the constitutional state by the means of a complaint to a constitutional court. It then functions in the form of "virtual representation', that is the consideration of the matter by a controlling body, which will take into account the arguments of all the parties, even those not participating in the actual legislative process[62]. The existence of

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[60] Referring to R. H. Fallon, it can be stated that a controlling body may have general political legitimacy in a constitutional regime "insofar as it helps to minimize fundamental rights violations, even if it lacks democratic legitimacy", see Fallon, supra note 59 at p. 1716. If the legitimacy of the democratic procedure is associated with the result to which it is to lead, that is lawmaking in accordance with the majority-minority rule, it is possible to indicate the general political legitimacy of a specific institution, which allows the achieving of all the goals and preserves all the values desired in a democratic constitutional regime. Therefore, not every institution of the constitutional democratic regime must have this direct democratic legitimacy if the results of these institutions have a positive impact on the functioning of the democratic system or are considered as such.

[61] N. Urbinati, *Democracy Disfigured. Opinion, Truth, and the People*, Cambridge-London: Harvard University Press, 2014, pp. 18–19.

[62] Ely, supra note 59 at p. 84–88.

a constitutional court[63] within the framework of representative democracy would constitute an element of restoring equality disturbed in the legislative process, i.e. maintaining its majority-minority character. The question arises whether this form of a constitutional guarantee would be particularly resistant to the designs that the political power has. It seems that it would require a widespread recognition by both political and social majorities of the value of majority-minority democracy which would limit the tendency to transform itself into majority democracy. It would be particularly important to have social support for the institutions of representative democracy, which would limit the tendencies of the political power willing to subject democracy to be ruled only by the majority. Citizens would have to be aware of the significance of the constitutional court for representative democracy, while the court would have to prove this importance.

VII. Conclusions

By adopting a specific understanding of the concept of democracy, we may get a certain normative concept of the role of "controlling bodies". From the perspective of Kelsen's theory, the main threat to representative democracy is the "alternative legislative procedure", that is a non-constitutional form of legislation based solely on the political will. The effect of this mode would be to deconstruct the chain of delegation provided for in the constitution. In such a case, we would be dealing with the majority delegation in the absence of the minority delegation. On a smaller scale, the chain of delegation is disturbed by violations of the constitutional legislative procedure.

In both cases the guarantee of constitutionality means the restoration of an equal representation in the legislative procedure based on the majority-minority rule. Pursuant to this principle, the minority has the right to participate effectively in the legislative process and to express their position in the forum of the legislative body. As the guardian of the democratic legislative procedure, the constitutional court should be

[63] In model 1 this would be a distributed control system with its maximum competence.

a ground for the "virtual representation" of all the parties of a democratic dispute, and as a result, it should prevent the transformation of representative democracy into majority democracy. The constitutional court which acts in this way becomes a political body as far as the second meaning of the political is concerned, guaranteeing that the real political practice will occur in a form consistent with the principles of representative democracy[64].

[64] We are not suggesting that it might be the only role that a constitutional court should play, but that it is a fundamental role from the point of view of the theory of representative democracy. What is more, we are not suggesting that only the issues of the legislative procedure should be subject to an audit, but that from our perspective they are particularly important.

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THE PUBLICISATION OF PRIVATE RELATIONS BY HORIZONTAL APPLICATION OF CONSTITUTIONAL RIGHTS**

Abstract

Constitutional courts (CCs) are more and more often facing a situation in which the status of entities of legal relation escapes public – private distinction. The reasons for this include inter alia the privatization of state tasks. To ensure the efficiency of fundamental rights in a "reduced" state, CCs develop instruments that make it possible to apply constitutional provisions also in formally private relations. These instruments are based on the horizontal application of constitutional rights. They result in the publicisation of private relations. The measures taken by CCs restore the balance previously disturbed because of privatization. Therefore I describe them as a "return" or "corrective" publicisation. Despite important differences between legal cultures and the legal reality in particular countries (Germany, USA, Poland) the mechanism of judicial publicisation is based, to some extent, on universal argumentation.

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Keywords

horizontal – application of constitutional rights – publicisation of private relations, constitutional courts – privatization of states tasks

Introduction: public-private

The question of the division into public and private law, which was present in ancient philosophy, but lost its importance in the Middle Ages, has been an important and constant subject of academic reflection all over the world since the advent of modern times. The existence of public law that is distinct from private law, understood as a set of specific rules applied in administration, is present in all legal systems, but nevertheless, according to M. Lemmonier, this distinction is a way of thinking about the law which has not been established everywhere and always in the same way[1]. First of all, it must be remembered that there is a difference between the states of *civil* and *common law*, because in the latter, the division in question is not very explicit and the norms of public and private law do not form separate systems[2]. However, they include institutions or rules of public law that differ from those applied in the private law order, such as public rights in the United States, which relate to the exercise of constitutional functions by the legislature or the executive[3]. Although many other *criterium divisionis*[4] have been formulated, starting with

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[1] M. Lemmonier, *Prawo publiczne a prawo prywatne. Uwagi prawnoporównawcze na podstawie prawa francuskiego,* [*Public law and private law. Comparative legal remarks based on French law*],"Studia Prawno-Ekonomiczne", v. C, 2016, pp. 68–69, [last accessed: 31.07.2019].

[2] Opinions critical of the legitimacy and need for a division into public and private law present in the science of law in the United Kingdom and the USA are presented by A. Clapham in *Human Rights in the Private Sphere*, Oxford 1993, pp. 130–133 and 150–151.

[3] E. Zoller, *Introduction au droit public* [*Introduction to Public Law*], "Dalloz" No 1–2, 2006, as cited in: "Revue de Droit Henri Capitant", No 30, Lexbase, 2012, p. I, as cited in: Lemmonier, supra note 1 at p. 71.

[4] Cf. on this subject e.g. J. Holliger, *Das Kriterium des Gegensatzes zwischen dem öffentlichen Recht und dem Privatrecht dargestellt im Prinzipe und in einigen Anwendungen mit besonderer Berücksichtigung des schweizerischen Rechtes* [*The criterion of the opposition between public law and private law presented in principle and in some applications with particular*

the ancient Ulpianian *utilitas*, there is no consensus on the elementary question of whether this dichotomy stems from the very nature of law, and therefore has cognitive significance, or whether it is a question of adopting criteria that are external to law, and thus results from a specific convention, ideology, or value, and the boundary of separation is not clear or certain[5].

Notwithstanding the existing difficulties in separating the two spheres, or even in assuming that any dividing criteria must, in principle, be indicative, there is agreement as regards the classification, according to which constitutional, criminal, or administrative law are types of public law, and civil law is primarily private law. The key issue here is to distinguish the sphere in which the individual is subject to the authority of state bodies in the sense of public intervention in their functioning, from the sphere that is free from it[6], in which the individual shapes his or her behaviour on the basis of private autonomy.

The existence of private autonomy and the related possibility of creating one's own affairs with all parties having equal status is considered to be the feature that characterizes horizontal relations most accurately. However, the systems of law undergo transformations that affect the possibility of easily separating the private sphere from the public sphere. The most diverse aspects of these transformations have long been analysed in the academic literature[7]. Particular attention is drawn to the progression of publicising the entire law, which is manifested by the growing interference of the public factor in the domain that had previously been reserved for the autonomous behaviour of

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reference to Swiss law], Zürich 1904, p. 11; J. Nowacki, *Prawo publiczne – prawo prywatne* [*Public Law – Private Law*], Katowice 1992, pp. 70–105.

[5] More on the subject Nowacki, supra note 4 at p. 132.

[6] L. Morawski, *Wstęp do prawoznawstwa* [*Introduction to jurisprudence*], Toruń 2005, pp. 90–91.

[7] See e.g. J. Habermas, *Strukturwandel der Öffentlichkeit: Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft* [*The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*], Frankfurt 1962; M. Ruffert (ed.), *The Public – Private Law Divide: Potential for Transformation?*, London 2009; M.R. Freedland, J.-B. Auby (eds), *The Public Law/Private Law Divide. Une entente assez cordiale? (Studies of the Oxford Institute of European & Comparative Law)*, Hart Publishing, 2006.

individuals[8]. It leads to a significant limitation of the sphere that is free from public interference. This transformation is most visible from the perspective of civil law, because, as it is observed, its essence is to depart from the classic assumptions of the nineteenth-century codification[9]. Thus, we are dealing primarily with limiting the field of application of the private law method in favour of public law regulations, i.e. the exclusion of certain segments from the scope of private law and the increasingly distinctive infiltration of the collective interest in the area of relations left on the basis of traditional exclusivity of the parties[10]. We will return to more detailed manifestations of publicising the law later in the text, and at this juncture we will only note that in principle it is perceived as a threat to individual freedom which cannot be reconciled with the ideology of human rights. Meanwhile, the expansion of the function of modern states, which is the main reason for publicising the law[11], is connected with the idea of securing constitutional regulations that guarantee rights and freedoms by state authorities. Moreover, such action by the state could be justified even from the perspective of classical liberalism, which allowed it to intervene if its aim was to maintain proper relations between citizens[12]. As early as in the mid-19th century, it was observed that the state should interfere with private law relations in order to protect their weaker side[13]. The expansion of state interventionism in the second half of the twentieth century was justified by the realisation of the growing scope of social functions. Above all, however, it should be stressed that it was the increase in the importance of the constitution and its guaranteeing function that significantly limited the autonomy of

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[8] M. Safjan, *Pojęcie i systematyka prawa prywatnego* [*The notion and the organisation of private law*], [in:] M. Safjan (ed.), *System prawa prywatnego* [*The system of private law*]. Vol. 1. *Prawo cywilne – część ogólna* [*Civil law – general part*], Warsaw: C.H. Beck 2012, p. 49.

[9] Ibid, p. 49.

[10] Ibid., p. 50.

[11] L. Morawski, supra note 6 at p. 93. The development of technology is also significant. A separate issue, however, is the emergence of totalitarian regimes with their philosophy which asserts that everything is a public matter. Cf. J. Nowacki, supra note 4 at pp. 108–109.

[12] H. Spencer, *The man versus the state: with six essays on government, society, and freedom*, Indianapolis 1981, p. 127.

[13] J. Limbach, "*Promieniowanie" konstytucji na prawo prywatne* ["*Radiation" of the constitution onto private law*], „Kwartalnik Prawa Prywatnego" no. 3/1999, p. 407.

private law in relation to the constitutional system of values, including values that express human rights. Following the jurisprudence of the Federal Constitutional Court, the German legal doctrine in this context speaks of the double binding nature of fundamental rights. As part of constitutional law, they are classic public-private norms used in vertical relations. At the same time, being the core of the objective order of values (*objektive Werteordnung*), they affect the entire legal system in such a way that no provision – including private law – can be in conflict with this order[14].

I. Constitutional rights in a "reduced state"

The publicisation of private law is a complex and internally heterogeneous phenomenon. The activities of the legislator, who introduces public regulations into the private sphere, are of fundamental importance. As a result, mixed areas emerge which are not subject to clear characteristics, the most evident example of which is labour law. The diversification of the scope and intensity of the state's interference in these relations is the response of the legislator to the diversity of legal relations occurring on the grounds of exchanging goods and services. A greater number of mandatory standards protecting the weaker side of legal relations in consumer trade (unilaterally professional) is the result of the observation that it differs significantly from the general and bilaterally professional trade, where the position of the parties is relatively equal and the *iuris dispositivi* regulation is sufficient.

The subject of interest of this article is the publicisation of private law which is observed in jurisprudence. More precisely, it refers to the situations in which a horizontal application of constitutional rights and freedoms in specific decisions is a response to the privatisation of the tasks and functions of the state. The jurisprudence strategies presented below, which make possible the protection of the rights of individuals in the conditions of the 'reduction of the state' have been developed in the decisions of the Federal Constitutional Court of Germany and the

[14] Judgment of 15 January 1958, 1 BvR 400/51, BVerfGE 7, 198 – *Lüth.*

Supreme Court of the United States. When justifying this choice, it should be noted that these are the longest-established concepts with the widest scope of influence[15]. It is possible that these strategies have a direct impact on the decisions of courts in other countries, and that they may be used as a model or a point of reference when creating domestic solutions in this scope[16]. In this text a national perspective on the protection of 'constitutional rights' in private relations has been adopted, although it is of course a problem that has been present for many decades at the level of the international protection of human rights. The latter perspective focuses in particular on the issue of globalisation, which, by leading to the development of transnational private corporations, drastically diverges from the ideals of human rights[17].

It can be assumed, by the use of a certain simplification, that publicising private law is the reverse of privatising public law. Speaking of

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[15] Interestingly, K. Stern, when speaking about the progenitors of German debates on *Drittwirkung*, points to the United States and the jurisprudence of the Supreme Court, which, at the same time as developing the *state action* doctrine, issued many decisions maintained in the spirit of the horizontal effect of fundamental rights. See. G. Thüsing, *Die „Drittwirkung der Grundrechte" im Verfassungsrecht der Vereinigten Staaten* [*The „third-party effect of fundamental rights" in the constitutional law of the United States*], *„Zeitschrift für Vergleichende Rechtswissenschaft"* 2000, Bd. 99, p. 70.

[16] The question of influence is a separate and extremely broad issue, broached in many publications particularly in the context of Drittwirkung (see e.g. articles presented in: A. Sajo, R. Uitz (eds), *The Constitution in Private Relations: Expanding Constitutionalism*, Utrecht 2005). By way of illustration let us only mention the judgment of the Constitutional Court of South Africa of 15 May 1996 in the Du Plessis v. De Klerk case, which referred extensively to the German concept of horizontality in its content (see e.g. J. Van der Walt, *Drittwirkung in Südafrika und Deutschland: Ein Forschungsbericht* [*Drittwirkung in South Africa and Germany: A research report*], „Die Öffentliche Verwaltung" 19/2001, 805–814). As regards the constitutional solutions that consist in the adoption of a general horizontal clause, they have been applied in Greece (Article 25 (1) (3) of the 1975 Constitution in its 2001 version), Portugal (Article 18(1) of the 1976 Constitution in its 1997 version), and South Africa (Article 8(2) of the 1996 Constitution).

[17] This issue has received extensive coverage in the literature around the world. See e.g. N. McMurry, *Water privatisation: Diminished Accountability*, „5 Hum. Rts. & Int'l Legal Discourse" Vol. 5, no 2, 2011 pp. 233–263; A. McBeth, *Privatising Human Rights: What Happens to the State's Human Rights Duties When Services are Privatised?*, "Melbourne Journal of International Law" 5(1), 2004, http://classic.austlii.edu.au/au/journals/MelbJIL/2004/5.html [last accessed 31.07.2019].

privatisation, I mean situations in which the state either delegates its tasks or functions[18], or uses private-law forms of action. More precisely, A. McBeth distinguishes between 'privatisation' and 'contracting out'. The former phenomenon refers to a situation whereby a previously state-run service is transferred to non-state operation. The latter, as subset of privatisation, encompasses the cases where ownership of the service enterprise remains with the state, but the provision of the service is transferred to non-state entities on a contractual basis[19]. Privatisation of areas once considered to be the domain of the state, such as public security, education, energy, health care, or the penitentiary system, is becoming increasingly widespread[20]. In consequence of the private and public spheres mutually penetrating each other, courts as well as other bodies applying the law are increasingly deciding on cases in which the status of entities in a legal relationship eludes public-private distinction. Delegation of public duties to the private sphere results in equipping a certain group of private entities with attributes that, according to classical criteria, characterize public-private participants in legal transactions. Having administrative power or a monopoly position in the scope of performed tasks (services provided), they acquire the ability to unilaterally shape the legal situation (rights and obligations) of an individual-consumer. In such a formal private-law relation, its essence, i.e. equality and autonomy of parties, is banished. The weakening of the position of an individual-consumer in simplified terms consists in the fact that if privatisation had not taken place and the given task, function or service was still performed by the state, the individual would benefit

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[18] In view of the fact that in the countries whose experience will be mentioned below, both the concept of a task (Federal Republic of Germany) and that of a function (USA) are present in the context of privatisation, in these remarks the precise delineation of these concepts has been abandoned. More specifically, it should be assumed that 'function' is essentially a broader concept, similar to the concept of purpose, whereas tasks are performed in the performance of functions.

[19] McBeth, supra note 17 in point IV.

[20] In the most developed countries, economic balance has long determined their abandonment of many of the traditional attributes of state functions, and what is more, in some of them, in the USA for example, the largest industrial corporations are historically private.

from the protection of their rights and freedoms guaranteed by the norms of the Constitution on the basis of their direct vertical action. However, in a situation where the status of entities in a legal relation eludes public-private distinction, it is not clear whether and how they can be held liable under these norms. It seems that the argumentative similarity observable in the judgments cited later in the text allows us to speak of a certain universality, and in a broader perspective than only the perspective of the presented countries. After all, we are talking about different countries that have completely different legal systems and cultures. The universality of court strategies is primarily the result of the fact that the phenomenon of the constitutionalisation of legal systems is strengthening. Another important factor is the "permeation" of the contemporary legal culture with the philosophy of human rights, expressed in an extensive catalogue of international and European legal acts. For example, according to the Preamble to the Universal Declaration of Human Rights, the aim of this document is that "all peoples and every organ of society shall strive ... to secure their universal and effective recognition and observance". In international systems, it is generally accepted that only the state can violate Convention rights, but even here a concept has been developed which extends their effectiveness to horizontal relations. The concept of State protection obligations, which has existed for several decades in the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights[21], has created the possibility of the challenging of an infringement of Convention rights by a private entity on condition that the infringement is linked to an act or omission by the State[22]. This gives rise to the liability of the State, which, as a party to the Convention, is obliged to protect one private party against infringements of its rights by another private party.

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[21] This concept was first formulated in the judgment of the ECHR of 23 July 1968, Belgian Linguistic Case and the judgment of the ECHR of 29 July 1988, *Velasquez Rodriguez v. Honduras Case*.

[22] L. Garlicki, *Relations between Private Actors and the European Convention on Human Rights*, [in:] Sajo, Uitz, supra note 16, at p. 130.

II. Judicial strategies towards the state's escape into private law

The common denominator of the analysed decisions in cases where one private entity demands protection of its constitutional rights in relation to the other, formally private entity, is the statement that "the change of the role of the State from a guarantor to a service provider does not abolish the binding nature of constitutional rights[23]". In other words, the state cannot "contract out" the responsibility for constitutional obligations through the so-called "escape into private law". This latter formulation expresses the intentional character of the activities of contemporary states, which, when deciding on a private form of a given activity are guided not so much by economic criteria as by the desire to get rid of specific public tasks in order not to be responsible for them[24].

Thus, in modern society, constitutional rights and freedoms may be threatened both by the state and by those private economic entities which, by assuming public responsibilities, gain significant dominance over the entities to which these responsibilities are provided. Their advantage is significantly strengthened by the fact that, not being subject to the obligation to act in the public interest, they are usually guided only by simple profit and loss motives. As we know, constitutional rights and freedoms do not, as a rule, apply directly to relations between private entities. However, most legal orders have developed ways and techniques of providing for a certain degree of the influence that fundamental rights have on private relationship[25]. Nowadays, there is no doubt that "the more the horizontal relationship becomes similar to the vertical relationship, the more justified is state interference aimed at protecting the constitutional

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[23] McBeth, supra note 17 in the footnote 1.

[24] Such an intention of privatisation activities is observed in America{n?} (D. Barack, *A State Action Doctrine for an Age of Privatization*, " Syracuse Law Review", Vol. 45, 1995, p. 1170 et seq.), German (J. Masing, *Grundrechtsschutz trotz Privatisierung*, [in:] M. Bäuerle, Ph. Dann, A. Wallrabenstein, *Demokratie-Perspektiven, Festschrift für Brun-Otto Bryde zum 70. Geburtstag*, Mohr Siebeck 2013, *passim*), and the Polish literature (E. Łętowska, *Prawo w „płynnej nowoczesności"* [*Law in „fluid modernity"*], "Państwo i Prawo" 3/2014, p. 23).

[25] G. Sommeregger, *The Horizontalization of Equality: the German Attempt to Promote Non-Discrimination in the Private Sphere via Legislation*, [in:] Sajo, Uitz, supra note 16 at p. 41.

rights of the weaker party in that relationship"[26]. If statutory regulations are unable to provide an adequate level of protection, which is particularly the case where the delegation of tasks by the state administration serves to relinquish responsibility for their performance, then what remains is the court's interference in a specific case. The development of jurisprudence instruments and strategies to ensure the effectiveness of fundamental rights in private relations takes place primarily in the jurisprudence of constitutional courts. The question of the reasons for their rather restrained application in the jurisprudence of courts of law, which is particularly important in the case of the States belonging to the European civil law circle[27], goes beyond the scope of this Article, since it is a wider problem arising from the understanding of the meaning and role of the Constitution in the legal system. It can only be noted that it is undoubtedly linked to the attachment in those States to the traditional division between public and private law. However, it is no secret that the control of court judgments as regards the fulfilment of constitutional provisions on rights and freedoms is carried out by constitutional courts or higher instance courts when reference is made to these schemes. Awareness of this fact is undoubtedly a motivating factor behind reaching for a horizontal interpretation of the Constitution.

As mentioned above, the strategies based on two concepts: German *Drittwirkung*[28] and American *state action* are the most characteristic and well-known. Despite the fundamental differences in the underlying philosophy and the different pattern of their application, as will be discussed below, they are usually presented as equivalent because of their identical objective of safeguarding the rights of the individual[29].

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[26] M. Florczak-Wątor, *Horyzontalny wymiar praw konstytucyjnych,* [*Horizontal dimension of constitutional rights*] Kraków 2014, p. 60.

[27] Z. Kühn, "*Making Constitutionalism Horizontal: Three Different Central European Strategies*", [in:] Sajo. Uitz, supra note 16 at pp. 217–240.

[28] On the subject in English see e.g. K.M. Lewan, *The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany*, "International and Comparative Law Quarterly, 17/1968, pp. 571–601; U. Preuss, *The German Drittwirkung Doctrine and Its Socio-Political Background*, [in:] Sajo, Uitz, supra note 16 at pp. 23–32.

[29] Cf. e.g. M. Tushnet, *The Relationship between Judicial Review of Legislation and the Interpretation of Non-Constitutional Law, with Reference to third Party Effect*, [in:] Sajo, Uitz, supra note 16 at p. 167.

Of course, behind each of these concepts there is a line of jurisprudence developed over many decades, referring to more detailed variants within the framework of different factual states.

The first strategy boils down to taking into account fundamental rights in the process of interpreting and applying the law, in accordance with the principle developed in the jurisprudence of the Federal Constitutional Court that "the objective values of the Basic Law affect all areas of law, including private law"[30]. This impact of constitutional norms is referred to as 'radiation' (*Ausstrahlungswirkung*). In such a case, the horizontal effect is indirect, since it does not create constitutional obligations on the part of private entities. Rather, as M. Sommeregger explains, "fundamental rights pass by the screen of private law before they reach the individual"[31]. The approach inspired by the German construct, unlike the US *state action* concept, is referred to as substance-oriented because it consists in assuring the compatibility of substantive legal rules with the constitution[32]. A manifestation of the publicising private law here is the obligation to take into account the material primacy of the constitutional norms expressing fundamental rights. It can be linked to Article 1(3) of the Basic Law, which directly obliges all holders of public power, and therefore also courts, to take into account the importance of these rights within the whole system of law. In view of the Federal Constitutional Court, this implies an obligation to interpret the law, including private law 'in the light of fundamental rights'. The statement of the Federal Constitutional Court in the constitutional complaint procedure that a civil court judgment did not take into account the importance of a fundamental right results in its annulment. The German concept of Drittwirkung, therefore, allows for a relatively broad publicising effect, but it is partial[33] since it does not impose direct constitutional obligations on private entities.[34]

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[30] *Lüth*-decision, supra note 14.

[31] Sommeregger, supra note 25 at p. 43.

[32] R. Uitz, *Yet Another Revival of Horizontal Effect of Constitutional Rights: Why? And Why Now? – an Introduction*, [in:] Sajo, Uitz, supra note 16 at p. 7.

[33] Similarly P.E. Quint, *Free Speech and Private Law in German Constitutional Theory*, "Maryland Law Review", Vol. 48, 1989, p. 266, https://digitalcommons.law.umaryland.edu/mlr/vol48/iss2/3/ [last accessed 31.07.2019].

[34] The interpretation of Drittwirkung in the spirit of direct (absolute) horizontality, which was applicable in the first years after the entry into force of the German Basic

Placing the *state action* doctrine among the models of the horizontal action of rights and freedoms requires certain explanations, because in the light of the interpretation of the US Constitution, its provisions, apart from the prohibition of slavery in the 13th Amendment, apply only to vertical relations[35]. On the other hand, the horizontal effect can be *de facto* allowed exactly on the basis of the *state action* doctrine, and what is more, if it happens, it takes on a direct form[36] – and this is the specificity of the American approach to this issue. When a private action is classified as *state action*, the same tools are used to assess it as the tools to assess the state action. However, this also means applying the 'all or nothing' principle, because if the court does not see *state action* in the actions of a non-state entity violating the norms of the Basic Law, such action is not subject to any constitutional restrictions. This concept, as has already been mentioned, has a more procedural character and focuses on which entity may be subject to constitutional obligations and the procedural considerations that relate to these entities[37]. As R. Uitz points out, it is a sort of "filtering mechanism aiding courts in selecting cases where a party may be subjected to the commands of the Constitution's rights guaranties"[38]. Unlike in the case of indirect Drittwirkung, the publicising effect is total as a result of the jurisprudence strategy based on state action.

It is common knowledge that these jurisprudence strategies consist in the adoption of the binding force of constitutional norms in relations between private entities. In the case of entities that carry out tasks delegated by the State, there is a problem with clearly expressing their legal nature and thus also with determining their belonging to one of the sub-systems of law. The need for a comprehensive assessment of the circumstances surrounding each case translates into the very casuistic

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Law, provided for such a possibility. It was applied in the jurisprudence of the Federal Labour Court during the presidency of H.C. Nipperdey (1954–1963). Nowadays, in the opinion of most constitutional law doctrines and jurisprudence, it is recognised that the vast majority of rights and freedoms are exercised only by the indirect third party effect.

[35] Cf. e.g. S. Gardbaum, *The „horizontal effect" of constitutional Rights*, "Michigan Law Review", Vol. 102, December 2003, pp. 411–412.

[36] Ibid., pp. 411–412.

[37] Uitz, supra note 32 at p. 7.

[38] Ibid., p. 6.

character of this jurisprudence, which is particularly evident in the case of the concept of *state action* in the USA, where more detailed tests of *state action* are distinguished. It seems that the so-called '*public function*' test[39] is particularly appropriate for considering the issue of responsibility for the implementation of constitutional rights in a privatised reality. The starting point for the development of the concept of *public function* was the case of *Marsh v. Alabama* of 1946[40]. The US Supreme Court stated that the constitution applies to a privately administered city, so unwanted manifestations of religious freedom (distribution of leaflets) cannot be suppressed, as would be possible in a private home. Administering of the city is the exercise of a public function, traditionally reserved for the state. The Supreme Court stressed that "the more the owner opens their property for public use, the more the constitution applies". The test of the public function consists in examining whether the entity infringing the rights of other people performs 'traditional functions of the state'. The concept of state action has been used in many Supreme Court decisions[41] and it should be noted that it evolved from its heyday in the 1940s and 1950s to the 1970s when the conservative judge W. Renhquist narrowed down the already modest catalogue of areas considered to be state functions to 'functions that are traditionally and exclusively the prerogative of the state' and 'traditionally associated with sovereignty'[42].

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[39] The second most widespread form of state action is based on the so-called *nexus theory*, in which it must be stated whether the state has been involved in the private activity that violates the rights of others. This involvement may take on different forms: during more detailed tests, the US Supreme Court examined, among other matters, whether there was 'close cooperation' or 'close enough connection' between the private and public entities, or whether the private activity was 'fairly attributable to the state', or whether the State encouraged a private body to act in a particular way.

[40] The judgment of 7 January 1946, 326 U.S. 501 (1946).

[41] J.D. Niles, L.E. Tribble and J.N. Wimsatt, in their article from 2011, indicated that the problem of distinguishing between private and state action was considered more than 70 times in the judgments of the Supreme Court. See idem, *Making Sense of State Action*, "Santa Clara Law Review." Vol. 51, No 3, 2011, p. 886.

[42] That line of jurisprudence was then used by the judges of the Supreme Court to declare that the following do not fulfill the test of such a public function: the supply of electricity by a private enterprise (*Jackson v. Metropolitan Edison Co, 419 U.S.* 345, 1974); settlement of disputes between a borrower and a lender (*Flagg Bross Inc. v. Brooks, 436 U.S.* 149, 1978); running of a school by a private entity, although maintained from public

III. Fraport judgment– German state action

An approach resembling the concept of a public function as a criterion for assessing whether a privatised entity may be subject to constitutional restrictions has also appeared in the jurisprudence of the German Federal Constitutional Court. In the judgment of 22 February 2011 in the Fraport case[43], it commented on the freedom of assembly and speech at Frankfurt Airport in the form of a mixed enterprise (a public limited company with a 52% State shareholding). In the case in question, the judges agreed with the applicant's assertion that Fraport S.A. acts as a legal entity to which the functions of state administration in the field of air transport have been delegated, and that the airport area is an element of infrastructure that provides public services. It stated that a private entity administering the airport cannot prohibit other private entities from exercising their constitutional rights at the airport, including the right to express opinions and organise demonstrations. If the state, in the performance of its public tasks, uses civil law organisational forms, these forms are subject to the Constitution as direct addressees of the rights. It is not only the state behind the enterprise that is bound by the constitution, but also the enterprise itself. In this case, however, the direct application of constitutional norms, in the light of the arguments of the Federal Constitutional Court, only resembled Drittwirkung. The decisive factor for the Federal Constitutional Court was not the legal form in which the entity operated, but who was the actual participant in legal relations. In this sense, *the Fraport* enterprise, organized as a public limited company,

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funds (*Rendell – Baker v. Kohn, 457 U.S.* 830, 1982) or running of amateur sports by a private organisation, even if it has the exclusive right to represent American athletes (*San Francisco Arts & Athletics v. United States Olympic Committee,* 483 U.S. 522, 1987).

[43] 1 BvR 699/06, BVerfGE 128, 226. Among the publications on the judgment see e.g. J.Ph. Schaefer, *Neues vom Strukturwandel der Öffentlichkeit, Gewährleistungsverwaltung nach dem Fraport-Urteil des Bundesverfassungsgerichts* [*News from the structural transformation of the public sphere, warranty management according to the Fraport judgment of the Federal Constitutional Court*], "Der Staat", Vol. 51, 2012, pp. 251–277; M. Goldhammer, *Grundrechtsberechtigung und -verpflichtung gemischtwirtschaftlicher Unternehmen* [*Fundamental rights and obligations of economically mixed enterprises*], JuS 2014, pp. 891–895.

is 'private' only in a formal sense and not in a material sense. Thus, we are dealing here with the case of a relationship that is only seemingly of a private-law nature. It should be noted that the Federal Constitutional Court had already expressed a similar opinion in one of its judgments from 1989[44]. At that time, it took a position that was different from the German doctrine that granted mixed enterprises fundamental rights and proclaimed the need to protect the interests of their private shareholders.

Returning to the similarity of the arguments of the US and German courts, what is interesting in the Fraport judgment is that the Federal Constitutional Court considered that a comprehensive assessment of a private company should have been carried out in order to examine whether it was involved in the exercise of state action[45]. Although the criterion of control (*Kriterium der Beherrschung*), which assumes that in order to recognise the public character of a private entity, the State must have a majority shareholding in its ownership structure and thus hold more than 50% of shares in the company, was of decisive importance for the assumption of direct binding of Fraport with the fundamental right, it was also important that it conducted state activity[46]. Although the judgment does not explain in more detail (apart from indicating postal and telecommunications services) which types of activity belong to "state" activities, it should be assumed that they are those that had previously been the domain of the state. Another criterion referred to by the German court was the "public forum" criterion[47] developed in the jurisprudence of American and Canadian courts, which was already present in the judgment in the case of Marsh v. Alabama, i.e. the place where the owner must respect the exercise of constitutional rights and freedoms. The judgment of the Federal Constitutional Court means that

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[44] Judgment of 16 May 1989, 1 BvR 705/88, NJW 1990, no 29, p. 1783.

[45] In the case of *Burton v. Wilmington Parking Authority* the US Supreme Court stated: *"(...) whether state action exists in a particular situation can be determined "only by sifting facts and weighing circumstances (...)"*.

[46] The Federal Constitutional Court contrasted 'private activity with the participation of the state' with 'state activity with the participation of private entities'.

[47] These are the judgments of the Supreme Court of Canada of 25 January 1991, *Committee for the Commonwealth of Canada v. Canada* (1991) 1 S.C. R. 139 and the US Supreme Court of 25 June 1992, *International Society for Krishna Consciousness <ISKCON> v. Lee*, 505 U.S. 672 (1992).

judges of German civil courts deciding in such cases in the future will not be able to restrict themselves to a simple distinction between the public and private spheres, but their assessment will have to refer to the concept of a public forum. The more a given space or object meets the definition of such a place, the weaker the associated property right will be. A broad interpretation of the concept of "public space" has enabled the Federal Constitutional Court, in its subsequent Bierdosen-Flashmob judgment a few years later, also related to the freedom of assembly, to include private space in a material sense within its framework of meaning. In it, the Federal Constitutional Court lifted the ban on demonstrations at Nibelung Square in Passau, which was owned by a "purely" private company, imposed by lower courts[48].

Analysis of the explanations contained in the reasons behind the Fraport judgment leads to the conclusion that the interpretation scheme applied therein corresponds to the concept of state action. The judgment also provides a good illustration of the difficulties encountered by the public-law classification of mixed economic entities. The criteria adopted by the Federal Constitutional Court for this assessment raise a number of doubts and do not close the subject: one can imagine a different legal assessment of the nature of Fraport. If it is to be based on purely formal characteristics, one could conclude that we are dealing with direct *Drittwirkung*. However, even if we stick to the rhetoric applied by the Federal Constitutional Court, we cannot but notice that the consequence of the judgment was a direct obligation under the constitutional rights and freedoms of Fraport's private shareholders. Interestingly, in the reasons for the judgment, the Federal Constitutional Court acknowledges that the indirect effect of fundamental rights may be as intense as that of direct effect, especially if the private entity performs functions traditionally performed by the State.

On the margin of the judgments presented above, it is worth noting that the Polish Constitutional Tribunal has also made statements in

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[48] Interim Order of 18 July 2015, 1BvQ 25/15 in the *Bierdosen-Flashmob* case, in which the Federal Constitutional Court lifted the ban on demonstrations at Nibelung Square in Passau, which was owned by a 'purely' private company, imposed by lower courts, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/07/, qk20150718_1bvq002515.html [last accessed 31.07.2019].

a similar vein on several occasions. It pointed to the existence of private entities which, owing to the performance of public tasks, are addressees of constitutional obligations resulting from regulations concerning the rights and freedoms of individuals. Thus, in its decision of 6 February 2001, it stated, in relation to public health care institutions, that entities which perform functions of authority are not the addressees of rights resulting from individual constitutional rights, but the addressees of obligations related to the exercise of the rights of people. It emphasized that the extension of the subjective scope of constitutional rights to the aforementioned entities would lead to the identification of entities that interfere with these rights with their carriers. However, the exercise of constitutional obligations related to the exercise of rights and freedoms of individuals has been imposed not only on public authorities, but also on other entities whose activities fall within the broadly understood scope of public authority[49].

IV. Corrective publicising

The common denominator for the court statements presented above is the conviction that the state is not only a violator, but also a guarantor of rights and freedoms. If the legislative or executive authorities are unable to guarantee an adequate standard of protection of rights and freedoms or take actions leading to the reduction of that standard, the individual seeking protection of his or her rights may be interested in initiating court proceedings. Courts (constitutional or common, depending on the existing procedures) as public authorities have direct obligations by virtue of constitutional norms concerning rights and freedoms. The vertical applicability of these norms is, as we know, an unquestionable standard of contemporary constitutionalism, included in the provisions of basic laws[50]. The court's intervention is a reaction to the transfer of the tasks of the state to the private sphere – 'an escape of the state into private law'. As could be seen from the judgments mentioned above,

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[49] Ref. no. Ts 148/00.

[50] By way of example: Article 3 of the German Basic Law, the supremacy clause from Article VI of the US Constitution or Article 30 of the Polish Constitution of 1997.

the extension of the binding force of constitutional rights and freedoms onto private relations is to counteract the reduction of citizens to the role of consumers, which is one of the consequences of privatisation. Horizontal application strengthens the position of the individual in relation to powerful private entities, such as companies, corporations, or other entities that gain strength by taking over public tasks, often assuming the role of a monopolist. It restores the balance distorted by the privatisation of state tasks and is therefore corrective in relation to the actions of other public authorities. It can be said that it performs contractual justice[51]. This type of argumentation which refers to the social dimension of law makes it possible, to a large extent, to legitimise the use of the indicated strategies in judicial decisions. However, it does not directly refer to this aspect of the strategy, which is connected with the problem of publicising the private relationship. As we have mentioned, the interference of the public factor in private autonomy also has that dimension. This publicisation is the most serious accusation filed against the expansion of the doctrine of third party effect. Covering a private entity with constitutional obligations is a restriction that constrains the freedom to act, i.e. the possibility of exercising one's own rights, e.g. the right to property. This in turn poses a threat to the functioning of liberal societies[52].

V. Conclusions

It seems that the above accusation, when presented *in genere*, does not sufficiently take into account the variety of reasons for which the courts decide to use the horizontal application of constitutional norms. In the cases presented above, it was based on a prior assessment of the actual legal status of the entities in a given relationship. Only when it was stated that their activity fulfilled the test of a public function, did the horizontal application of constitutional rights or freedoms take place. In other words, I believe that the fact that formally private entities perform

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[51] J. Limbach, supra note 13 at p. 411.

[52] More about it see: M. Tushnet, *The Relationship between Judicial Review of Legislation and the Interpretation of Non-Constitutional Law, with Reference to Third Party Effect*, [in:] Sajo, Uitz, supra note 16 at p. 167 and 180.

certain tasks or provide services that were previously the domain of the state, especially when the state does not offer a public alternative, justifies court intervention which 'makes the opportunities equal'. In the privatised reality, it seems possible and justified to resort to a strategy based on the doctrine of state action, the elements of which could also be seen in the Fraport case judgment. It makes it possible to assess whether the entity carrying out the tasks delegated by the State is still private or quasi-public. After all, a public entity does not enjoy private autonomy. In general, however, any doubts related to the threat to the private autonomy of a given quasi-public entity, or its private shareholders, are undoubtedly greater in the case of strategies based on the doctrine of state action. Indirect Drittwirkung, as G. Sommeregger points out, is, on the theoretical level, a construction that makes a horizontal effect of fundamental rights possible, and at the same time allows for the autonomy of private law from constitutional law[53].

In any case, achieving a fair result of a formal private-law relationship, which balances the rights of both parties, is an extremely difficult task that requires a proportionate balance between the rights and obligations of both parties. In this context, the view expressed in the jurisprudence of the German Federal Constitutional Court, according to which the condition for giving the constitutional norm a horizontal effect is the occurrence of so-called structural inequality, is worth noting. The intensity of the horizontal effect should therefore depend on the degree of inequality between the parties to the legal relationship – the greater the need to protect personal freedom against extreme market power, economic or personal dependence, the greater the intensity[54].

Since the horizontal application of constitutional rights and obligations follows the patterns developed by the courts, it is impossible to capture it in a coherent and comprehensive framework, let alone guarantee the predictability of decisions, as is the case with all other judicial concepts. The scale of the publicising effect depends, to a certain extent, on the discretionary decision of the court made each time. The less consistent and coherent the jurisprudence, the more justified the allegations of

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[53] G. Sommeregger, supra note 25 at p. 43.

[54] Judgment of 13 October 1993, 1 BvR 567, 1044/89, BVerfGE 89, 214 – *Bürgschaftsverträge*.

arbitrariness[55]. Above all, these allegations seem to be serious in relation to the way in which the theses formulated by the US Supreme Court within the framework of the *state action* doctrine are applied to cases decided by federal appeal and district courts. According to some, a wide range of tests with liquid borders creates a 'state of complete confusion' in which private entities remain unaware of the criteria by which they will be subjected to restrictions arising from the Constitution[56].

A separate issue to be considered is that aspect of judges' recourse to fundamental rights which takes the form of an allegation that the competences of the legislature are being taken over by the courts. After all, the former is democratically legitimised to draw a line between the private and public spheres[57].

Finally, in the context of both the above and any other doubts present in the literature related to the horizontal application of constitutional norms, it would be worth considering the real scale of the use of the schemes discussed in the text. A firm assessment in this respect would, of course, require more extensive empirical research that would take into account all the differences related to the importance of jurisprudence in the USA and civil law countries. The opinions formulated in the academic literature illustrate the diverse classification of the phenomenon in question: from describing it as 'residual category'[58] to recognising it as an element of the new constitutionalism[59]. First of all, we must remember that we are talking about the concept of jurisprudence, so its application, and thus the resulting publicisation of private law, is of an individual nature. In addition, in the case of the United States, in the last two decades the Supreme Court has seen a decrease in the number of cases referring to the category of *state action*. However, from the perspective of civil law countries, the horizontal application of constitutional rights and freedoms remains the domain of constitutional courts.

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[55] For the criticism of US Supreme Court rulings see e.g E. Chemerinski, *Rethinking State Action*, "Northwestern University Law Review", 80/1985, pp. 503–557.

[56] J.K. Brown, *Less is More: Decluttering the State Action Doctrine,* "Missouri Law Review", Vol. 73, Issue 2, 2008, p. 568.

[57] Tushnet, supra note 29 at p. 168.

[58] Ibid.

[59] Kühn, supra note 27 at p. 220.

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THE GALLEON '*SAN JOSÉ*'. ALMOST FOUR DECADES OF LEGAL STRUGGLES ON THE NATIONAL AND INTERNATIONAL PLANE

Abstract

The article presents the history and current disputes surrounding the Galleon San Jose. As an on-going case since 1980s, the dispute involves various actors on national, as well as international level. The article discusses this issue focusing on four relevant elements: international and national law, politics and diplomacy. Legal obligations under international law which may be applicable to San Jose galleon are presented, with comments regarding its applicability to Colombia. Subsequently, Colombian relevant national legislature and judicial decisions are discussed, to establish how the Galleon with its treasures may be classified under Colombian civil law. In the last part two elements are presented, namely: politics and diplomacy. This part presents in particular an attitude and actions regarding the case after announced discovery of the shipwreck of the Galleon in 2015.

Keywords

Galleon San Jose – Colombia – Underwater heritage – treasure – UNCLOS – UNESCO

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Introduction

On 8 June 1708, during the naval battle of Barú, the Spanish galleon *San José*, with unimaginable wealth, precious stones, and loads of gold and silver as its cargo, was lost in the deeps of the blue sea, leaving only 11 of its crew on the surface[1]. The galleon *San José* was carrying the treasure, which was collected during 6 years in the Spanish colonies in the New World. Philip the Fifth, King of Spain, was waiting and depending on this income, as his main source to finance his War of the Spanish Succession. Therefore, the British cannons on that date, not only sank the galleon, but, more importantly, also sank the hope and chances of Spanish king of winning his war[2].

Even if that fierce battle was over, the afterlife of the *San José* galleon was only about to start. Lost, but not forgotten, the wreck of this ship was hidden in the deep blue sea for centuries. The galleon *San José* with its precious cargo was inspiring the minds of adventurer and treasure hunters[3].

Since the 1980s, when the galleon was supposedly found, and more recently since 2015, when the discovery of the galleon *San José* was officially announced by the President of Colombia[4], the galleon is once again in the middle of a battle, but this time not with guns and powder, but with diplomatic, archaeological, and legal arguments before various national and international courts, and between various actors.

Legal battles for rights to underwater wrecks and treasures involve various parties, usually at least a private investor v. the State, with multiple transmutations, most commonly with the interests of other

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[1] See: C. Rahn, P. B. Hattendorf, T. R. Beall, *The sinking of the Galleon San José on 8 June 1708: An exercise in historical detective work*, The Mariner's mirror, num. 94, issue 2, March 2013, pp. 176–187. DOI: 10.1080/00253359.2008.10657053.

[2] See: J. Falkner, *War of Spanish Succession 1701–1714*, Pen & Sword Books Ltd. 2015.

[3] Rahn et al, supra note 1 at p. 179.

[4] See: El Heraldo, *Así comunicó el presidente Santos el hallazgo del galeón San José*, 5 December 2015, accesible at: https://www.elheraldo.co/nacional/asi-comunico-santos-el-hallazgo-del-galeon-san-jose-232099 [last accessed 1.11.2019]

States engaged[5]. There is no difference in the case of the *San José* galleon. Today, the status and future of the *San José* galleon is subject to dispute between various actors. The first front of the battle, however, was between Colombia and a private company, although there are more actors interested. The following states may be mentioned as having legal interests or as being involved in that dispute: Colombia, Spain, the United States of America[6], and even Bolivia[7].

What is more, another strong debate and confrontation exists within Colombia – between the Government and its plan on how to resolve that dispute and the academics, organizations, and society in general. But this governmental attitude has changed recently, with the change at the presidential palace in 2018.

The history of Colombian national law and international obligations related to underwater heritage and sunken treasure is intertwined with the history of the *San José* galleon. This article has as its objective to briefly present the legal problems surrounding the *San José* galleon, however with the reservation that this is still an on-going dispute, and new solutions and new development may occur at any moment. For that reason, the article will not contain an in-depth analysis of all the legal issues, as many

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[5] For example, the well discussed case of Galleon Nuestra Señora de Mercedes (also referred to as the case of 'Black Swan') See: M. R. Nelson, *Finders, Weepers-Losers, Keepers? Florida Court says U.S. Company Must Return Recovered Treasure to Kingdom of Spain*, 16 Law & Bus. Rev. Am. 2010, p. 587. D. Curfman, *Thar be Treasure Here: Rights to Ancient Shipwrecks in International Waters – A New Policy Regime*, Wash. U. L. Rev., num. 86 2008–2009. p. 181; J. Tsai, *Curse of the Black Swan: How the Law of Salvage Perpetuates Indeterminate Ownership of Shipwrecks*, 42 Int'l Law 2008, p. 211.

[6] On 7 of December 2010, SSA filed a suit against Colombia in the United States, which was dismissed owing to procedural issues. See case Sea Search Armada v. Republic of Colombia, Civil Action No. 10–2083 (JEB), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, Memorandum opinion (accessible at: https://www.govinfo.gov/content/pkg/USCOURTS-dcd-1_10-cv-02083/pdf/USCOURTS-dcd-1_10-cv-02083-0.pdf) [last accessed: 1.11.2019].

[7] Intervention of Comunidad Qara Qara (Bolivia) – indigenous people who occupy the territory near the POTOSI mines. They argue that the cargo of Galleon *San José* come from the mines from their territory, and therefore they have historical rights to the treasure. See Leonardo Botero Fernández, El reclamo indígena por el galeón San José, El Espectador, 2 August 2018, https://www.elespectador.com/noticias/nacional/el-reclamo-indigena-por-el-galeon-san-jose-articulo-803934. [last accessed 1.11.2019].

relevant facts have still not been established. But the dispute regarding the galleon, which has been going on since the 1980s, continues to be relevant today, which justifies the authors´ effort to at least conclude where they are standing right now, as at the date of 1 November 2019.

The article presents four relevant elements for the current dispute: international law, national law, politics, and diplomacy. First, legal obligations under international law which may be applicable to the *San José* galleon, with comments regarding its applicability to Colombia. Second, the Colombian relevant national legislature and judicial decisions. Third, the last two elements together, politics and diplomacy, and attitude and actions regarding the case after its announced discovery in 2015.

I. International law

The protection of underwater cultural heritage is obviously within the interest of international law. However, the landscape of international obligations is not perfectly clear, as nowadays the regime which refers to underwater shipwrecks is regulated by the both international and national law of each State. Also there is no one universal regime, as the world today is covered to a larger or lesser extent by various treaties with different, sometimes opposing sets of rules, with different legal force and with different geographical coverage – according to a number of ratifications by states.

The international rules evolve together with the technical capacity to explore the depths of the seas further and further. After the Second World War UNESCO introduced recommendations applicable to underwater wrecks[8]. Later on, in the United Nations Convention on the Law of the

[8] See Recommendation on International Principles Applicable to Archaeological Excavations; Resolution adopted on 5th December 1956 by General Conference of UNESCO at its 9th session held in New Delhi. Available at: http://portal.unesco.org/en/ev.php-URL_ID=13062&URL_DO=DO_TOPIC&URL_SECTION=201.html; see also Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private works, Resolution adopted at 19th November, 1968, by General Conference of UNESCO at its 15th session held in Paris. Available at: http://portal.unesco.org/en/ev.php-URL_ID=13085&URL_DO=DO_TOPIC&URL_SECTION=201.html [last accessed 1.11.2019].

Sea adopted on 1982 (UNCLOS)[9], also various stipulations relevant for underwater wrecks were included.

UNCLOS contains stipulations which may be applicable to sunken ships as archaeological objects. Article 303 of UNCLOS established: first, a legal obligation for all states to protect and cooperate in the protection of underwater treasures/heritage; second, that any extraction which is not authorized by the state should be penalized and; third, that apart from in situ preservation, also the rights of identifiable owners, the law of salvage, or other rules of admiralty, or laws and practices with respect to cultural exchanges, should be respected[10].

Later on, in 1989, the International Convention on Salvage was adopted. That Convention, which regulates extensively the question of the law of salvage, was prepared by the International Maritime Organization, and came into force on 14 June 1996 and up to today it has been ratified by 72 countries[11].

Since 1990, more specific acts which refer precisely to underwater heritage or underwater patrimony have been adopted, marking also the growing concern and interest of the international community regarding that problem. In this regard, the work of ICOMOS has to be acknowledged[12]. Its first important contribution was the so-called Lausanne Charter[13]. In that document, joint responsibility for the protection of the archaeological patrimony was established[14] and also the importance of including policies regarding protection in every level of

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[9] Convention on the Law of the Sea adopted on 10 December 1982, available at: https://www.refworld.org/docid/3dd8fd1b4.html [last accessed 1.11.2019].

[10] Ibid. Article 303 Archaeological and historical objects.

[11] International Maritime Organization. Status of treaties. 2019. Available at: http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf. [last accessed 1.11.2019].

[12] ICOMOS is a non-governmental international organisation dedicated to the conservation of the world's monuments and sites.

[13] Charter for the Protection and Management of the Archaeological Heritage (1990) Prepared by the International Committee for the Management of Archaeological Heritage (ICAHM) and/as approved by the 9th General Assembly of ICOMOS in Lausanne in 1990. Available at: http://wp.icahm.icomos.org/wp-content/uploads/2017/01/1990-Lausanne-Charter-for-Protection-and-Management-of-Archaeological-Heritage.pdf [last accessed 1.11.2019].

[14] Ibid. Art. 3.

legislation[15]. That Charter in general promotes the protection of the underwater heritage in situ[16]. The second significant contribution was a legal document the Charter on the Protection and Management of Underwater Cultural Heritage (hereafter: Sofia Charter)[17], which established as its fundamental principle that: "the preservation of underwater cultural heritage in situ should be considered as the first option"[18] and commercialization is not a desirable way[19].

In the year 2001, the next important legal development was accomplished under the auspices of UNESCO. The Convention on the Protection of the Underwater Cultural Heritage[20], (UNESCO Convention), was adopted during the Conference of the United Nations Educational, Scientific, and Cultural Organization, at its thirty-first session in Paris[21]. In general, the UNESCO Convention introduced rules to protect the underwater heritage with a strong preference for preservation in situ[22]. Also, in its article 4 the relationship to the law of salvage and law of finds was introduced, where it is clearly indicated that: "any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds", unless covered by exceptions enumerated in that article[23].

It is relevant to assess to what extent Colombia is bound by the international obligations mentioned above. As a starting point, it has to

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[15] Ibid. Art. 2.

[16] Ibid. Art. 3.

[17] ICOMOS, CHARTER ON THE PROTECTION AND MANAGEMENT OF UNDERWATER CULTURAL HERITAGE (1996) Ratified by the 11th ICOMOS General Assembly in Sofia, Bulgaria, October 1996. Available: https://www.icomos.org/18thapril/underwater-eng.pdf [last accessed 1.11.2019].

[18] Ibid. Art. 1.

[19] Ibid. Introduction and Article 13.

[20] UNESCO, Resolution adopted on the report of Commission IV at the 20th plenary meeting, on 2 November 2001. Text of the Convention available at: https://unesdoc.unesco.org/ark:/48223/pf0000124687.page=56 [last accessed 1.11.2019].

[21] Meeting was conducted in Paris from 15 October to 3 November 2001.

[22] Sofia Charter, at Annex, General Principles, Rule 1, "The protection of underwater cultural heritage through in situ preservation shall be considered as the first option".

[23] Ibid. Art 4. Those exceptions are: (a) is authorized by the competent authorities, and (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.

be noted that Colombia has not ratified any of the previously mentioned conventions, therefore formally it is not bound by their obligations. However, so as to understand the position of Colombia and its absence in this evolving international legal regime, in this part the Colombian standpoint will be briefly presented, especially regarding the UNESCO Convention (2001).

During the development of international obligations regarding the underwater heritage, Colombia has always been pending and active, as one of the states which has special interest in those regulations. However, owing to the serious concerns and fears of restraining its capacity to regulate freely the legal status of encountered shipwrecks and treasure within its jurisdiction, Colombia was very cautious over assuming any international obligations.

First, Colombia has not ratified UNCLOS, which by today has been ratified by more than 160 states[24]. However, Colombia was not openly against the rules enshrined in UNCLOS, which may be applicable to the current situation. As various commentators present, UNCLOS is nowadays treated as the world constitution on the law, and its principles owing to their worldwide acceptance, may be considered as reflecting the rules of customary international law[25], and such a view seems to be shared also among Colombian academics[26]. Also they highlighted, especially in the light of the Colombian non ratification of UNESCO Convention, that UNCLOS established a fragile balance between two opposite tendencies[27]. On the one hand, underwater ships should be treated as heritage of the mankind and cultural patrimony and, therefore, should be preserved

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[24] Oceans and law of the Sea United Nations, Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements, 2019, available at: https://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm. [last accessed 1.11.2019].

[25] See G. Mangone, W. Burke, *Introduction. Proceedings of the Annual Meeting*, American Society of International Law, 1987, pp. 75–84. Retrieved from www.jstor.org/stable/25658351. Cf. P. Tzeng, *Jurisdiction and applicable law under UNCLOS,* Yale Law Journal, vol. 126, issue 1, 2016, pp. 242–260.

[26] A. J. Rengifo Lozano, *Las objeciones de Colombia a la Convención Internacional de la UNESCO sobre Protección del Patrimonio Cultural Subacuático*, Pensamiento Jurídico, núm. 25, 2009, p. 123.

[27] Ibid., p. 124.

at the place (in situ) and not extracted. On the other hand, Convention allows for the extraction and commercialization of some of the treasures. Worth noticing is that those rules are applicable to archaeological and historical objects, which were found not within, but beyond the limits of national jurisdiction[28].

Colombia has not ratified the UNESCO Convention, which was finally approved in Paris on 2 November 2001, after almost 3 years of extensive discussion and diplomatic work. Colombia had been actively participating in the works on the Convention, although, at the end of the road, she refused to ratify the UNESCO Convention. During October 2001 a profound dispute regarding the ratification was conducted in the Colombian Congress of the Republic, which led to a radical change in the Colombian position[29]. The reasoning for such a decision is relevant to understanding the current dispute surrounding the *San José* galleon. Therefore, the concerns of Colombia regarding the UNESCO Convention 2001 should be mentioned[30].

In general, Colombia's position seems to be obviously against strengthening the rights of the flag state. For its geographical position and having access to both Oceans and more than 3200 kilometers of coastline[31], Colombia is against any proposal to weaken the rights of

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[28] Ibid. Art 149 in connection with Article 1, point 1, (1) (definition of Area) Article 1.1.(1): "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction; Article 149 Archaeological and historical objects. All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.

[29] Regarding the debate in the Colombian Congress, see official document: Acta de Comisión 10 del 23 de Octubre de 2001 Senado – GACETA DEL CONGRESO: 164 17/05/2002. http://svrpubindc.imprenta.gov.co/senado/index2.xhtml?ent=Senado&fec=17-5-2002&num=164&consec=4505 [last accessed 1 11. 2019].

[30] Colombian objections regarding the UNESCO Convention presented in this article are after: Lozano, supra note 26 at pp. 117–150. But see also opposing view, that most of those objections are ill-founded: E. Sarid, *International Underwater Cultural Heritage Governance: Past Doubts and Current Challenges*, Berkeley J. Int'l L. vol. 35, 2017, pp. 219–261.

[31] CIA, The World Factbook – Colombia, available at: https://www.cia.gov/library/publications/the-world-factbook/geos/co.html, [last accessed 1 11. 2019].

the coastal states, and the diminishing of any rights coming from the jurisdiction exercised by coastal states.

First, Colombia was preoccupied and disturbed by the UNESCO Convention definition of state vessels which states that: "State vessels and aircraft" means warships, and other vessels or aircraft that were owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes, which are identified as such and which meet the definition of underwater cultural heritage"[32]. The main concern was that the UNESCO Convention extended the definition, in comparison to the UNCLOS[33]. Such a wide definition, along with other provisions of the UNESCO Convention, may lead to a broader application of state immunity regarding sunken ships, and as Colombian commentators observed, it may lead to the application of immunity without limits of time and space[34].

The second Colombian concern regarding the UNESCO Convention, and also one of the most prominent one, is that this convention drastically changes the rules established in UNCLOS, and makes a shift from a regime where preservation *in situ* was coexisting with the possibility of extracting (and applying the law of salvage) towards a regime when strong preference was given just to preservation *in situ*[35], severely restraining law of salvage, which may be applicable only as exception in certain situations[36].

The UNESCO Convention, with its stipulations which clearly restrain the possibility of extracting underwater heritage, was obviously crossing the interests of Colombia regarding the *San José* galleon (the finding of which was still unconfirmed at the moment when the Convention was being debated). The Colombian government till the end of 2018

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[32] Article 1.8 of UNESCO Convention.

[33] Article 29 of UNESCO Convention.

[34] Lozano, supra note 26 at p. 145.

[35] UNESCO Convention, General Principles.

[36] UNESCO Convention, article 4: – Relationship to law of salvage and law of finds. Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it: (a) is authorized by the competent authorities, and (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.

was in favour of extracting treasures from the *San José* galleon, and partially commercializing it[37]. By accepting the UNESCO Convention in 2001, Colombia would restrain its possibility of following president Santos's plan.

What has to be stressed is that, in general, Colombia was not bluntly against preservation in situ, but rather against restricting options for states only to preservation in situ. Even if preservation in situ seems to be the most adequate form of preservation from the archaeological point of view, many objections are raised. For example, academics pointed out that not in every situation may preservation in situ be practically the best option[38]. Colombia claims that simply, under international law, the law of salvage still exists simultaneously with other obligations, such as preservation *in situ*[39]. It cannot be assumed that international law, having developed in such a way, almost totally excludes the law of salvage and law of finds, as enshrined in UNESCO Convention (2001). On the contrary, the Law of Salvage and the Law of Finds as a part of Maritime Law and Admiralty Law are recognized in such countries as the USA[40], with an established system of courts to resolve disputes related to maritime law[41]. Also, history knows successful applications of the law of salvage to situations with shipwrecks – as in the case of *Nuestra Señora de Atocha*[42].

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[37] See ABC Cultura, *Colombia podrá vender hasta el 80% del galeón San José*, published 1.4.2018) available at: https://www.abc.es/cultura/abci-80-por-ciento-objetos-galeon-san-jose-pueden-someterse-venta-acuerdo-contrato-201804012210_noticia.html [last accessed 1 11. 2019].

[38] Lozano, supra note 26 at p. 125; See also L. J. Kahn, *Sunken treasures: Conflicts between historic preservation law and the maritime law of finds,* Tulane Environmental Law Journal, vol. 7(2), 1994, pp. 595–644.

[39] See article which discuss in depth if law of salvage and law of finds may be applicable to the case of the galleon *San José* – M. F. Tedesco, *Between the Devil and the Deep Blue Sea: The Shortcomings of Forcing Courts to Choose from the Law of Salvage and the Law of Finds in Treasure Salvage Cases,* U.S.F. Maritime Law Journal, vol. 29, 2016.

[40] See Ch.Z. Bordelon, *Saving Salvage: Avoiding Misguided Changes to Salvage and Finds Law*, San Diego Int'l L.J., vol. 7, 2005–2006.

[41] See J.A.R. Nafziger, *The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck*, Harv. Int'l L.J., vol. 44, 2003, p. 251 et seq.

[42] R. Kelley, M. May, *Admiralty Law: Trial of a Treasure Hunter Treasure Salvors, Inc. v. Nuestra Senora de Atocha*, 4 Nova Law Journal, vol. 4, 1980, p. 237 et seq.

Those issues seem to specially preoccupy Colombia, together with the vagueness of the relation between stipulations of the UNCLOS and UNESCO Conventions. Even if art. 3 of the UNESCO Convention stipulates that its obligations have to be interpreted and applied in a manner consistent with the stipulations of UNCLOS[43], those two documents are not in conformity regarding the preservation of underwater treasures, as the first (UNCLOS) offers two choices, when the latter clearly indicates that only in situ preservation should be considered. That unclear relationship between those two legal instruments which was raised by Colombia, eventually leads to the non-ratification of UNESCO Convention (2001), as not coherent with widely recognised institutions of law of salvage, and especially with article 303 (3) of UNCLOS 1982.

It has to be noted that not only Colombia, but many other coastal states, especially those with a well-established law of salvage in their legal regimes such as the UK or the USA, decided not to ratify the UNESCO Convention. For example, Greece was also concerned by far reaching restriction of the sovereignty of coastal state[44] introduced by the UNESCO Convention.

As has already been noted, the case of the *San José* galleon could have an influence on the development of the international legal obligations of Colombia regarding underwater heritage. Maybe it was the *San José* galleon in 2001 which sank the ratification of the UNESCO Convention, when the Senate realized in the clear example of an on-going dispute, what legal repercussions the ratification of the UNESCO Convention would have. Wisely for Colombia, its attitude and treaty practice does not pose serious restrictions and leaves the *San José* galleon mainly in the hands of the national legislature and within the decision of the executive branch in Colombia. It does not mean that Colombia does not and will

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[43] UNESCO Convention in Article 3 states: "Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea".

[44] See Greece position presented by Anastasia Strati in: A. Strati, *Greece,* [in:] S. Dromgoole (ed.) *The Protection of Underwater Cultural Heritage. National Perspectives in Light of the 2001 UNESCO Convention*, Leiden/Boston, 2006, at pp. 118–120.

not follow the high standard of international law, but in any case, it is not limited only e.g. to *in situ* protection.

Having presented that international law does not constrain Colombia to follow one and only one established solution, it is therefore indispensable to take a closer look at the legal regime of Colombia applicable to the current dispute.

II. National law of Colombia

The legal status of the *San José* galleon, which is most probably sunk within the territorial sea of Colombia[45], depends on the national legal regime of Colombia. Therefore, it is shaped especially by the national law of Colombia and the judicial decisions of Colombia's courts[46]. Colombian law has different categories to refer to this kind of discoveries, depending on their particular characteristics. The evolution of those concepts can be traced as a legal battle over rights to the *San José* galleon. This legal battle began with a civil lawsuit filed on January 13, 1989, by Sea Search Armada (SSA), to recognize its rights over shipwreck[47]. Colombia gave permission to search for shipwrecks to a US company (Glocca Morra Company) on 1st March 1982, and those rights were ceded in 1983 by Glocca to Sea Search Armada. When SSA announced the discovery of the shipwreck, according to Colombian law[48], 50% of the treasure should be given to the finder, leaving 50% to the State. However, two years later in Colombia the Law 2324 from 1984[49] was passed, which modified the stipulations of the Civil Code[50] in such a way that SSA was left with

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[45] Regarding differences between *inter alia* Exclusive Economic Zone, Continental Shelf, and High Sea see: R. Frost, *Underwater Cultural Heritage Protection*, Australian Yearbook of International Law, vol. 25, 2004, pp. 28–36.

[46] Colombian Congress. Political Constitution of Colombia. 1991. Article 230.

[47] State Council, Administrative Contentious Chamber. Unification Judgment of February 13, 2018. File 25000-23-15-000-2002-02704-01 (SU). Para. 116

[48] See art. 700 of Colombian Civil Code adopted by Colombian Congress as Law 57 of 1887.

[49] Colombian Decree Law 2324 of 1984. Accessible at: https://www.dimar.mil.co/node/620 [last accessed 20.10.2019].

[50] Ibid., art. 188 and 191.

not 50% but 5% of the rights to the treasure. This lawsuit was resolved by the Civil Tenth Judge of the Barranquilla Circuit in 1994, declaring the assets as treasures and allowing SSA to have rights over the assets found[51]. Then, in 1997, the second instance court upheld the 1994 ruling[52]. Besides, the High Courts of the Supreme Court of Justice and the State Council had to rule over this matter, adding an important concept to be treated regarding its legal nature and whether it is cultural heritage[53].

Therefore, as it can be observed, the most relevant legal question, on which the legislation is not clear, and with which the courts were challenged, is the legal nature of the *San José* galleon, namely, how to classify its treasures and shipwreck itself within the Colombian legal system. The search for the answer to this problem makes visible the evolution of the legal regime of Colombia. In order to respond to that problem, two questions were considered relevant by the Colombian Courts[54]. Within this article, it seems pointless to present a detailed analysis of every step of the evolving Colombian legislation and also every judicial decision. Instead, in this part, a concise analysis of the most relevant problems will be presented.

Before discussing the legal nature of the discovery under Colombian law, some courts decided that it was necessary also to respond to a first, preliminary question – namely if Colombia in general has the right to underwater treasures such as the *San José* galleon[55].

Whatever legal rights there could be to the property on Colombian soil before 1821, such as, for example, those derived from Pope Alexander the Sixth's Bull "*Inter Caetera*"[56], the crown argument is that at the beginning of the XIX century, during the so-called Wars of Independence[57] in

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[51] Judgment of State Council, supra note 47. par. 117.

[52] Ibid., par. 121.

[53] See Supreme Court of Justice, Civil Cassation Chamber. Judgment of July 5, 2007, File 08001-3103-010-1989-09134-01 and Judgment of State Council, supra note 47.

[54] Judgment of State Council, supra note 47, para. 193.

[55] Ibid., para. 193.

[56] See H. Vander Linden, *Alexander VI. and the Demarcation of the Maritime and Colonial Domains of Spain and Portugal, 1493–1494,* The American Historical Review, Vol. 22, no. 1, October 1916, pp. 1–20.

[57] "Between 1808 and 1826 all of Latin America except the Spanish colonies of Cuba and Puerto Rico slipped out of the hands of the Iberian powers who had ruled the

Latin America, and also when the *San José* galleon was sunk, Spain was defeated and the General Congress of Colombia issued the Law of October 16, 1821, which was intended to confiscate the assets of the enemy government[58], a precept reiterated in article 2 of the 1830 Constitution[59]. Moreover, with Law 12 of 1881[60], which approved the Treaty of Peace and Friendship between Colombia and Spain, in Article 1 of this treaty the two States explicitly agreed that any past claims would be forgotten. This analysis allowed the Colombian Courts to reach the conclusion that any discussion about the ownership of assets related to the results of the independence struggle and decolonization was settled, in accordance with the normative sources mentioned above[61].

In summary, even if the assets found were primarily Spanish property, after the War of Independence with the subsequent laws, Colombia claimed the Spanish assets as its own, without opposition from Spain, leaving no possibility that Spain can make a legal claim based on reasonable grounds.

Even if the first question does not have enormous gravity, the second is much more relevant and contemporary for the current dispute. The clue to the problem seems to be how to classify the *San José* galleon under the national law of Colombia. Should it be treated e.g. as a treasure or as underwater cultural heritage and, of course, with all the repercussions of such classification? The response to that question may be found in the Colombian legislature, but more importantly, in the decisions of courts related to the *San José* galleon case. Therefore, the applicable national law and also judicial decisions that will be mentioned, are not presented in

region since the conquest", at: https://www.britannica.com/place/Latin-America/The-independence-of-Latin-America [last accessed 17.10.2019].

[58] General Congress of Colombia, Law October 16, 1821. On the confiscation of property belonging to the enemy government and those fleeing from the Republican, Article 1 and 2.

[59] Colombian Congress, Constitution of 5 May 1830, Article 2: "The Colombian Nation is irrevocably free and independent of any foreign power or domination, and is not and will never be the patrimony of any family or person".

[60] Official journals numbers 4976 of March 26, 1881, 4998 of April 19, 1881 and 5236 of January 4, 1882. National Coding, Volume XXXI number 4073.

[61] Judgment of State Council, supra note 47, para. 193.

exact chronological order, but rather by use of the main concepts related, namely: treasure, sea salvage, abandoned property, and underwater cultural heritage.

1. Treasure

The civil law concept of treasure is common for many legal systems[62]. Also, it is known in the Colombian civil law, and has been regulated since 1887 by article 700 of the Colombian Civil Code.

This figure points out two important aspects. First, treasure is understood as precious property without an owner, which has been hidden. And, second, that the person who discovers a treasure will be the proprietor of 50% of the ownership of those assets, if they are found in a remote place, as stated in article 701 of the same Code[63].

Since 1994 courts have been confronted with the legal question, how not only to classify the *San José* galleon itself, but more specifically, how to treat those (supposedly) unimaginable riches in gems and coins, (which in the argument of SSA, could be commercialized). At first, the Civil Tenth Judge of the Circuit of Barranquilla and the Superior Court of Barranquilla, Civil and Family Decision Chamber, treated the assets with a classical vision, whose narrative takes us back to the times when sailors needed to hide their assets, either by burying them or hiding them in strategic places, to prevent them from being captured by invaders[64]. The ancient situation that allowed that, should a person find a treasure, they would obtain the property of those goods[65]. However, the current legislation, grants only 50% of the finding to the discoverer.

In relation to the case of the *San José* galleon, on March 7, 1997, the Superior Tribunal of Barranquilla concluded in its ruling that those lost precious objects can be classified as treasure under the civil law, and

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[62] Civil Code of France, Art 716.; Louisiana Civil Code art. 3423 (1870); Civil Code of the Republic Uzbekistan, Art. 196.

[63] Article 701 of Colombian Civil Code.

[64] Judgment of State Council, supra note 47, para. 193.

[65] A.B. Guzmán, *Derecho Privado Romano. Vol. I. Legal Editorial Jurídica de Chile,* 1996. 1st edition, p. 540–549.

therefore the finder may be entitled to 50% of them, under the figure of occupation[66], regulated in the Colombian Civil Law[67].

Nevertheless, later on, also in relation to the case of the *San José* galleon, an interpretation by the Office of Consultation and Civil Service of the Colombia State Council was issued[68]. It was stated that it is essential that the goods must be buried in the ground or hidden in movable property to be considered as treasure. Because of that reason, the goods within the vessel/shipwreck found cannot be classified as a treasure.

2. Sea Salvage

Also, there was an attempt in the Judgment of the State Council to treat the riches of the *San José* galleon as Sea Salvage ("*Especie náufraga*" in Spanish)[69]. I*us naufragium o*r sea salvage is a common figure in various civil codes[70], and can be also found in the Colombian Civil Code in article 710[71]. This article is applicable to those goods which are saved from the wreck of a ship and, as the owner is unknown, they are declared as abandoned property. Nevertheless, in its interpretation of 2018, the State Council[72] explained that this category may not be applicable to findings like lost shipwrecks which were lost for a long period of time and have been recently discovered.

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[66] Judgment of State Council, supra note 47, para. 125.

[67] See Colombian Civil Code, article 685.

[68] State Council Consultation and Civil Service Room. Concept of December 10, 1981, Rad. 1610.

[69] Judgment of State Council, supra note 47, para. 194 and following. See in general: T. Y. Ortega Gonzalez, *ALGUNAS CONSIDERACIONES SOBRE EL NAUFRAGIUM Y SALVAMENTO MARÍTIMO: DE ROMA AL DERECHO MODERNO*, Universidad de Las Palmas de Gran Canaria 2015, accesible at: https://accedacris.ulpgc.es/bitstream/10553/17968/4/0726176_00000_0000.pdf) [last accessed 1.11.2019].

[70] UK – Merchant Shipping Act 1995. Part IX, Chapter, available at: http://www.legislation.gov.uk/ukpga/1995/21/part/IX/chapter/1. See also: Spain – Law 14/2014, de 24 de julio, de Navegación Marítima, Chapter IV, available at: https://www.boe.es/buscar/act.php?id=BOE-A-2014-7877&p=20150526&tn=0 [last accessed 1.11.2019].

[71] Colombian Civil Code, Article 710.

[72] Judgment of State Council, supra note 47, para. 193.

3. Abandoned property

It will also be just briefly mentioned that the institution of abandoned property, as applicable to the current dispute, was considered by the High Courts of Colombia as well[73].

4. Underwater cultural heritage

All previously mentioned possible classifications of the *San José* galleon and its treasures are applicable to goods which have no importance beyond the purely commercial, without relevance to the Nation, or are not a specially protected category of goods which may be classified as historical or cultural heritage.

In that long-lasting debate, in 2007, the Supreme Court of Justice in its Judgment[74], made a landmark decision, to basically end all of those previous disputes[75] and declare that none of those previously mentioned categories may be applicable in the current dispute. It did so by invoking as applicable to the *San José* galleon a law from 1959[76], which states that cultural objects which have the status of national heritage should be protected and preserved by Colombian Authority[77].

Article 1 of the Law 163 of 1959 stipulates that the specially protected category should have the nature of "natural historical and artistic heritage", movable monuments and other objects that are of interest and are

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[73] Ibid., para. 193.

[74] Supreme Court of Justice, Civil Cassation Chamber, Judgment of July 5, 2007, File 08001-3103-010-1989-09134-01.

[75] Of course, the reference about ending is made in relation to the dispute how to classify the galleon *San José* with its treasures, which is under discussion in this part. The dispute still was relevant for other issues, such as right to compensation for private investor.

[76] Congress of the Republic of Colombia, Law 163 of 1959.

[77] This reasoning was followed in 2008 by the State Council, see: State Council, Administrative Contentious Chamber, Unification Judgment of February 13, 2018. File 25000-23-15-000-2002-02704-01 (SU), Paragraph 193.

on the surface or under the national ground[78]. Furthermore, in the same law, it is clarified that the aforementioned goods cannot have the quality of treasure according to article 700 of the Colombian Civil Code[79]. This article from 1959, was interpreted by the Court in the light of the Colombian Political Constitution of the 1991, which states the protections of the cultural heritage by the Colombian State, and remarks on the inalienable, non-attachable, and imprescriptible as characteristics of these important goods[80]. Also, law 197 of 1997 reinforces that protection, stating that the goods of the colonial, independence, and similar ages, which would have been declared national goods, will be of cultural interest, belonging to the National Cultural Heritage[81].

From that moment on, under Colombian law, the *San José* galleon should be treated as potential underwater cultural heritage. Potential, because according to Colombian law, there is only one entity entitled to declare the status of cultural heritage – the National Council of Cultural Heritage[82]. Such understanding has been recently confirmed by the Constitutional Court in its Judgment C-264 de 2014[83]. Such an interpretation was also followed by the State Council, who stated that:

> "The collective rights and interests related to cultural, historical, archaeological, or submerged cultural heritage, have a reinforced judicial protection, because in the light of articles 63 and 72 of the Political Constitution, they are assets that are under the protection of the State, they belong to the Nation, and, therefore, they are inalienable, non-attachable and imprescriptible."[84]

So, right now, under the Colombian system, it is up to the National Council of Cultural Heritage, to decide whether findings such as the *San*

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[78] Congress of the Republic of Colombia, Law 163 of 1959, Article 1.

[79] Ibid., Article 14.

[80] Colombian Congress. Political Constitution, 1991, Article 72.

[81] See article 4 of the Law 397 of 1997, available at: http://www.secretariasenado.gov.co/senado/basedoc/ley_0397_1997.html. See also Supreme Court of Justice, Civil Cassation Chamber, Judgment of July 5, 2007, File 08001-3103-010-1989-09134-01.

[82] Congress of the Republic of Colombia, Law 1675 of 2013.

[83] Constitutional Court, Judgment C-264 of 2014, Judge Alberto Rojas Ríos, 29 April 2014.

[84] Judgment of State Council, supra note 47. Decision I.2.

José galleon are Underwater Cultural Heritage. And it is not precisely known when it will happen, as many scientific inquiries has to be conducted, which is a time-consuming process.

All of that judicial evolution from treasure to underwater cultural heritage was thanks to the litigation of SSA. At the end of the day, regarding the rights of US private company SSA, it can be concluded, that during that long litigation the company confirmed its rights, but not to the treasure itself from the galleon, but as was reaffirmed by Constitutional Court's Judgments, to compensation which should be equivalent to the specified percentage of the value. SSA has no right to the treasure itself, as any treasures from the galleon *San José* are most probably cultural heritage[85]. The most recent and burdensome development is that authorities have confirmed that the location is different from that provided by SSA[86], probably leaving the SSA with no rights in the matter at all.

III. Politics and Diplomacy

After describing the first two elements, it may be observed that international law does not provide a definite answer or a unique solution. But after long evolution and various Judgments in the legal system of Colombia since 2007, the legal status of the *San José* galleon under the national law of Colombia may be recognized as a specially protected category. However, such a legal situation leaves still plenty of space for the last two elements, which will be discussed in this section, namely, politics and diplomacy. Until November 2015, all of the legal battles surrounding the *San José* galleon, under the national law of Colombia, were based on the assumption that the private company had made an

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[85] See Judgment of Constitutional Court, case C-474 of 2003. See also the Judgment of Colombian Constitutional Court C-668/2005.

[86] See Notice of the Vice President from 9.10.2019, available at: https://mlr.vicepresidencia.gov.co/Paginas/prensa/2019/Declarar-al-Galeon-San-Jose-patrimonio-cultural-en-su-integridad-pedira-Gobierno-al-Consejo-Nacional-de-Patrimonio-Cultural.aspx [last accessed 1.11.2019].

accurate discovery in 1982, but it was still not ascertained that the *San José* galleon was truly found.

On 27 November 2015, the galleon was found by personnel of the Colombian Institute of the Anthropology and History (ICANH), the naval forces of Colombia, and by the Maritime General Office (DIMAR), as the President of the Republic of Colombia, Juan Manuel Santos announced on December 2015[87]. After that, the debate surrounding the galleon *San José* has moved from speculations to a higher level – politics and diplomacy. The president of Colombia had a clear vision of the solution and his government was pushing for the option that the Colombian state would enter an agreement with a private investor, who would invest money in underwater operations. What is more, the private party would be responsible for the creation and administration of the museum in Cartagena, when the remains of the *San José* galleon would be displayed. By such a construction, President Santos proudly announced that Colombian citizens would not pay a penny for that operation, as all of the costs would be assumed by the private party[88]. From the beginning, the President was firmly claiming that whatever solution would be adopted, it was only up to Colombia, not e.g. the international community, to make decisions regarding the *San José* galleon[89].

Such a proposal raised some serious doubts in Colombian society for various reasons. First, academics especially were arguing that the Colombian government was not free to decide about the *San José* galleon and its treasure as they wanted, because that treasure formed a part of underwater cultural heritage, and belonged to the Nation[90]. Even the

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[87] See: http://es.presidencia.gov.co/sitios/busqueda/noticia/160730-El-Galeon-San-Jose-lo-vamos-a-recuperar-afirmo-el-Presidente-Santos/Noticia, [last accessed 1.11.2019].

[88] See: http://es.presidencia.gov.co/discursos/180723-Declaracion-del-Presidente-Juan-Manuel-Santos-sobre-el-Galeon-San-Jose, [last accessed 1.11.2019].

[89] See: Santos: "San José is in Colombian waters and, therefore, it is Colombian", Diplomat in Spain, 15.05.2018, available: https://thediplomatinspain.com/en/2018/05/santos-san-jose-is-in-colombian-waters-and-therefore-it-is-colombian/ [last accessed 1.11.2019].

[90] See: https://www.elespectador.com/noticias/actualidad/universidad-nacional-pide-que-naufragio-del-galeon-san-jose-no-sea-intervenido-articulo-749634. See also: https://www.bluradio.com/nacion/comite-consultivo-de-la-unesco-critica-explotacion-comercial-del-galeon-san-jose-177693-ie3509872e, [last accessed 1.11.2019].

National Attorney Office issued a negative opinion regarding the plan of president Santos[91].

The discovery of the *San José* galleon also attracts the attention of the international community and various states. Needless to say, they were generally very critical of the idea of president Santos.

The main diplomatic dispute regarding the *San José* galleon is between Colombia and Spain. Colombia has highlighted that is not bound by any international legal instrument and is, therefore, not obliged to take into account the interest of Spain. Spain, acknowledging the lack of applicable legal conventions, still may have some legal arguments regarding its rights over the *San José* galleon[92]. A Spanish jurist and ambassador clearly stated that: "in case of *San José*, there is not the slightest of doubts that the *San José* is a property of the Spanish State"[93].

There is no space for profound analysis of those arguments, however, here they will be briefly mentioned. Many authors argue that some general principles incorporated into UNCLOS are nowadays binding as part of international customary law. The obligation of international cooperation to protect the underwater cultural heritage and the maintenance of the immunity of the sunk state ships, even if they are found within internal waters or territorial sea of another state[94] are mentioned as examples of those rules from UNCLOS which are of a customary character. Also, some argue that of a customary character is the rule also, included in the

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[91] See: Opinion of Procuradoria Nacional de Nacion. Available at: https://es.scribd.com/document/433394642/VEEDURIA-Refuta-a-La-Ex-Ministra-de-Cultura-Mariana-Garces-Cordoba#from_embed, [last accessed 1.11.2019].

[92] See: http://www.exteriores.gob.es/Portal/es/SalaDePrensa/Comunicados/Paginas/2019_COMUNICADOS/20191010_COMU149.aspx. See also: https://elpais.com/cultura/2019/10/17/actualidad/1571310899_047405.html. [last accessed 3.11.2019].

[93] J.A. de Yturriaga Barberán, *Hallazgo del galeón 'San José': los últimos de Cartagena*, Argentina – Facultad de Derecho de la Universidad Nacional de Córdoba – Núm. VII-1, Junio 2016, p. 30.

[94] See in general C. Parra, *Protection of Underwater Cultural Heritage from the International Law Perspective*, [in:] P.A. Fernández (ed.), *New approaches to the law of the sea: In honor of ambassador José Antonio de Yturriaga-Barberán*, New York: Nova Science Publisher 2017; M. Aznar, *Treasure Hunters, Sunken State Vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage*, International Journal of Marine and Coastal Law, vol. 25, 2010, p. 231.

UNESCO Convention[95], according to which States Parties shall ensure that proper respect is given to all human remains located in maritime waters[96] and to treat those sites as graveyards[97].

The Spanish argument of the immunity of a state vessel, applicable to the galleon *San José* which was most probably encountered on Colombian territory, would be quite difficult to sustain and enforce, in the case of a legal dispute between Spain and Colombia, as it is not based on a firm and clear legal international obligation of Colombia, but rather on the argument that some rules have become of customary character and, therefore, should be applicable, even to underwater shipwrecks within the territory of States.

Spain is definitely not the only State, however, with a legal interest in the current dispute. However, the legal demands of other States, such as Spain, reasonable or not, lack a forum where Spain could present its legal dispute against Colombia, as Colombia no longer accepts the compulsory jurisdiction of the ICJ, and is not a party to UNCLOS. Even if Colombia is not bound by international conventions, also some academics argue that under international law a rule of obligation of cooperation of interested States to resolve disputes regarding underwater cultural heritage has been developed[98]. Therefore, even if non-contracting States are not formally forced to do so, when finding a solution to protect underwater cultural heritage, cooperation between interested states seems to be the best option[99].

Many organizations have expressed their concern in various forms, as for example UNESCO called for Colombia to refrain from commercial exploitation of the *San José*[100].

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[95] See article 2, point 9 and norm 5 from Annex to UNESCO Convention.

[96] See Aznar, supra note 94 at p. 219.

[97] E. Pérez Álvaro, *Shipwrecks as Watery Graves: Cultural Attitudes, Legal Approaches and Ethical Implications*, [in:] J.M. Sánchez Patrón et al. (eds.), *Derecho del mar y sostenibilidad ambiental en el Mediterráneo,* Editorial Tirant lo Blanch 2014, p. 134 and 141.

[98] Ibid., at p. 136. See also Aznar, supra note 94.

[99] Yturriaga Barberán, supra note 93 at p.18.

[100] See a letter to Colombian Minister of Culture, Carta de la Unesco del 20 de abril del 2018, https://www.wradio.com.co/noticias/actualidad/unesco-desmiente-a-proponente-del-galeon-san-jose/20180424/nota/3741414.aspx. See also: https://www.abc.es/cultura/

A change in government policy occurred after the election of president Duque in 2018. At the national level, the new president after the elections found himself in a situation in which the process to find a private company to cooperate with the government had already been announced[101]. The Ministry of Culture, which is responsible for the protection of the cultural heritage, issued a resolution of provisional suspension of the APP selection process for the first time on 23 July 2018[102], then extending it at various times until today[103]. Also the government recently confirmed its dedication to declaring the *San José* galleon as cultural heritage[104].

At the international level, also international organizations, such as ICOMOS, took an active part in the dispute, as e.g. ICOMOS offers its expertise to the Colombian heritage authorities[105]. Regarding Spain, after 2018 the cooperation seems to have been working well, and diplomats from both countries have found common ground. In December 2018 it was announced that both States would work together[106]. Most recently, as announced on 18th October 2019, both States have agreed that commercial

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abci-unesco-denuncia-explotacion-comercial-galeon-san-jose-201804242154_noticia.html [last accessed 17.11.2019].

[101] See: Acuerdo de la inciativa 23 de marzo del 2018, https://www.contratos.gov.co/consultas/detalleProceso.do?numConstancia=18-20-5038 [last accessed 8.11.2019].

[102] See: Resolución de suspensión del 23 de julio del 2018. https://www.contratos.gov.co/consultas/detalleProceso.do?numConstancia=18-20-5038 [last accessed 9.11.2019].

[103] See: Resolución No 465 de 2019 por medio de la cual se prorroga la suspensión del proceso de selección del 6 de marzo del 2019, https://www.contratos.gov.co/consultas/detalleProceso.do?numConstancia=18-20-5038, see also https://thecitypaperbogota.com/news/colombia-extends-suspension-of-partnership-to-salvage-san-jose-galleon/22320 [last accessed 9.11.2019].

[104] See: Notice of the Vice President from 9.11.2019: https://mlr.vicepresidencia.gov.co/Paginas/prensa/2019/Declarar-al-Galeon-San-Jose-patrimonio-cultural-en-su-integridad-pedira-Gobierno-al-Consejo-Nacional-de-Patrimonio-Cultural.aspx [last accessed 15.11.2019].

[105] See: https://www.icomos.org/en/77-articles-en-francais/42628-le-san-jose-un-galion-espagnol-perdu-dans-les-eaux-colombiennes-en-1708-l-icomos-offre-son-expertise-aux-autorites-du-patrimoine-colombien-3 [last accessed 20.11.2019].

[106] See: *Colombia and Spain agree to manage together wreck of the galleon San José. Borrell announces a preliminary agreement which excludes involvement of any private company*, December 13, 2018, available at https://thediplomatinspain.com/en/2018/12/colombia-and-spain-agree-to-manage-together-wreck-of-galleon-san-jose/ [last accessed 20.11.2019].

extraction of the treasures of the *San José* galleon is no longer a viable option[107].

IV. Conclusions

As highlighted from the beginning, the case discussed is an on-going problem, and even if the dispute has been going on since 1980's, many pivotal changes have occurred in the meantime. For instance, after the SSA-prolonged-courts battle, which also witnessed many surprising decisions, today the US company may have no rights at all if the location of the shipwreck was inaccurate. However, in the current dispute, even such a firm fact as the location of the galleon itself may still be questioned. Right now, as for end of 2019, the landscape after the battle is that the national law (most probably) protects the *San José* galleon as cultural heritage – the result which was reached after almost 40 years of legal battle. On the international plane, even if at the beginning Colombia was forcing a solution which put her on a collision course with many international actors, after 2018 Colombia is working, hand in hand with Spain, is searching for a satisfactory result.

We will see if it is the end of the bumpy road, or just a quiet moment before next surprising revelations and a new turn in that story.

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[107] Official press release of Ministry of Foreign Affairs regarding the galleon *San José*, nr 157 from 18 October 2019 available at: https://es.scribd.com/document/430954116/Comunicado-sobre-el-Galeon-San-Jose-18-oct-2019#from_embed. [last accessed 22.11.2019].

CASE-LAW NOTES

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CASE NOTE TO THE JUDGMENT OF THE COURT OF JUSTICE OF 3 OCTOBER 2019 IN THE CASE EVA GLAWISCHNIG-PIESCZEK V. FACEBOOK IRELAND, C-18/18***

Abstract

The judgment of the Court of Justice of 3 October 2019 in case Eva Glawischnig-Piesczek v. Facebook Ireland, C-18/18, is one of the Court's multiple decisions concerning the liability of host providers and the obligations that may be imposed on them by a national court[1]*. The decision seems to follow two current pan-European (or even global) trends as far as host providers' liability is concerned. The first is to make the liability rules stricter. The second is a shift from the concept of horizontal to that of vertical liability*

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*** *Eva Glawischnig-Piesczek v. Facebook Ireland Limited*, case C-18/18, Judgment of 3.10.2019, EU:C:2019:821, available at: http://curia.europa.eu/juris/document/document.jsf?docid=218621&doclang=EN [last accessed: 20.10.2019].

[1] See e.g. *Scarlet Extended SA v. Société belge des auteurs, compositeurs et editeurs SCRL (SABAM)*, case C-70/10, Judgment of 24.11.2011, EU:C:2017:771 and *Belgische Vereniging van Auteurs Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, case C-360/10, Judgment of 16.02.2012, ECLI:EU:C:2012:85, available: http://curia.europa.eu/juris/liste.jsf?num=C-360/10&language=EN [last accessed: 20.10.2019].

rules[2]*. In essence, the Court of Justice decided that a host provider might be ordered by a national court to remove (or block access to) defamatory content identical or equivalent to the information which had been previously declared unlawful. What is more, according to the Court a host provider may be ordered to remove (or block access) to such information worldwide as long as measures adopted by a member state allow its national courts to issue a worldwide order and the measures are consistent with applicable international law.*

The judgment commented on will have a great impact on the content of claims lodged by plaintiffs in personal rights infringement cases, in particular in electronic communication. The efficacy of the court order in question, however, will depend on the imagination of plaintiffs (in how to formulate their claims so that a court order covers equivalent comments as well) and defendants (in how to express their opinions in such a way that the opinions are not covered by a court order). It will be also greatly affected by national courts whose job will be to interpret the notion of "equivalent information" and to find a balance between three groups of interests: plaintiffs, defendants, and a third party that may be affected by the order (e.g. users of an online platform).

Keywords

personal rights – online infringement – preventive injunction – equivalent content

I. Facts of the case

The plaintiff, Eva Glawischnig-Piesczek, is an Austrian politician. She was a member of the Nationalrat (National Council), chair of the parliamentary party "die Grünen" (The Greens) and federal spokesperson for that party. The defendant, Facebook Ireland, operates a global social media platform ("Facebook Services") for users located outside the United States of America and Canada.

On 3 April 2016, a Facebook Services user shared on their personal page an article from the Austrian online news magazine oe24.at. That user also posted a harmful, insulting and defamatory (as decided by the

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[2] See in particular G. F. Frosio, *From horizontal to vertical: an intermediary liability earthquake in Europe*, Oxford Journal of Intellectual Property and Practice 12/2017, p. 1–18. Available at SSRN: https://ssrn.com/abstract=2956859 or http://dx.doi.org/10.2139/ssrn.2956859

referring court) comment. The post could be accessed by any Facebook user. In a letter, Ms Glawischnig-Piesczek asked Facebook Ireland to delete that comment.

Facebook Ireland did not block access to the comment in question. In consequence, Ms Glawischnig-Piesczek brought an action before the Handelsgericht Wien (Commercial Court, Vienna). By an interim injunction, the court ordered Facebook Ireland to immediately cease and desist from disseminating photographs of the plaintiff with the accompanying text if it contained the assertions, verbatim and/or used words having an equivalent meaning as that of the defamatory comment.

In effort to comply with the injunction, Facebook Ireland disabled access to the content initially published, with effect in Austria.

On appeal, the Oberlandesgericht Wien (Higher Regional Court in Vienna) upheld the order as regards the identical allegations. However, it also held that the dissemination of the equivalent allegations had to cease only as regards those brought to the knowledge of Facebook Ireland.

Each of the parties in the main proceedings lodged appeals on a point of law at the Oberster Gerichtshof (Austrian Supreme Court).

The Oberster Gerichtshof stated that, in accordance with its own case-law, such an obligation must be considered to be proportionate where the host provider was already aware that the interests of the person concerned had been harmed on at least one occasion as a result of a user's post and the risk that other infringements may be committed was thus demonstrated. The dispute, however, raised questions on the interpretation of the EU law, thus the court decided to stay down the proceedings and refer three questions to the Court of Justice.

II. Questions

The following questions were referred to the Court of Justice for a preliminary ruling:

"1. Does Article 15(1) of Directive [2000/31] generally preclude any of the obligations listed below of a host provider which has not expeditiously removed illegal information, specifically not just this illegal information within the meaning of Article 14(1)(a) of [that] directive, but also other identically worded items of information:

- worldwide;
- in the relevant Member State;
- of the relevant user worldwide;
- of the relevant user in the relevant Member State?

2. In so far as Question 1 is answered in the negative: does this also apply in each case to information with an equivalent meaning?

3. Does this also apply to information with an equivalent meaning as soon as the operator has become aware of this circumstance?".

III. Judgment

The Court of Justice reformulated the above questions and answered that Directive 2000/31, in particular Article 15 (1), must be interpreted as meaning that it does not preclude a court of a Member State from:

- ordering a host provider to remove information which it stores, the content of which is identical to the content of information which was previously declared to be unlawful, or to block access to that information, irrespective of who requested the storage of that information;
- ordering a host provider to remove information which it stores, the content of which is equivalent to the content of information which was previously declared to be unlawful, or to block access to that information, provided that the monitoring of and search for the information concerned by such an injunction are limited to information conveying a message the content of which remains essentially unchanged compared with the content which gave rise to the finding of illegality and containing the elements specified in the injunction, and provided that the differences in the wording of that equivalent content, compared with the wording characterizing the information which was previously declared to be illegal, are not such as to require the host provider to carry out an independent assessment of that content, and
- ordering a host provider to remove information covered by the injunction or to block access to that information worldwide within the framework of the relevant international law.

IV. Analysis of the judgment

The main focus of the judgment is on the content of a court order and its territorial scope.

As insightfully noticed by Advocate General Szpunar in his opinion delivered on 4 June 2019[3], "*the key issue in the present case is whether a host which operates an online social network platform may be required to delete, with the help of a metaphorical ink eraser, certain content placed online by users of that platform*". To be more precise, the key element of the case was the proportionality of such an order in terms of its material and territorial scope. In particular, whether the host may be required to delete not only the content identical to infringing comments, but also the equivalent ones, and whether such erasure should be effective in the relevant Member State only or worldwide.

In the light of the above decision, there are three major issues which require further analysis. These are the following: the temporal and territorial scope of the injunctions as well as the notion of the equivalent content.

1. Territorial scope

The concept of extraterritorial injunctions is not new to EU law. In the field of intellectual property law, the accessibility of pan-European injunctions has been confirmed by the CoJ numerous times[4], however mostly in relation to unitary rights (such as rights to European Union trademarks or community designs). At times, however, owing to the proportionality

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[3] *Eva Glawischnig-Piesczek v. Facebook Ireland Limited*, case C-18/18, Opinion of Advocate General Szpunar delivered on 4.06.2019, EU:C:2019:458, available at: http://curia.europa.eu/juris/document/document.jsf?docid=214686&doclang=EN [last accessed: 20.10.2019].

[4] E.g. *Nintendo Co. Ltd v. BigBen Interactive GmbH and BigBen Interactive SA*, joined cases C-24/16 and C-25/16, Judgment of 27.09.2017, EU:C:2017:724, available at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=83E5B065407F5ABBCD179874AC825307?text=&docid=195045&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8645367 [last accessed: 20.10.2019].

requirement, the CoJ decided that it was justified to limit the territorial scope of the injunctions. For an instance, in the CoJ's decisions in *DHL Express France c*ase (C-235/09)[5] and *combit Software GmbH v. Commit Business Solutions Ltd*. (C-223/15)[6], both of which concerned the EU trademarks, the CoJ confirmed that, in general, injunctions should cover the entire territory of the EU since that reflects the territorial scope of their protection. In this way, the CoJ explained, it would be possible to guarantee unitary protection of the rights in the EU which is compliant with the aim of the regulation[7]. However, the CoJ also said that where there was no real risk of confusion (owing to linguistic aspects), the territorial scope of an injunction should be limited to only those Member States where the risk could be found.

Moreover, in *Solvay SA v. Honeywell Companies* (C-616/10)[8] the CoJ extended the above rule, by means of interpreting Article 22(4) and Article 31 of Regulation No 44/2001[9], to European patents. Despite the territorial nature of European patents[10] and their protection, the CoJ allowed for a cross-border prohibition against patent infringement to be

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[5] *DHL Express France SAS (formerly DHL International SA) v. Chronopost SA*, case C-235/09, Judgment of 12.04.2011, EU:C:2011:238, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=81436&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8649828 [last accessed: 20.10.2019].

[6] *combit Software GmbH v. Commit Business Solutions Ltd*, C-223/15, Judgment of 22.09.2016, EU:C:2016:719, available at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9A6EA50FCBA84D6AB4F8A0DA939E93F8?text=&docid=183701&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9266390 [last accessed: 20.10.2019].

[7] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (Text with EEA relevance), Official Journal L 154 of 16 June 2017, p. 1–99.

[8] Judgment of the Court of Justice of 12 July 2012 in case C-616/10, *Solvay SA v. Honeywell Fluorine Products Europe BV, Honeywell Belgium NV, Honeywell Europe NV*, EU:C:2012:445, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=124996&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8650607 [last accessed: 20.10.2019].

[9] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ EU L 012, p. 1–23.

[10] See rec. 26 of the case C-616/10.

issued by a national court since in the CoJ's opinion there was no risk of conflicting decisions being issued by different national courts.

However, since there is no pan-EU regulation on personal rights and their protection, the area is subject to national regulation. In other words, as wisely noted by the CoJ, the national rules of civil law and civil procedure of a particular Member State apply in case of personal rights and protective measures. In consequence, if the law of a Member State allows for a protective measure to have extraterritorial scope, no provision of the Directive 2000/31/EC[11] precludes a court of a Member State from ordering a host provider to remove information covered by the injunction in multiple jurisdictions (even globally). Yet, it has to be observed that the efficacy of such an order depends greatly on the framework of the relevant international law, in particular the rules of recognition and enforcement of decisions or judgments of a foreign court (international civil procedure). The procedure consists in, *inter alia*, verification of whether the order in question is not contrary to the basic rules of the public order of the Members State (public order clause)[12]. In cases concerning content blocking or removing orders, national courts of Member States should check an order issued by a foreign court against, *inter alia*, their national standard of freedom of speech, freedom of expression, and freedom of business operations.

2. Equivalent content

In this judgment, the CoJ dealt extensively with the limit of the national courts' powers to impose obligations on host providers in regard to blocking and removing illegal content.

Firstly, the CoJ ruled that the national court may order the host provider to block or remove information stored, the content of which is

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[11] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), Official Journal L 178 of 17 July 2000, p. 1–16, referred to as "Directive 2000/31/WE".

[12] See e.g. Article 1146 of Polish act of 17 November 1964 Code of Civil Procedure, OJ 2019 item 1460 with amendments.

identical to the content previously declared to be illegal irrespective of who requested the storage of that information. In other words, the CoJ stated that such injunction is permissible and falls under the specific case of monitoring allowed under recital 47 of Directive 2000/31.

Secondly, the CoJ stated that Directive 2000/31 does not prohibit granting orders for an injunction of information with an equivalent content to the messages declared illegal. It explained that the illegality of the information stems from the content conveyed by the terms and not the use of certain terms in certain way. Therefore, the injunction must be able to reach the information worded slightly differently, but essentially conveying the same message.

At this point, the judgment differs substantially from the AG's opinion. In recital 67 of the opinion, AG defined the equivalent information as information that scarcely diverges from the original information or information of which the message remains essentially unaltered. AG provided examples of reproduction of the information containing a typographical error and a reproduction having slightly altered syntax or punctuation as being 'equivalent information' to the one previously declared illegal. In recitals 72–73 of the opinion, AG restricted the host provider's obligation to block or remove such information to only those occasions when they are issued by the same user who disseminated the initial illegal information.

The AG narrowed down the meaning of information with an equivalent content and the monitoring obligations of host providers to an initial "offender". On the other hand, the CoJ sailed in uncharted waters by stating that the injunction may also concern information worded "slightly differently" but essentially conveying the same message. It leaves national courts with the difficult task of making decisions on the future illegality of an equivalent content – information that will be blocked for an indefinite period of time sometimes before it is actually posted.

The CoJ stated that a host provider may be ordered to carry out monitoring or search for the infringing equivalent content and at the same time, should not be ordered to make "an independent assessment" of the legal or illegal character of that content. It listed three elements that should be part of the injunction: 1) the name of the person concerned by the infringement, 2) the circumstances in which that infringement was determined, and 3) the differences in wording.

However, the abovementioned criteria are to an extent contradictory because the host provider will only learn whether he needs to carry out that assessment after carrying out the monitoring, which cannot be then undone.

Moreover, the elements mentioned in the injunction may include subtle changes and require further analysis and actual "understanding" of the content's context. What if the messages are conveyed by way of satirical use or are represented in a meme or other audiovisual form? The host provider will need to balance between the freedom of speech and expression of its users and the injunction. However, according to the judgment the host provider cannot be obliged to carry out an independent assessment, so he may end up being caught between a rock and a hard place.

Another interesting aspect is the question of translations. FS allows automatic translation of the posts, so potentially this functionality could be used to circumvent the initial removal of content. Should then the FS translation be automatically recognized as equivalent content? If the national courts go in this direction, it could lead to the Europeanisation of personality rights infringements.

It can be noted that a claim for removal of a similar content to the infringing one is not a new concept. Similar injunctions or orders are formulated in IPRs infringement cases so that it is not possible for an infringer to circumvent a court order easily by introducing minor changes to their product. However, unlike the situation in cases of personal rights infringement, there are specific legal grounds that justify the issuance of such broad injunctions or orders. For example, under Article 9(2) of Regulation No 2017/1001 the proprietor of an EU trademark is entitled to prevent all unauthorized third parties from using, in the course of trade, in general, any sign identical or **similar** to their sign (on condition that other requirements indicated in the provision are met).

3. Temporal scope

Besides the above considerations, yet another significant issue, the temporal scope of the injunctions, requires comment. Although this was not the subject of any of the questions referred to the CoJ, owing to

the proportionality requirement applicable to every protective measure, there is a need to ponder this aspect for a moment.

First, as far as the role of an injunction is concerned, pursuant to Article 14 (3) of the Directive 2000/31 the measure is not limited to the already existent infringements, but might be aimed at preventing future infringements by the same, or equivalent, content. This statement (with regard to preventive function) has never been a subject to controversy. An adverse interpretation of the provision would be contrary to its wording.

Second, the CoJ did not mention the period of time for which such an injunction is enforceable. It should be noted that in cases of personal rights infringements public interest shifts quite quickly from one person or event to another. Usually, the severity of personal rights infringement is stronger at its initial stage when the corresponding public interest in the matter is the most intense. With time, the public loses interest, there are fewer re-posts and comments, and the comments become more well-balanced. Also, the status of the person concerned may change (e.g. she/he might become a public official). Such changes might result in an injunction becoming disproportionate and having a chilling effect on freedom of speech and expression. In the light of the fact that an injunction can cover future identical of equivalent infringements, enforceability of an injunction should always be limited in time.

V. Practical implications of the judgment

Following the CoJ's reasoning, an order issued by a national court may cover not only identical comments, but also equivalent ones. In the CoJ's opinion, for the order to be proportionate, it is the national court's duty: first, to determine that the basic information covered by the plaintiff's claim is illegal, second – to determine which words or phrases should be considered equivalent, and third – to determine in which circumstances the use of the equivalent content might amount to an infringement.

In practice, the burden of defining which information is the equivalent of the content previously declared to be unlawful will be shifted onto a plaintiff. Although, on the surface the judgment seems to be plaintiff-oriented, as far as its enforcement is concerned, it raises more questions than answers. The main dilemma for plaintiffs and their representatives

then would be to formulate claims in a well-balanced manner. If a claim is too broad, a court might dismiss the claim, at least partially. This will, among other effects, determine which of the parties bears the costs of the proceedings. Where the claim is too narrow, its efficacy will be low.

It can be observed that the evolution of combating personal rights infringements on the Internet is already happening. In one of the recent Polish judgments, the court prohibited the use of a vulgar English word, even though it had many alternative meanings in Polish and the court itself stated that it is impossible to define the infringer's intended meaning[13]. However, in the Polish context, it is important to note that to obtain a preventive injunction, the plaintiff will also need to show a highly probable belief that an objectively justified violation of personal rights in the future is likely to occur[14].

And last, but not least, the way in which the CoJ defined the notion of equivalent content and the scope of obligations that can be imposed on a host provider, raises the question of whether the CoJ introduced an obligation to use a (preventive) automated general filtering system via the back door. It may be the case as the monitoring of and search for information is to be limited to specific equivalent information (as specified in the injunction), but, at the same time, it may cover the content of any user, not only the one who committed the infringement already assessed by the court. In addition, the CoJ specified that monitoring obligation may not be such as to require the host provider to carry out an independent assessment of the content. Simultaneously it defined the elements of the injunction vaguely and did not specify how they should be "transferable" into the monitoring mechanism of equivalent content. It is rather clear that indentifying them in the particular case will require carrying out an assessment. Then the question left is what the risk is, which the host provider is facing, when blocking or removing after carrying out an "independent assessment" and what is the risk of not doing it. Even

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[13] See Judgment of the Appeal Court in Cracow of 24.02.2016, case I ACa 1630/15, available at: http://orzeczenia.ms.gov.pl/details/$N/152000000000503_I_ACa_001630_2015_Uz_2016-02-24_001 (in Polish only) [last accessed: 20.10.2019].

[14] See Judgment of the Appeal Court in Cracow of 4.11.2015, case I ACa 979/15, available at: http://orzeczenia.ms.gov.pl/details/$N/152000000000503_I_ACa_000979_2015_Uz_2015-11-04_001 (in Polish only) [last accessed: 20.10.2019].

though the fact of acting in performance of a court order shields a host provider from contractual or tort liability, a tendency to remove allegedly illicit content might discourage users and affect the exercise of freedom of speech in a negative manner. Also, the obligation to implement and use automated general filtering system generates additional costs on the part of the host provider. This might be particularly detrimental to small and medium entrepreneurs.

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