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Editor's Introduction

Professor Jan Sandorski (1940–2018) was a distinguished student of the founders of the Poznań School of International Law, Professors Krzysztof Skubiszewski and Alfons Klafkowski[1]. Over the course of 50 years, he not only carried forward their legacy but also contributed to its dynamic development, beginning with his graduation from the Faculty of Law and Administration at Adam Mickiewicz University in Poznań in 1962. His master's thesis, titled *Nationalization in Light of International Law,* was written under the supervision of Professor Skubiszewski.

As a young assistant at the Department of International Law, Professor Sandorski initially focused his research on the international legal aspects of economic integration. This interest culminated in his doctoral dissertation, *The Council for Mutual Economic Assistance in Light of International Law,* supervised by Professor Klafkowski. In 1967, this work earned him the degree of Doctor of Law. The dissertation was later published under the revised title, *The Council for Mutual Economic Assistance: A Legal Form of Economic Integration Among Socialist States.*

Following his doctorate, Professor Sandorski undertook numerous international research fellowships, including an extended stay at the University of Oxford funded by a British Council scholarship. These experiences enriched his scholarship and informed his groundbreaking research on treaty law. His

1 Tadeusz Gadkowski, "Katedra Prawa Międzynarodowego i Organizacji Międzynarodowych Uniwersytetu im. Adama Mickiewicza w Poznaniu," in *Uczeni i nauka prawa międzynarodowego w Polsce. W 100. rocznicę utworzenia Grupy Polskiej Stowarzyszenia Prawa Międzynarodowego (International Law Association)*, ed. Jerzy Menkes et al. (C.H. Beck, 2023), 143 ff.

habilitation thesis, *The Invalidity of International Agreements*, published in 1977, remains a foundational work in the field. In recognition of this monograph and his broader academic achievements, he was awarded the degree of *doctor habilitatus* in 1978. That same year, he succeeded Professor Klafkowski as head of the Department of International Law, a position he held until 1984.

Throughout his career, Professor Sandorski expanded his research to encompass additional fields of international law, notably diplomatic law and the international protection of human rights. His contributions in these areas are exemplified by his comprehensive and highly acclaimed monograph, *Diplomatic Protection and the International Protection of Human Rights*, published in 2006. This work was instrumental in the proceedings that led to his appointment as Professor of Law in 2008.

Professor Sandorski's scholarly legacy is vast and multifaceted. He was a preeminent expert in international law and a scholar of extraordinary erudition. His writing was not only rigorous but also eloquent, reflecting his keen awareness of both substance and style, always aiming to engage and resonate with his readers. Whether addressing the theoretical intricacies of treaty invalidity, defending Poland's national interests in legal opinions prepared for the Ministry of Foreign Affairs, or commenting on the everyday matters of our Faculty, his work bore the hallmark of a Renaissance Man.

I had the privilege of knowing him for nearly 50 years, as his student, colleague, and friend.

Professor Sandorski's wide-ranging academic interests, while extensive, were particularly focused on several key areas of research. These will be briefly outlined below, accompanied by the necessary commentary.

1. The Law of International Organizations

Professor Sandorski's early publications focused on the law of international organizations and were featured in journals such as *Ruch Prawniczy, Ekonomiczny i Socjologiczny, Nowe Prawo,* and the *Polish Yearbook of International Law.* These works examined the legislative competences, functioning,

and composition of the organs of the Council for Mutual Economic Assistance (CMEA), as well as the dominant role played by its most powerful member, the Soviet Union. In his research, Professor Sandorski emphasized the principle of sovereign equality among socialist states—a principle that clearly conflicted with the so-called "Brezhnev Doctrine," which prioritized the „interests of the community as a whole" over those of individual member states. Sovereign equality also clashed with the dubious principles of socialist internationalism and fraternal mutual assistance, which sought to subordinate the norms of general international law.

Professor Sandorski's scholarly theses in this area diverged significantly from the official political line of the time, resulting in his writings being subject to political censorship. A representative example of his work on the law of international organizations is the monograph *The Council for Mutual Economic Assistance: A Legal Form of Economic Integration Among Socialist States*, which was published in 1977. However, it took a full decade after his doctoral defense for the monograph to appear in print due to censorship concerns over its „anti-Soviet undertones." It was only after the political climate shifted in 1975—on the eve of the Helsinki Conference on Security and Cooperation in Europe, and as the Brezhnev Doctrine began to recede—that the monograph was published, albeit with certain sections removed.

It is important to note that during this period, the Poznań Department of International Law faced ideological criticism, including accusations of lacking scientific objectivity as it was understood in those challenging times.

2. The Law of Treaties

Professor Sandorski began his research on the law of treaties during a year-long academic stay at Oxford in the 1969–1970 academic year. There, he worked under the supervision of Sir Humphrey Waldock, a professor and member of the International Law Commission, who was the rapporteur and principal drafter of the Vienna Convention on the Law of Treaties. Inspired by Waldock, Sandorski focused on the issue of the invalidity of international agreements.

The outcome of his Oxford research included a series of articles addressing the effects of coercion and corruption on treaty validity, as well as the role of *ius cogens* in the context of treaty nullity. In 1977, he published his seminal monograph *The Invalidity of International Agreements*, which offered a critical analysis of certain provisions of the Vienna Convention and highlighted the omission of economic coercion as a ground for treaty invalidity. Time has proven Professor Sandorski correct on this issue.

His monograph remains the first and only comprehensive work on this subject in both domestic and international legal literature. It secured his lasting position in the field of international law scholarship and teaching. Any researcher delving into the validity of international agreements inevitably turns—and will continue to turn—to Professor Sandorski's groundbreaking monograph.

3. International Human Rights Law

International human rights law became a central focus of Professor Sandorski's research in the early 1980s, particularly during his leadership of two scientific projects on the protection of the family in international law. These efforts led to a series of publications addressing topics such as the Vatican Charter of the Rights of the Family, the international protection of marriage, and the protection of children in armed conflicts. These studies formed the foundation for his original draft of a Convention on the Rights of the Family. Professor Sandorski was undoubtedly a pioneer in this field in Poland.

From 1992 onward, Professor Sandorski explored the impact of international law on the protection of human rights for people living with HIV/AIDS. His work addressed legal issues related to universal standards of international human rights protection, euthanasia, and the rights of the elderly and terminally ill. This focus on the rights of the sick culminated in his initiative to publish, under the editorship of anesthesiologist Professor Roman Szulc, a textbook for fifth-year medical students entitled *Selected Issues in Medical Deontology*. Published in 1999, the textbook includes a chapter by Professor Sandorski titled "International Human Rights Protection and Contemporary

Medical Issues", which served as the basis for lectures he delivered for many years to medical students.

The intersection of medical issues and international human rights law is also reflected in two of Professor Sandorski's books, published at the initiative of Professor Andrzej Szwarc as part of a series funded by the National AIDS Center under the Polish Ministry of Health. The first, *International Human Rights Protection and HIV/AIDS* (Wydawnictwo Poznańskie, 2002), and the second, *Enforcing the Rights of People Living with HIV/AIDS: Standards and International Documents* (Wydawnictwo Poznańskie, 2003), offer comprehensive and meticulously documented studies on this specific area of international human rights law. Both works remain unparalleled in legal literature.

4. Diplomatic Law

Diplomatic law had long been among Professor Sandorski's academic interests. His first scholarly article, published in 1965, examined the legal status of individuals serving on CMEA bodies and largely focused on diplomatic immunities and privileges. His 1984 article on UN credentials also explored aspects of multilateral diplomacy.

Professor Sandorski's concurrent research on human rights inspired him to merge these two fields of study. This synthesis began with his 1987 article in *Palestra* titled "The Lawyer and Diplomatic Protection". Subsequent publications in this area addressed topics such as the principle of exhausting domestic legal remedies, diplomatic protection as a tool for safeguarding human rights, consular protection, the rights of prisoners of war, Polish citizenship, and European Union citizenship.

The culmination of this research was his professorial monograph *Diplomatic Protection and the International Protection of Human Rights*. Written in an engaging and vivid style, the book highlights Professor Sandorski's passion for research and his remarkable writing talent. In it, he challenges the traditional notion that diplomatic protection by a state for its citizens abroad is purely discretionary, arguing instead that states have an obligation to provide

such protection. He demonstrates that a state failing to fulfill this duty may face liability for harm suffered by its citizen abroad in violation of international law. Ultimately, Professor Sandorski contends that the right to diplomatic protection should be viewed as a human right.

Additionally, he introduced innovative theories regarding the right to diplomatic protection arising from European Union citizenship, further expanding the scope of his contributions to this dynamic field of law.

5. History of International Law

The history of international law occupies a somewhat secondary position in Professor Sandorski's scholarly contributions. His primary motivation in this fieldwas to honor the achievements of prominent Polish scholars in international law. With this aim, he published several articles about Professor Bohdan Winiarski, the founder and head of the Department of International Law until 1949, a distinguished Polish internationalist, the first Polish judge at the International Court of Justice in The Hague (1946–1967), and its president (1961–1964). These articles served as the foundation for the publication *Bohdan Winiarski: Law – Politics – Justice* in 2004, part of the *Magistri Nostri* series by the Faculty of Law and Administration at Adam Mickiewicz University in Poznań.

Continuing the series on the lives and contributions of eminent Poznań-based international law scholars, Professor Sandorski also authored the 1996 essay *Professor Anna Michalska: A Sketch of a Life Beyond Academia*.

6. International Legal Issues in Polish-German Relations

This subject, still highly relevant, became part of Professor Sandorski's research in the 1980s, when he resumed active collaboration with the Legal and Treaty Department of the Ministry of Foreign Affairs in 1980 and joined the Advisory Legal Committee of the Minister of Foreign Affairs in 2003.

For the Legal and Treaty Department, he prepared an internationally renowned expert opinion on the legal significance of the 1953 declaration by

the Polish government renouncing war reparations. In this analysis, he challenged the validity of the declaration, arguing that it was made under economic duress from the Soviet Union, often referred to as the "coal blackmail." This thesis sparked extensive academic debate and remains a point of contention. An expanded version of this expert opinion, incorporating newly discovered documents from the 1950s, was included in the Ministry of Foreign Affairs' *White Paper* titled *Issues of Reparations, Compensation, and Benefits in Polish-German Relations, 1944–2004*, published in 2004.

Further publications, such as those in the journal *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, addressed the role of unilateral acts in Polish international practice. Professor Sandorski meticulously argued, based on international law and its sources, that the 1953 declaration lacked binding legal force. He emphasized that contesting the validity of the declaration did not equate to endorsing the theory of limited Polish sovereignty during that period. From the perspective of international law, sovereignty is an intrinsic attribute of a state, rendering discussions about "greater" or "lesser" sovereignty unfounded.

Professor Sandorski's work also explored the legal status of the Polish national minority in Germany. Among his contributions, a particularly significant example is a detailed study published on this topic.

7. History of the Judiciary

As an active member of the Historical Commission of the Regional Bar Council in Poznań, Professor Sandorski was deeply interested in the history of the judiciary. He tackled challenging topics, believing it was necessary regardless of potential criticism. Notably, he sought to uncover the truth about the Poznań June 1956 uprising and highlight the role of lawyers in the trials related to this event.

This focus directed his attention toward political trials and the history of the judiciary under the People's Republic of Poland (PRL). His efforts contributed to several books discussing the Poznań trials of 1956, the arguments of defenseand prosecution in these cases, the applicable laws of the 1950s, legal accountability for the Poznań June events, and the judiciary system during that era.

The most impactful of these works was the collective monograph *Poznański Czerwiec 1956*, published in 1981 under the editorship of J. Maciejewski and Z. Trojanowiczowa. Professor Sandorski authored the chapter titled "The Judiciary of the PRL in 1956 Against the Background of the Poznań June Trials." This chapter received high praise from reviewers, many of whom deemed the monograph essential reading for students of modern history.

By boldly addressing these difficult subjects, Professor Sandorski helped restore the dignity of many participants and heroes of the events, recognizing the inherent dignity of all individuals—a concept that lies at the heart of human rights.

Professor Jan Sandorski was a man of immense knowledge, culture, and kindness, an outstanding scholar who conducted his research with true passion, not only in Poland but also at some of the most prestigious universities abroad. He was a true professor with a distinguished reputation, particularly in the field of international law.

Tadeusz Gadkowski

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Jan Sandorski

The Polish National Minority in Germany in the Light of International Law

Abstract: The paper is an English translation of the article "Polska mniejszość narodowa w Niemczech w świetle prawa międzynarodowego" published originally in *Ruch Prawniczy, Ekonomiczny i Socjologiczny* no. 2 from 2010. The text is published as a part of a section of the Adam Mickiewicz University devoted to the achievements of the Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.
Keywords: polish national minority, Germany, public international law

Introduction

The migratory movement of Poles on German territory can be traced back to the eighteenth century. To a large extent, it resulted from the partition of Poland and numerous national uprisings, whose participants were forced to leave their homeland. Large-scale economic emigration did not begin until the latter half of the nineteenth century, but on the eve of the First World War there were over 4 million Poles on the Reich's territory. They would establish numerous educational, women's, youth, church, sports and singing organizations. The Union of Poles in Germany—which represented the Polish national minority before the German authorities—was founded in 1922, in the early days of the Weimar Republic. The association was dissolved on 27 February 1940 under the Nazi ordinance that abolished all Polish community structures in the Third Reich.

This study seeks to demonstrate that the suppression of all manifestations of Polish activity in Germany in 1940 contravened applicable international law, and that its legal grounds should therefore be considered invalid *ab initio*.

The Polish organizations which operate currently in the Federal Republic of Germany are demanding compensation for the losses incurred following the implementation of the 1940 ordinance. Their claims should be regarded as legitimate and deserving of satisfaction in those respects which have so far been overlooked or ignored. In addition to their financial claims, the organizations demand that the German authorities pronounce the 1940 ordinance invalid and acknowledge that the current Union of Poles in Germany is the continuator of the Union dissolved in 1940, being therefore entitled to the status of the representative of the Polish national minority in Germany. This position is informed by the postulation that Poles in Germany should be considered a national minority on the same principles according to which minority status is granted to the Polish citizens of German origin residing in Poland. Satisfying that demand would be eliminate the asymmetry between the legal position of Germans in Poland and Poles in Germany resulting from the Treaty of Good Neighbourship and Friendly Cooperation concluded between Poland and Germany on 17 June 1991. These particular issues are explored in the following study.

Significance of the Upper Silesian Convention of 1922 for the Polish National Minority in Germany

The Versailles Peace Treaty with Germany of 28 June 1919 and the Polish and German National Minorities after the First World War

The history of international relations has seen numerous treaties whose provisions obliged the signatory states to protect individuals or groups that were distinct from the majority by virtue of their religion or nationality. The Final Act of the Congress of Vienna, signed on 9 June 1815, had already stipulated in Article I that “the Poles, who are respective subjects of Russia, Austria,

and Prussia, shall obtain a representation, and national institutions, regulated according to the degree of political consideration, that each of the governments to which they belong shall judge expedient and proper to grant them."[1] The First World War brought about extensive changes to European borders, which compelled states to impose treaty obligations on the new members of the international community that granted national, religious and linguistic rights to minorities, so that their legal position would be on a par with the status of the majority of citizens. The Peace Treaty with Germany, concluded at Versailles on 28 June 1919 by the major allied and associated powers as well as other allied and associated powers (including Poland), also featured provisions for the protection of national minorities.

From the standpoint of the foreign policy towards Germany adopted by the reborn Polish State, Article 91 of the Treaty of Versailles particularly relevant. It asserted that that "German nationals habitually resident in territories recognized as forming part of Poland will acquire Polish nationality ipso facto and will lose their German nationality."[2] This article further provided that the German citizens residing on Polish territory would be entitled to choose in favour of German citizenship. The same right was granted to the Poles with German citizenship who resided permanently in Germany, enabling them to opt for Polish citizenship. The Treaty of Versailles stipulated that the provisions of Article 91 would only take effect for parts of Upper Silesia after the territory had been conclusively attributed following a plebiscite held there.

The Little Treaty of Versailles of 28 June 1919 and the German national minority in Poland

In the course of the conferences that regulated the aftermath of the First World War, the allied and associated states concluded treaties on the protection of

1 Karol Lutostański, *Les partages de la Pologne et la lutte pour l'independence* (Payot, 1918), 384.

2 Bohdan Winiarski, *Wybór źródeł do nauki prawa międzynarodowego* (Komitet Wydawniczy Podręczników Akademickich, 1938), 171.

national minorities. The victorious states which made such commitments included Poland, Yugoslavia, Czechoslovakia, Romania, Greece and Armenia. Analogous obligations were also assumed by the vanquished, such as Austria, Hungary, Bulgaria and Turkey.

As regards Polish-German relations with respect to national minorities, particular importance should be attached to the treaty between the major allied and associated powers and Poland, referred to in the literature as the Little Treaty of Versailles.[3] In the latter, the United States of America, the British Empire, France, Italy and Japan affirmed their recognition of the Polish State and, at the same time, obliged Poland to align its laws with the principles of freedom and justice as well as guarantee fair and equal treatment to all inhabitants of the territory over which Poland had assumed sovereignty. The Treaty imposed unilateral obligations on Poland, some of which were in the nature of fundamental rights. First and foremost, those included Article 1 of the Treaty, which set out as follows: "Poland shall deem the provisions contained in Articles 2 to 8 […] as fundamental rights, whereby no law, ordinance any or official action shall be in conflict with or contrary to those provisions; no law, ordinance or official action shall be of any force or effect against them."[4]

It follows from Article 1 of the Treaty that the parties found the rights enshrined in Articles 2 to 8 to be fundamental. Thus, the Treaty construes as such the right "of all inhabitants without distinction as to birth, nationality, language, race or religion to comprehensive and total protection of life and liberty" (Article 2). By right alone and without any formal procedure involved, Poland was to recognize German, Austrian, Hungarian or Russian nationals who—at the time when the Treaty came into force—were permanently resident on the territory already or prospectively determined as part of Poland (Article 3) as Polish citizens. Such persons could also choose any other nationality available to them (Article 5). Persons born on Polish territory to parents per-

3 Otherwise known as the Polish Minority Treaty (translator's note).
4 Winiarski, *Wybór źródeł do nauki prawa międzynarodowego*, 212.

manently residing there were also to be recognized as Polish citizens, although they themselves did not have a permanent residence there (Article 4).

Article 7 provided that "all Polish citizens, without distinction as to race, language or religion, shall be equal before the law and shall enjoy the same civil and political rights."

The fundamental right formulated in Article 8 of the Treaty is highly relevant for further deliberations. It stipulated that Polish citizens belonging to ethnic, religious or linguistic minorities shall be treated on a par with other Polish citizens. In addition, "they shall have equal rights to establish, run and control at their own expense charity, religious or social institutions, schools and other educational establishments, and the right to freely use their own language and practice their religion therein."

Article 12 of the Treaty contains an important statement. Poland agreed that the fundamental rights of national, religious or linguistic minorities constituted obligations of international significance and were guaranteed by the League of Nations. Any member of the League had the right to draw the Council's attention to any breach of or threat to the obligations in question. In the event of a dispute arising on those grounds, the Polish Government agreed that it would be referred for resolution to the Permanent Court of International Justice attached to the League of Nations.

The recognition of the fundamental rights of national minorities by Poland and other states bound by minority treaties, underpinned the international system for the protection of minority rights established under the auspices of the League of Nations.

Polish-German Mutual Obligations in the Light of the Upper Silesian Convention of 1922

On 15 May 1922 in Geneva, Poland and Germany entered into the Upper Silesia Convention. Unlike the previous minority treaties or articles, which set out unilateral obligations of states towards the allied and associated powers, the

Upper Silesian Convention contained mutual commitments of the two states. First, one should outline the historical background of the Convention.

Under the terms of the Versailles Peace Treaty, the national affiliation of Silesia was to be decided by a plebiscite. Following the example of the Greater Poland Uprising and inspired by its victory, the Poles living in Upper Silesia staged the first Silesian uprising as early as 1919. Its unsatisfactory outcomes brought about the second uprising in August 1920, and another one in May 1921. On 11 June 1921, the insurgents signed an armistice agreement with the Inter-Allied Governing and Plebiscite Commission, which established the demarcation line. It should be noted that in the plebiscite held in late March 1921, 707,605 votes were cast in favour of incorporation of the plebiscite area into Germany, while 479,359 voters supported affiliation with Poland.[5] The Council of Ambassadors approved the division of the plebiscite area on 20 October 1921. Poland received 29% of the area, which included 76% of the Silesian coal mines. A considerable number of Poles inhabiting Opole Silesia found themselves on the German side. As a result of repression and terror, they would subsequently emigrate to Poland, Czechoslovakia, Hungary, and Austria. Approximately 60,000–70,000 Poles left the Opole region. Still, half a million people who identified as Poles remained living in the Opole district (*Regierungsbezirk*).[6] Early 1922 saw an organizational revival due to the intense activities of the Polish Socialist Party, as well as the establishment of the Union of Polish Sports Associations in the German part of Silesia.[7]

The division of Upper Silesia provoked serious contention between the diplomacy of France, which sided Poland, and the British diplomacy, which

5 Report of the Committee of Experts appointed to study the frontier to be laid down between Germany and Poland in Upper Silesia as the result of the Plebiscite, August 6, 1921, Appendix I, in Georges Kaeckenbeeck, *The International Experiment of Upper Silesia: A Study in the working of the Upper Silesian Settlement, 1922–1937* (Oxford University Press, 1942), 557.

6 The German population remaining in the Polish part amounted to 250,000 people; see Jerzy Topolski, *Polska XX wieku. 1914–2000* (Wydawnictwo Poznańskie, 2001), 60.

7 Marian Dyba, *Śląskie drogi od X w. do 1939 r.* (Kuratorium Oświaty, Sejmik Samorządowy Województwa Katowickiego, 1992), 154.

took a pro-German stance. The matter was to be resolved at an extraordinary meeting of the Council of the League of Nations in August 1921. The Council decided that the forces of the allied powers would remain stationed in Upper Silesia until Poland and German sign a convention governing relations in the region. The resolution of the Council of the League of Nations of 20 October 1921 specified that Polish-German negotiations would be presided over by Felix Calonder, former president of the Swiss Federation. Polish-German negotiations focused on the liquidation of German property in Polish Upper Silesia. It was opposed by the German representative, Eugene Schiffer, who maintained that depriving German citizens of their chattels and immovables—even if subject to the principle of compensation—would consitute flagrant injustice. The Polish representative, Kazimierz Olszowski, highlighted nationality issues and argued that Upper Silesia had been subject to a process of Germanization for many years. Since 1872, there had not been a single Polish school in Upper Silesia, even though according to official German statistics 1,250,000 Poles and 700,000 Germans inhabited the region in 1919.

As of 1886, Poles were forbidden to hold any office in East Germany. Children speaking Polish were expelled from secondary schools. Poles were prohibited from serving as administrative and judicial officials, civil servants, prosecutors or healthcare officers.[8]

Given the anti-Polish actions of the German authorities, the Polish side placed particular emphasis on mutual protection of the national minorities as opposed to the previous unilateral approach. As a result of Polish efforts, the entire Part III of the treaty was devoted to minority protection.

Article 65, Part III, stated the obligations of both parties to the Convention regarding fundamental rights. Both states declared that "the provisions contained in Articles 66–68 shall be deemed fundamental rights (*fondamentales*), whereby no law, ordinance any or official action shall be in conflict with or contrary to those provisions; no law, ordinance or official action shall be of any force or effect

8 Kaeckenbeeck, *The International Experiment of Upper Silesia*, 17.

against them." As may be seen, the authors of the Convention followed the example of the Little Treaty of Versailles, with the exception that in the latter the above obligation rested solely with Poland.

Article 66 of the Convention is a faithful copy of Article 2 of the Little Treaty of Versailles. Article 67 iterates the content of Article 7, while Article 68 duplicates Article 8 without any change to the wording.

Article 12 of the Little Treaty of Versailles also found its way into the Upper Silesian Convention in the form of Article 72. Both states declared yet again that the fundamental rights were obligations of international significance and were guaranteed by the League of Nations. Both Germany and Poland agreed that in the event of a difference of opinion between their respective governments and any member of the League of Nations concerning the rights or acts stipulated in the articles on the protection of national minorities, it would be regarded as a dispute of an international character, in accordance with the tenor of Article 14 of the Covenant of the League of Nations. Both governments agreed that any dispute of that nature would be referred to the Permanent Court of International Justice at the request of the other party. Decisions of the Court would be considered unappealable and of the same weight as the decisions rendered under Article 13 of the Covenant, according to which the members of the League of Nations undertook to comply with the rulings in good faith (Section 4).

Title III, Part III, of the Upper Silesian Convention contained provisions (Articles 147–158) on petition procedures, according to which the Council of the League of Nations would resolve in the matter of individual or collective petitions concerning the Convention's articles for the protection of national minority submitted to the Council directly by persons belonging to such a minority. The Council was entitled to send the petition to the government concerned, which then had to send it back to the Council with its comments (Article 147). To examine such petitions, each government was to create an Office for Minority Affairs in its part of the plebiscite area (Article 148). The office was tasked with handling petitions from members of the minorities regarding

the interpretation and application of the minority protection provisions of the Convention by administrative authorities. The Office was obliged to convey petitions to the President of the German-Polish Mixed Commission to obtain their opinion. The Commission was based in Katowice and consisted of two Polish and two German members and the President, a third-country national. If dissatisfied with how a case was handled by the administrative authorities, the authors of complaints were entitled to appeal to the Council of the League of Nations. Seeking to file an appeal with the Council of the League of Nations, as provided for in Article 149, the petition had to be submitted to the Office for Minority Affairs, which referred it to the Council through its government (Article 157).

With regard to the Upper Silesian issue, if a judgment or decision was contingent on the interpretation of the Convention, any party to the dispute could request the interpretation to be made by the Arbitration Tribunal. The Tribunal had its seat in Bytom and consisted of a Polish and a German arbitration judge and the president, who was a third-country national (Article 563 § 1(1)). The ruling of the Arbitration Tribunal had to take into account the decisions of the Council of the League of Nations concerning analogous incidents in Upper Silesia (Article 158(2)). In this manner, the general principles of international law formulated by the Council of the League of Nations with a view to protecting national minorities would be manifested in the case law of the Arbitration Tribunal.

An increasingly predominant view within the League of Nations was that there exist certain norms which remain generally binding on the international community, while the provisions contained in minority treaties constituted instances of their special application. Ever more frequently, one would call for the minority obligations to be extended to all states in that community. These obligations limited the exercise of state sovereignty, but they did not elevate minorities or their members to subjects of international law. The prevalent notion in the League of Nations was that individuals or groups of citizens could

not exploit minority provisions to the detriment of the states of which they were part. The loyalty of a national minority towards its own state was associated which the English principle of "clean hands," according to which petitioners had to demonstrate their loyal conduct with respect to the state concerned and allegiance to the government under whose authority they came.

The atmosphere engendered by the provisions of the Upper Silesian Convention had a positive impact on the social activation of Poles in Germany.

On 27 August 1922, i.e. shortly after the Convention was signed, the Union of Poles in Germany was founded with headquarters in Berlin. Representatives of the Polish population of the Opole region actively contributed to its establishment. The first general meeting was held in December 1922. By drawing lots, the Opole region was designated as "District I" of the Union of Poles in Germany. The Union's activists sought to expand membership with a view to launching successful election campaign and introduce Polish representation into the German parliament. The Union of Poles in Germany regularly participated in the meetings of the Polish-German Mixed Commission, which examined disputes and complaints from the population. Despite obstruction from the German authorities, the Union organized protest actions and initiated submission of complaints to the administrative bodies, the Mixed Commission and the League of Nations. The tasks of providing legal defence and enforcing the rights enshrined in the Upper Silesian Convention were delegated to the legal and educational department of the Union, as well as its charity and economic commission.[9] The authorities of the Weimar Republic attempted to counteract the increasingly energetic and effective activities of the Union, but they did not question its mandate to represent the Polish national minority in Upper Silesia.

9 Dyba, *Śląskie drogi od X w. do 1939 r.*, 155.

The Position of the German Constitutional and International Law Doctrine after the First World War with Regard to National Minorities

The international law doctrine of the Weimar Republic placed considerable emphasis on the significance of the Upper Silesian Convention of 15 May 1922. According to German authors, the Convention offered important guidelines for the doctrinal clarification of the concept of "national minority" (*nationale Minderheit*).[10] In 1927, Hermann Plettner deplored the fact that the Weimar Constitution of 11 August 1919 did not contain specific provisions for the protection of national minorities.[11] Only Article 113 of the Constitution referred to the minority issue, setting out that "the foreign language-speaking communities of the Reich (*die fremdsprachlichen Volksteile des Reiches*) shall not be restricted by the legislation or administration (*Gesetzgebung und Verwaltung*) in free and national development, particularly in the use of their mother tongue at school or before the internal administration and the judiciary."[12] Godehard Joseph Ebers noted that the draft Constitution of the Reich had originally included Article 40 which, compared to Article 113, circumscribed the scope of the rights of the foreign language-speaking part of the nation, invoking only free and national development as well as use of the mother tongue, but without specifying pertinent circumstances.[13]

When Article 40 of the draft Constitution was being debated, certain members of Parliament requested that the term "die fremdsprachlichen Volksteile des Reiches" be changed to "nationale Minderheiten." Mr Cohn cited the experience of the French legislation and the German draft of the Covenant of the

10 See Martin Dachselt, "Die Rechtsverhältnisse der fremden Minderheiten in Deutschland," *Archiv für Politik und Geschichte – Sonderdruck 1926*, 317; Leo Epstein, *Der nationale Minderheitenschutz als internationales Rechtsproblem*, vol. 7, *Das Selbstbestimmungsrecht der Deutschen* (Hans Robert Engelmann, 1922).

11 Herman Plettner, *Das Problem des Schutzes nationaler Minderheiten: eine Studie seiner allgemeinen ideengeschichtlichen, politischen und formaljuristischen Grundlagen nebst einer ausgewählten Darstellung der Stellungnahme des geltenden rechts* (Sack, 1927), 93.

12 Plettner, *Das Problem des Schutzes nationaler Minderheiten*, 88–89.

13 *Die Verfassung des Reiches vom 11. August 1919*, zusammengestellt und eingeleitet von Godehard J. Ebers (Ferd. Dümmlers Verlagsbuchhandlung, 1919), 68–69.

League of Nations, in which it was not foreign language but subjective will that was to determine whether citizens belonged to a national minority. Cohn argued that the Jews could not be regarded as a foreign language-speaking community in the Reich, since a large proportion of that population spoke German exclusively.[14]

The position which prevailed in the debate was articulated by the rapporteur for the draft Constitution, Dringer, who was of the opinion that the term "national minority" should not feature in the Constitution.

Hermann Plettner criticized the solution adopted in the constitution and drew attention to the fact that the German side did not hesitate to sign the Upper Silesian Convention, even though many of its articles (Articles 76, 78, 79, 80, 81) referred to members of minorities (*die Angehörigen der Minderheiten*).[15] The author also questioned the wording of Article 113 and pointed out that whenever subjective public rights were formulated in the Constitution, the expression "every German has a right'' (*jeder Deutsche hat das Recht*) or "every German is entitled" (*jeder Deutsche ist berechtigt*) was used.[16] This would imply that Article 113 of the Constitution did not establish a law that could be applied directly and required a more precise, statutory determination of what phrases such as "foreign language-speaking community" or "national development" meant. Thus, Article 113 contained a legal principle, which nevertheless required to be rendered in specific terms through pertinent legislation.

In his critique of the wording of Article 113 of the Constitution, Plettner invoked Article 91 of the Treaty of Versailles of 28 June 1919, in which Poles (*Pole*) were referred to as a national minority. They were defined as German citizens permanently residing in Germany, who were entitled to opt for Polish citizenship. There is no mention of Polish as a mother tongue in Article 91. Thus, according to Plettner, the authors of the Treaty of Versailles adopted an objective ethnic criterion rather than a linguistic criterion. A similar solution may be

14 Plettner, *Das Problem des Schutzes nationaler Minderheiten*, 89.
15 Plettner, *Das Problem des Schutzes nationaler Minderheiten*, 94.
16 Plettner, *Das Problem des Schutzes nationaler Minderheiten*, 91.

found in Article 27 of the Upper Silesian Convention of 15 May 1922, as well as in its Article 74, which expressly stated that "(…) the authorities shall not inquire whether anyone belongs or does not belong to a national, linguistic or religious minority, nor shall they deny such affiliation to anyone."

All the German authors quoted above advocated the adoption of a subjective criterion, depending on the will of the individual who declares his or her national affiliation. It follows that the state cannot create objective criteria which preclude one from becoming a member of a national minority. Thus, the dominant view in the legal doctrine of the Weimar Republic was that belonging to a national minority was determined by the will of the individual and that the individual had fundamental rights to free national development.

From the moment Adolf Hitler came to power in 1933, those rights would be successively curtailed under the influence of fascist ideology, affecting the Jewish minority first and other national minorities later on. Robert O. Paxton observed that "enemies were central to the anxieties that helped inflame the fascist imagination." The number of internal enemies was rapidly increasing in their minds. In fascist Germany, "the unclean, the contagious, and the subversive often mingled in a single diabolized image of the Jew, Gypsies and Slavs were also targeted."[17] Among the Slavs, the first to become such a target were the Lusatians. Between 1935 and 1938, all Lusatian organizations and associations were dissolved, all Sorbian-language periodicals were shut down, the use of the language in schools was prohibited, while most Lusatian activists were arrested and deported or imprisoned in concentration camps. Such an approach from the Nazi leadership inevitably undermined the position of national minorities—contrary to international law—culminating in their liquidation.

17 Robert O. Paxton, *Anatomia faszyzmu*, trans. Przemysław Bandel (Dom Wydawniczy Rebis, 2005), 46.

Liquidation of the Polish National Minority in Germany in 1940: Ordinance of 27 February 1940

On 2 March 1940, the Reich Law Gazette (*Reichsgesetzblatt*) No. 39 published the ordinance of the Council of Ministers for the Defence of the Reich of 27 February 1940 concerning the organizations of the Polish ethnic group (*Volksgruppe*) in the German Reich.[18]

Due to the fact that the text of the ordinance is unknown in Poland and its content is somewhat bizarre, it is worth being quoted in full.

Ordinance on the organizations of the Polish ethnic group in the German Reich of 27 February 1940.

The Council of Ministers for the Defence of the Reich decrees with the force of law (*Gesetzeskraft*):

§ 1

(1) The activities of organizations of the Polish ethnic group in the German Reich (associations, foundations, societies, cooperatives and other enterprises) are prohibited. New organizations of the Polish ethnic group may not be established.

(2) The previous executive bodies of the organizations of the Polish national minority shall step down. They may not manage the enterprises of the organizations and those assets which have a legal or economic connection with the enterprises.

(3) In case of doubt, the Reich Minister of the Interior shall decide whether an organization is to be regarded as an organization of the Polish ethnic group.

18 *Reichsgesetzblatt*, Teil I, no. 39, 2 March 1940, 444.

§ 2

(1) The Reich Minister of the Interior is authorized to appoint the Commissioner for the organizations of the Polish ethnic group.

(2) The Commissioner shall carry out his activities in accordance with the instructions of the Reich Minister of the Interior and shall be subject to his official supervision. He may delegate his powers in individual cases.

§ 3

(1) The Commissioner shall administer the organizations of the Polish ethnic group with the aim of liquidating them and shall be authorized to act for or against such organisations.

(2) The Commissioner shall be authorized to dissolve the organizations of the Polish ethnic group.

(3) Dissolved organizations of the Polish ethnic group shall be wound up by the Commissioner. The Reich Minister of the Interior may, in agreement with the Reich Minister of Justice, issue guidelines for the liquidation. These guidelines may deviate from the general regulations on liquidation.

(4) Where organizations that are entered in public registers are concerned, the Commissioner may, at his own request, enter changes into the register.

§ 4

The Commissioner shall not be bound by the articles of association or resolutions of the general meeting of members (general meeting of the board) of an organization which regulate management by the executive bodies or the realization of assets.

§ 5

No claims for damages may be brought in connection with the measures taken on the grounds of this ordinance.

§ 6

Anyone who, contrary to § 1, participates in the continuation or establishment of an organization of the Polish ethnic group shall be punished with imprisonment and a fine or one of these penalties.

§ 7

The Reich Minister of the Interior shall issue the legal and administrative regulations necessary to implement and supplement this ordinance.

§ 8

This ordinance shall not apply to the incorporated eastern territories, including the territory of the former Free City of Danzig, as well as the Protectorate of Bohemia and Moravia.[19]

The above regulation was signed by the Chairman of the Council of Ministers for the Defence of the Reich, Field Marshal Hermann Göring, the Plenipotentiary General for the Reich Administration Frick, and Minister of the Reich and Head of the Reich Chancellery, Dr. Hans Lammers.

The function of the Reich Commissioner, an extraordinary plenipotentiary for the liquidation of the assets of the Polish ethnic group in Germany was entrusted to privy councillor A. Schmid. At first, he set about liquidating the property of the Union of Poles in Germany, which owned a number of tenements, mainly in Bochum. He placed four of them under administration exercised by a trustee, namely the stock company Treuhandstelle der ländlichen Genossenschaften Westfalens GmbH, based in Münster.

19 Polish translation from the German by J. Sandorski, J. Sandorski, jr.

The company sold the houses to the Germans. Three of them had previously been owned by the Bank Robotników [Workers' Bank] GmbH, a financial institution of the Polish diaspora. The Dom Polski [Polish House], where the Union was headquartered, was acquired by the Bremen-based company Scipio und Co.

Under the 1940 Ordinance, a number of Polish institutions were liquidated, including the Workers' Bank GmbH in Bochum. Commissioner A. Schmid seized all property belonging to the bank and the contributions of its shareholders. At the Commissioner's request, the Bank was removed from the court register. The property of the Union of Poles in Germany located in Mannheim-Santhofen was also appropriated. Subsequently, the property belonging to Towarzystwo Szkolne [School Society], Towarzystwo Młodzieżowe [Youth Society] and Towarzystwo "Zgoda" ["Concord" Society] was confiscated.

In Berlin, the Commissioner seized the assets of the Union of Poles in Germany and the banks of the Polish community: Bank Słowiański [Slavic Bank], Unia i Bank Ludowy "Pomoc" [People's Union and Bank "Succour"]. The capital acquired by Commissioner Schmid was deposited in an account at the Prussian State Bank (*Preussische Staatsbank*). The seized securities were also placed in liquidation accounts at the Dresdener Bank, Commerz und Privatbank and the Deutsche Bank.

The aftermath of the 1940 Ordinance was not confined to grave material damage suffered by the Polish national minority. Polish activists who were considered enemies of National Socialism were subjected to persecution and sent en masse to concentration camps; the number of such persons is estimated to have been at least 2,000. In May 1946 in Westphalia, the survivors formed the Association of the Former Political Prisoners of the Polish Minority in Germany. On behalf of those prisoners, the Bochum-based Union of Poles in Germany took steps to seek material compensation for the moral and physical harm as early as 1949.

After 1956, related claims would rely on the Federal Restitution Law (*Bundesentschädigungsgesetz*), enacted on 29 June 1956. One would particularly invoke § 1 of the law, which stated that compensation may only be paid to those who, being citizens of Germany, were able to prove that they had been subjected to discrimination on political, racial or religious grounds during the Nazi rule. The law was accompanied by a commentary, which stated that "Poles in Germany were persecuted not as a result of negative attitudes towards National Socialism, but due to their particularly radically represented and manifested nationalist aims."[20] That commentary was evidently discriminatory, as it only mentioned the Polish national minority. Such a position of the German lawmaker tallied with the occasionally expressed opinion that the "old Polish diaspora," who had migrated from the former Prussian partition mainly to Westphalia and the Rhineland, was not a national minority, because the reason for migration was the desire to improve their standard of living.

The Union of Poles in Germany fiercely objected to the anti-Polish notions and emphasized in its memoranda that it had been opposed to National Socialism, which is why it had been dissolved by the Nazi authorities, had its property confiscated and its members persecuted, despite the fact that they fulfilled their civic duties.

The disadvantageous situation faced by the Polish national minority was not changed by the Final Law of the Federal Restitution Law, adopted on 14 September 1965.[21] German courts repeatedly rejected compensation claims filed by members of the Polish national minority who had been persecuted by the Nazi authorities. Appeals to higher courts proved unsuccessful as well.

20 *Bundesgesetzblatt*, July 1956, 121.

21 Bundesentschädigungsgesetz – Schlussgesetz vom 14 September 1965, *Bundesgesetzblatt*, September 1965.

Estimatation of the Losses Suffered by the Polish National Minority After 1940

A global estimate of the losses suffered by the Polish national minority after 1940 is by no means an easy task. Particular difficulties can be encountered when formulating claims relating to loss of health or life as a result of the brutal Nazi persecution. However, such efforts should not be discontinued even though the German authorities chronically ignore the matter of compensation payments to the German citizens belonging to the Polish national minority who had been persecuted in the Third Reich. It is also quite difficult to estimate the material losses incurred by the Polish diaspora associations, banks and other enterprises. The mere inventory of their property is extremely problematic due to missing records.

In 1945–1948, one considered the possibility of having Poles who lived in Westphalia and the Rhineland re-emigrate. Therefore, the Provisional Government of National Unity, acting on behalf of the Polish associations, attempted to recover the community property confiscated under the Ordinance of 1940. Those efforts were cut short in 1949 following the founding of the Federal Republic of Germany, which the Polish government did not recognize. In consequence, all contacts that had been established as part of the recovery process were severed.

Albeit incomplete, the documents and records salvaged and collected after the war make it possible to state that the value of the Polish property sequestered in the area of North Rhineland and Westphalia was as follows:

1) the confiscated capital of the Union of Poles in Germany and other union organizations, in cash and bank deposits: RM (Reich Mark) 247,665
2) confiscated movables of Polish associations, societies, organizations and institutions: RM 255,000.

The total amount of RM 502,665,[22] cannot be considered final as it is only an estimate. Assessment of the losses of the Polish diaspora banks proves

22 Data after Anna Poniatowska et al., *Związek Polaków w Niemczech w latach 1922–1982*, ed. Jerzy Marczewski (Wydawnictwo Polonia, 1984), 213.

particularly problematic. It is to be presumed that the RM 3,000,000 which Commissioner A. Schmid deposited on an identified account (no. 141068) with the Prussian State Bank came from the assets which, may have belonged to the Slavic Bank, the People's Bank "Succour" as well as the Workers' Bank. As early as 1951, the Union of Poles in Germany applied for the removal of unlawful entries from the court register pertaining to the Workers' Bank and for a refund of the bank's capital. An Extraordinary General Meeting of the Shareholders of the Bank was instituted, and the Bank's Management Board and Supervisory Board were elected. However, reactivation the Bank was impossible because the DM 200,000 required as seed capital were lacking. For this reason, none of the pre-war Polish banks reopened.

It should be emphatically stressed at this point that the damages for the liquidated banks of the Polish community should not only include the compensation for the assets such banks had held but also the equivalent for the lost profits (lucrum cessans).

In Berlin alone, the documented amounts from the confiscated assets of the Union of Poles in Germany and other Polish diaspora organizations are as follows:

1) bank deposits: RM 1,413,534,
2) lump-sum interest of 25%: RM 353 383.50,
3) receivables for movable assets: RM 3,186,785.

With the aforementioned estimates in mind, it may be concluded that the losses incurred by the Polish national minority in Germany in the wake of the Ordinance of 1940 amount to RM 8,456,367.

If one adopts the revaluation coefficient of 1:5, which applied after the war to determine the RM to DM ratio, one obtains the amount of DM 1,691,273.50. As already noted, this amount does not include claims in respect of *lucrum cessans*.

The Issue of National Minorities in the Treaty of Good Neighbourship of 17 June 1991

The Polish-German Treaty of Good Neighbourship and Friendly Cooperation, signed on 17 June 1991, contains three articles (Articles 20–22) concerned with minority issues. Article 20(1) states that "members of the German minority in the Republic of Poland, i.e. persons with Polish citizenship who are of German origin or who acknowledge themselves to be of German language, culture or tradition, as well as persons in the Federal Republic of Germany, who hold German citizenship and who are of Polish origin or who acknowledge themselves to be of Polish language, culture or tradition have the right, individually or together with other members of their group, to freely express, preserve and nurture their ethnic, cultural, linguistic and religious identity without any attempt at assimilation against their will."

In Section 2 of the same article, both parties to the Treaty declared that they "exercise rights and discharge obligations in accordance with international standards on minorities […]." That section lists international documents which set the standards in question, such as the 1948 Universal Declaration of Human Rights, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 International Covenant on Civil and Political Rights, and the 1975 Helsinki Final Act.

The scope of protection is defined in Article 20(3), while its authors modelled it on the 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE.

In the provisions of Article 20 of the Treaty, protected persons in Poland were referred to as "German minority in the Republic of Poland," but no analogous qualification was applied to German citizens of Polish origin in Germany. This discrepancy requires a commentary, given that international law offers no definition of a national minority that would be accompanied by a catalogue of instruments for the protection of such a minority. Therefore, the distinction made in Article 20 should not entail adverse legal consequences.

In practice, a certain asymmetry may be observed between the position of persons of German origin in Poland and persons of Polish origin in Germany. Although no such international legal obligations exist, the Polish electoral law exempts the German national minority from the so-called "five percent clause". There is no equivalent provision in German legislation pertaining to German citizens of Polish origin. The wording used in Article 20(1) of the Treaty of Good Neighbourship suggests that there is no Polish national minority in Germany, which does not correspond to the actual state of affairs. J. Kranz aptly observes: "[…] although the Treaty and the law of the Federal Republic of Germany do not know the legal term of 'Polish minority in Germany', its existence is corroborated by the fact that the Treaty grants the same rights—described as minority rights and borrowed almost verbatim from the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE of 29 June 1990—to the German minority in Poland and the Polish group in Germany."[23] The author concludes that, "if there were no Polish group in Germany, the Treaty would be exclusively concerned with the German group in Poland."

In the Federal Republic of Germany, there is a noticeable tendency not to recognize certain national minorities in legal terms. Underlying that is a reluctance to bear the legal and financial consequences of minority recognition. Undoubtedly, German policies in this regard is influenced by the presence of a substantial Turkish population who reside permanently in Germany. The failure to include the Polish national minority in the 1991 Treaty does not mean that there are no minority protections for persons of Polish origin. It does, however, lead to certain organizational problems and makes it easier for the administrative authorities to adopt a negative attitude towards requests for financial assistance from the Polish diaspora in Germany.

23 Jerzy Kranz, "Problematyka mniejszościowa w świetle Traktatu polsko-niemieckiego z 17 czerwca 1991 r. (wybrane zagadnienia)," in *Problematyka mniejszościowa w świetle Traktatu polsko-niemieckiego o dobrym sąsiedztwie i przyjaznej współpracy z dnia 17 czerwca 1991 r.* (Biuro Studiów i Analiz Kancelarii Senatu, 1996), OT-159, 4.

The provisions of the 1991 Treaty contain obligations binding on both federal and local authorities. Polish diaspora organizations establish contacts with both federal and lower-tier authorities, but their interactions contacts often generate tensions and controversies resulting from a misunderstanding of the legal solutions provided for in the Treaty. In turn, this provokes dissatisfaction among certain Polish community groups in Germany. The asymmetry between the position of the German minority in Poland and the Polish community in Germany is largely due to the differences in their financial standing. The German minority in Poland takes advantage of the support from the Polish state as well as from the German government. The financial status of the Polish diaspora is much worse, as it does not benefit from funds provided by either government.

As regards the Polish community in Germany, one should strive for a much more effective realization of the rights which arise from the safeguards set out in Article 20(3) of the 1991 Treaty. Indisputably, due to the federal structure of the German state, it is much more difficult for Poles in Germany to exercise the rights enshrined in the Treaty than it is for Germans in Poland. For this reason, Polish diaspora organizations should demand—on the grounds of the 1991 Treaty—both legal and financial assistance to facilitate their organizational activities. In contrast to the Germans living in Poland, it is all too often the case that Poles in Germany do not know what subsidies they may obtain and on whose will they depend. This is compounded by the fact that they are dispersed across Germany and have to negotiate with representatives of 16 states (*Länder*).

Claims of the Polish National Minority Defined as "German Citizens of Polish Origin of Polish Origin" Against the Federal Republic of Germany

As early as 1945, The Polish Committee for Westphalia and Rhineland petitioned the occupation authorities requesting the restitution of the Polish property confiscated by the Nazi authorities. At the same time, the pre-war Board of

the Workers' Bank GmbH in Bochum demanded permission from the British occupation authorities to resume the operation of the Bank. To that end, Polish organizations were requested to demonstrate that they were formally and legally the same entities that had existed between 1922 and 1949. This requirement was only met in 1950, when the relevant decision was obtained at the Registration Court in Berlin-Charlottenburg.

In 1956, the Union of Poles in Germany recovered the Polish House in Bochum. The Union's authorities continued their efforts to reopen the Workers' Bank in Bochum. Already in 1951, an extraordinary General Meeting of the shareholders elected a new management and supervisory board, with the goal of taking formal steps to have the bank's assets restituted. The claims brought by the newly elected official bodies of the Bank were rejected in January 1954 by the West Berlin Senator for Treasury Affairs. The rationale behind his decision was astonishing in that it asserted—among other things—that the property in question used to belong to an enemy and that its subsequent fate should be decided by the states during peace treaty negotiations. In December 1955, the Regional Court (*Landgericht*) of Berlin did not—admittedly—share the senator's position, but it dismissed the compensation claim, stating that it was not possible to determine the value of the property as at 27 February 1940 and, consequently, the extent of the losses. An appeal to the Supreme Court in Berlin was unsuccessful, as the Court ordered material evidence to be provided documenting the history of the property, a demand that the Union of Poles in Germany was unable to meet.

Revindication attempts were resumed in 1963. The Supreme Restitution Court of Berlin (Das Oberste Rückerstattungsgericht für Berlin) ruled in March 1963 that the confiscation of the Polish diaspora property by the authorities of the Reich was unjustified. On those grounds, in June 1963, the Regional Court of Berlin awarded the Union of Poles in Germany symbolic compensation for the movable property once found at the Berlin headquarters of the Union of Poles in Germany. Also, one succeeded in obtaining compensation for the confiscation of the People's Bank "Succour."

With regard to the remaining Polish diaspora property, the requirement to supply evidence of the material losses resulting from Nazi confiscations remained in force, despite the intervention of the Federal Union of European Nationalities (Föderalistische Union Europäischer Volksgruppen), of which the Union of Poles in Germany had been a member since 1956. It was impossible to collect the relevant documents, because records of the kind had been partly destroyed during the war. By way of amicable procedure, the Polish side managed merely to obtain a refund of DM 500,000 in March 1967, though the amount constituted only partial compensation for the Union of Poles in Germany, without the property of other Polish organizations taken into account.

Furthermore, no indemnification has been awarded to date to the victims of Nazi terror among the Polish diaspora. Even the intervention of the German Human Rights League (Deutsche Liga für Menschenrechte e.V.) failed to change the German government's position on the issue. As the provisions of the 1956 Federal Restitution Law (*Bundesentschädigungsgesetz*) of 1956 were clearly in conflict with both the Federal Constitution of 1949, which guarantees equal treatment for all citizens, and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, to which Germany is a party, attempts were made to amend them, but they proved unsuccessful as well.

Recent Activities of the Polish Diaspora Organisations Aimed At Normalization of Their Legal Position and Recognition of Their Property Claims

Following the founding of the Convention of Polish Organizations in Germany in 1998, which united the previously conflicted Polish diaspora associations (Congress of the Polish Diaspora in Germany, the Union of Poles in Germany, the Union of Poles "Concord," the Polish Council in Germany, and the Catholic Centre for Promoting Polish Culture, Tradition and Language), efforts to

strengthen the position of persons of Polish origin in Germany intensified. The government of the Federal Republic of Germany has not yet decided to acknowledge the Convention as the representative of the entire Polish community. However, the community is slowly beginning to speak with one voice, even though the Union of Poles in Germany still retains a clearly distinct status in view of its historical role.

On 24 August 2009, Berlin-based attorney Stefan Hambura, acting on behalf of the Polish diaspora organizations, addressed a letter to the Chancellor Angela Merkel.[24] Hambura's letter met with lively response in Polish parliamentary circles—at a meeting of the Sejm Committee for Liaison with Poles Abroad on 24 September 2009—as well as in the statements by the representatives of the Ministry of Foreign Affairs.[25]

The response of the Federal Ministry of Justice of 13 October 2009 to the letter of attorney Stefan Hambura addressed to Chancellor Angela Merkel is fundamentally important, and it deserves to be discussed in greater depth in view of its import. In the letter, the Ministry stated that the Ordinance of 27 February 1940 could not be repealed, because it "has long become invalid" ("längst ungültig geworden ist"). To justify that viewpoint, it was asserted that "the laws of the Nazi regime automatically became invalid with the enactment of the Basic Law, insofar as their content was contrary to the Basic Law and, in particular, when they were incompatible with the fundamental rights and essential principles of the democratic constitutional order of the Federal Republic of Germany." The letter from the Federal Ministry of Justice underlined that "Article 123(1) of the Basic Law states that a law enacted prior to the meeting of the German Bundestag on 7 September 1949 remains in effect only if it does not contravene said Basic Law." "[…] The Ordinance on the organizations of the Polish minority in the German Reich is contrary to the freedom of associa-

24 Full text of the letter in Piotr Cywiński, "Walka o symbole złączyła Polaków w Niemczech," *Rzeczpospolita*, 25 August 2009.

25 Kancelaria Sejmu, Biuro Komisji Sejmowych, *Biuletyn*, no. 2771/VI kad. (24 September 2009), 4–7, 9.

tion as well as to the general principle of equality guaranteed under Articles 9 and 3 of the Basic Law." In addition, it is noted in the letter that all provisions from before that date are null and void unless they are expressly listed in the body of federal law contained in Part III of the *Federal Law Gazette*. The Federal Ministry of Justice concludes by stating that the Ordinance referred to in the letter of attorney Stefan Hambura "was not included in the compilation for the reasons mentioned above" and therefore "the repeal or abrogation of the 'Ordinance on the Organizations of the Polish Ethnic Minority in the German Reich' is not required" ("Einer Aufhebung oder Außerkraftsetzung der 'Verordnung über die Organisationen der polnischen Volksgruppe im Deutschen Reich' bedarf es daher nicht").[26]

Prospects for Resolving Legal Issues Relating to Claims of the Polish Diaspora Organizations in the Federal Republic of Germany

When the position of the German government, as expressed in the letter of the Federal Ministry of Justice of 13 October 2009, is examined against the position of the Ministry of Foreign Affairs of the Republic of Poland, one will readily conclude that both sides concur that the 1940 Ordinance is invalid. This raises the question of the consequences of such a mutually recognized legal state of affairs. The invalidity of a legal act, both in domestic and international law, should result in *restitutio in integrum*, i.e. the restoration of the state that had existed before the invalid act was introduced. Adopting the concept presented in the letter of the Federal Ministry of Justice, the 1940 Ordinance may be considered to have been invalid since 7 September 1949 at the earliest. However, even farther-reaching conclusions may be drawn.

26 Letter from the Bundesministerium der Justiz dated 13 October 2009, 1100/311–48–702/2009, 2.

Given the legal state of affairs described above and analyzing the prospects for resolving the problems involved in the claims of the Polish diaspora organizations, the following deductions should be made.

1) One should abandon the argument that the legislation of the Allied Control Council, which exercised governance in Germany after World War II, rendered the Ordinance of 27 February 1940 inapplicable. During the 32 months of its existence, the Allied Control Council was unable to resolve any major legal issue.[27] Its proclamations and laws give the impression of stating the obvious. On 10 October 1945, the Allied Control Council issued a law on the liquidation of all Nazi organizations, enumerating the latter in detail. At the same time, the Council indicated a number of enactments of the Third Reich that ceased to apply. The Ordinance of 27 February 1940 was not included in that list. It would follow that, in line with the wording of Article II of Law No. 1, the Council did not find it to cause "injustice or inequality […] by discriminating against any person by reason of his race, nationality […]."
2) The fact that the Federal Ministry of Justice unequivocally recognizes the Ordinance to be invalid under Article 123 of the Basic Law, warrants abandoning the arguments relying on the actions of the Allied Control Council. Given the construction of *restitutio in integrum*, one should perhaps recall the legal situation of the Polish minority in Germany and the German minority in Poland before the Second World War. Unlike the minority treaties, which in 1919 and 1920 obliged several states (Poland—the so-called Little Treaty of Versailles of 28 June 1919, Yugoslavia, Czechoslovakia, Romania, Greece and Armenia) to grant certain rights and privileges to racial, religious and linguistic minorities, the Polish-German Convention of 15 May 1922 on Upper Silesia (which expired in 1937) did not contain unilateral but mutual obligations of the two states, while their scope was much

27 See Jerzy Krasuski, *Historia RFN* (Książka i Wiedza, 1981), 31.

broader than in the minority treaties. Although—admittedly—it concerned the inhabitants of Upper Silesia on either of the border, it had a significant impact on the legal position of the Polish national minority in Germany.

The foreign policy of the Third Reich with respect to national minorities is compellingly reflected in the initiative of the German diplomacy following the expiry of the Upper Silesian Convention of 15 May 1922 on 15 July 1937. The German ambassador to Warsaw, Hans Adolf von Moltke, suggested to the Polish side that both states conclude an agreement on the mutual protection of national minorities. That proposal stemmed from the fact that on 26 January 1934 Poland had signed a declaration of non-aggression with Germany, while the Minister of Foreign Affairs, Józef Beck, had announced that he would not cooperate with the organs of the League of Nations where compliance with minority safeguards in Poland was concerned. Although the idea of a new minority agreement advanced by Germany did not meet with acceptance in Poland, the insistence of Ambassador von Moltke (who invoked the express wish of Adolf Hitler), prompted the Polish Government to endorse—on 5 November 1937—a concordant declaration on the mutual protection of national minorities.[28]

Considering the vital impact which that declaration had for upholding the fundamental rights of national minorities formulated in the Upper Silesian Convention, it may be worthwhile to examine the provisions of that instrument.

28 Übereinstimmende Erklärung der Deutschen und der Polnischen Regierung über den Schutz der beiderseitigen Minderheiten, veröffentlicht am 5 November 1937, in Dokumente zur Vorgeschichte des Krieges, Erstes Kapitel (Forts.) Entwicklung der Deutsch-Polnischen Beziehungen, B. Deutschlands Bemühen um eine Verständigung mit Polen, 1933 bis 1939, V. Verhandlungen über eine Deutsch-Polnische Minderheitenerklärung (Januar bis Novemver 1937), no. 101.

In the introduction, the Polish and German governments found it advisable to make the position of German minorities in Poland the subject of a friendly discussion.

Both governments were unanimous that the interests of those minorities were crucial for the further development of good-neighbourly relations between Germany and Poland, and that the welfare of the minorities would be ensured in accordance with the same principles in each country. For those reasons, it was with mutual satisfaction that the two governments agreed that within the framework of respective sovereignties and in the interests of said minorities, either state will regard the following principles as binding (*maßgebend*): (1) Reciprocal respect for the German and Polish nationhood (*Volkstum*) precludes attempts to forcibly assimilate minorities, question minority affiliation or hinder the declaration of minority affiliation. In particular, no pressure shall be exerted on the young members of minorities with the aim of alienating them from their minority membership; (2) Members of minorities shall have the right to use their language freely in speech and writing, both in personal and business matters, in periodicals, as well as during public gatherings. Members of a minority shall not suffer any negative consequences when cultivating their mother tongue and the customs of their nation in both public and private life; (3) Members of a minority are guaranteed the right to associate for cultural and economic purposes; (4) A minority may maintain and establish schools where their mother tongue is used. As regards worship, religious practice in the minority mother tongue as well as respective ecclesiastical structures shall be protected as well; (5) Members of a minority may not be persecuted due to their minority affiliation when choosing or engaging in their profession or any economic activity. In economic activities, they are ensured the same rights as mem-

bers of the state nation, in particular with respect to the ownership and acquisition of real estate.

In the conclusion of the declaration, the parties stipulated that the rules formulated therein must not undermine the loyalty of minority members towards the state to which they belong. The parties also underlined that the aim of those principles is to guarantee the minority an equitable existence and promote their harmonious coexistence with the majority nation in the state, which should contribute to the strengthening of good-neighbourly relations between Poland and Germany.[29]

The concordant declaration by the governments of both countries was accompanied by a statement from the Führer Adolf Hitler conveyed to representatives of the Polish ethnic group on 5 November 1937, in which he stressed that "the Government of the Reich has endeavoured to shape the coexistence of the Polish ethnic group with the German state nation (*Staatsvolke*) in a harmonious and internally peaceful manner."[30]

The joint declaration of 5 November 1937 bears all the hallmarks of a binding international agreement and contains the fundamental principles of international law pertaining to the protection of minorities. Compared to the Upper Silesian Convention of 1922, the joint declaration affirmed that those fundamental principles were valid not only for the inhabitants of Upper Silesia, but also with regard to the national minorities living elsewhere in both states. It would follow that the expiry of the Upper Silesian Convention did not worsen the legal position of the national minorities on either side of the border.

29 Übereinstimmende Erklärung der Deutschen und der Polnischen Regierung über den Schutz der beiderseitigen Minderheiten, veröffentlicht am 5 November 1937.

30 Erklärung des Führers, beim Empfang der Polnischen Volksgruppenvertreter, 5 November 1937, in: Dokumente zur Vorgeschichte des Krieges, Erstes Kapitel (Forts.), Entwicklung der Deutsch-Polnischen Beziehungen, B. Deutschlands Bemühen um eine Verständigung mit Polen, 1933 bis 1939, V. Verhandlungen über eine Deutsch-Polnische Minderheitenerklärung (Januar bis November 1937), no. 102.

Prior to further conclusions, it should be asserted that the Ordinance of 27 February 1940 on the Polish ethnic group in the German Reich was not only contrary to the general principles of international law, but also in flagrant breach of the joint declaration of 1937.

In keeping with the Convention of 15 May 1922, the Union of Poles in Germany was registered in the same year and subsequently recognized as the representative of the Polish national minority. During the Weimar Republic, the Union would be referred to using the term "nationale Minderheit" (national minority). It was only in the Fascist propaganda that the appellation "polnische Volksgruppe" (Polish ethnic group) would be propagated, manifesting in the title of the Ordinance of 27 February 1940.

3) From the standpoint of international law, the fascist Ordinance of 27 February 1940 was at variance with the applicable international standards at the time. After the First World War, the international community realized that ethnic tensions invariably entailed a threat to international security and potential escalation into armed conflict. Therefore, efforts to safeguard the rights of national minorities were seen as tantamount to striving for social and political stability. One was aware that protecting those rights was one of the foremost international issues, whose regulation in international and domestic law was anything but easy. Nonetheless, there was a widespread view that the core obligations contained in the minority treaties concluded after the First World War represented a special application of the norms generally binding on the so-called Western culture states. Such a notion is best illustrated by the position expressed in 1922 by the Assembly of the League of Nations, according to which "States not under treaty obligation with regards to minorities shall observe, in respect of their racial, religious and linguistic minorities, at least as lofty standards of justice and tolerance as those required of others by treaties and by the proper action of

the Council."[31] By virtue of being international standards, the generally applicable norms bound the "Western culture states" such as Germany, even if it was no longer a party to the minority provisions. The Ordinance of 27 February 1940 clearly violated the norms of widely applicable international law and, as such, must be deemed invalid *ab initio*. Therefore, it should be concluded that the Polish minority in Germany has existed uninterruptedly since 1922 to the present day.

4) With the 1940 Ordinance being invalid *ab initio*, adoption of the construction of *restitutio in integrum* warrants abandoning euphemisms such as "Polish ethnic group" or "persons in the Federal Republic of Germany who hold German citizenship and are of Polish origin," used so maladroitly in Article 20(1) of the Treaty of Good Neighbourship and Friendly Cooperation concluded on 17 June 1991 between the Republic of Poland and the Federal Republic of Germany. One should consistently employ the term "Polish national minority in the Federal Republic of Germany," whilst avoiding any other wording. Also, efforts should be made to revise Article 20 of the Treaty by negotiating an appropriate annex in which "the Polish national minority in Germany" would replace the awkward "persons in the Federal Republic of Germany who hold German citizenship and are of Polish origin."
5) It should also be emphasized that the Union of Poles in Germany which currently functions in the Federal Republic of Germany is, beyond any doubt, the same organization as the Union of Poles in Germany founded in 1922. According to the proposition advanced in (3) above, the Union of Poles in Germany has never ceased to exist, which makes it a continuator rather than a successor of the pre-war Union. In addition, a substantial proportion of the members of the Union meet the condition of having lived for generations in the areas of traditional

31 *Société des Nations. Actes de la Troisièmé Assemblée. Séances Plénières*, Genève 1922, 186.

settlement of the ethnic group in Germany. Therefore, there are no grounds to question whether it is representative of the Polish national minority in Germany.

6) The Polish authorities should make every endeavour to fully document the property claims of the Polish organizations in Germany. For this purpose, one should conduct research in the archives of the Provisional Government of National Unity, which made attempts to inventory the property of the Polish diaspora already in the late 1940s.

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Notes on the Attributed Powers of International Organizations

Abstract: This article aims to explore the fundamental aspects of the the concept of attributed powers of international organizations. This subject holds significant importance, as attributed powers are related to the very nature of international organizations and their international subjectivity. The author discusses the essence of the attributed powers of international organizations, the doctrinal assessment of this concept, and the selected decisions of international courts that have addressed this issue.

Keywords: attributed powers, international organizations, powers, inherent powers, implied powers

Introduction – the Essence of the Attributed Powers

Articles in two earlier editions of the Adam Mickiewicz University Law Review examined the inherent and implied powers of international organizations.[2] In contrast, this publication, highlights the main aspects of the concept of the attributed powers of international organizations. These are powers that seem to be the self-evident powers of any international organization, as they are

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2 Andrzej Gadkowski, "Notes on the Inherent Powers of International Organizations," *Adam Mickiewicz University Law Review* 15, 2023: 261–72; Andrzej Gadkowski, "The Doctrine of Implied Powers of International Organizations in the Case Law of International Tribunals," *Adam Mickiewicz University Law Review* 6, 2016: 45–59.

explicitly granted and stem directly form the intent of the founders, which are primarily states, the sovereign subjects of international law.

It is beyond dispute that attributed powers are related to the essence of international organizations as subjects of international law established by states. When establishing an international organization, its founders are required to determine the powers necessary to fulfil its statutory purposes and tasks. These matters are regulated by the constituent document which usually, though not always, takes the form of an international agreement.[3] The significance of the constituent document for the functioning of an international organization was aptly described by P. Reuter, who said that "[a]ll the essential rights and obligations of the organization are based on the text of its constituent charter; the organization not only may invoke its constituent charter, but must base its every action on that text."[4] F. Seyersted argues that in its original form the doctrine of attributed powers was presented by H. Kelsen and in practice "by the conservative American judge Hackworth in his dissenting opinion in the 1949 International Court of Justice (ICJ) Advisory Opinion."[5] Judge G. H. Hackworth stated in his dissent that "[t]here can be no gainsaying the fact that the Organization is one of delegated and enumerated powers. It is to be presumed that such powers as the Member States desired to confer upon it are stated either in the Charter or in complementary agreements concluded by them."[6]

To begin with, it is important to highlight that international organizations, as non-sovereign subjects of international law, differ from states in that they lack general competencies. This is why their powers are determined by statutes. In the framework of the law of international organizations, this means

3 For more detailed discussion, see Andrzej Gadkowski, *Treaty-Making Powers of International Organizations* (Wydawnictwo Naukowe UAM, 2018), 88 et seq.

4 See Paul Reuter, "Question of Treaties Concluded Between States and International Organizations or Between Two or More International Organizations," *Yearbook of the International Law Commission* 2, 1972: 189.

5 Finn Seyersted, *Common Law of International Organizations* (Brill, 2008), 29.

6 See *Dissenting Opinion by Judge Green H. Hackworth, Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: ICJ Reports 1949*, 198.

that their powers are limited to those conferred upon them by states. According to J. Klabbers, the idea of attribution is in fact eminently simple and means that international organizations and their organs may act only insofar as they have been empowered so to do.[7] In the literature this principle is known as the doctrine of attributed powers (*compétences d'attribution*), or the principle of conferral.[8] According to V. Engström, these two terms may be used interchangeably.[9] Nevertheless, the doctrine of attributed powers neither permits international organizations to generate their own powers, nor to confer powers on themselves. In accordance with a well-known doctrine, they have no *Kompetenz-Kompetenz*.[10]

A comparison of the powers of states and the powers of international organizations allows us to advance the thesis that the powers of states as sovereign subjects of international law depend on no other authority. In contrast, the powers of international organizations are limited insofar as it is necessary to perform the functions that their constitution or other international instruments define. In M. Virally's terms, this thesis is formulated as follows: the finality of the state is integral (*finalité intégrée*), whereas the finality of international organizations is functional (*finalité fonctionnelle*).[11] P. Reuter also talks about the functional nature of the powers of international organizations and notes that an organization has neither sovereign nor unlimited powers, and its competences allow it to perform only those acts indispensable for the fulfilment of its functions.[12]

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7 Jan Klabbers, *An Introduction to International Organizations Law* (Cambridge University Press, 2015), 56.

8 For example: Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (Brill – Nijhoff, 2011), 157.

9 Viljam Engström, *Constructing the Powers of International Institutions* (Brill – Nijhoff 2012), 47.

10 See for example: Norman Weiß, *Kompetenzlehre internationaler Organisationen* (Springer, 2009), 361.

11 Michel Virally, "La notion de fonction dans la théorie de l'organisation internationale," in Charles E. Rousseau, *Mélanges offertes à Charles Rousseau* (Pedone, 1974), 282 et seq.

12 Paul Reuter, *Institutions internationales* (Thémis, 1972), 214.

It is noteworthy that the doctrine of attributed powers found its way into international practice via several Permanent Court of International Justice (PCIJ) advisory opinions issued in the 1920s, which will be presented below. It is believed that the opinion which played the most significant role in the process of developing this doctrine was the *Danube* advisory opinion, in which the Court specified the sources and scope of the attribution of powers.[13] The International Court of Justice (ICJ) returned to this nearly seventy years later in the 1996 advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts*, in which the Court defended attributed powers against the expansion of implied powers. In the 1996 *WHO* advisory opinion, the ICJ explicitly referred to the doctrine of attributed powers. It also concluded that international organizations are governed by the principle of speciality, which, in the opinion of the Court, forms the basis of the doctrine of attributed powers. An analysis of the French version of this opinion allows us to advance a further thesis that these terms are synonymous. The following excerpt from the above opinion substantiates this claim: "[l]es organizations internationales sont régies par le "principe de spécialité", c'est-à-dire dotées par les Etats qui les créent de compétences d'attribution dont les limites sont fonction des intérêts communs que ceux-ci leur donnent pour mission de promouvoir."[14] In Polish legal doctrine, these terms are also regarded as synonymous. Polish scholars typically refer to the principle of speciality as "the principle of limited specific competence" (pol. *zasada ograniczonej kompetencji szczegółowej*).[15]

If the source of an international organization's attributed competences is the will of a state expressed in the statute or another international instrument, these competences are in fact conferred on this international organiza-

13 *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, PCIJ Publications 1927, Series B – No. 14.

14 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, ICJ Reports 1996, 78, para. 25.

15 See for example: Anna Wyrozumska, "Państwa członkowskie a Unia Europejska," in *Prawo Unii Europejskiej. Zagadnienia systemowe*, ed. Jan Barcz (Wydawnictwo Prawo i Praktyka Gospodarcza, 2006), I–346.

tion. This conferral may involve establishing specific competences of the international organization or transferring certain competences to this organization by its member states. Such a transfer is carried out under various transfer of competence clauses and is subject to constitutional regulations. An example of this constitutional construct is provided by the Article 90(1) of the Constitution of the Republic of Poland, which stipulates that "[t]he Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relations to certain matters."[16] The doctrinal bases of this transfer are described in constitutional jurisprudence.[17]

The Attributed Powers of International Organizations – Selected Jurisprudence of International Courts

The doctrine of attributed powers came into modern, universal international law through the case law of international courts. While the most frequently cited judgment that defines the essence of this principle is the 1996 *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts* advisory opinion, the earliest mention of it can be traced back to the case law of the PCIJ. This Court, as early as in its second advisory opinion, expressed the view that is usually cited as the origin of the doctrine of attributed powers. The opinion in question concerns the *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*. The Court was asked whether "the competence of the International Labour Organization extends to international regulation of the conditions of labour of persons employed in agriculture?"[18] In response, the Court adopted a view that

16 Journal of Laws of 1997, no. 78, item 483.

17 Jan Barcz, "Membership of Poland in the European Union in the Light of the Constitution of 2 April 1997. Constitutional Act on Integration," *Polish Yearbook of International Law*, no. 23 (1997–1998): 27 et seq.

18 *Competence of the ILO in Regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, PCIJ Publications 1922, Series B – No. 2, 9.

clearly refers to the sovereignty of the member states of the ILO, in the context of which the treaty provisions should be interpreted. The Court regarded the determination of the appropriate scope of the ILO's powers as a matter exclusively tied to the interpretation of its Constitution. This reading, based on the exact meaning of the Constitution's terms, led the Court to conclude that the ILO had the competence to regulate labour conditions in the agricultural sector. The Court expressed its opinion in the following terms: "[i]t was much urged in argument that the establishment of the International Labour Organization involved an abandonment of rights derived from national sovereignty, and that the competence of the Organization therefore should not be extended by interpretation. There may be some force in this argument, but the question in every case must resolve itself into what the terms of the Treaty actually mean, and it is from this point of view that the Court proposes to examine the question."[19]

At the same time, the Court issued another advisory opinion in the case of *The Competence of the ILO to Examine Proposals for the Organization and Development of the Methods of Agricultural Production*. The Court was asked: "[d]oes examination of proposals for the organization and development of methods of agricultural production, and of other questions of a like character, fall within the competence of the International Labour Organization?"[20] This time, the view expressed by the Court was much more precise than that adopted in the earlier advisory opinion. The Court concluded that the scope of the powers of an international organization "depend[s] entirely upon the construction to be given to the same treaty provisions from which, and from which alone the Organization derives its existence and its powers."[21]

The PCIJ considered the powers of the ILO once more in the 1926 *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer*

19 *Competence of the ILO in Regard to International Regulation*, 23.

20 *Competence of the ILO to Examine Proposals for the Organization and Development of the Methods of Agricultural Production*, PCIJ Publications 1922, Series B – No. 3, 49.

21 *Competence of the ILO to Examine Proposals*, 53–55.

advisory opinion. The fundamental question raised before the Court was whether it was "within the competence of the International Labour Organization to draw up and to propose labour legislation which, in order to protect certain classes of workers, also regulate[d] incidentally the same work when performed by the employer himself."[22] In response to this question, the Court invoked the provisions of the Constitution and stated that the true intention of the contracting parties was to ensure the broadest possible powers of co-operation. If states agreed on the purposes a given organization was to fulfil, it would have been inconceivable for them to try to prevent the achievement of these purposes. Any potential limitations states might have sought to impose would have been expressly stated in the Treaty. The Court offered no opinion on the relationship between the powers of the organization and state sovereignty. In his comment on the Court's finding, J. Klabbers wrote that "the Court sternly remarked that it was not to engage in such flights of theoretical fancy."[23] The Court held that: "in the present instance, without regard to the question of whether the functions entrusted to the International Labour Organization are or are not in the nature of delegated powers, the province of the Court is to ascertain what it was when the Contracting Parties agreed to. The Court, in interpreting Part XIII [of the Versailles Treaty], is called upon to perform a judicial function, and, taking the question actually before it in connection with the terms of the Treaty, there appears to be no room for the discussion and application of political principles or social theories, of which, it may be observed, no mention is made in the Treaty."[24]

The three PCIJ advisory opinions are often referenced in discussions on the powers of international organizations, especially regarding attributed powers. Most commentators are critical in their assessment of these opinions. They emphasise that the Court referred to international organizations with great

22 *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer*, PCIJ Publications 1926, Series B – No. 13, 7.

23 Klabbers, *An Introduction to International Organizations Law*, 52.

24 *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer*, PCIJ Publications 1926, Series B – No. 13, 23.

caution. The reason the Court distanced itself from the issue of international organizations, and especially their powers, was that they were a relatively new phenomenon in international relations. It is therefore hardly surprising that the Court found it difficult to grasp and assess the relationship between states and international organizations. Nevertheless, the Court had to address the problem and answer specific questions regarding the sources and scope of the powers of international organizations. The task was not easy since the Court had to consider the issue from the perspective of state sovereignty. Subsequent Court opinions show the way its view on the matter began to evolve. This evolution involved a steady progress from the concept of an absolute dominance of states and their sovereignty to an acceptance of a situation in which international organizations, as authorities other than states, might possess and exercise powers that had hitherto been vested exclusively in states. At the same time, the exercising of these powers by international organizations could not deny states the status of sovereign subjects of international law. Even in the 1923 judgment on the case of the *S.S. 'Wimbledon'*, the Court adopted the view that the legal capacity "[for] entering into international engagements" as an attribute of sovereignty is reserved only for states.[25]

The earliest signs of change in the Court's opinion are to be found in the *S.S. 'Lotus'* case judgment, in which the Court confirmed state consent as the basis for the international legal system. At the same time, the Court ruled that restrictions upon the independence of states are possible but stressed that they cannot be presumed.[26] Without a doubt, the next significant step in the evolution of the Court's view on the matter was the *Danube* advisory opinion.[27] In it the Court confirmed that international authorities other than states exist and may exercise legal powers in international relations. The question the Court was asked to address concerned the division of powers between

25 *The case S.S. 'Wimbledon'*, PCIJ Publications 1923, Series A – No. 1, 25.
26 *The case of the S.S. 'Lotus'*, PCIJ Publications, 1927, Series A – No. 10, 18.
27 *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, PCIJ Publications 1927, Series B – No. 14, 7.

a state – Romania – and an international organization – the European Commission of the Danube. In its opinion, the Court accepted the special status of the Commission as an authority with prerogatives and privileges that were generally withheld from international organizations. At the same time, however, it concluded that this organization, unlike a state, had no exclusive territorial sovereignty. If the Court thus accepted the parallel existence of two separate authorities, then it also indicated that the differences in the jurisdictions of each derive primarily from their functions.[28] In his analysis of this opinion V. Engström pointed out that the Court indicated the sources and scope of the powers of the Commission as an international organization. If an organization exercises powers attributed to it by states, the sources of these powers may be traced back to state consent.[29]

The PCIJ position that the European Commission of the Danube could only act on the basis of powers specifically attributed to it is commonly considered the foundation of the doctrine of attributed powers.[30] The Court expressed its view as follows: "[w]hen in the same and one area there are two independent authorities, the only way in which it is possible to differentiate between their respective jurisdictions is by defining the functions allotted to them. As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, insofar as the Statute does not impose restrictions upon it."[31]

As highlighted earlier, any discussion concerning the doctrine of attributed powers must refer to the 1996 *Legality of the Use by a State of Nuclear Weapons*

28 J. Klabbers stresses that although the Court used the term functions, and not powers, it clearly refers to powers; Klabbers, *An Introduction to International Organizations Law*, 53.

29 Viljam Engström, *Understanding Powers of International Organizations: A Study of the Doctrines of Attributed Powers, Implied Powers and Constitutionalism – with a Special Focus on the Human Rights Committee* (Åbo Akademi University Press, 2009), 26.

30 The text of the Court's opinion uses the phrase '*the functions bestowed upon it*'.

31 *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, PCIJ Publications 1927, Series B – No. 14, 64.

in Armed Conflicts ICJ advisory opinion. The Court was asked to answer the question whether "in view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law, including the WHO Constitution."[32] In its opinion, the ICJ expressed doubts on the legitimacy of the question and noted that the question seemed not to be addressing the effects of the use of nuclear weapons on health as such but the legality of the use of such weapons in view of their health and environmental effects. It was the Court's opinion that the competence of the WHO to deal with such effects is independent of the legality of acts potentially causing these effects. The most valuable aspect of this opinion is the Court's consideration of the nature of attributed powers of international organizations in the context of a teleological interpretation of their constituent instruments. The Court therefore emphasised that despite being subjects of international law, international organizations, unlike states, have no general competence. They are characterised by the principle of speciality, which indicates that their powers are created by states.[33] The Court expressed its view as follows: "international organizations are subjects of law which do not, unlike states, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those states entrust to them."[34]

The 1996 advisory opinion contains interesting considerations by the Court on the relationship between attributed and implied powers. The Court expressed strong support for the concept of attributed powers, marking the first explicit defence of this concept in nearly seventy years, particularly in contrast to the concept

32 *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts*, *Advisory Opinion*, ICJ Reports 1996, 68.

33 In its definition of the principle of speciality, the Court referred to the aforementioned PCIJ advisory opinion on the Danube, in the light of which the expressions 'attributed powers' and 'principle of speciality' are synonymous.

34 *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts*, *Advisory Opinion*, ICJ Reports 1996, 78, para. 25.

of implied powers. The Court distanced itself from recognising the implied powers of the WHO with regard to the matter in question. By way of explanation, it stated that accepting the implied powers of the WHO would be akin to 'disregarding the principle of speciality'. This is illustrated by the following excerpt from the advisory opinion: "[t]he powers conferred on international organizations are normally the subject of an express statement in their constituent instrument. Nevertheless, the necessities of international life may point out to the need for organizations in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as 'implied' powers […] In the opinion of the Court, to ascribe to the WHO the competence to address the legality of the use of nuclear weapons – even in view of their health and environmental effects – would be tantamount to disregarding the principle of speciality; for such competence could not be deemed a necessary implication of the Constitution of the Organization in the light of the purposes assigned to it by its member States."[35]

The view of the ICJ is presented by V. Engström, who notes that by refusing to accept the implied powers of the WHO the Court "wanted to keep the WHO safely within those powers that States had 'invested' in the organization."[36] The Court's view clearly constituted no rejection of the implied powers of international organizations in general, since this functional interpretation of the constituent instruments of international organizations had already been commonly applied in practice. On the other hand, it was also a popular practice at the time to include the principle of attributed powers in the statutes of international organizations, often in the form of the principle of conferral.[37]

35 *Legality of the Use by a State of Nuclear Weapons*, 78, para. 26.

36 Viljam Engström, "Reasoning on Powers of Organizations," in *Research Handbook on the Law of International Organizations*, ed. Jan Klabbers and Åsa Wallendahl (Edward Elgar Publishing Limited, 2011), 62.

37 In the modern law of international organizations, the principle of attributed powers is the most important and characteristic feature of the division of powers between an international organization and its member states. This is prominent in the statutes of international orga-

It should be emphasised, that the assessment of the 1996 advisory opinion presented in the literature is fairly unequivocal. The opinion is usually analysed from the perspective of both attributed powers and implied powers. It should be noted that, based on the 1949 advisory opinion, international practice often employed a functional interpretation of the constituent instruments of international organizations, which made it possible to seek the powers of these organizations within the concept of implied powers. This was a common occurrence in the practice of various international organizations, including the UN, and will be analysed more carefully in the next section. In this context, the 1996 advisory opinion is universally seen as a departure from the previous case law concerning the powers of international organizations, and some commentators even describe it "as the end of an era of functional interpretations of constituent instruments of organizations."[38]

Concluding Remarks

When assessing the doctrine of attributed powers, we must stress that since states are the creators of international organizations it is understandable that they would confer certain powers on these organizations to allow them to serve their designated purposes. It follows that these powers are the result of the will of the member states. At the same time, creating an organization with these specific powers gives it an independent status in relation to its member states. After all, the international organization gains its own legal personality and thus the capacity to act on an international level. For this reason, a situation

nizations, of which EU law provides the best and most recent example. The principle that allows the EU to exercise powers attributed to it in the Treaties is the principle of conferral. EU Treaties emphasise this principle more strongly and in a much broader sense than the constituent instruments of other international organizations; see Alina Kaczorowska, *European Union Law* (Routledge, 2011), 167 et seq. and Gadkowski, *Treaty-Making Powers of International Organizations*, 90 et seq.

38 Engström, *Understanding Powers of International Organizations*, 51. Engström adds that, as a result of such an interpretation of the constituent instruments, the "finding of ever more (implied) powers of at least the UN had started to look almost automatic."

where the powers of an international organization are limited to those expressly conferred on it by the constituent instrument is unacceptable. If this were to be the case, we could say that this organization is in a sense 'incapacitated': all its actions are dependent on the member states. We must also emphasise that every international organization operates in a specific field of international co-operation. The dynamic nature of this co-operation requires the organization to be flexible in its actions; that is to say, it has to perform acts which could not be explicitly specified by states in the statute. The constituent instrument of an international organization is a constitution of sorts, whose purpose is to regulate only the most fundamental issues regarding the functioning and organization of a given entity (a state or an international organization). For this reason, the powers of an international organization conferred on it in the statute by states may be treated as the most important.

In acknowledging the importance of the attributed powers of international organizations, and in particular their expressly granted powers, it should be noted that such attribution cannot be, and indeed is not, the only source of international organizations' powers. Practice clearly shows that these powers need to be complemented by another category, particularly implied powers and, to some extent, the inherent powers of each international organization.[39]

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Labor Protection in the Perspective of Artificial Intelligence: New Challenges for the EU and the ILO

Abstract: The introduction of artificial intelligence (hereinafter referred to as AI) is an active process and today touches almost all areas of human life. Labor relations are no exception. However, the current legislation on many labor relations issues is not ready for such innovations and needs to be updated. This is a particular challenge for such participants in international relations as the ILO and the EU, as they implement national standards that are unified by many countries. The purpose of the article is to study the current challenges for the ILO and the EU with regard to AI implementation in labor relations, to classify them and to find legal solutions. The authors propose new legislative initiatives, including standardization, establishing the right to appeal against AI decisions, ensuring transparency of algorithms, enshrining the right to discon-

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nect, and amendments to the GDPR. The practical significance of the article lies in its recommendations for improving the current legislation as guidelines for the ILO, the EU and the United States.
Keywords: labor rights, artificial intelligence, labor protection, labor automation, protection of workers' rights

Introduction

Any technological innovation proves stressful in the implementation process. Though many such innovations encountered resistance in society, they were eventually effectively introduced. Scientists have been discussing artificial intelligence since the last century. In general, the second half of the 20th century, called the Information Age, has slowly but surely replaced the Industrial Age. It has significantly reduced the demand for unskilled labor, while highly skilled labor, on the contrary, is in far greater demand. Thus, while the Information Age has profoudly facilitated people's lives, it has also added new challenges, which have led to corresponding changes in legal regulations.[6] As the need for hard and exhausting labor has decreased, labor law has also evolved, prioritizing the interests and rights of employees.

Despite the milestones and instability of AI development, it has achieved significant results and can profoundly influence many processes in business and everyday life. Some researchers even talk about a Fourth Industrial Revolution involving AI, as the boundaries of its use are expanding.[7] AI is used in manufacturing, services, agriculture, medicine, trade, and other industries that employ hired labor. This highlights the fact that we are already facing the need to make fundamental changes in the foundations of labor

6 D. Hrytsai, "Development of Artificial Intelligence as a New Challenge for Humanity in the Field of Employment," *Legal Bulletin* 3, 2018: 97–102.

7 Leonid Ostapenko et al., "Artificial Intelligence in Labour Relations: A Threat to Human Rights or New Opportunities?" *Financial and Credit Activity: Problems of Theory and Practice* 4, no. 57(2024): 531–45, https://doi.org/10.55643/fcaptp.4.57.2024.4421.

law. Employers and HR teams must be mindful of ethical and privacy risks that arise from the use of AI in recruitment and employment processes and management.[8]

Most European Union countries are already implementing AI departments, experimental laboratories, and research centers at universities, which allow students to acquire new skills and prepare future highly specialized specialists that meet the requirements of the modern labor market.[9] Its importance has been recognised by the European Parliament and the European Commission, as reflected in the legislation prepared at the European Union level.[10] Nevertheless, legislative regulation is still superficial and the issue is not properly raised. Traditional approaches to workplace safety may not be sufficient to address the challenges posed by the introduction of new algorithms and robotization.[11]

It should be noted that any legal evolution usually starts with key players and then moves horizontally to other members of the international community. Today, such a key player in Europe is the EU. Accordingly, it should take the lead in creating legal regulation of the role of AI in labor relations. The distinctive feature of EU labor law is that it embodies the legal experience of all member states, allowing it to incorporate the best examples of legal solutions to certain problems.[12]

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8 Russell Bennett and Mark Chiu, "AI in the Workplace: Employment Law Risks from Using AI," Tanner De Witt, published Setember 12, 2024, https://www.tannerdewitt.com/ai-in-the-workplace-employment-law-risks-from-using-ai/.

9 Iryna Rossomakha et al., "The Impact of Artificial Intelligence on the Labor Market in the World and Particularly in Ukraine," *Economics. Finances. Law* 2, 2024: 27–30. https://doi.org/10.37634/efp.2024.2.6.

10 Maciej Jarota, "Artificial Intelligence in the Work Process: A Reflection on the Proposed European Union Regulations on Artificial Intelligence from an Occupational Health and Safety Perspective," *Computer Law & Security Review* 49, 2023: article 105825, https://doi.org/10.1016/j.clsr.2023.105825.

11 Sergiy Vavzhenchuk and Vladyslav Zhmaka, "Problems of Protection of Labor Rights During Hiring with the Use of Artificial Intelligence Algorithms," *Problems of Legality* 164, 2024: 19–38, https://doi.org/10.21564/2414–990X.164.288964.

12 S.I. Tyimenko, "Concept and Essence of European Labor Law," *Southern Ukrainian Legal Journal* 4, no. 3(2022): 148–51, https://doi.org/10.32850/sulj.2022.4.3.24.

The task for the ILO, as the leading international organization for global labor protection, is similar. For these organizations, the issue of adapting the new legal framework is extremely important. After all, it is their responsibility to create appropriate legal regulation that will ensure an adequate level of labor protection, on the one hand, and will support economic innovation on the other. In light of the development of AI and its growing influence in labor relations, the EU and the ILO should improve international legal acts to include proper regulation of AI. Such steps are necessary to unify the relevant legal norms among member states and create decent working conditions for workers around the world.

Literature Review

Despite numerous studies of the legal support for the development and penetration of artificial intelligence into various spheres of human life, its impact on employment is the least covered. In our research, we paid special attention to the scientific work of Jarota.[13] In the paper, the author explores the growing use of AI in the work environment and its impact on occupational safety and health. The author focuses on analyzing the changes in EU legislation relating to the general principles of labor law, as well as legislation on labor protection and industrial safety.

The article also discusses the issues of monitoring labor protection. The author proposes to introduce a mechanism of responsible regulation, where employers should cooperate with regulatory authorities to achieve the regulatory objectives, and the authorities themselves should assess compliance with occupational health and safety standards and intervene in case of non-compliance. We are very impressed by this idea, and have also highlighted this in our article.[14]

13 Jarota, "Artificial Intelligence in the Work Process."
14 Jarota, "Artificial Intelligence in the Work Process."

Other important scientific findings appear in Ostapenko, Pasternak, Kropyvnytskyi, Chystokletov, Khytra.[15] These researchers study the possibility of using artificial intelligence in the field of labor relations, examining how modern technologies create new opportunities, but also raise complex issues regarding the right to work. The authors' main idea regards the need to modernize labor legislation, expand the circle of stakeholders in labor relations, and revise the concept of the employee. We relied on the analysis conducted by these authors when designing our own study on the challenges associated with introducing AI, as well as in finding ways to improve the legal situation.

Costantino, Falegnami, Fedele, Bernabei, Stabile, Bentivenga[16] classified and analyzed various risks associated with the introduction of AI in labor relations. Their scientific work focuses on new threats to the life and health of workers that arise from introducing various new 4.0 technologies into modern production systems, including AI. The article emphasizes the need to develop new safety standards to ensure the protection of workers during the rapid digitalization of production processes.

Ethical issues were covered in Bennett and Chiu[17] and De Stefano.[18] In particular, they focus on the need to implement the principle of transparency and the possibility of appealing decisions. These studies point to the relevance of ethical standards, such as the Ethics Guidelines for Trustworthy AI, which have an important impact on the regulation of AI in the context of labor protection.

Kim, Soh, Kadkol, Solomon, Yeh, Srivatsa, Nahass, Choi, Lee, Ajilore[19] analyze the legal implications of AI decisions without human intervention and

15 Ostapenko et al., "Artificial Intelligence in Labour Relations."

16 Francesco Costantino et al., "New and Emerging Hazards for Health and Safety within Digitalized Manufacturing Systems," *Sustainability* 13, no. 19(2021): article 10948, https://doi.org/10.3390/su131910948.

17 Bennett and Chiu, "AI in the Workplace."

18 Valerio De Stefano, "'Negotiating the Algorithm': Automation, Artificial Intelligence and Labour Protection," *Comparative Labor Law & Policy Journal* 41, no. 1(2018), http://dx.doi.org/10.2139/ssrn.3178233.

19 Jeff Kim et al., "AI Anxiety: A Comprehensive Analysis of Psychological Factors and Interventions," *SSRN Electronic Journal*, 2023, http://dx.doi.org/10.2139/ssrn.4573394.

propose to integrate into the legislation a rule on mandatory human supervision of critical decisions. The findings of these researchers confirm the relevance of legal regulation to ensure transparency and fairness.

Thus, the literature covers many aspects of AI labor protection with regard to artificial intelligence. However, many scientific papers omit the issue of improving legal regulation, which we explore in our work. In addition, the rapid pace of changes and technological advancements is driving constant innovations in labor relations related to the use of AI. This requires consistent research and updating of scientific sources.

Methodology

The main scientific method used by the authors of this article is analysis and synthesis. Its use ensured the comprehensiveness of the results and the formulation of clear conclusions in the paper. The analysis of the scientific literature helped to identify and systematize existing works in this area. Based on their analysis, the risks of using AI were identified and recommendations for overcoming these were developed. The synthesis method was used to combine disparate information to produce a holistic, in-depth view of the problem. Synthesis was also used at the stage of developing recommendations for standardization, creating mechanisms for appealing AI decisions, limiting monitoring, transparency, and other initiatives. This approach allowed us to produce a holistic picture of the necessary legal measures.

The authors applied a systematic method to identify three main categories of risks: physical, psychological, and ethical. In addition, based on the application of this scientific method, subcategories of each risk were identified.

The legalistic approach was used for a comprehensive and in-depth analysis of the legal acts adopted within the ILO, the EU and, in some cases, member states. This method was used to analyze the legislation regulating the use of AI in general and in labor relations in particular. This method was also applied

to other legal acts directly related to AI risks with regard to labor protection. It helped to identify the main gaps in the current legislation and areas where regulatory improvements are needed. The authors then formulated their own legal norms aimed at eliminating these gaps and inaccuracies. In addition, this method provided an in-depth understanding of the legal limitations and opportunities existing in international legislation to protect workers' rights from the risks associated with the use of AI in the workplace.

Moreover, the authors used the method of induction and deduction. Induction was used to analyze cases of AI's possible use in labor relations and its impact on both psychological and physical risks. Studying specific examples facilitated general conclusions about the potential risks of using AI in the labor sphere. This approach also allowed us to identify the patterns that provide the basis for proposals on legal regulation and protection of workers' rights, as well as pinpointing the prospects for AI-related legislative changes. In turn, deduction allowed general legal principles to be applied to specific situations in labor relations, which in turn made it possible to construct a coherent legal model for regulating the risks caused by AI systems.

In general, this combination of research methods provided a comprehensive analysis of the research topic, identified risks and suggested ways to overcome them through the adoption of specific legislative steps. In addition, this allowed the authors to analyze trends and identify potential areas in which AI legislation might develop in the future.

Results

Modern Approaches of the EU and the ILO to Occupational Safety and Health in the Context of AI

Considering that the topic of AI has long been studied in academic circles, it is logical that the EU and the ILO have also responded to the growing trend by creating relevant legal acts. However, it is important to determine whether

the current legislative proposals of the European legislator are sufficient in protecting workers' health and ensuring proper working conditions and work ethics. Thus, in 2021, the European Commission submitted a draft Artificial Intelligence Act regulating the use of AI in the territory of the Member States. It should be noted that AI regulation is a part of the broader EU digital strategy aimed at establishing the best conditions for the use and development of innovative technologies.[20]

The relevant act was adopted in 2024 and is the first attempt to regulate the use of AI at the international level in such a way as to protect the rights of citizens, ensure security, transparency, and ethics in its application. It is important to emphasize that Art. 3 of the regulation in question defines AI as a system, which means a machine-based system designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.[21]

An important point introduced by this Regulation is its classification of AIs according to the level of risk they may pose to humans: unacceptable, high, limited, and minimal. The first type of AI includes all systems that pose significant threats to European values: these are subject to a complete ban. An example of this is AI systems designed to manipulate people.[22] The second

20 "EU AI Act: First Regulation on Artificial Intelligence," European Parliament, last updated June 18, 2024, https://www.europarl.europa.eu/topics/en/article/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence#ai-act-different-rules-for-different-risk-levels-0.

21 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (Text with EEA relevance), OJ L, 2024/1689, 12.7.2024, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32024R1689.

22 Rostam J. Neuwirth, "Prohibited Artificial Intelligence Practices in the Proposed EU Artificial Intelligence Act (AIA)," *Computer Law & Security Review* 48, 2023: article 105798, https://doi.org/10.1016/j.clsr.2023.105798; Michael Veale et al., "AI and Global Gover-

type of AI, namely high-risk systems, is the focus of the Regulation. These are subject to strict control, including conformity assessment before being put into operation. Examples include AI systems used in critical infrastructures (energy, transportation), healthcare, education, justice, and human resources.

The AI systems studied in this article fall precisely under the definition of high-risk, because they are used in labor relations. The Regulation sets out clear, structured requirements for the developers of such systems, which include transparency, accountability, testing, regular monitoring and auditing. In addition, the Regulation emphasizes the need to establish a central supervisory authority with the power to monitor the relevant systems both at the EU level and at the national level of the Member States.

Low-risk systems are not subject to strict regulation, because they do not pose a threat to fundamental human rights. But their developers must follow basic requirements for transparency, ethics, and personal data protection.[23] In addition, such systems are required to inform individuals that they are interacting with an AI, not a human.[24] An example of such systems is chatbots, email spam filters or games, which have been operating successfully for many years

The Regulation is the first important step towards establishing comprehensive oversight of AI in various areas of human activity. Although it regulates the general features of AI implementation and supervision, it is also of importance in protecting labor relations. AI-enabled systems that can be implemented in the workplace fall into the high-risk category, and therefore require detailed regulation and accountability, the main purpose of which is to avoid possible abuse by employers and minimize the negative impact on the health and feelings of employees.

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nance: Modalities, Rationales, Tensions," *Annual Review of Law and Social Science* 19, no. 1(2023): 255–75, https://doi.org/10.1146/annurev-lawsocsci-020223-040749.

23 Jonas Schuett, "Risk Management in the Artificial Intelligence Act," *European Journal of Risk Regulation* 15, no. 2(2023): 367–85, https://doi.org/10.1017/err.2023.1.

24 Johann Laux et al., "Three Pathways for Standardisation and Ethical Disclosure by Default under the European Union Artificial Intelligence Act," *Computer Law & Security Review* 53, 2024: article 105957, https://doi.org/10.1016/j.clsr.2024.105957.

In other words, the Regulation establishes a foundational legal framework for governing labor relations involving AI, which will be gradually expanded and improved, thus creating a comprehensive legal framework. However, the above regulation is insufficient to protect employees properly when interacting with AI. The legal framework should be significantly broader and address possible challenges generated by the use of AI.

The EU Strategic Framework for Occupational Safety and Health 2021–2027 seems to be an equally important act in the context of our study. The Framework is a key document in the context of modernizing approaches to the protection of labor rights, especially with regard to the innovative development and implementation of AI technologies. The Framework recognizes the need not only to control traditional threats in the workplace, but also to anticipate and manage risks associated with digital technologies. In addition, it emphasizes that Member States must ensure that AI does not pose threats to health and safety and prevent deterioration of working conditions.[25]

It is also important to emphasize that an important part of the Strategic Framework is to revise and update existing occupational health and safety legislation to meet the current challenges posed by digitalization and the use of AI. This new strategy focuses on three cross-cutting objectives, namely: anticipating and managing change in the context of green, digital and demographic transformation; improving the prevention of work-related accidents and diseases and striving for a Vision Zero approach to workplace fatalities; and enhancing preparedness to respond to current and future health crises.[26]

25 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU Strategic Framework on Health and Safety at Work 2021–2027 Occupational Safety and Health in a Changing World of Work, COM/2021/323 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0323&qid=1626089672913#PP1Contents.

26 Delfina Ramos et al., "Frontiers in Occupational Health and Safety Management," *International Journal of Environmental Research and Public Health* 19, no. 7(2022): article 10759, https://doi.org/10.3390/ijerph191710759.

The last document we will consider is the EU Ethical Guidelines for Trustworthy AI.[27] The aim of the Guidelines is to promote Trustworthy AI. Although this document tangentially relates to labor relations, we could not omit it from our analysis, as it sets out important Union-wide recommendations on AI. For example, it states that in order for AI to be recognized as trustworthy, it must meet three criteria: legality, ethics, and technical reliability.[28]

The Ethics Guidelines have identified seven key requirements for AI ethics: transparency, human control, security, privacy, non-discrimination, and fairness, environmental well-being, accountability.[29] The Ethics Guidelines for Trustworthy AI also offer practical tools, which include the Assessment List for Trustworthy AI, which helps to check whether AI systems are ethically compliant.[30]

Given the EU's typically advanced approach to legislation, it is unsurprising that the Union has taken appropriate legal measures to regulate this area of AI. The EU has classified such systems as high-risk, subject to strict control by both those who implemented them and the relevant regulatory authorities. We can state that the EU is clearly aware of the possible risks to occupational health and safety, and takes preventive measures against this.

As for ILO, we have been unable to find any important legislative initiatives or legal acts to regulate labor protection in the context of AI. We have only noted some efforts to conduct relevant research, which are compiled in relevant reports, one such report being the Global Commission on the Future of

27 European Commission: Directorate-General for Communications Networks, Content and Technology, *Ethics Guidelines for Trustworthy AI* (Publications Office, 2019), https://data.europa.eu/doi/10.2759/346720.

28 European Commission: Directorate-General for Communications Networks, Content and Technology, *Ethics Guidelines for Trustworthy AI*.

29 Eleanore Hickman and Martin Petrin, "Trustworthy AI and Corporate Governance: The EU's Ethics Guidelines for Trustworthy Artificial Intelligence from a Company Law Perspective," *European Business Organization Law Review* 22, 2021: 593–625, https://doi.org/10.1007/s40804-021-00224-0.

30 Kristine Bærøe et al., "How to Achieve Trustworthy Artificial Intelligence for Health," *Bulletin of the World Health Organization* 98, no. 4(2020): 257–62, https://doi.org/10.2471/BLT.19.237289.

Work Report.[31] This report includes a number of issues related to labor relations, with one being the need to regulate new technologies to ensure decent working conditions. In the same year, at the 108th session, the ILO Centennial Declaration for the Future of Work was adopted, dealing with such issues as the need to develop new approaches to labor regulation in the context of digital changes.

The Role of Digital Labour Platforms in Transforming the World of Work[32] is a report analyzing the impact of digital platforms on labor relations. In particular, the report looks at the issue of automated worker management and its potential implications for working conditions, workers' rights and social protection. Globally, the report represents an extensive study, offering a comprehensive overview of the experiences of workers and businesses, based on surveys and interviews with approximately 12,000 workers and representatives of 85 companies from around the world, operating in various sectors.[33] However, AI is still not sufficiently described within the report.

In view of the above, we can observe a certain lag in the ILO's efforts to regulate AI in work processes. This once again allows us to demonstrate the EU's leadership in regulating current global challenges. It is evident that in this field challenges remain that can pose serious threats to all parties to labor relations. Below, we consider such challenges and he ways to regulate them.

Physical Risks in Work Environments with AI

Although the EU's legal initiatives are extremely progressive, they are still at an early stage of development and do not cover many relevant issues. The first problem was identified by Vagaš,[34] among other researchers, and concerns the physical

31 International Labour Organization, *Work For A Brighter Future: Global Commission on the Future of Work Report* (International Labour Organization, 2019), https://webapps.ilo.org/digitalguides/en-gb/story/global-commission#people.

32 International Labour Office, *World Employment and Social Outlook 2021: The Role of Digital Labour Platforms in Transforming the World of Work* (International Labour Office, 2021).

33 International Labour Office, *World Employment and Social Outlook 2021*.

34 Marek Vagaš, "Safety and Risk Assessment at Automated Workplace," *Technical Sciences and Technologies* 4, no. 14(2018): 78–84.

risks of working next to automated systems. He notes that the goal of automation is to retain skilled workers with representative expert and analytical knowledge in companies who have the potential to create added value at their automated jobs. At the same time, such workplaces can only be fully safe under the proper supervision of a qualified person, as they can only be considered safe after risks have been assessed and minimized. This message of the author is highly correlated with that of the principles of the Ethics Guidelines for Trustworthy AI, which stipulates the need for human participation in AI-controlled processes.[35]

Industrial automated systems designed to operate at a distance from humans often lack sufficient sensory capabilities to detect people in the vicinity, which can lead to potential risks. In addition, the proliferation of collaborative robots, which are designed to interact directly with humans and share workspaces, may also pose additional safety risks. First of all, there is a higher probability of technical failure due to improper system functioning. Such shortcomings can arise from both software errors and technical malfunctions and can lead to emergencies that threaten the physical safety of employees. Risks can also appear in situations where employees do not have time to respond to the behavior of automated systems. This would entail a risk of disrupting the interaction between people and systems.[36]

Of course, the most important step in mitigating this risk is to ensure that AI-automated mechanisms are properly equipped and that employees are highly competent. Moreover, we believe it is advisable to introduce uniform standards for the introduction of AI in production in those industries where doing so can directly cause physical harm to employees. A similar opinion can be seen in the works of various scholars studying the impact of AI on labor protection.[37]

35 European Commission: Directorate-General for Communications Networks, Content and Technology, *Ethics Guidelines for Trustworthy AI*.

36 Timo Malm et al., "Safety Risk Sources of Autonomous Mobile Machines," *Open Engineering* 12, no. 1(2022): 977–90, https://doi.org/10.1515/eng-2022-0377.

37 Carlos Faria et al., "Safety Requirements for the Design of Collaborative Robotic Workstations in Europe: A Review," in *Advances in Intelligent Systems and Computing. Proceedings of the AHFE 2020 Virtual Conferences on Safety Management and Human Factors, and Hu-*

For our part, we would like to add that the importance of standardization lies in the fact that the competent authority establishes clear rules and requirements to minimise the risk of errors. Uniform standards also create a doctrinal basis for employee training, which is important for avoiding physical injury.

Standardization should be carried out at three levels:

1) universal – ILO and ISO. These organizations bear the main responsibility for creating global standards for interactions with AI. It should be noted that ISO 10218 (Safety Standards for Robotics) already regulates some aspects of the safe use of robots.[38] However, this standard focuses more on industrial robots and their safe operation.

   As AI allows robots to make autonomous decisions, this requires updating standards to ensure human control and safety in the event of unpredictable robot actions. The same applies to the collaborative robots previously mentioned. These work alongside humans, and thus require enhanced requirements for sensors and perception systems that will more accurately detect human presence. It is important to include cybersecurity requirements, as networked AI systems are at risk of cyberattacks. In addition, the standards should provide for transparency of AI solutions, enabling employees to understand the systems' logic and interact with them effectively.

2) Regional – the main role of the EU here. Analyzing the current situation, we can assume that an EU Regulation standardizing the safety of automated systems and artificial intelligence at work would be appropriate. It should include uniform standards for implementing AI in automated production systems. It will include clear requirements for sensor systems, AI decision-making algorithms, and human control. In addition,

man Error, Reliability, Resilience, and Performance, July 16–20, 2020, USA (Springer, 2020), 225–32, https://doi.org/10.1007/978-3-030-50946-0_31; Costantino et al., "New and Emerging Hazards for Health and Safety within Digitalized Manufacturing Systems."

38 International Organization for Standardization, *ISO 10218–1:2011: Robots and Robotic Devices – Safety Requirements for Industrial Robots* (International Organization for Standardization, 2011), https://www.iso.org/standard/51330.html.

the Regulation should establish the limits of state responsibility for implementing the standards, and also identify authorized bodies.

3) National – each state should implement international standards into its national legislation, ensuring compliance with local working conditions and production standards. National labor protection regulators should update safety regulations. Given the progressive nature of EU legislation, we believe that the relevant standardization can be used as a basis not only in the member states but also in other countries.

In addition, we can highlight the need to update the existing labor legislation on labor protection of employees involved in AI. The legislation should require employers to conduct mandatory training for employees working with AI-based automated systems. Such training should cover safety rules, risk management, and understanding possible threats. In our opinion, these steps will help to ensure greater protection of employees in their interaction with automated AI systems.

Addressing Psychological Risks Caused by AI

However, the risk of physical injury is not the only threat existing today. The second problem highlighted by the scientific community concerns psychological risks.[39] Introducing artificial intelligence in the workplace can be a source of significant psychological stress for employees. As an additional stress factor Trivedi and Alqahtani[40] indicate workers' insecurity and fearfulness of losing their jobs as automation and AI may replace humans in some areas. This prompts concerns about future careers and stability. The emergence of flexible

39 Rania Gihleb et al., "Industrial Robots, Workers' Safety, and Health," *Labour Economics* 78, 2022: article 102205, https://doi.org/10.1016/j.labeco.2022.102205; Daron Acemoglu et al., "Artificial Intelligence and Jobs: Evidence from Online Vacancies," *Journal of Labor Economics* 40, no. S1(2022): 293–340, https://doi.org/10.1086/718327.

40 Priyank Trivedi and Fahad M. Alqahtani, "The Advancement of Artificial Intelligence (AI) in Occupational Health and Safety (OHS) Across High-Risk Industries," *Journal of Infrastructure Policy and Development* 8, no. 10(2024): 1–26, https://doi.org/10.24294/jipd.v8i10.6889.

AI systems capable of performing complex cognitive tasks once thought to be exclusively human has significantly raised the stakes.

Dastin,[41] Vavzhenchuk and Zhmaka[42] highlight possible discrimination by AI as a cause of mental health issues. Dastin[43] cites the example of Amazon using an experimental AI-based hiring tool to give candidates ratings from one to five stars, similar to how customers rate products on Amazon. The company realized that its new system was not evaluating candidates for software development and other technical positions in a gender-neutral way. Amazon's system had learned that male candidates were better, and rejected resumes that contained the word female, such as captain of the women's chess club. This clearly highlights the problem of possible bias in AI systems and the importance of considering gender equality and non-discrimination in developing and applying them in labor law.

Discrimination can be direct and indirect. Direct discrimination occurs when AI algorithms explicitly use discriminatory criteria, such as race, gender, nationality or age to select or ignore candidates for a position. In turn, indirect discrimination is a subtler type of discrimination, where AI algorithms apply neutral criteria but this still results in unequal opportunities for different groups of job applicants. This issue becomes particularly acute due to AI's inherent ability to learn and adapt. In the course of their development, AI algorithms can go beyond the established criteria or bypass them, which poses a threat of indirect discrimination in the field of labor and beyond.[44]

There is also a risk of increased workload due to the need to adapt new technologies. This situation often creates psychological pressure, as employees may feel a lingering sense of incompetence and can result in professional burn-

41 Jeffrey Dastin, "Amazon Scraps Secret AI Recruiting Tool That Showed Bias Against Women," Reuters, published October 11, 2018, https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G.

42 Vavzhenchuk and Zhmaka, "Problems of Protection of Labor Rights During Hiring with the Use of Artificial Intelligence Algorithms."

43 Dastin, "Amazon Scraps Secret AI Recruiting Tool That Showed Bias Against Women."

44 Vavzhenchuk and Zhmaka, "Problems of Protection of Labor Rights During Hiring with the Use of Artificial Intelligence Algorithms."

out.[45] In this regard, some researchers also highlight the frustration that arises from the great differences between the employee's expectations and the reality they experience.[46]

Automated performance monitoring and evaluation systems can create constant pressure, increasing stress levels due to the feeling of constantly being monitored and evaluated. As a result, interaction with artificial intelligence can not only affect employees' physical health but also their mental state, impairing their quality of life and productivity.

Thus, the study allows us to identify psychological risks of interacting with AI in labor relations, which includes subcategories such as the following: fear of being replaced by AI; discrimination; overload and burnout; pressure from constant supervision. Molino et al.[47] emphasizes the need to train and inform workers to adopt new technologies, as this can help them to overcome the fear of technology and find positive aspects of interacting with AI.

The high rate of possible stress requires the ILO and the EU to take legal steps to improve the situation of workers. We recognize the inevitability of AI integration due to its economic advantages. Accordingly, we propose a number of legislative initiatives that, in our view, could contribute significantly to improving the current regulatory framework.

The ILO, the EU as a whole, and its individual member states already dispose of specific legal acts on non-discrimination of employees. For example, the Discrimination (Employment and Occupation) Convention[48] prohibits

45 Ana Pinto et al., "Relationship Between New Technologies and Burnout: A Systematic Literature Review," in *International Conference on Lifelong Education and Leadership for All* (Atlantis Press, 2024), 254–65, https://doi.org/10.2991/978-94-6463-380-1_25.

46 Daniel S. Tawfik et al. "Frustration with Technology and Its Relation to Emotional Exhaustion Among Health Care Workers: Cross-Sectional Observational Study," *Journal of Medical Internet Research* 23, no. 7(2021): article e26817, https://doi.org/10.2196/26817.

47 Monica Molino et al., "Technology Acceptance and Leadership 4.0: A Quali-Quantitative Study," *International Journal of Environmental Research and Public Health* 18, no. 20(2021): article10845, https://doi.org/10.3390/ijerph182010845.

48 International Labour Organization, Discrimination, Employment and Occupation) Convention, https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111.

any form of discrimination in labor and employment, including discrimination based on race, sex, religion, political opinion, etc. However, in the context of AI, it is important to extend the concept of discrimination to decisions made by automated systems, as algorithms may exhibit bias due to flawed data or imperfect programming. In particular, we propose adding the following wording to Article 1(1): c) any distinction, exclusion or preference arising from automated or algorithmic decisions which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

We believe that the following additions will provide an impetus for states to similarly improve their respective legislation in the field of AI labor protection.

As for the EU, we note that Council Directive 2000/78/EC[49] establishing a general framework for equal treatment in employment and occupation is in force. This legal act aims to combat discrimination on various grounds. However, in the context of AI implementation, it is advisable to finalize its provisions. We have reviewed the current version and proposed a number of changes in line with the psychological threats of discrimination identified above (Table 1).

Offer	Description of the measure
Include provisions about algorithmic discrimination	Expand the existing definition of discrimination to include decisions made on the basis of AI that may be biased or unbiased.
Introduce mandatory transparency of algorithms	Require that employers disclose the principles of AI in labor relations (disclose the criteria used by AI in decision-making)
Guaranteeing the right to explain and appeal AI decisions	Enshrine the right of employees to receive explanations of AI decisions and the possibility to appeal such decisions.

49 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, 16–22, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0078.

Mechanisms for regular audits of algorithms	Include a requirement for companies to conduct regular independent audits of AI systems to assess their impact on equality of opportunity and avoidance of discrimination.
Obligation to conduct a preliminary assessment of the impact of AI	Oblige employers to conduct a preliminary assessment of the impact of AI systems on equality of opportunity before their implementation.

Table 1. Suggestions for improving the Council Directive 2000/78/EC

Thus, the relevant changes will help to strengthen the protection of employees from possible discrimination by AI algorithms.

Legal ways to mitigate other risks also exist. For example, regarding the fear of being replaced by AI, we propose to create a legislative requirement at the EU level for Member States to create a national retraining program for workers, as well as to introduce social benefits and state support for relevant workers.

Regarding burnout and overwork, we believe that effective good initiatives to counteract this are already in place. After all, these risks can be caused not only by AI, but also by general disruption to the life-work balance. In this context, both the EU and Member States are already taking steps to improve the situation. In particular, they are ensuring the right to disconnect. The big drawback today is that not all EU countries have enshrined the right in their legislation.[50] However, this reveals a high level of interest among countries in ensuring that employees can avoid burnout and overwork. In our opinion, this approach will work for AI as well. Therefore, to reduce the relevant risk, it is advisable to enshrine in national legislation the right to disconnect an employee and to introduce sanctions against employers who violate this right.

The ILO recognizes the right to disconnect, especially in view of the introduction of digital platforms and remote work. The ILO has long supported decent working conditions and emphasized work-life balance as a key element

50 Stine Lomborg and Brita Ytre-Arne, "Advancing Digital Disconnection Research: Introduction to the Special Issue," *Convergence* 27, no. 6(2021): 1529–35, https://doi.org/10.1177/13548565211057518.

of workers' well-being. The right to disconnect is becoming an integral of this concept. Nevertheless, the ILO has not yet enshrined this right at the regulatory level. We believe that it is advisable to develop recommendations for national governments to include the right to disconnect in labor legislation.

Psychological pressure from constant AI monitoring is another problem we have identified. To address this, it is proposed to restrict employers' ability to monitor employees' activities continuously using AI. The regulations should provide for the use of such systems only in justified cases and with respect for employees' privacy rights. In addition, employees should have the right to be informed about how and in what scope their activities are being monitored by AI, as well as to consent to the use of such technologies. This provision is in line with the previous thesis on the need to introduce mandatory transparency of algorithms, which we have already announced in the context of improving the Council Directive 2000/78/EC[51] establishing a general framework for equal treatment in employment and occupation.

Thus, addressing psychological issues caused by AI in the workplace is a rather complex matter. Most people differ in how they perceive these issues due to their own level of mental health and perception. However, properly implemented legislative changes will help safeguard people against possible threats and pressure from AI systems and, as a result, reduce the negative impact on employees' psychological health.

Ethical Risks of AI in Labor Relations

The third major layer of modern risks caused by integrating AI into labor relations relates to ethical issues. Human dignity should be considered not only in terms of the law but also with regard to work ethics.[52] One of the important

51 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, 16–22.

52 Andreas Cebulla et al., "Applying Ethics to AI in the Workplace: The Design of a Scorecard for Australian Workplace Health and Safety," *AI & Society* 38, 2022: 919–35, https://doi.org/10.1007/s00146-022-01460-9.

aspects of this issue is the confidentiality of employee data and AI's access to it. As the digital age progresses, the integration of artificial intelligence into various digital services raises significant concerns about the erosion of personal privacy.[53] There exists a risk that AI systems may collect more data than is actually necessary to ensure their operation. In turn, this can lead to a violation of employees' right to privacy. Even when data is collected legally, employees may not know how their data will be used, including whether it will be limited to internal purposes or shared with third parties.

Moreover, AI systems use advanced algorithms to analyze data about people, predicting their future behavior, preferences, and even emotional state. Such profiling often leads to targeted advertising, personalized content, and automated decision-making. AI can combine and correlate data from different platforms and devices, creating detailed profiles that provide a complete picture of people's lives. This integration can expose private data and connections that people may wish to keep private, increasing their sense of vulnerability.[54] AI's predictive capabilities can also lead to a perceived loss of autonomy, as people may feel that their choices are influenced by inferred data rather than their own explicit intentions.[55]

In our opinion, a key problem concerns the complexity of the algorithms AI uses in decision-making. Such algorithms are not always clear even to developers, especially in view of AI's self-learning capability. Cadario et al.[56] note that the preference for human decision-making over AI systems suggests that

53 Doha Kim et al., "How Should the Results of Artificial Intelligence Be Explained to Users? Research on Consumer Preferences in User-Centered Explainable Artificial Intelligence," *Technological Forecasting and Social Change* 188, 2023: article 122343, https://doi.org/10.1016/j.techfore.2023.122343.

54 Nishtha Madaan et al., "Data Integration in IoT Ecosystem: Information Linkage as a Privacy Threat," *Computer Law & Security Review* 34, no. 1(2018): 125–33. https://doi.org/10.1016/j.clsr.2017.06.007.

55 Kim et al., "How Should the Results of Artificial Intelligence Be Explained to Users?"

56 Romain Cadario et al., "Understanding, Explaining and Utilizing Medical Artificial Intelligence," *Nature Human Behaviour* 5, 2021: 1636–42, https://doi.org/10.1038/s41562-021-01146-0.

people regard human decision-making as more observable and understandable. Such transparency is most likely also illusory, since human decision-making is not transparent either.[57] Nevertheless, this does not exclude the factor of creating ethical challenges.

There is a practical example of how a human can be trained to trust AI's decisions, as evidenced by research in the field of medical AI. Participants in an experiment preferred a human worker to AI, partly because they overestimate how accurately and deeply they understand doctors' medical decisions. After the experiment, participants were asked to explain how they understood the decision-making process between humans and AI using the example of cancer diagnosis. After discussing this matter, participants noted a decrease in their subjective understanding of the human element compared to the AI tool. Measures that reduce the difference in subjective understanding of decisions made by humans and AI improve attitudes toward AI tools were noed by Cadario et al.[58] and Kim.[59] Thus, the relevant risk can be mitigated by informing humans about AI decision-making algorithms. This also actively aligns with the transparency and accountability thesis of the previously mentioned Ethical Guidelines for Trustworthy AI.

The third category of risks concerns ethical risks, which include data privacy and decision-making without human intervention. In order to mitigate the relevant risks, certain steps should be taken in the field of legal regulation. The first important step at the EU level might be to introduce certain changes to the General Data Protection Regulation (hereinafter: GDPR). Currently, the GDPR already contains Art. 22, which regulates the issue of automated decision-making. However, in view of the rapidly expanding use of AI in labor relations, it is necessary to expand the relevant provision, in particular, to add a requirement to inform employees about how AI affects their work decisions

57 Julian De Freitas et al., "Psychological Factors Underlying Attitudes Toward AI Tools," *Nature Human Behavior* 7, 2023: 1845–54, https://doi.org/10.1038/s41562-023-01734-2.
58 Cadario et al., "Understanding, Explaining and Utilizing Medical Artificial Intelligence."
59 Kim et al., "AI Anxiety."

(hiring, firing, performance evaluation), as well as to ensure their right to human control over these processes.[60]

In the context of employment relations (other areas may also be added, given the comprehensive nature of the legal act), decisions may not be made solely on the basis of automated processing, including profiling, without the active participation of a human being in the decision-making process. Employers should ensure that such decisions are reviewed by a human to ensure fairness and objectivity.

Note that GDPR gives data subjects the right to access their data. However, if we consider this issue through the prism of our problem, we note that employees should have expanded rights to receive explanations about the logic, criteria and consequences of decisions made with the help of AI systems. In our opinion, this approach would help avoid possible opacity.

Finally, attention should be drawn to the GDPR's data minimization requirements. In the context of AI use, this principle requires clarification for labor relations. In order to avoid excessive collection of personal data of employees, it is important to clearly regulate which data are relevant and necessary for performing work functions. The GDPR already contains many useful provisions on data privacy protection, but regarding the application of AI in the field of employment, its provisions need to be clarified and strengthened.

We also note the importance of introducing rules for member states at the legislative level of the ILO and the EU, which will be implemented in national legislation and reflect the right to appeal decisions made by AI. First of all, it is necessary to consolidate the mechanism of appeal of the relevant decisions. This right will give employees the opportunity to protect their interests if an automated decision unfairly or prejudicially affects their employment or

60 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, 1–88, https://eur-lex.europa.eu/eli/reg/2016/679/oj.

working conditions. Such a provision would promote greater accountability of AI systems and provide workers with protection from potential discrimination or erroneous decisions. In addition, the ILO and the EU could create special bodies or commissions to oversee the implementation and use of AI in labor relations. Such bodies could also consider employee complaints about automated decisions and take steps to prevent abuse.

Discussion

Our research allowed us to identify three main categories of risks arising from the introduction of AI in the workplace: physical, psychological, and ethical. We have identified legal measures to counteract the respective risks. Nevertheless, we would also like to emphasize the need to supervise the use of AI in labor relations. Monitoring the technical condition can significantly prevent physical injuries.[61] In addition, monitoring the operation of AI systems is important to ensure the transparency and fairness of automated decisions. Such systems should be subject to regular checks for objectivity, lack of bias, and compliance with workers' rights. Reviewing algorithms for compliance with ethical standards, as well as having mechanisms for employees to appeal decisions, can mitigate the risk of discrimination and ensure rights are protected. It is important to check the privacy context, namely the limits and ways of using employees' personal information.

In general, the monitoring of AI systems should include two principal components: a technical audit to maintain their functionality and security, and an evaluation of their solutions to comply with ethical standards and thus protect the rights of employees. This will not only allow technical risks to be reduced, but also minimization of psychological and ethical threats that may arise from the use of AI in labor relations.

61 Fatema Mustansir Dawoodbhoy et al., "AI in Patient Flow: Applications of Artificial Intelligence to Improve Patient Flow in NHS Acute Mental Health Inpatient Units," *Heliyon* 7, no. 5(2021): article e06993, https://doi.org/10.1016/j.heliyon.2021.e06993.

We should also note that for the implementation of AI in the workplace to be effective and safe, employers must cooperate closely with the competent state authorities. Regular audits and inspections involving the state will also help to check whether employers comply with safety standards and AI systems with ethical standards. At the same time, the state can provide support, for example, in the form of consultations, guidelines, and, if necessary, training programs for employees involved in interacting with automated systems.[62]

In general, the development of AI in the workplace also requires improvements in the relevant legal regulation.[63] In this regard, the legislative integration of the right to transparency and explanation of AI decisions appears to be a promising direction in which legislation may develop. This means that the right of employees to request explanation of decisions made by AI should be enshrined in the legislation. In particular, this includes the mandatory informing of employees about the criteria automated systems employ in evaluating their performance. In general, transparency in the use of AI will promote trust in automated systems and help avoid feelings of unfairness and discrimination.[64]

Improvements will be required by legal acts related to the protection of personal data, such as GDPR. Future legislation is expected to contain stricter requirements on the scope and purpose of data collection, including a ban on excessive monitoring, and granting employees enhanced rights to control and protect their personal information.

Finally, the changes will also impact the safety standards of interacting AI systems. Legislation should establish clear requirements for regular monitoring, maintenance, and technical auditing of workplace AI systems. Such regulations are necessary for the timely detection of technical flaws. Employee training is also required, since the introduction of AI requires im-

62 Vavzhenchuk and Zhmaka, "Problems of Protection of Labor Rights During Hiring with the Use of Artificial Intelligence Algorithms."

63 Roksolana Yaroslavivna Butynska, "Artificial Intelligence in the Field of Work: Problems and Prospects of Legal Regulation," *Analytical and Comparative Jurisprudence*, no. 2(2024): 301–08, https://doi.org/10.24144/2788-6018.2024.02.52.

64 Hickman and Petrin, "Trustworthy AI and Corporate Governance."

proving employees' skills. We expect relevant changes in the legislation of the Member States.

If automation or AI implementation leads to job losses, the legislation should provide for appropriate social protection measures. These may include retraining programs, financial support during the transition to new positions, or incentives to create alternative jobs.

Thus, developing labor relations legislation regarding implementation of AI will foster a safer, more ethical and transparent work environment and strike a balance between technological progress and employee rights.

Conclusion

Taking into account the rapid development of AI and its integration into labor relations, international organizations face new challenges that must be overcome by creating appropriate legal regulation. The EU has adopted the Artificial Intelligence Act, whose purpose is to establish clear rules on the use of AI in various areas, including labor relations. An important innovation is the classification of AI systems according to the level of risk: from minimal to high, where high-risk covers systems that directly affect the rights of employees, their productivity and working conditions. This ensures closer control of the use of such systems in workplaces.

In addition, the EU constantly updates strategic documents such as the Strategic Framework for Occupational Safety and Health 2021–2027, which adapt to new challenges. The strategy focuses on psychosocial risks, ergonomics, and the mental health of employees. Its provisions emphasize the need to create a safe working environment in the digital world. Currently, the ILO does not have such progressive legislation on this issue: it has only created general guidelines and remains at the research stage. Today, however, the EU is significantly ahead of the ILO in terms of AI regulation in the field of labor

relations, creating a solid legal framework and prioritizing the protection of workers' rights.

The study identifies three main categories of risks arising from the introduction of AI in the workplace. Physical risks are associated with technical failures and disruption to interaction between humans and automated systems, which can lead to dangerous situations in the workplace. Psychological risks encompass emotional and psychosocial aspects, such as employees' fear of being replaced by AI, discrimination, overwork, burnout, and constant surveillance. Finally, ethical risks relate to data privacy and decision-making without human intervention, which can create a sense of a loss of control, therefore exacerbating employee vulnerability.

Each of these risks requires the adoption of its own legislative initiatives. The article proposes the following: to standardize, update the existing labor legislation with regard to enshrining the obligation of employers to train employees; expand the concept of discrimination at the ILO and EU levels; enshrine at the EU level the requirements for Member States to create a national retraining gap for employees; introduce the right to disconnect; limit the ability of employers to continuously monitor employees' activities using AI; expand the provisions of the GDPR and implement the right to appeal against the decision of the court. Additionally, it is proposed to establish independent supervisory bodies that will be able to monitor the implementation of AI systems in labor relations and ensure that their work meets the established standards of security, transparency and ethics.

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Diplomatic Protection in International Law: A Comprehensive Analysis of ICJ Rulings with Particular Focus on the Landmark Diallo Case Judgment of 2012

Abstract: This paper explores the concept of diplomatic protection in international law through a detailed analysis of International Court of Justice (ICJ) rulings, with a particular focus on the landmark June 19, 2012 judgment in Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo). Diplomatic protection, a traditional legal mechanism allowing states to seek redress for their nationals harmed by other states, reflects a nuanced intersection between state sovereignty and individual rights within international law. This study traces the evolution of diplomatic protection in ICJ jurisprudence, assessing how the Court has balanced state responsibility with the protection of individuals abroad. The Diallo judgment is analyzed for its substantive contributions, particularly in recognizing non-material damages and the principles underpinning adequate reparations. Through this case study, the paper examines key requirements for diplomatic protection, such as nationality, exhaustion of local remedies, and the discretionary nature of state action. By evaluating the implications of this and related ICJ rulings, this research offers insights into the evolving role of diplomatic protection and its effectiveness in modern international law for advancing individual justice within the framework of state sovereignty.

Keywords: diplomatic protection, International Court of Justice (ICJ), Ahmadou Sadio Diallo Case, state responsibility, international law, sovereignty and individ-

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ual rights, reparations, jurisprudence on diplomatic protection, nationality requirement, exhaustion of local remedies

Introduction

Throughout the history of human civilization, the interactions between societies and individuals have led to the adoption of international rules, whether express or tacit, codified or customary. These rules have taken the form of treaties and conventions, as well as domestic laws and regulations, which enable the peaceful coexistence of the various communities. In this context, international public law is the legal system arising from these rules, which governs relations between States and international and domestic entities recognized as subjects of the international community. Protection against violations of international law, particularly by States, often aims to regulate the subject matter of disputes at an international level. States, as subjects of international law, are entitled to defend their own legal rights, and, at times, the legal rights of other individuals and entities under their jurisdiction.

One way to safeguard legal rights is through the institution of diplomatic protection, which, in its broader meaning, refers to any action taken by a State to protect its own legal rights and those of persons other than its own nationals, who, in accordance with the rules of international law, are in a position effectively to act on behalf of the State. Diplomatic protection presupposes the taking of any diplomatic action in favor of these individuals or entities, with the aim of obtaining redress for injuries suffered, particularly when such injuries result from a violation of international law by the host state conducing an international obligation concerning the recipient state, whether or not material damage has occurred.

The primary and most common form of diplomatic action is diplomatic intervention in disputes arising from such activities, including legal disputes.[2]

2 Many international legal proceedings have been based on diplomatic protection. In particular the Permanent Court of International Justice (PCIJ) dealt with a number of cases involving diplomatic protection: these include the Mavrommatis Palestine Concessions

When such disputes cannot be settled by negotiation or arbitration, they are submitted to international courts or tribunals for a binding decision. In this way, the subject matter of the dispute is addressed or resolved through a public international solution, as opposed to being reduced to a private settlement, which would occur if the claims of the injured states obtained benefits that correspond not to them, but to foreign nationals or even stateless persons residing or traveling in the foreign territory.

This paper aims to explore the institution of diplomatic protection in depth, examining its legal framework, historical development, and practical implications. It will examine the criteria that govern the exercise of diplomatic protection, the rights and duties of states, and the challenges that arise in its implementation. Additionally, this analysis will consider the evolving nature of diplomatic protection in light of recent developments in international law, including human rights law and the increasing recognition of individual rights in the global legal landscape. Through this exploration, we will gain a better understanding of the significance of diplomatic protection as a tool for promoting justice and accountability in the international community.

The International Court of Justice (ICJ), as the principal judicial organ of the United Nations,[3] plays an essential role in the peaceful settlement of international disputes and the interpretation of international law. Over the years, the ICJ has shaped the development of international legal principles through its landmark rulings, providing clarity on various contentious issues among states. The judgment delivered on June 19, 2012, represents one such case where the Court's

Case (*Greece v. United Kingdom*), PCIJ, Series A, No. 2 (1924); Certain German Interests in Polish Upper Silesia (*Germany v. Poland*) PCIJ, Series A, No. 10; Case Concerning the Payment of Various Serbian Loans issued in France (*France v. Serb-Croat-Slovene State*), PCIJ, Series A, Nos. 20/21 (1929); Lighthouses in Crete and Samos (*France v. Greece*), PCIJ, Series A/B, No. 71; and Panevezys-Saldutiskis Railway Case (*Estonia v. Lithuania*), PCIJ, Series A/B, No. 76 (1937).

3 In accordance with the provisions of Chapter XIV of the Charter of the United Nations in its Article 92, the International Court of Justice constitutes the principal judicial organ of the United Nations. It operates in accordance with a Statute established on the basis of the Statute of the Permanent Court of International Justice and annexed to this Charter of which it is an integral part.

reasoning offers significant insights into the evolving framework of international law, particularly in matters concerning state responsibility, reparations, and the protection of human rights.

This paper also provides an in-depth analysis of the ICJ's judgment of June 19, 2012, exploring its legal implications and broader relevance in the context of international jurisprudence. By dissecting the Court's reasoning, this commentary aims to highlight how the decision aligns with established legal principles and where it introduces new interpretations that could influence future cases.

Additionally, this study examines the broader impact of the judgment on international relations and its contribution to the ongoing discourse on state accountability under international law. Through a detailed review of the case facts, legal arguments presented by the parties, and the Court's ultimate findings, this analysis seeks to offer a comprehensive understanding of the decision's place within the ICJ's broader body of jurisprudence. Furthermore, it reflects on the potential consequences of the ruling for international law, particularly in relation to human rights, reparations, and the scope of diplomatic protection of the decision's place within the ICJ's broader body of jurisprudence. Furthermore, it reflects on the potential consequences of the ruling for international law, particularly in relation to human rights, reparations, and the scope of diplomatic protection.

The Characteristics of Diplomatic Protection in International Law

The evolution of diplomatic protection is a significant aspect of the development of international law. Initially conceived to protect the commercial interests of states, particularly to support claims from merchants and investors harmed abroad, it has progressively expanded to encompass the protection of individual rights. Over the centuries, this evolution mirrors broader shifts in international law, which has transitioned from a state-centric framework to one

that increasingly prioritizes the rights of individuals. Diplomatic protection originally served as a tool for states to safeguard the interests of their nationals, particularly in the context of trade. This meant that if a foreign national's property or business dealings were violated abroad, their home country could intervene on their behalf, often using diplomatic channels or pressure to resolve the dispute.

The expansion of diplomatic protection's scope coincides with the growing recognition of human rights as a key component of international law. As international legal frameworks shifted from state sovereignty to include individual rights, diplomatic protection began to be used as a means to defend citizens who suffered violations of fundamental rights, such as wrongful detention or torture, particularly when the host state failed to provide an effective remedy.

While both the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations acknowledge the rights of states to protect their nationals, neither provides a formal definition of *diplomatic protection*. Furthermore, no single normative definition exists across international legal instruments. As a result, scholars and practitioners often rely on doctrinal interpretations, which may vary considerably.[4] The most widely recognized definition of diplomatic protection was formulated by E.M. Borchard in 1915. Borchard's conceptualization positions diplomatic protection as a right invoked only when the host state of a foreign national fails to adhere to international legal standards. This classical definition underlines the relationship between the international community's legal norms and the state's role in enforcing those norms on behalf of its nationals.[5] Accord-

4 See Jan Sandorski, "Adwokat a opieka dyplomatyczna," *Palestra* 30, no. 1(337) (1986):15–24.

5 See the interesting reflection on diplomatic protection and the inability of private individuals in international law to directly defend their rights before international bodies. This principle highlights the fact that only States can act on behalf of their nationals in cases of rights violations committed by other States. This inability of private individuals to claim direct protection at the international level underscores the essential role of States in diplomatic protection and the recourse to international justice to obtain redress for the harm suffered.

ing to Borchard, "diplomatic protection serves as a mechanism to ensure that foreign nationals are treated in line with international standards of justice and fairness, especially when their rights are violated abroad."[6] This framework has significantly influenced subsequent legal developments. For instance, the International Law Commission (ILC), in its first report on the international responsibility of states, cited Borchard's work as foundational. In this context, F.V. García Amador further refined the definition by stating: "The right of diplomatic protection is recognized as the right of a state to demand from other states that they treat persons and property of its nationals in accordance with the principles of international law." Similarly, E.J.S. Castrén proposed that diplomatic protection entails a state's ability to intervene through diplomatic and consular channels when its nationals are not afforded fair treatment according to international law, or binding agreements between states.[7] Moreover, the Permanent Court of International Justice (PCIJ) also addressed this concept in the *Mavrommatis* case. The Court ruled that it is an "elementary principle of international law" that a state is entitled to protect its nationals if they are harmed by actions that contravene international law, particularly if they are unable to seek redress through ordinary legal remedies available in the host state. Incorporating these legal and doctrinal views, diplomatic protection emerges as both a state responsibility and an individual right within the international

Carlo Santulli, "Entre protection diplomatique et action directe, éléments épars du statut international des sujets internes," in *Société française pour le droit international, Colloque du Mans – Le sujet en droit international* (A. Pedone, 2005), 85.

6 See Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* (The Banks Law Publishing Co., 1915) review by W. W. Gager, *The Yale Law Journal*, 26, no. 7(1917): 623–24.

7 The existence of the state's right to protect its own citizens is undisputed and confirmed by both legal doctrine and case law. Back in 1758, Vattel emphasized—"(…) whoever treats a citizen badly violates the rights of the state as the guardian of that citizen. Country has the right to avenge the wrongdoing done to a citizen and to force the offender to redress or punish him, because otherwise, the citizen would not achieve the main goal assigned to the civic community, which is security"; see Emer de Vattel, "Le droit des gens, t. II, chap. VI, par. 71," in Wilhelm Euler, *Klassiker des Völkerrechts, vol. 3* (Mohr, 1959), 217.

system, designed to safeguard the interests of nationals who face unjust treatment in foreign jurisdictions.

A pivotal moment in the development of diplomatic protection came in 2006, when the International Law Commission (ILC) adopted a set of Draft Articles on Diplomatic Protection.[8] These articles were designed to clarify and harmonize state practice concerning diplomatic protection. They emphasize key principles such as exhaustion of local remedies, which requires individuals to attempt to resolve their grievances through the legal systems of the host country before seeking international intervention. The ILC's codification provided a clearer legal framework, aiming to reconcile different national practices and promote a more consistent approach in dealing with claims involving diplomatic protection. The trajectory of diplomatic protection from a tool for defending commercial interests to a mechanism for securing individual rights highlights a profound shift in international law. The ILC's codification of its rules was an important step in ensuring that the protection of nationals abroad is governed by clear, consistent principles, reflecting the evolving nature of international law from a focus on states to a more human rights-centered approach. Diplomatic protection is a mechanism that allows a state to assert claims on behalf of its nationals whose rights have been violated by another state, provided the wrongful act violates international law. It is rooted in the principles of state sovereignty and responsibility. Diplomatic protection is the right of a state to protect its nationals when their rights under international law are infringed abroad. The state, not the individual, is the pri-

8 The International Law Commission's *Draft Articles on Diplomatic Protection* reaffirm this customary principle. Article 1 states that diplomatic protection consists of the invocation by a State, through diplomatic action or other peaceful means, of the responsibility of another State for harm caused by an internationally wrongful act of that State to a natural or legal person who is a national of the first State, with the aim of implementing that responsibility, see CDI, Rapport de la 58e session, Doc. off. AG NU, 61e sess., suppl. n° 10, A/61/10 (2006) [Projet d'articles sur la protection diplomatique]; Laurence Boisson de Chazournes, "The International Law Commission in a Mirror: Forms, Impact and Authority," in *Seventy Years of the International Law Commission: Drawing a Balance for the Future* (Brill/Nijhoff, 2020), 133–53 [I.C.J., 148–49].

mary actor. Individuals do not have a right to demand that their state exercise diplomatic protection—it remains a discretionary act of the state.[9]

Diplomatic protection, as a concept in international law, is governed by a set of strict conditions that must be met for a state to exercise its right to protect its nationals abroad. One of the requirements for the implementation of diplomatic protection is exhaustion of local remedies. Before invoking diplomatic protection, the affected individual must exhaust all available legal remedies in the state where the violation occurred. The principle of the *exhaustion of local remedies* is a key requirement in invoking diplomatic protection under international law. It dictates that before a state can espouse a claim on behalf of one of its nationals, the individual must first utilize all legal and administrative avenues available within the domestic legal system of the state allegedly responsible for the violation. This principle ensures respect for state sovereignty and provides the alleged offending state an opportunity to address the matter internally before it escalates to the international level. Local remedies refer to legal means provided by a state's judicial or administrative systems to redress a violation. Exhaustion means that the affected individual has pursued all levels of legal recourse (e.g., appeals) unless exceptions apply. Ensures the offending state has a fair chance to rectify its wrongful acts domestically. Protects international mechanisms from being overwhelmed with cases that could be resolved locally. A exceptions to this rule may apply if local remedies are unavailable or ineffective or the legal system is unduly delayed, biased, or unable to deliver justice. It has been central to cases like the *Interhandel* case (*Switzerland v. United States*),[10] where

9 See Patrick Daillier and Alain Pellet, *Droit international public* (Librairie générale de droit et de jurisprudence, 2002), 809. It is important to note that, while this mechanism is essential for an injured individual to obtain international reparation for their harm, it remains discretionary in nature. In other words, the State is free to accept or refuse to endorse the cause of its injured national. If the State refuses, no blame can be placed upon it, and it cannot be held liable for this decision.

10 In the literature on the subject, there is a general consensus that a state cannot formally take steps to claim compensation for harm done to its citizen before the exhaustion of local remedies. The principle of international law regarding the exhaustion of local remedies is widely accepted, and its legal basis was clarified by the International Court of Justice (ICJ) in its judgment of March 31, 1959, in the *Interhandel* case. In this judgment, the Court stated

the International Court of Justice emphasized the need to exhaust local remedies. The rule is codified in Article 15 of the International Law Commission's *Draft Articles on Diplomatic Protection* (2006). The principle strikes a balance between an individual's right to redress and a state's sovereignty, ensuring an orderly process for resolving international disputes related to human rights and other violations. Another requirement is nationality. Only individuals with a genuine link of nationality to the protecting state can benefit. Diplomatic protection is reserved for individuals who possess a genuine and effective link of nationality to the protecting state. This principle, established in customary international law and upheld by various international legal instruments, ensures that a state can only espouse claims on behalf of its nationals. The criterion of a "genuine link" was famously elaborated in the *Nottebohm* case (*Liechtenstein v. Guatemala*) before the International Court of Justice (ICJ) in 1955. The ICJ emphasized that the nationality must reflect a meaningful connection between the individual and the state seeking to provide protection. The key aspects include the requirement of effective nationality. The individual must have substantive ties to the protecting state, such as residence, familial connections, or allegiance, rather than merely formal or nominal citizenship. For dual nationals, diplomatic protection may not apply if the individual holds nationality in the respondent state. Due to the customary nature of the rule, this criterion has been universally recognized as a component of international law and ensures the integrity of the state's protective claim. This rule underscores the alignment of diplomatic protection with principles of sovereignty and state responsibility in international law.[11]

that the principle of exhausting local remedies before initiating international proceedings is a deeply rooted principle of customary international law. It is generally observed in cases where a state takes up the case of its citizen whose rights have been violated in another state in contravention of international law.

11 See Anne Peters, "Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty, and Fair Principles of Jurisdiction," *German Yearbook of International Law* 53, 2010: 623–76; Ian Brownlie, "The Relations of Nationality in Public International Law," *British Yearbook of International Law* 39, 1964: 284–85. *Nottebohm* (*Liechtenstein v Guatemala*) *(Second Phase)*, Judgment of 6 April 1955, ICJ. Rep. 4. Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State. As the Permanent Court of International

The State responsibility, diplomatic protection arises only when the host state violates its international obligations. Diplomatic protection as an institution of international law is grounded in the principle of *state responsibility*. It is invoked when a host state violates its international obligations, causing harm to the nationals of another state. This principle is governed by well-established norms of international law, including the rules codified in the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) by the International Law Commission (ILC). The key Elements of State Responsibility in Diplomatic Protection: violation of an International Obligation, diplomatic protection can only be exercised when the host state breaches an international obligation owed to the injured person's state of nationality. These obligations may arise from treaties, customary international law, or other sources of international commitments, such as protecting the rights of foreign nationals. Attribution of Conduct to the State, the wrongful act must be attributable to the host state, meaning it involves the conduct of state organs or entities acting on behalf of the state (e.g., government officials or state-controlled entities).

The harm to the national of another State, diplomatic protection is premised on the idea that harm to an individual indirectly affects the state of nationality, allowing it to bring claims on behalf of its citizen. Diplomatic protection is not merely for individual redress but also serves to uphold international norms and deter future violations by holding states accountable. Diplomatic protection is typically exercised after the exhaustion of local remedies (unless exceptions apply, such as ineffectiveness or unavailability of remedies). In sum, state responsibility is the cornerstone of diplomatic protection, ensuring that states adhere to their international obligations while providing a mechanism for redress when these obligations are breached. This framework supports the enforcement of international law and the protection of individual rights within

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Justice has said and. has repeated, "by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights-its right to ensure, in the person of its subjects, respect for the rules of international law" (PCIJ, Series A, No. 2, 12, and Series A/B, No. 20–21, 17).

the global legal system. The exercise of diplomatic protection is often influenced by political considerations. Conflicts may arise between the sovereign interests of states and the pursuit of justice for individuals.

The Aspects of the Intersection Between International and Domestic Law

On the domestic front, diplomatic protection is both a reflection of and a tool for the state's duty to protect its citizens under constitutional or administrative frameworks. Many states enshrine the protection of citizens abroad as a governmental duty. Diplomatic protection mechanisms are integrated into national foreign policy and legal systems, ensuring state support for citizens abroad. Domestic laws often regulate the circumstances and processes through which diplomatic protection is extended. Administrative procedures may require individuals to formally request intervention from their government. Domestic political and economic considerations may influence the extent and nature of diplomatic protection. For instance, a state may decline to provide protection if it conflicts with broader national interests or foreign relations. In many cases, embassies and consulates act as the operational arms of diplomatic protection, providing consular assistance and facilitating communication between the citizen and their home government. Diplomatic protection lies at the intersection of international and domestic law. While governed by international principles, its execution depends heavily on domestic legal frameworks and political decisions. The institution underscores the dual role of states as both sovereign entities in the international sphere and protectors of individual rights under domestic law.

Diplomatic protection relies on two primary means of action: diplomatic and jurisdictional. Diplomatic protection often starts with peaceful methods aimed at resolving disputes without escalating tensions. These methods can include, negotiations: direct talks between the state whose national has been wronged and the host state to seek a resolution. Good offices and mediation:

involving a neutral third party to assist in bringing both states to the negotiating table. Severing or downgrading diplomatic relations: in extreme cases, a state may break or suspend its diplomatic relations with the host state as a measure of protest or to exert pressure on the offending state. Such diplomatic actions aim to resolve the dispute in a manner that avoids litigation, fostering peaceful international relations. Jurisdictional means, if diplomatic efforts fail or the dispute remains unresolved, a state may pursue jurisdictional means by bringing the matter before international courts or tribunals. These include: The International Court of Justice (ICJ), the principal judicial organ of the United Nations, which resolves disputes between states, including those involving the violation of rights. International Criminal Court (ICC)**,** for violations such as crimes against humanity or war crimes, the ICC has jurisdiction to prosecute individuals responsible for such actions. Arbitration tribunals, when both states agree, arbitration is an alternative dispute resolution mechanism where an independent tribunal makes a binding decision. These judicial and diplomatic actions aim not only to address the specific grievance but also to strengthen the overall system of international law by ensuring that states are held accountable for their actions. These mechanisms reflect a growing emphasis on protecting individual rights under international law, moving beyond the traditional focus on state-to-state relations. This dual approach ensures that states are able to resolve conflicts both peacefully and with legal recourse when necessary.

The Institution of Diplomatic Protection as a Mechanism in Human Rights Protection

As examined above, diplomatic protection is a complex legal concept in public international law. In its widest sense, it refers to those activities that are the essence of a State's functions as a lawyer for its nationals. In this capacity, a State claims wrongful acts done to its citizens in violation of international law as its own and directs claims against the delinquent State. Diplomatic pro-

tection is a fundamental principle of international law that allows a state to intervene on behalf of its nationals who have suffered harm due to actions taken by another state. This mechanism serves as a crucial means through which states can safeguard the rights and interests of their citizens abroad, ensuring that individuals are not left vulnerable to injustices in foreign jurisdictions. The institution of diplomatic protection is rooted in customary international law and has evolved over time to address the complexities of contemporary international relations, human rights, and state sovereignty. Diplomatic protection is one of the oldest rights of a state in international law. The diplomatic protection should be understood as the endorsement, or even appropriation, by a State of the claim of an individual who has been harmed by an internationally wrongful act committed by another State or an international organization. This legal fiction allows an individual or a legal entity, both of whom are not subjects of international law and lack the ability to directly assert their rights on the international stage, to have their rights defended by the State of which they are nationals.[12] As mentioned above, the primary condition for exercising diplomatic protection is citizenship. Citizenship, as the foundation of such protection, must exist not only at the time of the violation of the individual's rights but also at the moment when the claim is brought by the state. In other words, this private or legal person requests the State, to which they are a national, to

12 See Mariusz Muszyński, "Opieka dyplomatyczna i konsularna w prawie wspólnotowym," *Kwartalnik Prawa Publicznego*, no. 2/3(2002): 143–67; see K. Complak's commentary on Article 36 of the Constitution of the Republic of Poland, found in the work edited by M. Haczkowska (Krystian Complak, "Art. 36," in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. Monika Haczkowska (LexisNexis, 2014)), emphasizes the constitutional framework regarding the protection of Polish citizens abroad. As highlighted by L. Garlicki and M. Zubik, Article 6, paragraph 2 of the Constitution should be applied to Poles living abroad. This article establishes the principle of state policy aimed at supporting Poles residing outside the country in maintaining their ties to their national cultural heritage (Leszek Garlicki and Marek Zubik, "Art. 36," in *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II*, ed. Leszek Garlicki and Marek Zubik (Wydawnictwo Sejmowe, 2016), 175; Anna Maria Helena Vermeer-Künzli, "The Protection of Individuals by Means of Diplomatic Protection: Diplomatic Protection as a Human Rights Instrument" (PhD diss., Leiden University, 2007), Leiden University Scholarly Publications, https://hdl.handle.net/1887/12538.

take up their case and endorse their claim. Thus, a dispute that is initially private in nature becomes internationalized and transforms into a claim between States.[13] The landmark ruling on diplomatic protection is the *Mavrommatis Palestine Concessions* case. In this decision, the Permanent Court of International Justice (PCIJ) stated that, by taking up the case of one of its nationals and initiating diplomatic or international judicial action on their behalf, the State is, in fact, asserting its own right—the right it holds to ensure that international law is respected in relation to its nationals.[14] In a world characterized by increasing globalization and interconnectedness, the role of diplomatic protection has become ever more significant. As individuals traverse borders for work, education, and leisure, the potential for conflicts and disputes with foreign governments arises. In this context, diplomatic protection acts as a vital safeguard, allowing states to advocate for their citizens in situations where they may face violations of their rights or wrongful treatment.

Despite the norms established by international practice, there is a noticeable tendency among states to avoid fulfilling their obligation to protect their citizens. Nonetheless, diplomatic protection as a means of safeguarding the rights and freedoms of individuals remains a significant and necessary institution in international relations. In the present case, the analysis centers on the judgment of the Court concerning the application of general principles of international law regarding compensation for international delicts, as well as the issue of the function of diplomatic protection exercised by the state. While the International Court of Justice (ICJ) has addressed the issue of diplomatic protection in several previous cases, such as the *Nottebohm* case and the *Barcelona Traction, Light and Power Company* case,[15] its experience in

13 See Denis Alland, *Droit international public* (Presses universitaires de France, 2000), 413.

14 See Mavrommatis Palestine Concessions Case (*Greece v. United Kingdom*), PCIJ, Series A, No. 2 (1924), 12. See confirmation by the PCIJ: Panevezys-Saldutiskis Railway Case (*Estonia v. Lithuania*), PCIJ, Series A/B, No. 76 (1937); see Biswanath Sen, *A Diplomat's Handbook of International Law and Practice* (Martinus Nijhoff Publishers, 1988), 246; Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* (William S. Hein & Company, 2003), 436.

15 For more on this topic, see: Józef Brzeziński, "Teoria efektywności obywatelstwa jednostki we współczesnym prawie międzynarodowym," *Państwo i Prawo*, no. 12(1958): 1011–22;

the specific matter of diplomatic protection related to this case is limited. This case not only deals with the issue of a state's responsibility under international law but also addresses the matter of managing the amount of compensation for breaches of international obligations. This analysis refers to the International Court of Justice (ICJ) judgment of June 19, 2012,[16] in relation to the proceedings concluded with the Court's judgment of November 30, 2010, concerning the determination of compensation for the damages arising from the unlawful detention and expulsion of Mr. Diallo, as well as the issue of reparations owed to Guinea for exercising diplomatic protection on behalf of its citizen. In this case, the Court had to adhere to the general principle that the burden of proof lies with the party that asserts a particular fact.[17] However, flexible application of this principle was justified, especially when the defendant was in a better position to determine certain facts. The evidence submitted by Guinea served as the starting point for the Court's deliberations, considering the difficulties in providing some of this evidence due to the sudden nature of Mr. Diallo's expulsion.

The Judgment of June 19, 2012: Case Background and Significance

In its judgment of November 30, 2010,[18] the Court called on the parties to engage in negotiations to reach an agreement on the amount of compensation, set-

and also Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, ICJ, Reports, 1970, 3.

16 See: Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), Compensation, Judgment, ICJ, Reports 2012, 324.

17 See: ICJ Reports 2010 (II), 660, para. 54; see also Application of the Interim Accord of 13 September 1995 (*The former Yugoslav Republic of Macedonia v. Greece*), Judgment, ICJ Reports 2011 (II), 668, para. 72; Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), Judgment, ICJ Reports 2010 (I), 71, para. 162); See Certain Activities carried out by Nicaragua in the Border Area (*Costa Rica v. Nicaragua*), Judgment on the question of the compensation owed by Nicaragua to Costa Rica; Report of the International Court of Justice (ICJ Report) 1 August 2017—31 July 2018.

18 In its judgment on the merits of 30 November 2010, the Court ruled that, in view of the conditions under which Mr. Diallo was expelled on 31 January 1996, the DRC had violated Article 13 of the International Covenant on Civil and Political Rights (hereinafter the 'Cov-

ting a six-month deadline from the date the judgment was issued. It appears that no substantive negotiations took place, undoubtedly due to significant differences between the parties regarding the compensation amount. Each side blamed the other for this failure, as reflected in their submissions. Faced with this impasse, the case returned to the Court, which was tasked with ruling on the merits of the parties' positions and determining the amount of compensation owed by the Democratic Republic of the Congo to the Republic of Guinea.[19]

The Court duly established a number of facts, particularly the unlawful arrest of Mr. Diallo in 1988, which was overlooked due to Guinea's delayed request for assistance. Most notably, the unlawful detention lasted nearly two and a half months, during which Mr. Diallo was given no information regarding the reasons for his arrest, and was prevented from contacting Guinean authorities, leaving him uncertain about further proceedings. Clearly, beyond the discomfort of being in harsh detention conditions, this situation caused anxiety or distress, especially intense for the prisoner, who found himself in complete uncertainty about his fate. In this case, the moral harm stemmed from the actions of the Congolese authorities, which began harassing Mr. Diallo as soon as he tried to collect debts from his creditors. These creditors were public institutions and state-owned enterprises. Not only was he detained, but there were also attempts to discredit him and weaken his position as a businessman, using various means to undermine his reputation and dignity (e.g., accusing him of bribing state officials and judges, without allowing him to defend himself against these unfounded charges). Moreover, even though Congolese judges

enant'), as well as paragraph 4 of Article 12 of the African Charter on Human and Peoples' Rights (hereinafter the 'African Charter') (Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), Judgment, ICJ Reports 2010 (II), 692, para. 165, point 2 of the operative part). It also found that, given the conditions under which Mr. Diallo had been arrested and detained in 1995–1996 for the purpose of his expulsion, the DRC had violated paragraphs 1 and 2 of Article 9 of the Covenant and Article 6 of the African Charter (Judgment, ICJ Reports 2010 (II), 692, para. 165, point 3 of the operative part).

19 On, June 19, 2012, The International Court of Justice (ICJ), the principal judicial organ of the United Nations, delivered its judgment in the case of Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*) concerning the compensation owed by the Democratic Republic of the Congo to the Republic of Guinea.

did not pursue these accusations, their formulation and public disclosure had serious consequences, damaging the accused's business and, consequently, his future presence in Zaire (now the Democratic Republic of Congo).[20]

Regarding compensation for personal property, the Court faced difficulty in determining the extent of the actual damage suffered by Mr. Diallo, as the evidence he provided about his household furnishings was highly unconvincing, and there was a complete lack of evidence regarding the list of valuable items and the contents of his bank accounts.[21] While there was an inventory of his household furnishings, it was incomplete, and it is difficult to determine what may have happened between Mr. Diallo's arrest and the time the inventory was made, as the property could have been stolen during this period. This is not mere speculation, given that Mr. Diallo's standard of living was high, and his relationships with many prominent figures in politics and business suggest that he lived in a comfortable and well-furnished apartment. Therefore,

20 In the case of compensation for non-material loss or moral harm, the Court takes into account various factors when assessing the non-material harm suffered by Mr. Diallo, including the arbitrary nature of the arrests and detentions he endured, the excessively long duration of his detention, the unsubstantiated accusations against him, the unlawful nature of his expulsion from a country where he had resided for thirty-two years and conducted significant commercial activities, and the link between his expulsion and his attempts to recover debts he believed were owed to his companies by the Zairean State or companies in which the State held a significant share. The Court also considers the fact that it was not demonstrated that Mr. Diallo had been subjected to ill-treatment. Based on considerations of equity, the Court deems that the sum of 85,000 US dollars constitutes appropriate compensation for the non-material harm suffered by Mr. Diallo.

21 In the case of compensation for personal property, the Court finds that Guinea has not succeeded in proving the extent of the loss of personal property—namely, the furniture listed in the inventory of items found in Mr. Diallo's apartment, certain valuable objects allegedly present but not listed in the inventory, and bank assets—that Mr. Diallo may have suffered, nor the extent to which this loss was caused by the unlawful conduct of the DRC. However, the Court recalls that Mr. Diallo lived and worked on Congolese territory for about thirty years, during which time he could not have failed to accumulate personal belongings. It considers that Mr. Diallo would have had to move these belongings to Guinea or take measures to dispose of them in the DRC. Therefore, the Court does not doubt that the unlawful conduct of the DRC caused Mr. Diallo some material damage regarding the personal property left in his apartment. Under these circumstances, based on considerations of equity, the Court considers that a sum of 10,000 USD constitutes appropriate compensation for the material damage suffered by Mr. Diallo.

since paragraph 36 of the judgment sets a lump sum for the compensation, it could be argued that the value of the damage was underestimated, and its proper assessment may exceed the amount granted by the Court. However, it is still challenging to accept the Court's reasoning and decision. Regarding the valuable items for which compensation was requested, the claimant provided only a basic list to the Court, without any evidence to support their actual existence or value. This does not mean that these items did not exist, as—given Mr. Diallo's high standard of living before his arrest—it would not be unreasonable to trust his claims about the property listed. Nevertheless, the Court, lacking any proof, understandably could not rely solely on the claimant's statements and thus had no choice but to dismiss the claim.[22] However, to some extent, the Court could have awarded a symbolic lump sum to cover these losses, in line with the principle of equity, but it did not find this necessary.

In this regard, it is regrettable that Guinea's claim was disproportionate and clearly excessive. Additionally, Guinea misinterpreted the Court's 2010 ruling to reinstate compensation for losses sustained by the two companies managed by Mr. Diallo, despite the Court's dismissal of these claims. The Court could only logically draw conclusions from its previous judgment and reject the claim for any alleged damages relating to the companies themselves.[23]

22 This case shows that the International Court has contributed to the interpretation of remedies. Several aspects of the remedies available before the Court have been clarified through its practice and, consequently, states now have more reasonable expectations when they submit a dispute before the Court. The consistency that the Court has demonstrated in its interpretation of the remedies available before it has enhanced predictability in the manner in which the Court applies and clarifies the remedies that are requested by the parties appearing before it. The manner in which the remedies of international law are interpreted and applied is, however, strictly connected with the function of the Court, i.e., that of being the principal judicial organ of the United Nations. Therefore, the fact that the Court observes the manner in which its judgments contribute to the maintenance of international peace influences the application of remedies with respect to the disputes submitted before it.

23 In the case of loss of income and profits, the Court finds that Guinea has not established that Mr. Diallo was receiving a monthly salary from his two companies in the period immediately preceding his detentions. It notes that Guinea has also failed to explain how Mr. Diallo's detentions would have caused the interruption of any salary he might have received as the manager of those companies. Under these circumstances, the Court concludes that Guinea has not proven that Mr. Diallo suffered a loss of professional income as a result of

Even though the companies' losses fall outside the scope of this dispute, Mr. Diallo earned income from his work as an employee of the companies he managed. His two arrests, lasting more than two and a half months, followed by his expulsion, prevented him from fulfilling his managerial duties and deprived him of his rightful income.[24]

Regarding the costs incurred for legal assistance, it is worth noting that this compensation pertains not to Mr. Diallo's personal situation but rather to Guinea's involvement. Indeed, by providing diplomatic protection, Guinea became the claimant in this case and covered the costs of defending the rights and interests of its citizen. Therefore, I believe Guinea also deserved compensation for these expenses. It is important to note that the Court has had few opportunities to rule on compensation, particularly regarding its calculation. While the Court established principles governing reparation for unlawful state actions in the famous *Chorzów Factory* case, its actual application of these principles has occurred in only one instance: the *Corfu Channel* case, in which the Court determined the compensation Albania owed for the human and material damage inflicted upon the British Royal Navy.[25] The principles govern-

his unlawful detentions. As a result, the Court awards no compensation for the alleged loss of salary suffered by Mr. Diallo during his detentions and after his expulsion.

24 It seems logical and fair to consider compensation for the loss of income. In reality, a manager who is also a shareholder is treated as self-employed and receives remuneration for performing their duties. This principle applies even when the shareholder is the majority or sole shareholder, as in this case. While Guinea did not provide evidence regarding the amount of compensation associated with Mr. Diallo's managerial functions in both companies, instead of rejecting the claim, the Court could have used the principle of equity to determine a reasonable amount of compensation for the material and moral losses incurred. Based on logic and common sense, I believe the Court took an overly categorical approach to this part of the case. In fact, while Mr. Diallo was imprisoned, he must have had some income from one source or another, even just to cover necessary expenses, such as rent for his apartment, lawyers' fees, ongoing costs, and daily living expenses, including food in prison, as prisoners were not provided with meals. Even though the compensation amount demanded by Guinea was disproportionate and it is difficult to estimate Mr. Diallo's income, the Court should have considered the specific circumstances of this case and awarded appropriate compensation. Therefore, the Court's radical decision to completely reject the claims (paragraph 46 of the judgment) is difficult to fully understand.

25 See Corfu Channel Case (*United Kingdom of Great Britain and Northern Ireland v. Albania*, Determination of the Amount of Reparations, Judgment, ICJ Reports 1949, 244).

ing compensation for damage resulting from actions contrary to international law are well-established in international law, largely due to norms from both international conventions and the jurisprudence of various international tribunals (the Permanent Court of International Justice, the International Court of Justice, arbitral tribunals, and especially regional human rights courts). Additionally, projects from the International Law Commission (ILC) on state responsibility, work from the International Human Rights Commission, and doctrinal contributions have further solidified these principles.[26] It is crucial to note that the Court excluded restitution in kind, which is typically the primary principle of reparation since the famous ruling of the *Chorzów Factory* case, which stated.[27]

Given that Guinea did not request restitution in kind—and that it was no longer feasible—the purpose of the present judgment was to determine a financial sum corresponding to what restitution in kind would have required, based on the Chorzów Factory principles. This judgment aligns with Article 36 of the 2001 ILC, Articles, which states that a responsible state must provide compensation to the extent that damage is not remedied by restitution.[28]

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26 The question of interest here is to what extent these principles can apply to the case under review and how compensation should be determined. The compensation provisions were already largely defined in the aforementioned judgment of 30 November 2010, in which the Court ruled that the Democratic Republic of the Congo (DRC) was obliged to make reparations for violating certain provisions of the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, and the Vienna Convention on Consular Relations.

27 Referring to the *Chorzów Factory* case, the reasoning in Judgment No. 13 of 1928, the Permanent Court of International Justice (PCIJ) stated in Series A, No. 17, on page 47, that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed." This landmark ruling introduced the principle of full restitution as the basis for remedying the damage caused by internationally wrongful acts committed by states; see Factory at Chorzow (*Germany v. Poland*), 1927 PCIJ (Series A), No. 9 (July 26).

28 In 2001, the International Law Commission adopted the Articles on the Responsibility of States for Internationally Wrongful Acts.; see Mirka Mőldner, "Responsibility of International Organizations – Introducing the ILC`s DARIO," *Max Planck Yearbook of United Nations Law* 16, no. 1(2012): 286.

Conclusion

The above analysis of a various decisions shows that the discretionary nature of diplomatic protection has undergone a change. Contrary to earlier decisions dismissing all claims as falling outside the scope of judicial review as acte de gouvernement present day courts have agreed to review claims based on lack of protection. Notwithstanding the possibility of preliminarily dismissing the claims on the ground of non-jusiticiability, the judges, without exception, have entered into the merits of the various claims and considered carefully the actions taken by the respective governments and the violations of international law. Jan Sandorski's observation on the diminishing relevance of diplomatic protection in light of developing international human rights frameworks highlights a pivotal shift in international law. He noted that as international human rights mechanisms have evolved, particularly through treaties, conventions, and the work of specialized institutions like the United Nations Human Rights Council (UNHRC) or regional bodies like the European Court of Human Rights (ECHR), the need for diplomatic protection has diminished. Diplomatic protection, traditionally a tool for states to defend the interests of their nationals abroad, might seem less necessary in an era where individuals can directly petition international bodies.

However, in the current global landscape, individuals still face significant barriers in effectively invoking their rights through international mechanisms. One of the core challenges is that the processes for petitioning international bodies, such as the UN Human Rights Committee, can be long, complex, and difficult to navigate, especially for those without legal expertise. Moreover, as Sandorski pointed out, individuals often do not file complaints against the state where they reside—where they may face human rights violations—but rather against their own home state, which might have a role in those violations or the failure to address them.

In light of these challenges, diplomatic protection remains a critical safeguard. Rather than being obsolete, diplomatic protection continues to be a fun-

damental tool for ensuring the protection of foreigners' rights on foreign soil. States, particularly those with well-established diplomatic frameworks, still rely on diplomatic protection to ensure that their nationals are not subjected to unjust or illegal treatment abroad, especially when local legal remedies are unavailable or ineffective. Thus, diplomatic protection has evolved, and while it may no longer be the sole or primary avenue for protecting individuals' rights, it remains one of the most important mechanisms within the broader system of international human rights protection. This evolution underscores the complex interplay between traditional state-centered legal mechanisms and the contemporary focus on individual human rights. Diplomatic protection remains a vital institution, complementing modern human rights treaties and international legal recourse, ensuring that a dual layer of protection exists for individuals facing violations in foreign states. The creation of the International Court of Justice was centered around a key idea: in 1945, it was envisioned that the progress of international life would rely on a strong and increasingly prominent judicial function, with the shared hope, at the dawn of the post-World War II era, that peace could be achieved through law. Thus, a Court was established to serve as the true Olympus of the international order, a venerable and quasi-sacred institution meant to oversee the legal structure of modern international relations. The rulings of the ICJ are decisions issued by this court in the context of its activities related to the settlement of disputes and the provision of advisory opinions. These rulings are binding on the parties involved in the case and carry mandatory authority worldwide. The ICJ based its decisions among others on the principles of equity and established international jurisprudence, such as the *Chorzów Factory* case. Although compensation for Diallo's rights violations was granted, its extent was limited. The judgment underscores the challenges of assessing moral and material damages within diplomatic protection cases and highlights the importance of strong evidence in such proceedings. While Guinea achieved partial success, many aspects of compensation remain unaddressed, leading to questions about the complete-

ness of the reparations and the judgment's impact on international law development. In summary, the analysis of the International Court of Justice's (ICJ) judgment delivered on June 19, 2012, reveals the Court's pivotal role in shaping international law and upholding justice in the global arena. This judgment not only highlights the complexities inherent in disputes between states but also underscores the importance of the principles of state sovereignty, accountability, and the rule of law. Throughout our detailed commentary, we have examined the Court's reasoning, the legal precedents it referenced, and the implications of its findings for both the parties involved and the broader international community. The ruling serves as a vital reminder of the necessity for states to adhere to their international obligations and to engage in diplomatic dialogue to resolve conflicts peacefully. It also emphasizes the importance of the ICJ as a forum for the peaceful settlement of disputes, reinforcing its status as a cornerstone of the international legal system.

Moreover, the judgment reflects the evolving nature of international law, particularly concerning issues of human rights, environmental protection, and state responsibility. As global challenges become more intricate and interlinked, the role of the ICJ will likely become even more critical in fostering cooperation among states and ensuring that justice is served. In conclusion, the June 19, 2012 judgment not only contributes to the development of international jurisprudence but also offers valuable insights for policymakers, legal practitioners, and scholars alike. As we navigate an increasingly complex international landscape, the principles elucidated in this ruling will continue to guide states in their interactions and reinforce the framework for upholding justice in the international legal order.

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The Criminal Law Counteraction to Obstruction of Mobilization in Ukraine: Current Challenges and Solutions in the Context of the Russian-Ukrainian War[2]

Abstract: The intensification of the mobilisation process taking place in Ukraine, given the new phase of the Russian-Ukrainian war, which began on 24 February 2022 with Russian troops' full-scale invasion of the territory of Ukraine, requires criminal law regulation. One of the negative influences on this process is the behaviour of those who obstruct mobilisation. Based on the study of the current law enforcement practice, such behaviour is charged under Article 114–1 of the Criminal Code of Ukraine and is considered one of the ways of obstructing the lawful activities of military formations. This article attempts to determine the specificities of such a criminal law response to cases of obstruction of mobilisation by analysing the practice of applying Article 114–1 of the Criminal Code of Ukraine, as this provision is used to counteract the obstruction of mobilisation. Research has revealed some positives and flaws concerning the description of the formulation and content of the charge; the determination of the motives for the criminal offence; the characterization of the person accused; the results of the case based on the charge; and the correctness of qualifying the actions of persons

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who obstruct mobilisation or otherwise facilitate evasion of military duty under Article 114–1 of the Criminal Code of Ukraine. It is concluded that the current approach to developing effective practices for counteracting obstruction of mobilisation requires change. Eliminating the identified flaws and amending criminal legislation is necessary for its more effective application.
Keywords: criminal law counteraction, criminal law qualification, Criminal Code of Ukraine, obstruction of military formation activity, obstruction of mobilisation

Introduction

Mobilisation was launched and is being carried out on the territory of Ukraine due to the need to defend the state following the Russian Federation's military aggression against Ukraine. As of today, the aggression is still ongoing. Therefore, the mobilisation process has not stopped, and the period of general mobilisation is extended every three months.

In the context of the high-intensity war characterising the current stage of the Russian-Ukrainian confrontation,[3] policymakers are seeking to reform the legal mobilisation procedure in Ukraine, limit the number of persons who are not subject to mobilisation, introduce more effective measures to deal with persons who avoid military registration, etc.[4] The implementation of the mobilisation process is with reason considered to be the key to successfully countering the more powerful enemy in the war. Therefore, social relations in the field of mobilisation

3 Ionita Craisor-Constantin, "Conventional and Hybrid Actions in the Russia's Invasion of Ukraine," *Security and Defence Quarterly* 44, no. 4(2023): 5–20, https://doi.org/10.35467/sdq/168870; Hal Brands, ed., *War in Ukraine: Conflict, Strategy, and the Return of a Fractured World* (Johns Hopkins University Press, 2024).

4 Julia Kazdobina and Jakob Hedenskog, *Challenges of the Ukrainian Mobilization* (Stockholm Centre for Eastern European Studies, 2024), https://sceeus.se/en/publications/challenges-of-the-ukrainian-mobilization/; Yuliia Dysa, "Explainer: Ukraine Considers Changing Mobilisation Rules as War with Russia Drags On," *Reuters*, published January 5, 2024, https://www.reuters.com/world/europe/ukraine-considers-changing-mobilisation-rules-war-with-russia-drags-2024-01-04/.

are subject to legal protection, in particular, using the resources of criminal law, given the significant nature of the impact of these relations on national security.

Criminal law protection of mobilisation is provided in Ukraine based on Chapter XIV of the Special Part of the Criminal Code of Ukraine, "Criminal offences in the field of protection of state secrets, inviolability of national borders, conscription, and mobilization," which contains a set of prohibitions in this area (Articles 335–337).[5] In general, these prohibitions apply to persons who evade military service in one way or another. Instead, the actions of persons who take measures aimed at obstructing the normal implementation of mobilisation as a whole, assisting all those who want to avoid military service during mobilisation, are not covered by these criminal law provisions. On the one hand, the escalation of the military situation and the increase in the number of war victims, along with other factors, make such avoidance actions relatively common in Ukraine due to the fear of being mobilised, and on the other hand, they cause outrage, given the long-lasting confrontation with the aggressor and the regular need to recruit.

What is the way to counteract acts which obstruct mobilisation? Today, other criminal law means are used for this purpose, namely Article 114–1 of the Criminal Code of Ukraine, which provides for liability for obstructing the lawful activities of the Armed Forces of Ukraine and other military formations during a special period (see the table below). It is important to note that the legislator has classified this crime as an offence against the foundations of national security, and it is covered by the relevant section of the Special Part of the Criminal Code of Ukraine (Section I).[6]

5 The Criminal Code of Ukraine, https://zakon.rada.gov.ua/laws/show/2341-14?lang=en.

6 In addition to providing for some of the most severe sanctions for the relevant crimes, which are mostly punishable by imprisonment, these crimes lead to some other negative criminal law consequences related to restricting opportunities for applying for release from criminal liability, release from punishment, etc.

The object of a criminal offence			
The direct object	The foundations of Ukraine's national security in the field of military security		
The objective side of a criminal offence			
Socially dangerous act	Obstruction of lawful activity of the Armed Forces of Ukraine and other military groups		
Time of the act	A special period (covers the time of mobilization, wartime and partially the recovery period after the end of hostilities)		
The subject of a criminal offence			
an individual	a person of sound mind	aged 16 or over at the time of committing an offence	
The subjective side of a criminal offence			
guilt	intent		

Table. Obstruction of lawful activity of the Armed Forces of Ukraine and other military groups (Article 114-1 of the Criminal Code of Ukraine)

This study is aimed at identifying trends in the implementation of Ukraine's criminal law policy to counter the obstruction of mobilisation. The criminal law policy of the state at war is changing under the influence of new factors to effectively counteract the relevant challenges and threats (the desired state). The real situation shows that these changes do not always demonstrate the proper level of efficiency. Given this, the main research issue is to establish how criminal law reacts to cases of obstruction of mobilisation in the current phase of the Russian-Ukrainian war (after a full-scale invasion).

Given the aforesaid, the subject of this research is the practice of applying Article 114–1 of the Criminal Code of Ukraine, the tool for counteracting obstruction of mobilisation.

The issue is discussed using the following methods: dogmatic (establishing the content of the criminal law provision on obstruction of the lawful activities of military formations and identifying the mechanisms of its application using the rules of legal logic); observation (studying the materials of law enforce-

ment practice and court proceedings; processing criminal statistics); comparison (comparing different approaches to criminal law reaction to the obstruction of mobilisation); abstraction (imaginary removal of insignificant features, connections that affect the process of criminal counteraction and obstruction of mobilisation, while emphasising the most important features that characterise it).

In 2015, when the prohibition on obstructing the lawful activities of military formations was introduced, 11 people were convicted of this crime, and in 2016–2022, a total of 10 people were convicted, with 1 to 2 sentences delivered annually.[7] A review of the available court decisions shows that in the majority of cases such obstruction did not relate to mobilization activities. In particular, actions related to blocking the movement of a column of military equipment of the Armed Forces of Ukraine,[8] causing bodily harm to military personnel of a military formation,[9] and launching a small unmanned aerial vehicle in the direction of a military unit[10] were qualified under Article 114–1 of the Criminal Code. Such a state of law enforcement is not random, since it was actions seeking to obstruct combat operations or preparations for their implementation (such as blocking the movement of military equipment columns, military units, etc.) that primarily led to the enactment of the criminal law provision provided for in Article 114–1 of the Criminal Code of Ukraine. This statement is confirmed by referring to the transcript of the session of the Ukrainian parliament when the relevant draft law was considered,[11] among other factors.

7 Mykola Karchevskyy, "Infographics: Interactive Guide *Countering Crime in Ukraine* Version 3.0. (2023)," Karchevskyy.com, https://karchevskiy.com/i-dovidnyk/ (in Ukrainian).

8 Case no. 425/3250/14-к, Rubizhne city court of Luhansk region (June 12, 2017), The Unified State Register of Court Decisions, https://bit.ly/4hXUHNA (in Ukrainian).

9 Case no. 723/341/19, Storozhynets District Court of Chernivtsi Region (May 17, 2019), The Unified State Register of Court Decisions, https://reyestr.court.gov.ua/Review/81837770 (in Ukrainian).

10 Case no. 552/2404/20, Kyiv District Court of Poltava (June 2, 2020), The Unified State Register of Court Decisions, https://reyestr.court.gov.ua/Review/89566708 (in Ukrainian).

11 The transcript of meeting no. 21 of the fourth session of the Verkhovna Rada of Ukraine of the VII convocation dated April 8, 2014, https://www.rada.gov.ua/meeting/stenogr/show/5227.html.

According to the court statistics, the application of Article 114–1 of the Criminal Code of Ukraine significantly intensified after 2022, thus the next full calendar year (2023) was chosen for this study. According to the Unified National Register of Court Decisions of Ukraine, it was established that twelve verdicts were delivered in 2023 and entered into force during the same period.[12] Analysing them made it possible to identify the specificities of criminal cases under Art. 114–1 of the Criminal Code of Ukraine that may be of interest from the standpoint of substantive criminal law, according to the following criteria: (1) description of the formulation of the charge; (2) content of the charge; (3) motives for the criminal offence of which the person is accused; (4) circumstances mitigating or aggravating the punishment and the characteristics of the accused; (5) results of the discussion of the charges (punishment imposed, exoneration from serving it, conclusion of an agreement, etc.); (6) correct qualification of actions of persons who obstruct mobilisation or otherwise contribute to evasion of military duty under Article 114–1 of the Criminal Code of Ukraine.

Description of the Formulation of the Charge

Without going into the procedural details, which are not the subject of this study, attention should be drawn to the issues identified in the description of the charge under Art. 114–1 of the Criminal Code of Ukraine in the verdicts. It is established that the majority of court verdicts under Art. 114–1 of the Criminal Code of Ukraine (seven out of twelve) start with an excessively detailed presentation of the legal material in the context of the incriminated act, with an over-emphasis on many aspects of the political and military situation in Ukraine. It is notable that this part of the verdict, covering a considerable part of it, is in some cases characterised by a formulaic content.[13]

12 Although according to court statistics in 2023, 14 such verdicts were delivered, only those that became final in 2023 were used for the analysis.

13 A similar conclusion is drawn by V. Myslyvyi based on the results of his study of the practice of collaborative activity, although he also notes a gradual shift away from such

The so-called "preamble" in the motivational part of the verdict, which mainly describes the preconditions for martial law and the normative components of national security policy, ultimately has no particular criminal law relevance. Only in two of these seven verdicts does the court, in explaining the reasons for its decision, refer to "committing a crime under martial law" as an aggravating circumstance (the correctness of this decision will be discussed separately below). As for the compulsory element of the criminal offence under Art. 114–1 of the Criminal Code of Ukraine in the form of a special period,[14] its establishment and justification do not require such extensive explanations (it is sufficient to state that the special period is directly related to the introduction of martial law in Ukraine).

Moreover, there are certain regional specificities in the formulation of the charge, such as the use of the same arguments and verbal constructions to substantiate the corpus delicti established in the actions of the persons charged. As an example, one may consider two verdicts delivered by judges from the Cherkasy region in this regard. In particular, when describing the behaviour of the individuals in both cases, the judges stated that the incriminating actions led to socially dangerous consequences in the form of a failure with regard to: fully implementing mobilisation measures; establishing the state's mobilisation resource in due time; conscription and staffing of the Armed Forces of Ukraine and other military formations under martial law; keeping military records of conscripts, persons liable for military service, and reservists; and maintaining the Unified State Register of Conscripts, Persons liable for mili-

a material presentation. See: V. Myslyvyi, "'Latent' Characteristics of Subjective Features of Collaborative Activity in Court Judgments," in *Collaborationism in Temporarily Occupied Territories: Issues of Legal Assessment, Human Rights Guarantees, and Reintegration of Territories* (Odesa, 2023), 18 (in Ukrainian).

14 According to the Law of Ukraine "On Defense," a special period is the period beginning from the moment the decision on mobilisation (except for targeted mobilisation) is announced or brought to the attention of the executors regarding hidden mobilisation or from the moment martial law is introduced in Ukraine or certain areas of Ukraine and covers the time of mobilisation, wartime, and partially the reconstruction period after the end of hostilities.

tary service, and reservists. A similar trend can be observed in the practice of judges from the Ivano-Frankivsk region (three out of twelve verdicts), who also use the same formulations and language patterns.

The ostentatious templating, which can be observed on a regional basis in certain court decisions, is primarily due to the lack of experience in counteracting obstruction of mobilisation in the face of high-intensity war challenges. That is why the practice is beginning to be shaped by reference to previous court judgements. However, in this way, incorrect arguments or even openly inappropriate methods of structuring verdicts may be repeated.

Content of the Charge

The analysis of all verdicts shows that in eleven out of twelve verdicts, obstruction of the lawful activities of the Armed Forces of Ukraine or other military formations was reduced to the same type of behaviour, namely the creation and/or administration of channels (chats) in Internet messengers, which disseminated information about the places where military personnel were conducting mobilisation campaigns.

For instance, under one of the verdicts, the convict's actions were qualified as obstruction of the lawful activities of the Armed Forces of Ukraine and other military formations during a special period under Part 1 of Article 114–1 of the Criminal Code of Ukraine, given that he administered a channel on the Telegram messenger that disseminated information on the forms and methods of mobilisation activities in the city of Kyiv to an indefinite number of persons. In this way, the convict assisted persons evading military registration or otherwise violating the rules of military registration in avoiding receiving the relevant summonses. The court stated that the publication of the places where the military personnel of the recruitment centre[15] performed their tasks impedes the process

15 Territorial recruitment and social support centres in Ukraine, or in other words, recruitment centres, ensure the implementation of mobilisation training and mobilisation activities. See more details: Roman Khardel et al., "Opportunities to Improve the Efficiency of Mobiliza-

of notifying persons liable for military service and reservists and creates conditions for evasion of mobilisation measures during martial law. This reduces the mobilisation resources of persons eligible for military service.[16]

In another case, the creation and administration of a channel on the Internet messenger Telegram for posting information on the handing out of summonses by recruitment centre officers, which received a similar criminal law assessment, is described from the point of view of developing a mechanism for obstructing the lawful activities of military formations in the form of systematic posting of information that obstructs these activities.[17]

In only one verdict were actions to promote unjustified evasion of military service by a person liable for military service and a serviceman (for a reward) deemed to constitute obstruction of the lawful activities of the Armed Forces of Ukraine and other military formations. The convict provided him with a temporary certificate of a person liable for military service and a medical certificate confirming deregistration and therefore allowing him to be discharged from military service, in fact, without standing before the military medical commission.[18] Such a qualification appears extremely doubtful because there are all the necessary objective signs of obstruction of the lawful activities of military formations. This is an example when the inaccurate legislative wording, which formally established liability for obstructing almost any activity, is used for a broad interpretation of Article 114–1 of the Criminal Code of Ukraine (without taking into account its specifics and without clari-

tion Activities for Human Resources," *Topical Issues in Modern Science. Series: Public Administration* 3, no. 3(2024), https://doi.org/10.52058/2786-6300-2024-3(21)-462-474 (in Ukrainian).

16 Case no. 753/6889/23, Darnytskyi District Court of Kyiv (June 5, 2023), The Unified State Register of Court Decisions, https://reyestr.court.gov.ua/Review/111344469 (in Ukrainian).

17 Case no. 346/3338/23, Kolomyia City District Court of Ivano-Frankivsk region (September 14, 2023), The Unified State Register of Court Decisions, https://reyestr.court.gov.ua/Review/113471837 (in Ukrainian).

18 Case no. 175/556/23, Dnipropetrovs'k District Court of Dnipropetrovs'k Region (June 7, 2023), The Unified State Register of Court Decisions, https://reyestr.court.gov.ua/Review/111368762 (in Ukrainian).

fying its true meaning). In general, it seems that this qualification conceals another crime, but this is the subject of a separate research study.

The use of the same approach by judges in different regions of Ukraine when defining the concept of obstructing the lawful activities of the Armed Forces of Ukraine and other military formations is of interest. Some verdicts (four out of twelve) do include such a concept and formulate it in the same way, verbatim, reproducing the definition proposed by the scholar D. Oleinikov in one of his articles from 2014.[19] On the one hand, we should welcome judges' use of criminal law doctrine in arguing their position, and on the other hand, such use should be disclosed by the source (in this case, the academic paper by D. Oleinikov). Unfortunately, not all judges do so, although there are generally some contrasting examples (in cases of other criminal offences).

However, this is not the core issue. The problem is that this concept, which also has certain drawbacks, is applied without consideration of the context of the actual circumstances established in a particular case, etc.

Thus, obstruction of the lawful activities of the Armed Forces of Ukraine and other military formations is defined as commission of an act (actions or inaction), which is expressed in interference with these activities, or the creation of obstacles or barriers *aimed at preventing, stopping, or prohibiting certain actions* (italics mine) or manoeuvres of the Armed Forces of Ukraine and other military formations, and the and the making tactical or strategic decisions by the leadership or personnel of these units to complicate or make impossible the legitimate activities of the Armed Forces of Ukraine and other military formations or to significantly reduce their effectiveness.

Given that each of the four verdicts that use this concept to substantiate the fact of a socially dangerous act under Art. 114–1 of the Criminal Code of Ukraine involve the actions undertaken by the accused, such as the creation and/or administration of a channel in the Internet messenger Telegram

19 D. Oleinikov, "Criminal-Legal Characteristics of the Crime Provided by Article 114–1 of the Criminal Code of Ukraine," *Scientific Bulletin of Uzhhorod National University. Series: Law* 3, no. 27(2014): 56 (in Ukrainian).

(Viber), which consolidates and broadcasts messages with information about the place and time of mobilisation efforts, it is unlikely that such behaviour is intended to: (1) prevent, (2) stop, or (3) prohibit certain actions by military formations, which include recruitment centres. Actions to create or administer such channels only complicate the activities of military formations, since the posting of relevant information could not in fact cause the prevention, stopping, or prohibition of mobilisation activities. Despite the behaviour of the individuals charged, such activities continued but did not have the expected effectiveness (potentially, the number of men who could receive summonses was decreasing).

Moreover, some guilty verdicts contain provisions that essentially disprove the charge. For example, in some verdicts, it is clearly stated that the obstruction by the accused constitutes purposeful activity, which consists in illegal interference, creating obstacles and barriers *to prevent or stop the relevant lawful activities of military formations* (*italics mine*).[20] Alongside this, the individuals charged in the case are accused of creating and administering an Internet channel and using it to collect, consolidate and disseminate messages with information about the places and times of mobilisation campaigns on the territory of a territorial community (thus creating obstacles to the establishment of the mobilisation resource of the Ukrainian state). This means that there is no question of preventing or stopping the activities of military formations. The impediments created reduced the effectiveness and productivity of such activities and complicated them, but could not lead to the cessation of the activities on the part of military formations.

It is also worth noting that one of these verdicts reveals the focus of the accused's intent in such a way: the intent of the accused directly covered actions

20 Case no. 343/2557/23, Dolyna District Court of Ivano-Frankivsk Region (October 20, 2023), The Unified State Register of Court Decisions, https://reyestr.court.gov.ua/Review/114304551 (in Ukrainian); Case no. 344/9926/23, Ivano-Frankivsk City Court of Ivano-Frankivsk Region (July 26, 2023), The Unified State Register of Court Decisions, https://reyestr.court.gov.ua/Review/112424960 (in Ukrainian).

aimed at disrupting the activities of recruitment centres as military formations. This is even though the criminal offence under Art. 114–1 of the Criminal Code of Ukraine is classified as an offence against the foundations of national security and should be associated with the nature of the damage caused by obstructing the lawful activities of the Armed Forces of Ukraine and other military formations.

Motives for the Criminal Offence of Which the Person Is Accused

The motive is not a compulsory element of a criminal offence under Article 114–1 of the Criminal Code of Ukraine and therefore does not directly affect its qualification. At the same time, under the provisions of Article 374 of the Criminal Procedure Code (hereinafter referred to as the CPC) of Ukraine,[21] the court is obliged to indicate the motives for the criminal offence in the motivational part of the verdict.

Out of the twelve verdicts analysed, eight do not even mention the motive for the criminal offence that is being charged, that is, despite the law's requirements, internal reasons for committing an offence against the foundations of Ukraine's national security are not analysed at all.

In three verdicts, the courts concluded that the person had committed obstruction of the lawful activities of the Armed Forces of Ukraine and other military formations, guided by a mercenary motive (no mention was made of the other motives that would be associated with the direct object of the offence). In two of these three verdicts, it was established that the mercenary motive underlying the convict's actions was to make a profit by placing advertising messages for interested parties on thematic information channels.[22]

21 The Criminal Procedural Code of Ukraine, https://zakon.rada.gov.ua/laws/show/4651-17?lang=en#Text.

22 Case no. 344/9926/23, Ivano-Frankivsk City Court of Ivano-Frankivsk Region (July 26, 2023); Case no. 344/14510/23, Ivano-Frankivsk City Court of Ivano-Frankivsk Region

In another verdict, the court stated that the convict had *an imaginary* (*italics mine*) goal of helping fellow villagers and residents of Kamen-Kashirsky district to avoid military duty and military service, mobilisation training and mobilisation, and acted on *false* (*italics mine*) motives of saving their lives and health in this way, contrasting his insignificant ideas of ensuring the allegedly legitimate interests of people with the interests of national security and defence.[23] It should be noted that the court calls the motives of the person's behaviour false, and this raises certain doubts. It is unclear on what basis this falsity is based. It seems that such motives may be quite genuine and accurately reflect the motivation for activities related to the creation and administration of Viber chat and its use for collecting, consolidating, and disseminating messages with information about the places and times of mobilisation campaigns. It follows from the content of the verdict that it was the desire to prevent the mobilisation of other persons that led to the defendant's actions. Therefore, while such a motive can be considered base, it is characterised by a certain degree of altruism.

Circumstances Mitigating or Aggravating the Punishment and Characteristics of the Person Accused

The need to determine the circumstances mitigating or aggravating the punishment in the motivational part of the verdict follows from the provisions of Article 374 of the CPC of Ukraine. At the same time, five of the twelve verdicts reviewed in the course of the study do not contain any mention of these circumstances. The rest of the verdicts contain such mentions, some of which are noteworthy.

(October 16, 2023), The Unified State Register of Court Decisions, https://reyestr.court.gov.ua/Review/114193605 (in Ukrainian).

23 Case no. 157/1546/23, Kamen-Kashyrskyi District Court of the Volyn Region (October 2, 2023), The Unified State Register of Court Decisions, https://reyestr.court.gov.ua/Review/113902758 (in Ukrainian).

Seven verdicts include provisions on sincere remorse as a mitigating circumstance. Eight verdicts state that the offender had actively contributed to the disclosure of the criminal offence. Thus, these circumstances can be considered typical of the majority of the cases studied, and they are prevalent. As the most informative example, in one of the verdicts, the court described these circumstances as follows: (1) sincere remorse, which is expressed in the fact that the suspect admits his guilt, expresses regret for the deed, and wishes to rectify the situation (in particular, he stopped the administration and activities of the Viber group); (2) active assistance in investigating the crime, which means that the suspect gave detailed testimony about the activities and technical functioning of the Viber group and reported circumstances that were not known to the pre-trial investigation body.[24]

Some verdicts recognised as mitigating circumstances the fact that the accused transferred charitable assistance for 30,000 UAH to the needs of the Ukrainian army[25]; the accused did not cause material damage, transferred charitable assistance for 10,000 UAH to the account of the Armed Forces of Ukraine, and has a young child[26]; the accused transferred funds for 20,000 UAH to support the Ukrainian army, has no previous convictions, is described positively at his place of residence, takes care of his father-in-law, who has a disability, and has a young daughter.[27] It should be noted in this context that the fact of transferring funds for the purposes of the Armed Forces of Ukraine is considered a circumstance that presents the accused in a positive light. However, this circumstance, given the nature of the acts committed, was recorded in only three cases out of twelve researched.

It is also worth noting that in 100% of cases, the persons prosecuted fully admitted their guilt. As stated in one of the verdicts, the accused pleaded guilty to

24 Case no. 343/2557/23, Dolyna District Court of Ivano-Frankivsk Region (October 20, 2023).
25 Case no. 344/9926/23, Ivano-Frankivsk City Court of Ivano-Frankivsk Region (July 26, 2023).
26 Case no. 344/14510/23, Ivano-Frankivsk City Court of Ivano-Frankivsk Region (October 16, 2023).
27 Case no. 724/2179/23, Khotyn District Court of Chernivtsi Region (October 18, 2023), The Unified State Register of Court Decisions, https://reyestr.court.gov.ua/Review/114244290 (in Ukrainian).

the criminal offence in court in full and unconditionally.[28] Such an attitude on the part of these persons towards the offence correlates with the means of criminal legal sanctions applied to them, the specifics of which will be analysed below.

As for the aggravating circumstances, they are not established in the five verdicts, and it is clearly stated in their motivational parts. Instead, two verdicts contain provisions stating that an aggravating circumstance is "committing a crime under martial law."[29] This refers to the aggravating circumstance of "committing a crime *using the conditions of martial law or a state of emergency* (*italics mine*), other emergency events," as provided for in paragraph 11 of Part 1 of Article 67 of the Criminal Code of Ukraine.

The fact that this circumstance is met means that the crime is committed under martial law or a state of emergency, as well as in the context of other emergencies, and the perpetrator intentionally uses the situation to achieve his or her goal.[30] It should also be noted that at the beginning of the full-scale invasion of Ukraine by Russian troops, the Supreme Court addressed all citizens, explaining that committing a crime using martial law conditions encompasses cases where a person uses the most unfavourable time for society, difficult circumstances, and conditions in which society finds itself, which indicates an increased degree of public danger of crimes, to facilitate the commission of a criminal offence. That is why the court will sentence persons found of criminal offences during the *period* (*italics mine*) of martial law with due regard to this aggravating circumstance, i.e., the type and scope of the sentence will be close to the maximum limit provided for by the Criminal Code of Ukraine.[31]

28 Case no. 344/14510/23, Ivano-Frankivsk City Court of Ivano-Frankivsk Region (October 16, 2023).

29 Case no. 344/14510/23, Ivano-Frankivsk City Court of Ivano-Frankivsk Region (October 16, 2023); Case no. 343/2557/23, Dolyna District Court of Ivano-Frankivsk Region (October 20, 2023).

30 M. Melnyk and M. Khavroniuk, eds., *Academic and Practical Commentary on the Criminal Code of Ukraine* (Yurydychna dumka, 2018), 193 (in Ukrainian).

31 The penalty for committing a criminal offence under martial law will be close to the maximum limit provided by the Criminal Code of Ukraine, Supreme Court (March 4, 2022), https://supreme.court.gov.ua/supreme/pres-centr/news/1261723/ (in Ukrainian).

With this clarification, the Supreme Court of Ukraine has effectively equated committing a criminal offence under martial law with its being committed during the period of martial law.[32]

Returning to the verdicts in which judges recognised the commission of a crime under martial law as an aggravating circumstance, it is important to point out that the establishment of this circumstance did not affect the punishment imposed. The appropriateness of including martial law conditions in such a category of circumstances in the cases under consideration is a separate issue and is questionable, as discussed below. Thus, in one verdict, a person convicted of a crime under Part 1 of Article 114–1 of the Criminal Code of Ukraine was sentenced to a fine of 6,000 tax-free minimum income, equivalent to UAH 102,000, with the application of Article 69 of the Criminal Code of Ukraine.[33] In other words, this is even a milder punishment than that provided for in the sanction of Part 1 of Article 114–1 of the Criminal Code of Ukraine. In another verdict for committing a similar crime, the court sentenced the person to the minimum of all possible punishments in the form of imprisonment for a term of 5 years and released him from serving his sentence with probation. Thus, how did the established circumstance, which should have been an aggravating factor, have an impact on the decision? It is difficult to explain.[34]

32 It seems that the approach outlined above cannot be viewed as unambiguous. It rightly raises some questions. Since during martial law and in its conditions, the circumstances of a criminal offence are not identical. The time of martial law is more universal and applies to any act committed during the relevant period. The use of martial law conditions does not characterise any act, but only where this situation affects or determines the behaviour of a person, facilitates the commission of a criminal offence, etc.

33 This provision makes it possible, as an exception, to impose a sentence that is less severe than the sanction of the article of the Criminal Code of Ukraine under which the act is qualified.

34 Significantly, in both of these cases, much attention is paid to the so-called martial law preamble, which begins the motivational part of the verdicts. However, why overload the prosecution's statement with the history of martial law if the relevant feature does not ultimately have any criminal legal consequences? Why, among other points, is it necessary to state, in support of the charge, that the aggressor carried out fire strikes on objects protected by international humanitarian law and that these actions led to grave consequences in the form of deaths, bodily injuries of varying severity, and material damage in the form of the destruction of buildings, property, and infrastructure? How does this ultimately correlate with the imposition of a minimum sentence?

As for the question of whether the relevant circumstance should have been indicated as an aggravating factor, in my opinion, the answer should be negative. That is why those judges—the absolute majority of them—who did not specify such a circumstance in their verdicts acted correctly and legally. This position is substantiated by the fact that a mandatory constitutional feature of the crime under Article 114–1 of the Criminal Code of Ukraine is the time of its commission, which is a special period covering the time that begins from the moment the decision on mobilisation is announced.[35]

The Results of Considering the Case (Conviction, Punishment, Release from Serving It, Concluding an Agreement, etc.)

All of the verdicts delivered during the period under review were guilty verdicts, which means that in each of them the persons accused of committing the crime under Part 1 of Art. 114–1 of the Criminal Code of Ukraine were convicted. At the same time, the absolute majority of verdicts (eleven out of twelve) were passed with the approval of plea agreements, and the punishment was imposed by Part 5 of Art. 65 of the Criminal Code of Ukraine, i.e., the punishment agreed by the parties to the agreement.

In eight cases, the minimum punishment established in the sanction of Part 1 of Article 114–1 of the Criminal Code of Ukraine, namely imprisonment for a term of five years, was imposed. Along with that, the individuals convicted were released from serving this punishment on probation under Art. 75 of the Criminal Code of Ukraine with different probationary periods, the most common of which is two years (in seven cases).

A similar release from serving a punishment was applied in two more verdicts (i.e., in total, in ten out of twelve), with the only difference being that in

35 On Mobilization Preparation and Mobilization: The Law of Ukraine, https://zakon.rada.gov.ua/laws/show/3543-12#Text.

these cases the individuals convicted were sentenced to a less severe punishment of three years imprisonment and released from serving it. In at least one of the cases, doubts arise as to the legality and validity of the imposition of a sentence less severe than that provided for by law, in terms of establishing several circumstances that mitigate the punishment and *significantly* (*italics mine*) reduce the severity of the criminal offence. It is extremely doubtful whether the fact that the accused has no previous convictions, is not registered with a psychoneurological or narcological clinic, is single, has no children, is officially employed, and exhibits a positive character is considered to be one of these circumstances.[36] Thus, given the above, it appears that the court had no right to approve such an agreement and, guided by paragraph 1 of part 7 of Article 471 of the CPC of Ukraine, should have refused to approve it.

Attention should also be drawn to the fact that, in general, five out of twelve verdicts imposed a punishment that was less severe than that provided for by law. At the same time, in the remaining three, the court moved to another, milder type of basic punishment not covered by the sanction of Part 1 of Article 114–1 of the Criminal Code of Ukraine. This is a fine that is not reasonably provided for for crimes against the foundations of national security,[37] given the typical nature of the public danger of the relevant offences and their general object.

The situation when the vast majority of verdicts under Art. 114–1 of the Criminal Code of Ukraine are passed with the conclusion of plea agreements and, at the same time, the imposition of the punishment that is the least severe under the sanction or even more lenient makes it possible to express the following considerations. Firstly, the total widespread use of plea agreements in the practice of applying Article 114–1 of the Criminal Code of Ukraine limits

36 Case no. 645/3550/23, Frunzensky District Court of Kharkiv (October 26, 2023), The Unified State Register of Court Decisions, https://reyestr.court.gov.ua/Review/114467250 (in Ukrainian).

37 The only exception is Part 4 of Article 111–1 of the Criminal Code of Ukraine, which provides for liability for so-called economic collaborative activity.

the possibilities for appealing against them. This, in turn, results in a lack of effective judicial control in such cases. This study demonstrates that some verdicts under Art. 114–1 of the Criminal Code of Ukraine most likely contain misapplications of both substantive and procedural criminal laws. As a result, a line of law enforcement practice is formed, which is gradually established and, despite the identified flaws that are not being corrected, becomes a guideline for similar cases. Secondly, the application of such a lenient punishment to persons who commit acts related to obstruction of mobilisation in all the cases studied indicates that the relevant behaviour may be wrongly qualified, as will be discussed in the next section of the article (application of an improper criminal law provision).

Correctness of Qualification of the Actions Performed by Persons Who Obstruct Mobilisation or Otherwise Contribute to Evasion of Military Duty Under Article 114–1 of the Criminal Code of Ukraine

The study of all verdicts delivered under Article 114–1 of the Criminal Code of Ukraine demonstrates the tendency to give a legal assessment of the same type of behaviour, which is manifested in the form of obstructing the actions of military personnel in carrying out mobilisation activities. These actions are primarily limited to the creation and/or administration of special channels (chats) in Internet messengers to inform about the place and time of such events. Such behaviour does not seem to come under Art. 114–1 of the Criminal Code of Ukraine, and the subjects of qualification make a mistake, namely, they admit the corpus delicti in the committed act, which does not contain some objective features of the corpus delicti under Art. 114–1 of the Criminal Code of Ukraine.

This conclusion can be drawn by comparing the features (factual circumstances) of the acts of behaviour described in the verdicts studied with the features of the offence under Article 114–1 of the Criminal Code of Ukraine. In particular, it seems that the legal position reflected in the verdicts indicates

an attempt to interpret literally the criminal law provision on liability for obstructing the lawful activities of the Armed Forces of Ukraine and other military formations, and this is not justified for this provision, as otherwise its true meaning is distorted. Such content should be consistent with the purpose of this prohibition, which is to ensure the protection of national security. Given that not all actions that involve obstructing the lawful activities of military formations can be considered as threatening the national security of Ukraine, Article 114–1 of the Criminal Code of Ukraine should be interpreted in this part not literally but restrictively. This means that liability should not be imposed for obstruction of any lawful activity, including, in particular, economic or recruitment activities, but only for such activities that are directly related to ensuring the national security of Ukraine, including preparation for and conduct of combat operations. In the literature, there are reasonable proposals to define in Article 114–1 of the Criminal Code of Ukraine the forms of obstruction and types of "lawful activity" of the Armed Forces of Ukraine or other military formations, since such activity has a rather broad interpretation.[38]

The conclusion drawn based on the analysis of the actual data indicates that the criminal legislation of Ukraine is erroneously applied to persons who obstruct mobilisation and necessitates amendments to it by establishing separate grounds of liability for obstructing mobilisation or contributing to its avoidance with the establishment of a sanction that would proportionally reflect the level of social harmfulness of this behaviour.[39] This approach is consistent with the position that Ukraine needs to introduce evidence-based policy

38 A. Politova, "Issues of the Objective Side of Hindering the Lawful Activities of the Armed Forces of Ukraine and Other Military Formations," in *Current Issues of Theory and Practice in Law, Education, Social, and Behavioral Sciences – 2020*, ed. O. Tohochynskyi Chernihiv, 2020, 218 (in Ukrainian).

39 This refers to the idea of introducing Article 337–1 to the Criminal Code of Ukraine, which would establish liability for obstructing mobilization or other actions that contribute to the avoidance of mobilization by a third person during a special period (see more: Yevhen Oleksandrovych Pysmenskyy, "Criminal-Legal Qualification of Hindering Mobilization (Current Law Enforcement Practice and Legislative Improvement Prospects)," *Legal Journal of Donbas*, no. 1(86) (2024), https://doi.org/10.32782/2523-4269-2024-86-65-71 (in Ukrainian).

making (EBPM)[40] as soon as possible, which will allow criminal law policy to be formed not on the basis of prognostications and assumptions but the actual results of law enforcement activities and generalised data on them.

Conclusions

The research on the practice of applying Article 114–1 of the Criminal Code of Ukraine on liability for obstructing the lawful activities of the Armed Forces of Ukraine and other military formations during a special period, in the context of the full-scale invasion of Ukraine by Russian troops showed that this provision was used as a tool to respond to the behaviour of persons who obstruct the mobilisation of the population.

The study of the relevant court verdicts also revealed several other peculiarities of the implementation of the criminal law policy on countering obstruction of mobilisation. Firstly, there are signs of templating in the description of the formulation of the charges, and they may also differ by region. This situation occurs primarily because until 2023, there were no cases of behaviour to obstruct mobilisation committed in a manner that became widespread in the context of a high-intensity war. Consequently, the practice is only just beginning to form its own trajectory. Secondly, the application of 114–1 of the Criminal Code of Ukraine in the vast majority of cases was limited to responding to the same type of behaviour of obstructing mobilisation, namely, the creation and/or administration of channels (chats) in Internet messengers that disseminated information about the places where military personnel were conducting mobilisation campaigns. Thirdly, a significant flaw in most of the verdicts studied is the missing motive for obstructing mobilisation, even though this subjective feature is key to

40 Vladislav Rashkovan, "To Avoid What Happened with the Blacksmith and the Tractor Driver: What's Wrong with Ukrainian Politics?," Liga.net, published January 3, 2024, https://www.liga.net/ua/all/opinion/dvi-osnovni-problemy-ukrainskoi-polityky (in Ukrainian); Paul Cairney, *The Politics of Evidence-Based Policy Making* (Palgrave Pivot London, 2016), https://doi.org/10.1057/978-1-137-51781-4_2.

understanding the full nature of the act. Fourthly, in some verdicts, the transfer of funds for the purposes of the Ukrainian army was recognised as a mitigating circumstance, which, in the context of the ongoing war and due to the kind of act committed, can be recognised as a positive law enforcement practice. In contrast, the rare practice of recognising the commission of a crime under martial law as an aggravating circumstance should be acknowledged as negative, given that the relevant element is reflected as a compulsory crime-forming element under Article 114–1 of the Criminal Code of Ukraine. Fifth. The vast majority of verdicts are delivered after approval of plea agreements, and the punishment is imposed by agreement of its parties, which are the prosecutor and the accused. The punishments imposed by the court are the mildest of those provided for by the sanction of Article 114–1 of the Criminal Code of Ukraine (simultaneously, the release from serving the sentence is applied), or in some cases, the punishment is even more lenient. Hence, the sanction of Article 114–1 of the Criminal Code of Ukraine does not apply to persons who obstruct mobilisation. Sixthly, the situation revealed with punishment points to the fact that an inappropriate criminal law provision is used for counteracting obstruction of mobilisation, which has a different (more serious) focus, directly related to the damage to the national security of Ukraine. As a result, it is proposed that separate grounds of criminal liability for obstructing mobilisation or promoting its avoidance should be introduced, with a sanction commensurate to the level of harmfulness of this act.

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Functioning of Procedural Agreements in the Polish Legal System in Comparison with the Solutions Adopted by German Legislation

Abstract: The history of consensual litigation in Polish criminal proceedings dates back to the 1990s. It is based on the assumption that the participants in the proceedings will come to an agreement on the resolution of the conflict, which will then be accepted by the court. This solution was most popular between 2010 and 2015. Since 2016, however, a change in attitudes towards consensual modes has been very noticeable. While the consensual method speeds up criminal proceedings, opponents point to shortcomings - there are even calls to abandon their use in Poland. In the Federal Republic of Germany, on the other hand, informal procedural agreements, called *Absprachen*, existed for several decades, and these agreements accelerated the course of proceedings. However, it was only decided to regulate this issue after several decades. In this article, I will characterise the reasons for the introduction and development of procedural agreements in the Republic of Poland and in the Federal Republic of Germany.

Keywords: consensual proceedings, Republic of Poland, Federal Republic of Germany, procedural solutions, comparative analysis

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Introduction

In the evolution of criminal procedure over the last decades, one can see a mutual convergence of European legal systems in criminal matters. This trend is of an objective nature, so to speak, resulting primarily from the processes of globalisation and the economisation of the process. It involves both legislative changes and changes in procedural practice. It is no different with consensual agreements.

In Western European countries, such as Germany, Italy or Spain, litigation agreements have a long history.[2] In contrast, consensual forms of ending criminal proceedings have only existed in Polish criminal procedure since 1 January 1998. After many intense discussions within the Codification Committee in the 1990s, it was decided to introduce procedural solutions that functioned well in other countries and contributed immensely to curbing the growth in crime. Following the example of other European countries, the Act of 6 June 1997, the Code of Criminal Procedure,[3] introduced two consensual institutions, constituting a novel aspect of the criminal process.[4] The precursors for the Polish legislator were primarily the Spanish institution known as *conformidad* and the Italian institutions known as *patteggiamento* and *processo abreviado*.[5] While the legal solutions introduced were novel, the agreements themselves between the participants in the process did not represent anything groundbreaking.

The main premise of consensual proceedings is that the litigants themselves come to an agreement on the resolution of the conflict, which is subsequently accepted by the court. According to S. Steinborn, a consensual agreement is an agreement that must be concluded by at least two litigants, within the limits of their

2 Katarzyna Urbanowicz, "Formy konsensualizmu procesowego w świetle ostatnich nowelizacji Kodeksu postępowania karnego," *Zeszyt Studencki Kół Naukowych Wydziału Prawa i Administracji UAM*, no. 6(2016): 257.

3 Journal of Laws of 1997, no. 89, item 555, hereinafter: Code of Criminal Procedure.

4 Stanisław Waltoś, "Nowe instytucje w kodeksie postępowania karnego z 1997 roku," *Państwo i Prawo*, no. 8(1997): 26–27.

5 Anna Malicka, "Koncepcja porozumienia w polskim postępowaniu karnym," *Wrocławskie Studia Erazmiańskie. Zeszyty Studenckie*, no. 1(2008): 192.

powers. It is based on the fact that in order to obtain a favourable procedural situation for themselves, and at the same time make concessions to the other party, the parties to an agreement reach a compromise on an issue of importance for the course of the criminal trial or the substantive outcome.[6] According to S. Waltos, a procedural agreement should be understood as an agreement concluded by accused with the public prosecutor and the injured party, or even the procedural authority. Under this agreement, in exchange for a specific performance by the accused, a more favourable outcome will be offered than the one that could have been expected without the conduct.[7]

On the basis of Polish procedural law, consensual forms of ending a criminal trial are the institutions of sentencing without a trial, functioning in two variants, i.e. with an admission of guilt by the accused (art. 335 § 1 of the Code of Criminal Procedure) and without an admission of guilt (art. 335 § 2 of the Code of Criminal Procedure) and without admitting guilt (Article 335 § 2 of the Code of Criminal Procedure), as well as the so-called voluntary submission to punishment, which is also possible in two variants, i.e. before the commencement of the trial (Article 338a of the Code of Criminal Procedure) and after the commencement of the trial (Article 387 of the Code of Criminal Procedure).[8]

In the Federal Republic of Germany, on the other hand, with a view to judicial efficiency, informal procedural agreements in trial were made possible as early as the 1960s. Among the most important procedural principles in the German legal system is the principle of concentration (from the German *Konzentrationsmaxime*), within which the injunction to speed up the process (from the German *Beschleunigungsgebot*) stands out. The best example

6 Sławomir Steinborn, *Porozumienia w polskim procesie karnym: skazanie bez rozprawy i dobrowolne poddanie się odpowiedzialności karnej* (Kantor Wydawniczy „Zakamycze," 2005), 30.

7 Stanisław Waltoś, "Porozumienia w polskim procesie karnym *de lege lata* i *de lege ferenda*," *Państwo i Prawo*, no. 7(1992): 36.

8 Piotr Karlik, "Postępowania szczególne," in *Polski proces karny*, ed. Paweł Wiliński (Wolters Kluwer Polska, 2023), 629.

of the implementation of this injunction is actually informal agreements (from the German *Abprachen*).[9]

It must be borne in mind that these were informal agreements. Therefore, the sentencing courts put pressure on defendants to plead guilty in order to simplify and speed up the trial. As early as the 1960s, this problem was recognised by the Federal Court of Justice (from the German Bundesgerichtshof[10]). Unfortunately, it was not resolved immediately, leading to constant pressure on defendants over the following decades.

It was not until the Federal Court of Justice's judgment of 28 August 1997 that the institution of agreements was 'legalised' in a way.[11] However, this was legislated much later, i.e. in 2009.[12]

The following part of the article will characterise the reasons for introducing and developing procedural agreements in the Republic of Poland and in the Federal Republic of Germany. This will make it possible to see significant differences in the approach to these institutions in the two different legal systems.

Sentencing Without Trial in Polish Criminal Proceedings

The institution of sentencing without trial is a basic form of procedural agreements. In its original wording, it applied to misdemeanours punishable by up to 5 years' imprisonment. As a result of successive amendments, the scope of application of the regulation was gradually extended until, in 2013, all misdemeanours were covered. Modifications introduced in 2015–2016 resulted in the implementation of two variants of this solution.[13]

9 Hans-Heiner Kühne, *Strafprozessrecht. Eine systematische Darstellung des deutschen und europäischen Strafverfahrensrechts* (C.F. Müller, 2009), 146–50.

10 Abbrevation BGH.

11 Thomas Weigend, "Urteilsabsprachen in Deutschland," in *Nauki penalne wobec problemów współczesnej przestępczości. Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Andrzeja Gaberle*, ed. Krzysztof Krajewski (Oficyna a Wolters Kluwer business, 2007), 309.

12 Kühne, *Strafprozessrecht*, 484.

13 Piotr Karlik, *Postępowanie konsensualne i szczególne w procesie karnym. Praktyczny przewodnik ze wzorami pism* (Wolters Kluwer Polska, 2017), 21.

In the first option, the accused admits his guilt. Moreover, in the light of his explanations, the circumstances of the commission of the offence and the question of guilt are not in doubt and his attitude clearly indicates that the objectives of the proceedings will be achieved. In the second option, on the other hand, the circumstances of the offence and the question of guilt are also not in doubt and his attitude indicates that the objectives of the proceedings will be achieved. However, in the second case, the condition of pleading guilty has been waived.[14]

This is a fundamental distinction that affects the subsequent stage of the proceedings. Even if the suspect admits guilt, the necessary steps must be taken to secure traces and evidence against their potential loss, distortion or destruction. This is important because a confession may only be a temporary procedural tactic for some suspects.

In the first option, the prosecutor applies to the court for a conviction and the imposition of penalties or other punitive measures agreed with the accused. This is not an indictment, but a surrogate indictment. The suspect has the opportunity to reach an agreement with the prosecutor on the sanction for the alleged offence. In doing so, the suspect may be assisted by a professional defence counsel. The prosecutor, on the other hand, is obliged to take into account the legally protected interest of the victim in this agreement.[15] This is important insofar as taking into account the legally protected interest of the victim is one of the main objectives of criminal proceedings.

In the second option, the prosecutor sends a simple indictment to the court, accompanied by a request for a conviction and the imposition of agreed penalties or other measures with the accused. This is quite exceptional, as, on the one hand, the guilt and the circumstances surrounding the commission of the offence are supposed to be beyond doubt and, on the other hand, the accused does not admit guilt. However, this can easily be explained. Sometimes a person admits to the act itself, but not to guilt. Moreover, it is the trial

14 Katarzyna Dudka, ed., *Kodeks postępowania karnego. Komentarz* (Wolters Kluwer, 2023), 750.

15 Dudka, ed., *Kodeks postępowania karnego*, 754.

authority that must be convinced of the absence of doubt, meaning the pre-trial investigator's belief is only subjective. Ultimately, the absence of contradictions between the accused's evidentiary statements and the findings made will eliminate any definitive doubts.[16]

One very important element of consensual proceedings is the application for conviction without trial. This is the case regardless of whether it is a standalone application or an annex to the indictment. It is subject to formal control, which is carried out by the president of the competent court or another authorised person. If all formal conditions are met, the case is referred to a hearing. This hearing may be attended by the victim, the prosecutor and the accused, i.e. the parties to the proceedings, about which they are informed in advance.[17]

It is the court's task to legalise such an agreement. At the same time, the court grants the prosecutor's application only if it is not opposed by the victim. The victim thus has the opportunity to have a real impact not only on the course of the proceedings, but also on the final content of the agreement.

The court may also make granting the application subject to a specific amendment or amendments being made to it. The role of the court is to ensure that the objectives of the proceedings are met. However, it should not be forgotten that any amendment to such an agreement must ultimately be approved by the accused.[18] However, it cannot be overlooked that in this case the accused's procedural position is not particularly strong, especially when he has already formally admitted to having committed certain criminal acts.

Therefore, the agreement reached must be balanced and should satisfy all parties. In the absence of any objection, the court passes sentence at a hearing. It is important that the court informs the defendant of the limited possibility of appealing against the verdict under this procedure, but this should be done before a final decision is reached. However, the court is not required to grant the

16 Dariusz Świecki, ed., *Kodeks postępowania karnego. Komentarz, Vol. 1: Art. 1–424* (Wolters Kluwer, 2024), 1223.

17 Jerzy Skorupka, ed., *Proces karny* (Wolters Kluwer Polska, 2022), 640.

18 Świecki, ed., *Kodeks postępowania karnego*, 1222.

prosecutor's application, which triggers further proceedings. If it was an independent complaint, the court returns the case to the prosecutor for further proceedings. However, the situation is different in the case of a motion attached to an indictment. In such a situation, the prosecutor merely supplements the indictment with the missing elements.[19]

Voluntary Submission to Penalty in Polish Criminal Proceedings

The second form of consensual proceedings is the institution of voluntary submission to punishment. Unlike the institution of conviction without trial, it is only possible at a later stage of criminal proceedings. Voluntary submission to punishment originates from the Fiscal Penal Code, which earlier allowed for the possibility to agree on criminal liability.[20]

Originally, it covered acts punishable by up to eight years' imprisonment. Over the years, numerous amendments extended the scope to cover all misdemeanours and then to include felonies. In 2016, it was finally established that voluntary surrender could apply to acts punishable by up to 15 years of imprisonment.[21] Moreover, the amendment of 27 September 2013 resulted in the stratification of this institution by introducing Article 338a of the Code of Criminal Procedure. Currently, voluntary surrender to punishment operates in two variants: before the trial begins and after the trial has already begun.[22]

19 Dariusz Świecki, "Ograniczenie podstaw odwoławczych do wniesienia apelacji w trybach konsensualnych (art. 447 § 5 k.p.k.)," *Przegląd Sądowy*, no. 9(2019): 26.

20 Karlik, *Postępowanie konsensualne i szczególne w procesie karnym*, 49.

21 Piotr K. Sowiński, "Kształtowanie się dobrowolnego poddania się karze w trybie 338a i 387 k.p.k. Kilka uwag na tle zmian 1997–2016," *Zeszyty Naukowe Uniwersytetu Rzeszowskiego*, no. 102(2018): 231, https://doi.org/10.15584/znurprawo.2018.23.17.

22 Urbanowicz, "Formy konsensualizmu procesowego w świetle ostatnich nowelizacji Kodeksu postępowania karnego," 266.

This institution also consists of an agreement between the participants in the proceedings on the issue of the final outcome, but the initiative for the agreement comes from the accused. This is a characteristic feature of this procedural solution. The accused is motivated by the possibility of obtaining a more favourable outcome. However, in this procedural arrangement, he or she is in a worse position than a suspect at the pre-trial stage negotiating a plea bargain without a trial. This concerns the inevitability of the accused suffering the consequences of his or her actions. Voluntary surrender is a kind of fallback option for the accused, the last possible option to enter into an agreement with the prosecutor.[23]

The accused has the chance to take the initiative only after the indictment has been brought before the court. Before being served with the notice of the date of the trial, the accused may submit a request for a verdict and imposing a specific penalty or measure, forfeiture or compensatory measure without taking evidence. This is the first variant of voluntary surrender to punishment set out in Article 338a of the Code of Criminal Procedure mentioned previously. It is important to note that the accused need neither plead guilty nor give an explanation at this stage.

The application submitted by the accused shall be subject to examination. If it meets all formal requirements and is fit for consideration, the application may be referred to a hearing. Such a hearing may be attended by the parties and even by a victim who has not yet acted as an auxiliary prosecutor. The aforementioned parties shall be served with a copy of the accused's letter in order to familiarise themselves with it and, ultimately, to be able to make their own submissions.[24]

To grant the application made by the defendant the court must be convinced of the circumstances of the offence and the defendant's guilt. Moreover, the attitude of the accused himself should suggest that the objectives of the

23 Ryszard A. Stefański and Stanisław Zabłocki, eds., *Kodeks postępowania karnego. Tom 3. Komentarz do art. 297–424* (Wolters Kluwer Polska, 2021), 861.

24 Katarzyna Dudka and Hanna Paluszkiewicz, *Postępowanie karne* (Wolters Kluwer, 2022), 543.

proceedings will be achieved. At the same time, granting the application is only possible if the prosecutor and the victim do not oppose it. Therefore, the proposal put forward by the accused should be carefully thought out. It must satisfy the legally protected interests of the victim as well as the prosecutor's expectations regarding the level of punishment. The defendant should be aware of the expectations of these parties in good time, which should result in a request for voluntary submission to sentence. The court may also grant a request after prior modification.[25]

However, before granting the application itself, the court is always obliged to inform the accused of the limited possibilities of appealing against such a judgment. If the court grants the defendant's request, it sentences him or her to the agreed punishment and imposes the accepted punitive and compensatory measures, as well as other incidental issues.[26]

There is a second option for voluntary surrender of sentence. A request for a conviction and the imposition of a specific sentence on the accused can also be made at a later date. The time limit is when the hearing of all defendants at the main hearing has been completed.[27] This is the final moment to conclude procedural agreements.

As with the first variant of voluntary surrender, such a request may relate to any offence punishable by up to 15 years' imprisonment. Moreover, the prerequisites for granting such a plea are almost identical to those for the previous option. The circumstances of the offence and the guilt of the accused cannot be doubted. At the same time, the achievement of the proceedings' objectives has not been tied to the offender's attitude. This is a rather questionable solution, and one which is difficult to justify.

The granting of the motion is possible if the prosecutor agrees and the victim, duly notified of the date of the hearing, does not object. This is a solution in-

25 Piotr Hofmański and Stanisław Waltoś, *Proces karny. Zarys systemu* (Wolters Kluwer, 2023), 313.
26 Karlik, "Postępowania szczególne," 635.
27 Skorupka, ed., *Proces karny*, 692.

troduced by the Act of 7 July 2022 amending the Act - Criminal Code and certain other acts.[28] The rules on procedural agreements have been amended numerous times, but this law significantly affects the scope of this institution. The amendment replaces the 'no objection' condition of the prosecutor at the defendant's request for a conviction with a 'consent' condition.[29]

It is worth pointing out that in the original wording of Article 387 of the Code of Criminal Procedure, the condition of consent was indicated. Realising that consent may generate protraction of consensual modes, by virtue of the amendment of the Code of Criminal Procedure of 10 January 2003, the legislator consciously abandoned the previously adopted solution, introducing 'no objection' for both the prosecutor and the victim.[30]

However, this is a problematic and even inconsistent change. If it was necessary to introduce the requirement of consent, instead of the absence of objection, the legislator, in order to guarantee the consistency of the legal system, should also make changes with regard to the institution of Article 338a in connection with Article 343a of the Code of Criminal Procedure. This is practically a dual solution, which has remained unchanged.[31]

At the same time, it is ultimately up to the court to grant the application. It has the power to make the granting of the application conditional on certain amendments being made to the application. In addition, the court is obliged to instruct the accused of the limited possibilities to lodge an appeal in respect of this form of consensual agreement.[32]

28 Journal of Laws of 2023, item 1860.

29 Joanna Mierzwińska-Lorencka, *Kodeks karny. Kodeks postępowania karnego. Podsumowanie zmian 2023* (Wolters Kluwer, 2024), 71.

30 Cezary Kulesza, ed., *Ocena funkcjonowania porozumień procesowych w praktyce wymiaru sprawiedliwości* (Oficyna a Wolters Kluwer business, 2009), 59.

31 Mierzwińska-Lorencka, *Kodeks karny*, 71.

32 Świecki, ed., *Kodeks postępowania karnego*, 1447.

Genesis of Informal Agreements (Absprachen)

In the interests of judicial efficiency, informal agreements were made possible in German trials as early as the 1960s. Informal agreements from the German *Absprachen* were both an expression of the order to expedite the trial (*Beschleunigungsgebot*) and a manifestation of economy in the broader sense (*Wirtschftlichkeit*).[33]

Yet the most important principles in the German criminal process are the principle of legalism, the principle of free assessment of evidence, the principle of openness, and the principle of the contradictory. For many German lawyers, reducing these in favour expedited proceedings was unnecessary, if not impossible. For this reason, informal agreements have become a problematic topic.

Agreements emerged in the context of identifying economic crimes, as the complex nature of the cases made the participants in these proceedings the most likely candidates for the kind of negotiations that would simplify the whole process. They were, however, kept secret. They were widely regarded as violating the principle of legalism and the basis for ex officio prosecution. For this reason the discussions held were not even minuted. Moreover, they took place outside the courtroom. As a rule, the accused was not involved in the negotiations, and, like the jurors, was subsequently informed of the results of the discussions.[34] This form of agreements led to many irregularities, above all, with pressure being exerted on defendants to plead guilty in order to simplify and speed up the trial.

Informal Agreements and Procedural Rules

The academic debate on the legitimacy and form of procedural agreements did not begin until the 1980s.[35] The importance of the problem is determined by the

33 Kühne, *Strafprozessrecht*, 152–54.

34 Stephen C. Thaman, "Plea Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases," *Electronic Journal of Comparative Law* 11, no. 3(2007): 43–44.

35 Julia Peters, *Urteilsabsprachen im Strafprozess. Die deutsche Regelung im Vergleich mit Entwicklungen in England & Wales, Frankreich und Polen* (Universitätsverlag Göttingen, 2011), 7.

fact that lawyers could not agree on the actual name of these agreements. Among the works on the subject from that period, one can find many terms such as negotiation, consent, transaction or agreement. Understanding the essence of an agreement depended primarily on the point of view of the author of the publication. This was the main reason for the diversity in the terminology.

Numerous critical discussions appear in the German literature. Many legal scholars opposed the development of procedural agreements in the criminal process. One of the main objections raised in the discussions was that the principle of material truth was not respected or even violated. It was argued that if the overriding objective of the negotiations being conducted is to save money and speed up the proceedings, a comprehensive clarification of the facts cannot be expected.[36] According to critics of the procedural agreements, this could lead to a selective perception of the entire proceedings being conducted.

The next plea was a violation of the principle of free assessment of evidence. In the case of such procedural agreements, the court does not rely on the entire body of evidence when deciding a particular case. The outcome of the discussions held outside the trial determines the outcome of the case.[37]

Procedural agreements were also found to be contrary to the principle of openness. This principle is explicitly stated in German procedural law. It serves first and foremost to control state power and to protect the individual against arbitrary actions taken by state authorities. The principle of openness is one of the fundamental principles of the German criminal process, and is also a mainstay of the rule of law and democracy. For this reason, procedural agreements have been subject to enormous criticism. The problem is that instead of being reached at the trial, agreements were reached 'in the back room'.[38] This practice raised justified doubts about the legitimacy of the discussions.

36 Ralf Tscherwinka, *Absprachen im Strafprozeß* (Peter Lang AG International Academic Publishers, 1995), 20.

37 Thomas Rönnau, *Die Absprache im Strafprozeß* (Nomos,1990), 155.

38 Werner Beulke, *Strafprozessrecht* (C.F. Müller, 1994), 376.

It was widely believed that the agreements were incompatible with the principle of legality. Opponents of the agreements unanimously reiterated that there could be no legality when opportunistic solutions were used arbitrarily. They considered it unnecessary and against the law.[39]

Informal Agreements in the Rulings of German Courts

The problem of informal agreements has been evident since the early 1960s. The constitutionality of procedural agreements was questioned, as was their legitimacy. In 1987, the Federal Constitutional Court of the German Bundesverfassungsgericht[40] ruled on the subject. The Constitutional Court of the Federal Republic of Germany held that the conduct of fair criminal proceedings in accordance with the supreme procedural principles does not preclude an agreement between the court and the trial participants. At the same time, the court should feel obliged to continue gathering evidence. The court cannot rely solely on the explanations of the accused.[41]

In addition, the problem of informal procedural agreements has been addressed on numerous occasions in the decisions of the Senates of the Federal Court of Justice. During the course of the 1980s and 1990s, these varied greatly. Over time, views have evolved: at times, it was argued that such procedural agreements were risky, at other times they were viewed extremely positively.

– A crucial moment was the decision of the Fourth Senate for Criminal Matters of the Federal Court of Justice on 28 August 1997.[42] On the back of this case, the Senate identified the necessary rules for a legal agreement:

39 Beulke, *Strafprozessrecht*, 378.

40 Abbrevation BVerfG.

41 Cezary Kulesza, "Porozumienia procesowe w europejskich systemach wymiaru sprawiedliwości," in *Porozumienia karnoprocesowe w praktyce wymiaru sprawiedliwości*, ed. Cezary Kulesza („Temida 2," Wydawnictwo Stowarzyszenia Absolwentów Wydziału Prawa Uniwersytetu w Białymstoku, 2010), 52.

42 Peters, *Urteilsabsprachen im Strafprozess*, 42.

- Agreement between the court and the defendant on the defendant's confession and the amount of the punishment must take place during the trial. This is a necessary element for the principle of openness to be respected. However, this does not exclude discussions held before or outside the trial as to the willingness to enter into trial negotiations.
- Importantly, the result of the agreement must be recorded in the minutes. This is essential.
- Yet the defendant's explanations alone cannot become the sole basis for a conviction. The court must remain faithful to the principle of material truth. It must thoroughly investigate the case, even if it is possible to reach an agreement with the accused. The evidence must be carefully gathered.
- Even in the case of a possible agreement, the principle of free evaluation of evidence must be upheld and implemented. This is one of the guiding principles of the German trial and no exceptions can be made to it.
- The court must take into account the guilt of the accused. In adjudicating the case, it cannot disregard this criterion. The same is true in the case of procedural agreements. Reaching a consensus does not affect the degree of guilt.
- A confession of guilt in the framework of the consensus reached can lead to a mitigation of the punishment imposed. It is possible even if practical considerations, rather than remorse, are behind the defendant's explanations. Drawing unfavourable conclusions from the defendant's behaviour alone during the proceedings is not possible. In addition, making promises about a possible reduction of the penalty for a guilty plea is also not permissible.
- It is impermissible for the accused to waive his right to appeal in exchange for a promise to reduce his sentence.
- In discussions, the accused must have free will. He cannot be threatened with a higher sentence, nor can he receive a number of promises with no payoff.

– If a consensus is reached at trial in this way, the court is bound by the provisions of the agreement. However, when new circumstances that could affect the final verdict come to light after the conclusion of the agreement, and these circumstances were previously unknown to the court, the authority may withdraw from the agreement.[43]

The Fourth Senate's resolution was welcomed by some of the doctrine. It provided certainty about the permissibility of the agreements. Some have even stated that the Federal Court of Justice is moving in the right direction.[44]

At the same time, the position of the Fourth Senate did not end the discussion on the appropriateness of procedural agreements in the German legal system. The strongest opponents of concluding agreements continued to criticize this solution. They described it as unacceptable, arguing that the rules indicated by the Fourth Senate were insufficient. Indeed, the indicated standard still has some shortcomings and contradicts existing legal principles.[45] This ruling has sparked renewed discussion on the admissibility of procedural agreements in criminal proceedings.

Another landmark moment was the March 3, 2005 ruling of the Grand Senate on Criminal Matters.[46] As part of a clarification of a legal issue submitted by one of the Chambers, it clarified the 1997 standard for entering into procedural agreements:

– The obligation to provide information cannot be viewed in a discretionary manner by the parties to the proceedings and the court.
– Fair and law-abiding criminal proceedings primarily serve to establish the circumstances necessary for a just verdict.
– Punishment is to be proportional to the guilt.

43 Kühne, *Strafprozessrecht*, 484.

44 Korinna Weichbrodt, *Das Konsensprinzip strafprozessualer Absprachen* (Duncker & Humblot, 2006), 158.

45 Bernd Schünemann, *Strafprozessuale Absprachen in Deutschland. Der Rechtsstaat auf dem Weg in die "Bananenrepublik"?* (Roderer Verlag, 2005), 10.

46 Agnes Saal, *Absprachen im deutschen und polnischen Strafprozess. Eine rechtsvergleichende Darstellung des Konsensualverfahrens* (Peter Lang, 2009), 55.

- The court must act diligently and must not rush.
- The defendant's confession must be checked for credibility.
- A guilty verdict cannot be the subject of a plea bargain.
- The punishment imposed must be neither excessive nor overly reduced. It is to be reasonable from the point of view of the law.
- The court may deviate from the agreement when new facts and evidence come to light.
- In addition, it is impermissible to agree to waive the right to legal protection.[47]

The Need for Regulation

After many years, a loophole was recognized in the absence of a statutory mandate for the institution of procedural agreements. The standards pointed out by German courts were insufficient. After March 3, 2005, it became clear that the time had come for legislative action. Representatives of the doctrine analysed what the final statutory regulation of such agreements should look like. For months, they drafted bills, yet none found recognition in the Bundestag. Each bill presented had shortcomings that prevented it from being passed.[48]

This situation continued for several years and it was not until July 29, 2009 that the Bundestag passed a law to regulate agreements in criminal proceedings. This entered into force on August 4, 2009,[49] and was based on the draft legislation submitted by the Ministry of Justice in 2006.[50] This law allows agreements on the course of the proceedings and their outcome, which the court may seek with the participants in the proceedings in the relevant cases, and makes clear that they do not violate the duty to clarify the facts of the case.

47 Saal, *Absprachen im deutschen und polnischen Strafprozess*, 66.
48 Peters, *Urteilsabsprachen im Strafprozess*, 57.
49 Dirk Sauer and Sebastian Münkel, *Absprachen im Strafprozess* (C.F. Müller, 2009), 92.
50 Kühne, *Strafprozessrecht*, 486.

The regulations clearly indicate what can be the subject of agreement and what cannot. They can only be legal effects, which are the elements of the judgment and related orders, other procedural measures relating to the court proceedings, as well as the procedural behaviour of the trial participants. An admission of guilt should be a component of the agreement. A guilty verdict or mention of waiver of legal remedies cannot be part of the agreement.[51]

In certain situations, at the trial stage the court may come to an agreement with the participants in the proceedings as to the further course and outcome of the proceedings. The court may set the upper and lower limits of the punishment. The rest of the participants in the proceedings can make their conclusions or observations. At the same time, in order to talk about a conclusion to an agreement, the prosecutor and the defendant must agree to it. The court can deviate from such an agreement when important facts have been omitted, or when new evidence has emerged. In addition, it is possible to appeal a conviction reached under the agreement.[52]

Undoubtedly, the above law was necessary. After years of discussion, it was decided to effect a legislative and regulatory intervention. This was a systemic solution based on the standards indicated by the German courts. In essence, this law can be described as a historical moment in the German criminal process.

Conclusions

The role of procedural agreements in both the Polish criminal process and the German justice system has evolved from an experimental approach to a widely accepted and frequently used solution. Such agreements have contributed to significantly speeding up criminal proceedings and thus reducing costs.

51 Martin Niemöller et al., *Gesetz zur Verständigung im Strafverfahren* (C.H. Beck, 2009), 155–60.

52 Sauer and Münkel, *Absprachen im Strafprozess*, 93.

At the same time, the speed of the proceedings should not affect the substantive quality of the settlement and the implementation of procedural principles. Procedural agreements cannot be viewed solely through the prism of the postulate of speeding up the proceedings. For this reason, it is extremely important to develop consensual methods in both the Polish system and in the German criminal process and do so sensibly. In addition, any amendments should be carefully considered in order to ensure stability and peace of mind for the public.

Consensual modes, known as criminal-procedural agreements, are an important institution in the Polish legal system. The purpose of consensual modes of completing criminal proceedings is primarily to speed up and reduce the costs of these proceedings following a shortened trial. A full evidentiary hearing, and sometimes even preliminary proceedings, are not held.

It can be argued that sentencing without trial and voluntary surrender of criminal responsibility have met the expectations set in 1997. When sentencing without trial is applied, most cases end at the first hearing. Under voluntary surrender of punishment, the jurisdictional proceedings are limited to one hearing.[53]

Procedural agreements are a topic frequently addressed in the Polish literature. The introduction of procedural agreements is largely driven by pragmatism stemming from the lack of need to resolve at trial cases referred to the court.

Consensual adjudication increases the acceptance of decisions made in criminal proceedings, when the parties (the defendant and sometimes the victim) gain influence over the shape of the decision. This is a major advantage of procedural agreements. Acceptance of the verdict and the punishment imposed by the convicted person impacts positively on its preventive purpose, a consequence of which is the small number of appeals against sentences handed down in consensual proceedings.

53 Michał Jankowski and Andrzej Ważny, "Instytucja dobrowolnego poddania się karze (art. 387 k.p.k.) i skazania bez rozprawy (art. 335 k.p.k.) w świetle praktyki. Rezultaty badań ogólnopolskich," *Prawo w Działaniu*, no. 3(2008): 131.

Procedural agreements are also widely discussed in the Federal Republic of Germany, where lawyers have emphasized the dangers of informal agreements. Over the years, they have voiced demands for statutory regulations aimed at preventing possible abuses in this area, the goal being to ensure minimum standards of the rule of law.

The need for statutory regulation of the issue was justified on the grounds of the defects of informal agreements (*Absprachen*) and reference was made to the demands for their formalization contained in BGH and BVefG case law and literature. In connection with the demands raised in the jurisprudence of the courts and the doctrine, the German legislator has made numerous attempts to regulate this issue by law.

The formalization of procedural agreements was seen as the best means to accelerate and streamline criminal proceedings. The consequence of reaching an agreement would be to avoid performing unnecessary actions by discussing the facts and evidence in advance.

It is the opinion of this author that consensual agreements will continue to play a significant role not only in the framework of Polish but also German criminal proceedings. It cannot be ruled out that new consensual solutions will emerge that will expand the current catalogue. A significant role in this regard will be played by the development of technology enabling remote communication.

Ultimately, aiming to increase the efficiency of criminal proceedings through the introduction of procedural agreements is a manifestation of the pragmatism of the Polish and German legislators. Pragmatism in this case can be equated with rationality. The actions taken by legislators are aimed at increasing the efficiency of the countries' legal systems.

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Consent in Data Privacy: A General Comparison of GDPR and HIPAA

Abstract: The purpose of this paper is to conduct a general comparison of legal requirements regarding consent under the Health Insurance Portability and Accountability Act (HIPAA) and the General Data Protection Regulation (GDPR). Both regulations aim to protect health data as a special category of personal data, highlighting the importance of obtaining explicit consent or authorization from the data owner before processing or disclosing the information. The article explores the distinct approaches of HIPAA and the GDPR in defining consent and authorization, the requirements for withdrawal or revocation of consent, and the form and language of consent. It also examines the scope of application and the impact on healthcare operations, emphasizing the need for informed and transparent consent practices under both regulations. Furthermore, it examines the differences in the regulatory scopes and the specific measures each framework takes to safeguard personal health information.

Keywords: GDPR, HIPAA, Privacy Rule, consent, authorization, healthcare data, data privacy

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Introduction

As we overcome the complexity of the digital age, the protection of personal health data has emerged as a key focus in the areas of data privacy and healthcare law. The unprecedented integration of technology into healthcare systems has led to the digitization of patient health records and changed the landscape of medical information management. The digitization of medical data requires robust legal and ethical safeguards to ensure the privacy and security of individuals' sensitive health information.[3]

Health data are, by their nature, particularly sensitive in relation to fundamental rights and freedoms, and therefore merit specific protection as the context of their processing, use or disclosure could create significant risks to the fundamental rights and freedoms.[4] At the same time, use of health data can bring great benefits not only in the context of an individual's medical care, but also e.g. in the research of new medical treatment. It should be noted that the right to the protection of personal data is not absolute and is subject to limitations, due to other goods and values protected by law. For example, Recital 4 of the preamble to the GDPR indicates that the processing of personal data should be organized in such a way as to serve humanity, and the right to the protection of personal data should be seen in the context of its social function and weighed against other fundamental rights in accordance with the principle of proportionality.

To protect the privacy of patients, various privacy standards are followed in different regions; these include the Health Insurance Portability and Accountability Act (HIPAA) in the United States and the General Data Protection Regulation (GDPR) in Europe. HIPAA controls the collection and use of medical data in the United States for other related purposes. In the EU, all process-

3 Israel Olawunmi, *Safeguarding Health Data in a Digital Era: A Comparative Study of the GDPR and HIPAA* (2023), 2, https://www.researchgate.net/publication/370934056_SAFEGUARDING_HEALTH_DATA_IN_A_DIGITAL_ERA_A_COMPARATIVE_STUDY_OF_THE_GDPR_AND_HIPAA.

4 Ludmila Georgieva and Christopher Kuner, "Article 9. Processing of Special Categories of Personal Data," in *The EU General Data Protection Regulation (GDPR): A Commentary*, ed. Christopher Kuner et al. (Oxford University Press, 2019), 369.

ing of personal data must be GDPR compliant, and entities that obtain health data from individuals in the EU must meet GDPR guidelines. Organizations that transfer US health-related data to the EU must comply with both rules.[5] This article conducts a comparison of the main elements related to data subject consent under the GDPR and HIPAA regulations. Specifically, it defines the scope of entities obliged to comply, the situations in which consent is required, and the form that consent must take.

Historical Development and General Characteristics of the GDPR and HIPAA

The historical development of the General Data Protection Regulation (GDPR)[6] dates to the 1995 Data Protection Directive,[7] which laid the foundation for data protection regulation in the EU. However, recognizing the need for a more robust and unified approach to data privacy, the European Union embarked on a journey to revamp its data protection framework, culminating in the adoption of the GDPR in 2016. The GDPR represented a significant overhaul of existing data protection laws, aiming to modernize and strengthen data privacy rules to meet the challenges of technological advances and increasing data flows.[8] One of the main goals of the GDPR was to harmonize data protection laws across EU Member States, eliminate regulatory fragmentation, and streamline data privacy requirements for organizations

5 Tian-Fu Lee et al., "Compliance with HIPAA and GDPR in Certificateless-Based Authenticated Key Agreement Using Extended Chaotic Maps," *Electronics* 12, no. 5(2023): 1, https://doi.org/10.3390/electronics12051108.

6 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 (GDPR).

7 Directive 95/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (Data Protection Directive).

8 European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law* (Publications Office of the European Union, 2018), 30.

operating in the EU.[9] In addition, the GDPR placed a strong emphasis on allowing individuals to exercise greater control over their personal data.[10] The regulation introduced several key provisions aimed at strengthening individuals' rights regarding their data, including the right to access and rectify personal data, the right to erasure (commonly known as the "right to be forgotten")[11] and the principle of data minimization.[12] These provisions were intended to shift the balance of power in favor of data subjects, allowing them greater control over how their data is collected, processed, and used by organizations.

The GDPR introduced strict requirements for organizations that process personal data, highlighting transparency and accountability in data processing practices. Organizations have been obligated to implement robust data protection measures, conduct privacy impact assessments,[13] and comply with data protection principles as well as data breach notification procedures.[14] The GDPR's enforcement mechanisms, including substantial fines for noncompliance, underscored the importance of complying with data protection laws and upholding individuals' privacy rights. The GDPR's proactive approach to data protection and focus on accountability and transparency[15] have set a precedent for global data privacy standards, influencing data protection practices and regulatory frameworks around the world.[16]

9 Christopher Kuner et al., "Background and Evolution of the GDPR," in *The EU General Data Protection Regulation (GDPR)*, 5.

10 Kuner et al., "Background and Evolution of the GDPR," 20–21.

11 Kuner et al., "Background and Evolution of the GDPR," 22–23.

12 European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law*, 125.

13 Paweł Fajgielski, „Artykuł 35. Ocena skutków dla ochrony danych," in *Ogólne rozporządzenie o ochronie danych. Ustawa o ochronie danych osobowych. Komentarz* (Wolters Kluwer Polska, 2022), 437.

14 Paweł Fajgielski, „Artykuł 33. Zgłaszanie naruszenia ochrony danych osobowych organowi nadzorczemu," in *Ogólne rozporządzenie o ochronie danych*, 419.

15 Sanjay Sharma, *Data Privacy and GDPR Handbook* (Wiley, 2019), 126, https://doi.org/10.1002/9781119594307.

16 Christopher Kuner, "Article 49. Derogations for specific situations," in *The EU General Data Protection Regulation (GDPR)*, 858.

The Health Insurance Portability and Accountability Act[17] (HIPAA) was enacted by the U.S. Congress in 1996 with the primary goal of addressing data privacy and security issues in the healthcare sector. HIPAA was introduced in response to the growing use of electronic medical records and the need to establish comprehensive standards for protecting individuals' health information.[18] Unlike the GDPR, which has a broader scope with respect to personal data, HIPAA is a U.S. federal law that strictly regulates a type of personal health information in the United States,[19] statutorily referred to as protected health information (PHI).[20] Consequently, HIPAA rules apply to covered entities (e.g. doctors, clinics, psychologists, dentists, health insurance companies, health plans etc.) and business associates.[21] HIPAA consists of several rules, mainly The Privacy Rule and the Security Rule, each of which is designed to protect the confidentiality and integrity of patient health information and ensure the secure handling of electronic health records.[22]

Individually identifiable health information, protected under the Privacy Rule, is information that is a subset of health information, including demographic data collected from an individual, and meets the following criteria: it is cre-

17 U.S. Department of Health and Human Services Office for Civil Rights, "HIPAA Administrative Simplification: Regulation Text: 45 CFR Parts 160, 162, and 164" (2013), accessed June 27, 2024, https://www.hhs.gov/sites/default/files/hipaa-simplification-201303.pdf.

18 Wasim Fathima Shah, "Preserving Privacy and Security: A Comparative Study of Health Data Regulations – GDPR vs. HIPAA," *International Journal for Research in Applied Science and Engineering Technology* 11, no. 8(2023): 2189, https://doi.org/10.22214/ijraset.2023.55551.

19 Israel, *Safeguarding Health Data in a Digital Era*, 5.

20 Protected Health Information (PHI) is any health information that can be used to identify a patient, who relates to physical or mental health, relating to a past, present, or future condition, and includes both living and deceased patients. PHI may be in any form, e.g. oral, paper, or electronic – Lorna Hecker, *HIPAA Demystified: HIPAA Compliance for Mental Health Professionals* (Loger Press, 2016), 7.

21 Office for Civil Rights (OCR), "Covered Entities and Business Associates," Text, November 23, 2015, accessed June 27, 2024, https://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html.

22 Tim Benson and Grahame Grieve, "Privacy and Consent," in *Principles of Health Interoperability: FHIR, HL7 and SNOMED CT* (Springer Cham, 2021), 368, https://doi.org/10.1007/978-3-030-56883-2_19.

ated or received by a health care provider, health plan, employer, or health care clearinghouse; it relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual; and it identifies the individual (or with respect to which there is a reasonable basis to believe the information can be used to identify the individual).[23] This regulation is intended to balance the interests of individuals in maintaining the confidentiality of their personal health data in a variety of private and public activities. The fundamental concentration of the Privacy Rule is to regulate the circumstances involving the use and disclosure of PHI by entities subject to it. It covers the use, disclosure, and request for PHI, excluding specific cases such as educational records or employment records.[24] Protecting electronic data is critical for businesses and individuals to build customer trust. The objective of the Security Rule is establishing national safeguards to protect the confidentiality, integrity, and availability of electronic PHI (ePHI) against unauthorized access, use, or disclosure.[25] The HIPAA Security Rule obliges organizations to implement a security management process to identify and investigate risks and subsequently implement security measures to remediate those risks. Mostly, this comprises evaluating threats to patient ePHI, evaluating the adequacy of existing privacy and security measures, assessing potential future threats, and addressing barriers to adoption.[26]

There is no doubt that the shape of both regulations was influenced by the legal system under which they were created. Common law, which originated in England and has since spread to the United States and other former British colonies, is known for its reliance on judicial decisions and the doctrine of

23 Code of Federal Regulations (CFR), "45 CFR § 160.103 Definitions," accessed June 27, 2024, https://ecfr.io/Title-45/Section-160.103.

24 Shah, "Preserving Privacy and Security," 2191.

25 Shah, "Preserving Privacy and Security," 2191.

26 Hecker, *HIPAA Demystified*, 91.

precedent.[27] This system is based on flexibility and case-by-case adjudication, which allows for rapid evolution of the law. In contrast, civil law systems, such as those found in EU Member States, have their origins in Roman law and were primarily shaped by the Napoleonic Code.[28] These systems prioritize written laws over judicial interpretation, with laws being comprehensive and structured to address a wide range of situations in order to promote consistency and foreseeability.[29] The GDPR is structured according to civil law principles, with comprehensive and well-organized statutory provisions that emphasize transparency, accountability, and data minimization in line with the EU Charter of Fundamental Rights.[30] This highlights the close connection between law and human rights in continental legal systems. On the other hand, HIPAA follows a common law approach with a more limited and specific scope of regulation. Unlike the broad application of the GDPR, HIPAA's regulatory focus is on specific sectors,[31] reflecting a common law system's tendency to address issues through targeted and incremental legislative measures. Data privacy laws in the United States are diverse, with separate rules governing various sectors like health care, finance (as outlined in the Gramm-Leach-Bliley Act),[32] and children's online privacy (under COPPA).[33]

27 Časlav Pejović, "Civil Law and Common Law: Two Different Paths Leading to the Same Goal," *Poredbeno Pomorsko Pravo* 40, no. 155(2001): 9.

28 Pejović, "Civil Law and Common Law," 9.

29 Mathias Siems and Po Jen Yap, eds., "Central Themes in Comparative Law," in *The Cambridge Handbook of Comparative Law* (Cambridge University Press, 2024), 232–33, https://doi.org/10.1017/9781108914741.022.

30 Lee A. Bygrave, *Data Privacy Law: An International Perspective* (Oxford University Press, 2014), 58.

31 Richard Stokes, "HIPAA Standards for Privacy of Individually Identifiable Health Information," *Technical Bulletins*, 2002: 2, https://trace.tennessee.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1082&context=utk_mtastech.

32 Edward J. Janger and Paul M. Schwartz, "The Gramm-Leach-Bliley Act, Information Privacy, and the Limits of Default Rules," *Minnesota Law Review* 86, 2001–2002: 1224.

33 Dalia Topelson et al., *Privacy and Children's Data: An Overview of the Children's Online Privacy Protection Act and the Family Educational Rights and Privacy Act* (The Berkman Center for Internet & Society, 2013), 1–2.

Consent Under the GDPR

Health data is sensitive personal information (a special category of personal data) under the GDPR, which requires extra legal protection. Article 9 GDPR states that processing of personal data revealing racial or ethnic origin, political opinions, religious beliefs, 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 shall be prohibited. The regulation provides exceptions from this rule, including the situation where the data subject has given explicit consent to the processing of those personal data for one or more specified purposes.

Before exploring the specifics of the topic, it is essential to establish and present the relevant definitions. Article 4(11) GDPR provides the following definition of consent: "consent of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her." Moreover, personal data means any information relating to an identified or identifiable natural person ("data subject"); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier, or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.[34] Data concerning health means personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status.[35]

The definition of consent provided above demonstrates the conditions which have to be met cumulatively for the consent to become a lawful basis for the processing of personal data:

34 Article 4(1) GDPR.
35 Article 4(15) GDPR.

1) Freely given: The term "free" in this context signifies genuine autonomy and authority for individuals regarding their data. According to the GDPR, consent is considered invalid if the data subject feels pressured to consent, lacks a true choice, or faces negative repercussions for not consenting.[36] Consent should not be coerced, and the data subject should be able to choose whether or not to give consent.[37] Moreover, consent should not be relied upon where there is a clear imbalance between the data subject and controller, in particular, where the controller is a public authority.[38] Consent is not considered voluntary if it cannot be given separately for different personal data processing operations.[39] When assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.[40]
2) Specific: Requiring explicit consent coupled with the principle of purpose limitation outlined in Article 5(1)(b) serves as a protection against the potential expansion or ambiguity of reasons for processing data beyond what was originally agreed upon by the data subject during data collection.[41] Articles 5(1)(b) and 6(1)(a) GDPR demand a fairly clear description of the purposes of data processing, therefore supporting in the fulfillment of the specificity criterion.[42] The content of

36 The European Data Protection Board, *Guidelines 05/2020 on Consent under Regulation 2016/679*, 7, accessed November 8, 2024, https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf.
37 Paweł Fajgielski, „Artykuł 4. Definicje," in *Ogólne rozporządzenie o ochronie danych*, 137.
38 Recital 43 GDPR.
39 Fajgielski, „Artykuł 4. Definicje," 137.
40 Article 7(4) GDPR.
41 The European Data Protection Board, *Guidelines 05/2020 on Consent under Regulation 2016/679*, 14.
42 Lee A. Bygrave, Luca Tosoni, "Article 4(11). Consent," in *The EU General Data Protection Regulation (GDPR)*, 183.

the consent statement should correspond to the scope and purpose the consent to data processing; it should not be a vague statement that does not indicate what data is to be processed and for what purpose.[43] On the other hand, recital 32 of GDPR indicates that one consent may cover multiple processing operations if these are undertaken for the same purposes.[44]

3) Informed: This criterion involves ensuring that the data subject is provided with advance knowledge of the parameters of the data processing operation to which they are to consent.[45] Recital 42 of GDPR states that for consent to be informed, the data subject should be aware at least of the identity of the controller and the purposes of the processing for which the personal data are intended. Moreover, controller is responsible for obtaining consent from data subjects by providing clear information that allows them to easily identify the controller and understand the purpose of data processing. The controller must also fulfill additional information duties outlined in Articles 13 and 14 of the GDPR when relying on consent from data subjects.[46]
4) Unambiguous: the expression of consent should not raise doubts about the intention of the person who makes such a statement. If the statement of consent can be interpreted differently and different conclusions can be drawn from it on the subject of consent, doubt may arise as to whether the condition discussed here is met.[47] This criterion is elaborated on in Recital 32 of GDPR, which refers to the need for consent to be provided by a clear affirmative act establishing an un-

43 Dominik Lubasz, "Warunki wyrażania zgody jako przesłanki legalizującej przetwarzanie danych osobowych," *Gdańskie Studia Prawnicze*, no. 4(52)(2021): 69, https://doi.org/10.26881/gsp.2021.4.04.

44 Bygrave and Tosoni "Article 4(11). Consent," 183.

45 Bygrave and Tosoni "Article 4(11). Consent," 184.

46 The European Data Protection Board, *Guidelines 05/2020 on Consent under Regulation 2016/679*,17.

47 Fajgielski, „Artykuł 4. Definicje," 139.

ambiguous indication of the data subject's agreement. D. Lubasz emphasizes that the Regulation does not dictate the specific format or medium in which information must be presented to fulfill the requirement for informed consent. This allows for flexibility in how important information can be communicated, including through written or verbal statements, as well as audio or video recordings.[48] On the other hand, when asking for consent through electronic means, the request should not disrupt the user's ability to use the service. It may be necessary for the data subject to actively indicate consent in order to avoid any confusion. Therefore, it may be acceptable for a consent request to temporarily interrupt the user's experience in order to be effective.[49]

As mentioned above, Article 9 GDPR mandates "explicit consent" shall be obtained when sensitive personal data is processed. The term "explicit" pertains to how consent is communicated by the individual providing the data. This entails the data subject giving a clear and direct statement of consent. One straightforward method to ensure explicit consent is to confirm consent explicitly in a written format.[50] "Explicit consent" cannot be implied and involves a high degree of precision and definiteness in the declaration of consent, as well as a particular description of the purposes of processing.[51] Thus, Article 9 sets a higher threshold than Article 6 GDPR. As T. Osiej pointed out, the primary legal justification for data processing by medical professionals and healthcare facilities will typically be Article 9(2)(h) of the GDPR. This provision allows for the processing of health data when necessary for activities such as preventive healthcare, occupational medicine, providing healthcare, or social secu-

48 Lubasz, "Warunki wyrażania zgody jako przesłanki legalizującej przetwarzanie danych osobowych," 71.

49 The European Data Protection Board, *Guidelines 05/2020 on Consent under Regulation 2016/679*, 19.

50 The European Data Protection Board, *Guidelines 05/2020 on Consent under Regulation 2016/679*, 20.

51 Christopher Kuner et al., eds., *The EU General Data Protection Regulation (GDPR)*, 377.

rity purposes.[52] The responsibility lies with the controller[53] to prove the data subject has consented to the processing.[54] Usually, the declaration of consent is pre-formulated by the controller, therefore the consent should be provided in a comprehensible and easily accessible form, using clear and plain language.[55]

Moreover, Article 8 states that in relation to providing information services to a child based on consent, the processing will only be lawful under GDPR if the child is at least 16 years old. If the child is under 16, the processing will only be lawful if the consent of the parent (or legal guardian) is provided. The Member States may lower this age requirement; however, it cannot be lower than 13 years for valid consent. Additionally, the controller shall make reasonable efforts to verify parental consent considering the available technology.[56]

The GDPR underlines further conditions of consent in Article 7, in which it mandates that if the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent must be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form. Any part of such a declaration which constitutes an infringement of this Regulation must not be binding. Furthermore, the data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent must not affect the lawfulness of the processing based on consent before its withdrawal. Prior to giving consent,

52 Tomasz Osiej, "Personal Data Protection – Where to Start?," *Ophtha Therapy* 6, no. 1(21) (2019): 52, https://doi.org/10.24292/01.OT.300319.08.

53 Controller means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law – Article 4(7) GDPR.

54 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, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction – Article 4(2) GDPR.

55 Victoria Hordern "Lawful Processing Criteria," in *European Data Protection: Law and Practice*, ed. Eduardo Ustaran (International Association of Privacy Professionals, 2023), 160.

56 Sharma, *Data Privacy and GDPR Handbook*, 134.

the data subject shall be informed about it. It must be as easy to withdraw to give consent. A person providing data may consent to one or multiple purposes, as well as multiple independent consents. As a result, it is important for the controller to be able to clearly identify which consent is being withdrawn in each instance.[57]

It is necessary to mention the proposal for a European Health Data Space which was approved politically by the Council and the European Parliament in the spring of 2024. The objectives of European Health Data Space are as follows: establishing a single market for electronic health record systems, giving citizens control over their health data, and making it easier for data to be shared for the primary use of providing healthcare services throughout the EU. It would also offer a consistent system for using health data for research, innovation, policy-making, and regulatory action (secondary use of data).[58] Regarding electronic health data, the EHDS is in favor of implementing the rights outlined in the GDPR. The EHDS expands on the GDPR's potential for EU legislation pertaining to the use of personal electronic health data for diagnosis, treatment, or the administration of health care systems and services. Moreover the EHDS expands natural persons' right to data portability in the health sector and envisions additional measures to foster interoperability.[59] Building on the GDPR's requirements, natural persons will have more options for digitally accessing and transmitting their electronic health data. It will be mandatory for market participants in the health sector to share electronic health data with third parties chosen by users. Without sacrificing the necessary safety precautions to safeguard natural person rights under the GDPR, the proposal will offer the tools to enforce these rights (via com-

57 Natalia Kalinowska et al., "Badania kliniczne w świetle RODO," *Prawo Mediów Elektronicznych*, no. 3(2018): 5.

58 "European Health Data Space," European Commission, accessed November 8, 2024, https://health.ec.europa.eu/ehealth-digital-health-and-care/european-health-data-space_en.

59 "Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the European Health Data Space," EUR-Lex, accessed November 8, 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0197.

mon standards, specifications, and labels). It would support the free flow of health-related personal data and its enhanced protection, as guaranteed by the GDPR.[60]

Consent Under HIPAA

Under the Privacy Rule, except in certain circumstances, such as emergency situations, medical institutions require explicit consent from patients to use or disclose PHI for treatment, payment, or medical operations.[61] This consent often takes the form of written approval, which must be specific and detailed, indicating to whom and for what purpose the information is authorized to be disclosed.[62] HIPAA defers to state law to regulate the age of majority and the rights of parents to act for a child in making health care decisions, and thus, the ability of the parent to act as the personal representative of the child for HIPAA purposes.[63] HIPAA does not provide a legal definition of authorization; however this term should be understood as a consent obtained generally from the patient that permits a covered entity or business associate to disclose or use PHI to an individual or entity for a purpose that would otherwise not be allowed by the HIPAA Privacy Rule.[64]

60 "Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the European Health Data Space."

61 45 CFR §164.508 (a)(1): "Except as otherwise permitted or required by this subchapter, a covered entity may not use or disclose protected health information without an authorization that is valid under this section. When a covered entity obtains or receives a valid authorization for its use or disclosure of protected health information, such use or disclosure must be consistent with such authorization."

62 David M. Parker et al., "Privacy and Informed Consent for Research in the Age of Big Data," *Penn State Law Review* 123, no. 3(2019): 718–19.

63 "At What Age of a Child Is the Parent No Longer the Personal Representative of the Child for HIPAA Purposes?," U.S. Department of Health and Human Services, accessed June 27, 2024, https://www.hhs.gov/hipaa/for-professionals/faq/2093/what-age-child-parent-no-longer-personal-representative-child-hipaa-purposes.html.

64 Steve Alder, "What Is HIPAA Authorization?," The HIPPA Journal, accessed June 27, 2024, https://www.hipaajournal.com/what-is-hipaa-authorization/.

45 CFR §164.508 details the uses and disclosures of protected health information that require an authorization, e.g.:

1) Use or disclosure of PHI otherwise not permitted by the HIPAA Privacy Rule.
2) Use or disclosure of psychotherapy notes.[65]
3) Use or disclosure of protected health information for marketing.[66]
4) Disclosure of protected health information which is a sale of protected health information.

As a general rule, HIPAA prohibits combining an authorization for use or disclosure of protected heath information with any other document to create compound authorization. There are three exceptions to the regulation, concerning research documentation, psychotherapy notes and authorizations that are not conditioned on e.g. treatment, payment, enrollment in a health plan.[67] The Privacy Rule specifies necessary elements of the authorization,[68] including:

1) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.
2) The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure.
3) The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure.
4) A description of each purpose of the requested use or disclosure.
5) An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure.
6) Signature of the individual and date.

The regulation also requires: a statement of the individual's right to revoke written approval; a statement of "the ability or inability to condition treatment,

65 Exceptions included in 45 CFR §164.508 (a)(2).
66 Exceptions included in 45 CFR §164.508 (a)(3).
67 45 CFR §164.508 (b)(3).
68 45 CFR §164.508 (c)(1).

payment, enrollment or eligibility for benefits on the authorization." Moreover, HIPAA-compliant approval forms must also be written in plain language.[69] The high level of prior individual authorization required in HIPAA approval forms implicates the value placed on individuals' interest in preserving the confidentiality of their protected health information.

The regulation states that an individual may revoke an authorization provided that the revocation is in writing, except to the extent that the covered entity has taken action in reliance on the authorization; or if the authorization was obtained as a condition of obtaining insurance coverage and another law provides the insurer with the right to contest a claim under the policy or the policy itself.[70]

Conclusion

Both HIPAA and the GDPR recognize that health data is a special category of personal data and take specific measures to adequately protect it, while trying to preserve the ability to effectively treat the patient and operate the health care system. Moreover, both regulations underline the importance of consent and require that before data can be processed or used/disclosed, the consent/authorization of the owner of the information must be obtained. On the other hand, unlike the GDPR, which has a broader scope with respect to personal data, HIPAA is a U.S. federal law that strictly regulates a type of personal health information in the United States, statutorily referred to as protected health information (PHI). As a result, the scope of entities required to comply with HIPAA is much narrower than the GDPR.

The GDPR provides the definition of consent as "freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement

69 45 CFR §164.508 (c)(2), (3).
70 45 CFR §164.508 (b)(5).

to the processing of personal data relating to him or her" but at the same time recognizes that for protection of healthcare data this standard is not sufficient. Thus, "explicit consent" must be obtained prior to the data processing. This aligns with the comprehensive nature of civil law and aims to provide broad data protection across various contexts. Although consent is included in the HIPAA's Privacy Rule, it is not as fundamental as it is in the GDPR. HIPAA does not provide a legal definition of authorization; however, this term should be understood as consent obtained generally from the patient that permits a covered entity or business associate to disclose or use PHI to an individual or entity for a purpose that would otherwise not be allowed by the HIPAA Privacy Rule. In addition, the GDPR sets out general rules that consent should meet, without explicitly prejudging its specific content. On the other hand, HIPAA indicates the substantive elements of authorization, e.g. the name of the person to whom the covered entity may make the requested use/disclosure, or an expiration date that relates to the individual or the purpose of the use or disclosure. As opposed to consent under the GDPR, which can be given in other ways than in writing, authorization under the HIPAA must be in writing. The HIPAA's focus on the healthcare sector is a specific application of common law, allowing for different consent standards in other sectors governed by separate laws.

The GDPR and HIPAA also regulate the rights of withdrawal/revocation of consent/authorization. The GDPR grants individuals the explicit right to withdraw consent at any time, emphasizing individual rights and autonomy in civil law. This requirement ensures that withdrawing consent is just as simple as giving it, giving individuals greater control over their personal data. Moreover, the European regulation states that the data subject must be informed about his or her right of withdrawal. On the other hand, HIPAA requires a statement of the individual's right to revoke written approval and that an individual may revoke an authorization provided that the revocation is in writing. The HIPAA approach does not prioritize the right to withdraw consent as much as the GDPR. Individuals are able to revoke authorization in specific

situations, but the process has more restrictions in terms of its reach and use. This approach is based on a practical common law perspective that focuses on the operational requirements of healthcare providers and insurers, while also taking into account patient privacy and practical considerations. Neither law directly specifies the age of majority at which the data subject can lawful consent/authorization, instead referring to EU Member State laws/US state laws.

Regarding the form of consent, the GDPR allows combining request for consent with other written documents if it is presented in a manner which is clearly distinguishable from the other matters. Conversely, HIPAA generally prohibits combining an authorization for use or disclosure of protected heath information with any other document to create compound authorization. In this regard, therefore, it is a stricter regulation that aims to increase data subject awareness and transparency of use/disclosure of information. Both the GDPR and HIPAA underline the necessity of providing consent/authorization in plain language, which supports the conclusion that under both regulations, not only the European one, the consent should also be informed.

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Legal and Ethical Aspects of Discontinuing Futile Medical Care in Poland, the United Kingdom and Italy. A Comparative-Legal Perspective[3]

Abstract: Futile care encompasses a range of medical procedures that serve to sustain the vital functions of a terminally ill person, thus prolonging their dying process. This paper aims primarily to arrive at a legal and ethical characterization of the institution of futile care. In the light of pertinent laws in other countries (the United Kingdom, Italy), the authors demonstrate that it is necessary to take legislative action concerning futile care in Poland, including e.g. the institution of advanced decision and lasting power of attorney. There are certain obstacles to introducing legal norms that pertain to futile care. For one thing its normative definition is lacking while the applicable law, such as the Act on the Medical Profession, imposes an obligation on the physician to provide medical assistance in each case where delay could expose the patient to the risk of loss of life, grievous bodily injury or serious disturbance of health.

Keywords: futile care, living will/advanced decision, lasting power of attorney, human dignity

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Introduction

Doctors and lawyers in Poland confront a major issue with respect to the cessation of futile care, given the absence of both a normative definition of the latter and legal institutions which would allow the patient to decide on their own to discontinue treatment when it is known to have no positive effect and merely serves to maintain vital functions (resulting in excessive suffering). As medical law experts attempt to define the concept, it is often highlighted that the scope of futile care is difficult to determine.[4] According to the definition formulated by the Polish Working Group on End-of-Life Issues, published in *Paliatywna Medycyna w Praktyce* (2008), futile care should be understood as "the application of medical procedures to sustain the vital functions of a terminally ill patient that prolongs their dying, involving excessive suffering or violation of the patient's dignity."

In Poland, the process of legal change that would establish a framework in which discontinuation of futile care could lawfully operate is still ongoing, with no normative regulation yet in place. A number of European countries have statutorily provided for advanced decision, i.e. a declaration of will regarding further medical treatment in the event of incapacity to make decisions. Under such legislation, persons may also appoint an attorney to make decisions related to the treatment on behalf of the principal (otherwise known as the donor), as well as appoint a guardian, in such cases where a person incapable of making decisions has not appointed an attorney.[5]

Given the ethical and emotional aspect which directly affects the terminally ill as well as their relatives, there is an evident need to establish procedures which ensure dignified last moments of life in a manner that is safe and underpinned by law.[6]

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4 Jacek Siewiera and Andrzej Kübler, *Terapia daremna dla lekarzy i prawników* (Edra Urban & Partner, 2015), 15.

5 Siewiera and Kübler, *Terapia daremna dla lekarzy i prawników*, 16.

6 Rzecznik Praw Pacjenta, *Standardy postępowania w terapiach medycznych stosowanych w okresie kończącego się życia* (Rzecznik Praw Pacjenta, 2021), 24.

Thus, this paper will examine the initiatives undertaken to date to introduce legislation on futile care in Poland and subsequently compare them with the equivalents in force in the United Kingdom and Italy. These countries have been chosen in view of the fact that their respective legislations provide in detail for futile care procedures, thus ensuring dignified last moments for both the patient and their family.

The aim of this paper is to characterize the legal institution of futile care in relation to foreign legal systems by means of the comparative-legal method. In the United Kingdom—or more specifically in England and Wales—these affairs are regulated at present under the Mental Capacity Act of 2005[7] and in Italy by the Law of 22 December 2017, no. 219, Rules on Informed Consent and Advance Directives for Treatment.[8] The analysis will make it possible to draw conclusions *de lege lata* and *de lege ferenda*, and subsequently formulate certain proposals concerning the incorporation of futile care into Polish law.

Attempted Regulations of Futile Care in Polish Law

In the Polish legal system of universally applicable law, there are no solutions governing the discontinuation of futile care.[9] Also, no legal definition of such care has been introduced into the Polish legal system by the lawmaker.[10]

Even so, the adoption of such provisions may be argued for in the light of the constitutional value of unassailable human dignity.[11] Article 30 of the Constitution of the Republic of Poland clearly asserts that human dignity is acquired at birth and remains inalienable throughout life, which also includes

7 John Taggart, "Powers of Attorney and 'Lack of Capacity' under the Mental Capacity Act 2005: A Narrowing of the s 44 Offence? *R v Kurtz* [2018] EWCA Crim 2743," *The Journal of Criminal Law* 84, no. 1(2020): 74–82, https://doi.org/10.1177/0022018319883146.

8 Marco Di Paolo et al., "A Review and Analysis of New Italian Law 219/2017: 'Provisions for Informed Consent and Advance Directives Treatment'," *BMC Medical Ethics* 20, 1(2019): 1, article 17, https://doi.org/10.1186/s12910-019-0353-2.

9 Siewiera and Kübler, *Terapia daremna dla lekarzy i prawników*, 53.

10 Siewiera and Kübler, *Terapia daremna dla lekarzy i prawników*, 53.

11 Siewiera and Kübler, *Terapia daremna dla lekarzy i prawników*, 61.

terminal states, when any improvement in health is no longer possible. Since public authorities are responsible for respecting and protecting dignity, it is incumbent on them to lay down specific provisions.[12]

Since the legislation was lacking, pertinent guidelines have been developed by bodies specializing in medical sciences. The possibility of discontinuing treatment which does not result in improvement but only causes suffering to the patient is referred to exclusively in Article 32 of the Code of Medical Ethics: "In terminal states, the physician is not obliged to undertake and administer resuscitation, futile care, or emergency measures. The decision to discontinue resuscitation rests with the physician, based on the assessment of therapeutic prospects."[13]

The earliest initiative in terms of futile care legislation should be attributed to the Polish Working Group on End-of-Life Issues, in that the body advanced a definition of futile care which explicitly stated that it aims at sustaining the vital functions of a terminally ill patient and entails excessive suffering and violation of the patient's dignity.[14] This became the basis for the bill of the Bioethics Law of 17 December 2008.[15]

A definition of futile care was to be included in the Act of 6 November 2008 on Patients' Rights and the Patients' Ombudsman. It was argued that the right to dignity also encompasses the right to die in peace, from which it may be inferred that the patient should be able to decide on their own or through an attorney whether to continue or discontinue a treatment that offers no chance of improvement but merely prolongs the dying process.[16]

A 2013 bill submitted by the Warsaw Hospice for Children Foundation envisaged a number of rules which governed lasting powers of attorney, ad-

12 Article 30, Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, no. 78, item 483.

13 Article 32 *Kodeks etyki lekarskiej*, II Krajowy Zjazd Lekarzy, 1991, as amended.

14 Wojciech Bołoz et al., "Definicja Uporczywej Terapii. Konsensus Polskiej Grupy Roboczej ds. Problemów Etycznych Końca Życia," *Medycyna Paliatywna w Praktyce* 2, no. 3(2008): 77.

15 Małgorzata A. Świderska, "Aspekty prawne terapii daremnej w okresie końca życia," *Białostockie Studia Prawnicze* 28, no. 3(2023): 73, https://doi.org/10.15290/bsp.2023.28.03.04.

16 Consolidated text: Journal of Laws of 2022, item 1876.

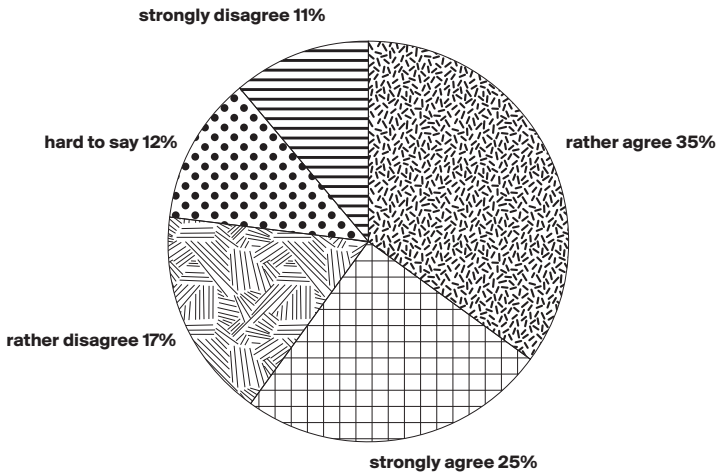

Fig. 1. In Some Countries, It Is Possible To Sign a So-Called 'Living Will', a Declaration in Which a Person Declares That, in the Event of a Permanent Incapacity, He or She Does Not Want Life-Sustaining Measures to Be Applied to Him or Her. Should Such a Solution Be Introduced Into Polish Law?
Source: Centrum Badania Opinii Społecznej, *Komunikat z badań. Zaniechanie uporczywej terapii a eutanazja* (Fundacja Centrum Badania Opinii Społecznej, 2013), 15 (the graph translated by the authors).

vanced decisions and other *pro futuro* declarations.[17] According to a CBOS survey conducted after the draft law had been created, the majority of respondents believed that having the advance decision introduced in Polish law would enable individuals to decide on the last moments of their life.[18]

The above graph shows how the public view the adoption of advanced decisions in Polish law. The majority of respondents (60%) declare that they do not want life-sustaining treatment to be applied in the event of permanent incapacity.[19]

17 Sławomir Zagórski, *O zaniechaniu uporczywej terapii i reanimacji. Czekamy na dobre prawo*, OKO.press, published February 21, 2024, https://oko.press/o-zaniechaniu-uporczywej-terapii-i-reanimacji-czekamy-na-dobre-prawo.

18 Centrum Badania Opinii Społecznej, *Komunikat z badań. Zaniechanie uporczywej terapii a eutanazja* (Fundacja Centrum Badania Opinii Społecznej, 2013), 15.

19 Centrum Badania Opinii Społecznej, *Komunikat z badań*, 15.

Presented in 2014, *Guidelines on the Management of Ineffective Organ Function Support (Futile Care) in Patients Incapable of Making Conscious Declarations of Will in Intensive Care Units* proposed that certain methods of organ function support may be abandoned if the patient cannot be successfully treated.[20] The document included a template protocol which would serve to state that, in the current clinical condition, a specific patient is incapable of declaring their will regarding treatment consciously, on the grounds of which responsible physicians may discontinue organ function support modalities listed in the document, as they will constitute futile care.[21]

The *Standards of Practice for End-of-Life Medical Treatments* introduce the possibility of withholding futile care *pro futuro*. In its decision of 27 October 2005 (III CK 155/05), the Supreme Court also spoke in favour of prior declarations of will, stating that such instruments should be binding on the physician if the patient has formulated them explicitly and unequivocally; the Court also found that they should be followed through should communication with the patient be no longer possible.[22] It was underscored in the decision that in Poland, the patient's consent or lack thereof is not regulated under any universally applicable laws by virtue of which patient's will is respected, e.g. laws on declarations made *pro futuro*, as is the case in other countries (e.g. living will, advanced directives). Specifically, this concerns situations where the (potential) patient expresses their will with respect to the future actions of the physician in the event that the patient is incapacitated. Isolated cases of such declarations have been reported in Poland, and the very fact demonstrates that it would be impossible to prohibit them from being made. How-

20 Andrzej Kübler et al., "Wytyczne postępowania wobec braku skuteczności podtrzymywania funkcji narządów (terapii daremnej) u pacjentów pozbawionych możliwości świadomego składania oświadczeń woli na oddziałach intensywnej terapii," *Anestezjologia Intensywna Terapia* 46, no. 4(2014): 231.

21 Kübler et al., "Wytyczne postępowania wobec braku skuteczności podtrzymywania funkcji narządów (terapii daremnej) u pacjentów pozbawionych możliwości świadomego składania oświadczeń woli na oddziałach intensywnej terapii," 232.

22 Rzecznik Praw Pacjenta, *Standardy postępowania w terapiach medycznych stosowanych w okresie kończącego się życia*, 25.

ever, the institution is not expressly provided in law, but tends to be interpreted on the grounds of general provisions. This is because advanced decisions are approached as classic declarations of will under civil law, reifying the patient's right of choice (Art. 60 et seq., Civil Code).[23]

Even so, the declaration should meet certain strict conditions: its validity period must not exceed five years, and it has to be made by way of a notarial act or an appropriate form.[24] From the standpoint of Polish law, it is also vital to establish the institution of an attorney, who would be authorized to make decisions from the moment that their principal loses the capacity to decide about medical procedures relating to their health.[25] The attorney is also subject to requirements: they should be of age, have the capacity to act, and have no professional connection with the medical treatment of that patient.[26] Another important option to consider is appointing a guardian for a person who has lost the ability to make independent decisions but has not appointed an attorney. Current law in Poland does not permit filing a one-off petition to the court to have a person appointed to make decisions throughout the treatment. It may therefore be reasonable to limit the practice of requesting permission from the court to carry out particular health services.[27]

The most recent document which advances regulatory proposals regarding futile care is *Prevention of Futile Care in Terminal State Adult Patients in Hospitals. Position Paper of the Polish Society of Internal Medicine Working Group for Futile Care in Internal Medicine Departments*. The document contains guidelines concerning patients when care has become futile.[28]

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23 Decision of the Supreme Court of the Republic of Poland of 27 October 2005, III CK 155/05, https://www.sn.pl/sites/orzecznictwo/orzeczenia1/iii%20ck%20155-05-1.pdf.

24 Rzecznik Praw Pacjenta, *Standardy postępowania w terapiach medycznych stosowanych w okresie kończącego się życia*, 26.

25 Rzecznik Praw Pacjenta, *Standardy postępowania w terapiach medycznych stosowanych w okresie kończącego się życia*, 27.

26 Rzecznik Praw Pacjenta, *Standardy postępowania w terapiach medycznych stosowanych w okresie kończącego się życia*, 28.

27 Rzecznik Praw Pacjenta, *Standardy postępowania w terapiach medycznych stosowanych w okresie kończącego się życia*, 28.

28 Wojciech Szczeklik et al., "Zapobieganie terapii daremnej u dorosłych chorych umierających w szpitalu – stanowisko Grupy Roboczej Towarzystwa Internistów Polskich ds. Tera-

The above draft laws and non-normative documents have all been intended to prompt legislative solutions which would regulate the discontinuation of futile care. It is therefore necessary to discuss pertinent procedures and institutions adopted in other countries, where patients are entitled to declare their will or have decisions on their medical treatment taken by appointed attorneys. Subsequently, one should consider whether it might be possible to introduce such solutions in the Polish legal order.

Legal Regulation of Futile Care in the United Kingdom

The lack of adequate regulations concerning futile care in Poland calls for an examination of other legal systems, in which one can lawfully discontinue treatment that is not aimed at recovery, but only at sustaining one's vital functions without prospective improvement. One of the countries where such provisions exist is the United Kingdom or, more specifically, England and Wales. The principal piece of legislation governing the procedures applicable to incapacitated persons is the Mental Capacity Act (hereinafter: MCA) of 2005, which came into effect in 2007.[29] Persons who have lost mental capacity are defined as individuals who are unable to comprehend and remember the decision-making process and the resulting consequences. It cannot be presumed that a person has lost their mental capacity merely based the fact that their decisions appear illogical, or judging by external characteristics such as age and appearance.[30]

The above date is important because Poland at the time saw the early-stage proposals, which have not resulted in a normative regulation to this day. Al-

pii Daremnej na Oddziałach Internistycznych. Część 1: chory umierający nieubezwłasnowolniony, niebędący w stanie podejmować świadomych decyzji co do leczenia w sytuacji daremności medycznej stosowanej terapii," *Medycyna Praktyczna*, no. 4(2023): 121.

29 Dominic Bell, "The Legal Framework for End of Life Care: A United Kingdom Perspective," *Intensive Care Medicine* 33, no. 1(2007): 158–59, https://doi.org/10.1007/s00134-006-0426-9.

30 "Mental Capacity," Menal Health Foundation, https://www.mentalhealth.org.uk/explore-mental-health/a-z-topics/mental-capacity.

though the MCA does not pertain to the end-of-life period or the discontinuation of futile care directly, it introduces procedures that may also apply at the final stage of the life of an incapacitated patient.[31] Another relevant aspect is that England and Wales rely on the common law system, in which precedents established by judicial decisions carry substantial importance. Hence, it would be advisable to examine which procedures adopted in UK law might be introduced in Poland.

There are two distinctive instruments which may readily apply in the case of futile care, namely Advance Decision to Refuse Treatment (ADRT) and Lasting Power of Attorney (LPA) for health and care decisions.[32] ADRT is otherwise known as the living will, although the latter is a colloquial term rather than a notion recognized under English law.

An advance decision to refuse treatment enables one to specify beforehand what medical treatment one does not wish to receive if one becomes incapacitated in the future. If the ADRT concerns refusal of life-sustaining treatment, a written form is mandatory.[33] The two factors which determine whether one may make an advance decision are being at least 18 years old and having full legal capacity at the time of making the declaration. An ADRT must not request the performance of an act that is unlawful; refuse consent to acts that constitute standard of care (e.g. the administration of analgesics); request the performance of a specific medical act; or refuse the treatment of a mental illness if the criteria of the Mental Health Act 1983 are met.[34] The ADRT does not require a physician to be in attendance when such a statement is made or to be involved in the process. However, if the ADMR is made by a terminally ill individual, it is advisable to consult a professional to understand the consequences of such a declaration and assess the mental state of the person concerned at the time of making it.[35]

31 Bell, "The Legal Framework for End of Life Care," 158–59.
32 Age UK, "Advance Decision, Advance Statements and Living Wills," *Factsheet*, no. 72(2023): 3.
33 Age UK, "Advance Decision, Advance Statements and Living Wills," 5.
34 Age UK, "Advance Decision, Advance Statements and Living Wills," 6.
35 Age UK, "Advance Decision, Advance Statements and Living Wills," 6.

Furthermore, such a declaration is only valid when signed by the person making it, which they shall do before a witness.[36] When refusing life-sustaining treatment, where another declaration has already been made, a new document must be signed and dated by both the person concerned and a witness.[37]

Another institution which sanctions discontinuation of life-sustaining treatment is the lasting power of attorney (LPA); that particular institution was also introduced into the legal system of the England and Wales by way of the Mental Capacity Act of 2005.[38] The LPA pertains to two areas, namely financial as well as health-related decisions,[39] both of which are relevant to this inquiry. In a situation where an LPA has been granted following a previous advance decision, the attorney cannot require any of the medical acts stated in the advance decision to be performed if any of those has been designated by the maker as an act not to be undertaken by medical practitioners after they have lost the capacity to decide for themselves.[40]

The UK legal system relies heavily on precedent, also where the procedures relating to discontinuation of futile care are concerned. For a starting point in deliberations, one should draw on a 1990 case,[41] in which it was expressly held that there is no obligation to administer medical procedures that are futile. Subsequent rulings endorsed the aforementioned holding. It has been affirmed that a patient with full legal capacity may not be compelled to undergo treatment and may refuse to have medical procedures performed, even if this would result in death.[42] The physician, on the other hand, is obliged to

36 Age UK, "Advance Decision, Advance Statements and Living Wills," 8.
37 Age UK, "Advance Decision, Advance Statements and Living Wills," 8.
38 Mental Capacity Act 2005, legislation.gov.uk, https://www.legislation.gov.uk/ukpga/2005/9/contents https://www.legislation.gov.uk/ukpga/2005/9/notes/division/6/1/3?view=plain.
39 Mental Capacity Act 2005, Sections 9–14, https://www.legislation.gov.uk/ukpga/2005/9/notes/division/6/1/3?view=plain.
40 Mental Capacity Act 2005, Sections 9–14.
41 Great Britain. England. Court of Appeal, Civil Division, "Re J (A Minor) (Wardship: Medical Treatment)," *All England Law Reports*, no. 3(1990): 930–45.
42 Great Britain. House of Lords, "Airedale NHS Trust v. Bland," *All England Law Reports*, no. 1(1993): 821–96, at page 860 per Lord Keith and page 866 per Lord Goff.

respect the will of the patient and refrain from attempting treatment if the person with full legal capacity has refused it; should the physician dissent, they are obliged to find another physician who will comply with the patient's will.[43]

A special type of discontinuation of futile care which generally requires court approval concerns patients in a vegetative state, for whom even essential procedures such as feeding and hydration will be considered treatment.[44] As demonstrated earlier, pursuant to the Mental Capacity Act, a patient who makes a declaration of will in the event of loss of capacity to make decisions (advance decision) or appoints an attorney may not waive the performance of essential care activities. However, in the light of the judicial ruling, such a possibility exists if three conditions are met at the same time: the provisions of the Mental Capacity Act 2005 have not been breached; the relevant professional guidelines have been followed; and there is no doubt that it is in the best interests of the patient.[45]

Regulation of Futile Care in Italy

Until 2018, the legislation in Italy had not provided for discontinuation of futile care, i.e. a treatment that does not produce positive clinical results, improve the patient's quality of life or offer a reasonable chance of survival.[46] At first, Italian case law was not in favour of approving the patient's advance decisions, as in the case of Piergiorgio Welby who, as a terminally ill patient, made a declaration of will to have futile care discontinued. On 16 December 2006, a court in Rome found such a request "inadmissible" and the physician

43 *Re Ms B v a NHS Hospital Trust* [2002] EWHC 429 (Fam), United Kingdom High Court of Justice.

44 "Legal Annex," General Medical Council, https://www.gmc-uk.org/professional-standards/the-professional-standards/treatment-and-care-towards-the-end-of-life/legal-annex.

45 "Legal Annex."

46 Cesare Triberti and Maddalena Castellani, *Libera Scelta sul fine vita. Il testament biologico. Commento alla Legge n.219/2017 in materia di consenso informato e dispozioni anticipate di trattamento* (goWare, 2018), 39.

in charge was charged with "murder under consent." It should be noted that the physician was acquitted on 14 July 2007.[47]

The context of futile care was invoked by the National Ethics Committee in the 1995 document entitled *Ethical Issues Concerning the End of Life*, which further stressed the need to discontinue treatment which does not improve the patient's condition. It was also observed that withholding such a treatment is a duty of physicians, notably in extreme situations, whereas patient declarations of will—whose introduction the document advocated—should not be treated merely as guidance to inform the actions undertaken by medical professionals.[48] A 2003 document concerned with advance decision asserted that statements of will are not only an instrument to legitimize treatment, but also a fundamental human right.[49] Considerable emphasis was placed on the importance of treating an unconscious patient in accordance with their will, but advance decisions were approached somewhat conservatively, as it was argued that an advance decision may not be respected if there are chances for the patient to recover.[50]

The New Code of Medical Ethics of 2014 acknowledged that advance decisions are statements of will which nevertheless were not legally binding on medical professionals. Thus, with respect to discontinuation of futile care, the main problem was that patients' declarations of will in which they refused to undergo further ineffective treatment were not statutorily recognized. The matter of appointing attorneys and guardians for incapacitated persons was also insufficiently elaborated and provided for; admittedly, the decree of 9 July 2008 did introduce the institution of guardian, but the authority of the latter to make declarations on behalf of another was confined to patients in a vegetative state.[51]

47 Triberti and Castellani, *Libera Scelta sul fine vita*, 11.

48 Nereo Zamperetti and Rodolfo Proietti, "End of Life in the ICU: Laws, Rules and Practices: The Situation in Italy," *Intensive Care Medicine*, no. 32(2006): 1620, https://doi.org/10.1007/s00134-006-0330-3.

49 Denard Veshi, "End-of-Life Decisions in Italy: An Overview of the Currentsituation," *Liverpool Law Rev*, no. 38(2017): 233, https://doi.org/10.1007/s10991-017-9200-z.

50 Veshi, "End-of-Life Decisions in Italy," 234.

51 Triberti and Castellani, *Libera Scelta sul fine vita*, 13.

It may be noted that prior to the enactment of Law no. 219/2017, three bills which sought to introduce the living will (*testamento biologico*) were submitted. The first was rejected in 2009 by the President, while the bill of 2011 did not enter into force; the last one was dated 2014.[52] On 14 December 2017, the Italian Parliament adopted a law which expands on the right to self-determination by establishing the institution of advance decision, and also protects the autonomy of choice and the dignity of the patient—construed as fundamental human right—through the validation of the declaration of will and the appointment of a guardian.[53]

Article 1 of Law no. 219/2017, *Rules on Informed Consent and Advance Directives for Treatment*, states that "in compliance with the principles laid down in Articles 2, 13 and 32 of the Constitution and Articles 1, 2 and 3 of the Charter of Fundamental Rights of the European Union, [this law] protects the right to life, health, dignity and self-determination of the person and sets out that no health treatment may be commenced or continued without the free and informed consent of the person concerned, except in cases expressly provided for by law."[54] It augments the relationship of care and trust between the patient and the physician in which the autonomy of the patient's decision-making and the responsibility of the physician are beneficially aligned through consent to treatment. Informed consent should be obtained using means which are most suited to the patient's condition as well as by appointing a guardian who expresses the will of an incapacitated patient.[55]

The matter of advance directives is addressed in Article 4, in which it is construed as a preliminary instruction regarding treatment. Article 4 (1) states that "Every person of full age and capacity, in anticipation of a possible future incapacity to self-determine and after having acquired adequate medical information on the consequences of his or her choices, may, through the advance

52 Enkelejda Koka and Denard Veshi, "A New Law of 'Living Will' in Italy: A Critical Analysis," *Liverpool Law Rev*, no. 40(2019): 115, https://doi.org/10.1007/s10991-019-09224-0.

53 Koka and Veshi, "A New Law of 'Living Will' in Italy," 116.

54 Article 1, Law no. 219/2017 *Rules on Informed Consent and Advance Directives for Treatment.*

55 Triberti and Castellani, *Libera Scelta sul fine vita*, 107.

directive, express their will with regard to medical treatment, as well as consent to or refuse diagnostic tests or therapeutic choices and specific medical treatments. They also designate a person whom they trust, hereinafter referred to as 'trustee', to act on their behalf and represent them in relations with the physician and healthcare institutions."[56]

The declaration of will enables taking competent decisions on the type of treatment the patient wishes to receive prospectively, which means that such decisions remain valid at a future point in time, when the patient may not have the capacity to make informed decisions.[57] Although it is not specified what an advance directive should contain, it is explicitly stated that the patient should first obtain "adequate" medical information about the consequences of their choices, which ensures that the decision—albeit taken in advance—does not result from inaccuracies or outdated and non-medical information obtained from unauthorized sources.[58]

Such a declaration of will empowers an individual to self-determine regarding their health and life in cases where treatment becomes futile, having no positive impact on their condition and their quality of life. The article entitles one to elect an adult guardian with full legal capacity, who represents the patient in relations with healthcare institutions and, moreover, has the authority to alter the patient's decision in cases where the treatment offers a chance of recovery.[59] The physician, on the other hand, is statutorily obliged to respect the patient's declaration of will, even in the case of conscientious objection. However, if the patient's decision is at odds with current medical knowledge, it is the physician—in consultation with the guardian—who shall suggest a treatment that reasonably improves one's quality of life.[60]

56 Article 4(1), Law no. 219/2017 *Rules on Informed Consent and Advance Directives for Treatment*.
57 Di Paolo et al., "A Review and Analysis of New Italian Law 219/2017," 4.
58 Di Paolo et al., "A Review and Analysis of New Italian Law 219/2017," 4.
59 Triberti and Castellani, *Libera Scelta sul fine vita*, 109.
60 Di Paolo et al., "A Review and Analysis of New Italian Law 219/2017," 5.

Until 2018, the institution of advance directive was not statutorily regulated in Italy. Since the matter was addressed only in recommendations as opposed to formal provisions, declarations of will had no legal foundation. Given the need for the issue to be regulated, the legislature ultimately enacted Law No. 219/2017, *Rules on Informed Consent and Advance Directives for Treatment*, which sanctioned advance directives and the informed consent related thereto, and created the institution of a guardian to act as the patient's representative.

Conclusions

To date, the institution of discontinuation of futile care remains unregulated in Poland. Consequently, no provisions in the Polish legal order allow individuals to make a prior declaration of will so as to waive medical procedures that do not benefit them but only prolong their suffering. Moreover, no statute authorizes the appointment of an attorney who would be empowered to make decisions on patient's behalf when the latter has lost the capacity to act independently.

The guidelines for the discontinuation of futile care that have been published so far are not binding. Functioning as no more than suggestions or recommendations, they contain information on advisable or preferred practices in a particular field. Even so, the guidelines are crucial in terms of introducing new futile care regulations in the Polish system, including the institution of attorney and advance decision. They constitute a major point of reference for legislators, as well as for medical professionals, patients and other stakeholders, helping to shape future medical law and practice. They can support the legislative process since they offer tested solutions and directions that are worth considering when drafting new laws. The introduction of guidelines concerning futile care, along with the institutions of attorney and advance decision, aims to standardize medical practice and ensuring better protection of patients' rights. These guidelines may serve as a basis for the education and training

of medical personnel, as well as for raising public awareness of patients' rights and the ethical aspects of healthcare.

The above study demonstrates that, in view of the need to bring the Polish legal system up to date with regard to protection of patients' rights, it would be reasonable to introduce several key institutions and definitions that reflect contemporary standards and respect human dignity. One of the solutions is to establish the institution of attorney, i.e. a person authorized to represent the patient in the decision-making process concerning health and treatment in situations where the patient is unable to express their will. The attorney, acting on the basis of the lasting power of attorney granted beforehand, will thus be empowered to decide in accordance with the patient's will and best interests. Another important measure is to sanction advance decision, a document in which the patient may, at an early stage, state their wishes regarding medical care in the event that they are unable to make decisions for themselves in the future. Advance decision enables the patient to express their preferences regarding the treatment and medical procedures which they would or would not like to receive. In addition, it is necessary to define futile care, i.e. medical procedures that do not have the expected therapeutic effect and only prolong the patient's suffering. A clear-cut definition of futile care would facilitate decisions to discontinue ineffective medical interventions on the part of medical professionals. Furthermore, consideration should be given to introducing the institution of a guardian, who could be appointed in disputable situations or when no attorney has been appointed. This guardian would act in the interest of the patient, ensuring that their rights are respected and that treatment-related decisions correspond as closely as possible to the expressed or implied will of the patient. These changes, inspired by legal solutions adopted in the United Kingdom and Italy, should be aligned with the characteristics of the Polish legal order as well as applicable standards and procedures. It is crucial that they take into account the dignity of the patient and the right to autonomy in making decisions regarding their own health, even in circumstances where the patient is incapable of freely articulating their will.

The legislative process in that regard should be preceded by an extensive information campaign, so as to ensure that the public is acquainted with the notion of futile care as well as its legal, ethical and moral ramifications.

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The Role of State Aid in the COVID-19 Pandemic – Polish Case Study

Abstract: The article aims to assess the utility of the legal instruments implemented during the COVID-19 pandemic in terms of responding to other sudden crises with vast economic consequences. The analysis will consist of presenting the legal basis for state aid, the measures undertaken and their consequences on both the EU and national level.

Firstly, the legal response to the crisis on the EU level will be tackled with a particular focus on the provisions of the temporary framework. Other possible legal bases will also be taken into consideration – Article 107(2)b TFEU, Article 107(3)c TFEU, de minimis regulation, General Block Exemption Regulation. Secondly, the response to the crisis in Poland will be analysed on two levels: legislation (implementation of the "anti-crisis shield") and jurisprudence (using the example of the judgement of the Administrative Court in Opole I SA/Op 97/21 from April 23, 2021, which resolved the legal controversies regarding the so-called PKD classification).

Keywords: state aid, COVID-19 pandemic, competition law, EU law

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Introduction

Given the huge economic consequences of the outbreak of the COVID-19 pandemic, a range of unprecedented state aid measures were introduced all over Europe, both on the national and EU level. The main focus of the paper will be to present how state aid measures function[3] in member states through an analysis of EU policies as well as their implementation, and of national measures, taking Poland as a case study.

First of all, the legal basis for the state aid measures implemented by the EU will be presented with a particular focus on the State Aid Temporary Framework. Next, the reaction to the crisis on a national level will be examined through the analysis of the so-called Polish "anti-crisis shield." Case-law will also be taken into account in order to present how certain legal controversies regarding eligibility for state aid were resolved. Finally, the paper will conclude with an assessment of the effectiveness of the measures in terms of responding to other sudden crises with far-reaching economic consequences, for instance, the 2022 Russian invasion of Ukraine.

Legal Response to the Crisis – EU

The outbreak of the COVID-19 pandemic in Europe was followed by a quick reaction of the EU. Due to previous experience from earlier crises, a significant change in crisis management and response time could be observed. It is already known that during a crisis, the lack of an effective crisis management mechanism and uncoordinated actions taken by individual countries can only increase tensions in the markets.[4] Moreover, in order for state aid to be effective

3 Since, as announced, the main focus will revolve around state aid, it is necessary to recall the definition of the term introduced in article 107 of the Treaty on the Functioning of the European Union (hereinafter: TFEU), according to which the phrase "state aid" can refer to "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods." Such a definition will be adopted in the present article.

4 Małgorzata Jabłońska et al., "Public Aid and Entrepreneurship During the Covid-19 Pandemic in the European Union Countries," *Journal of Finance and Finance Law*" 3, no. 31 (2021): 63, https://doi.org/10.18778/2391-6478.3.31.04.

and not to distort free competition, it is absolutely necessary that state support be clearly defined and limited in time with regard to what is needed to address the crisis.[5] On March 13, 2020, the European Commission published the communication on "Coordinated economic response to the COVID-19 outbreak,"[6] which outlined the EU's actions regarding COVID-19. Section 5 of this document is dedicated to state aid. The European Commission stated that the main fiscal response to the crisis will come from member states' national budgets and that member states can design ample support measures in line with existing state aid rules such as:

- Article 107(2)b TFEU regarding damage caused by natural disasters or exceptional occurrences;
- Article 107(3)c TFEU regarding aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- de minimis Regulation[7];
- General Block Exemption Regulation.[8]

Moreover, the preparation of a special legal framework under the Article 107(3)b TFEU was announced. This provision considers state aid as a form to remedy a serious disturbance in the economy of a member state as compat-

5 Andreea-Emanuela Drăgoi, "Supporting the EU Economy through State Aid during COVID-19 Crisis: A Comparative Approach," *Global Economic Observer* 8, no. 1(2020): 15.

6 Communication from the European Commision to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup of March 18, 2020 – Coordinated economic response to the COVID-19 outbreak, EUR-Lex – 52020DC0112.

7 Communication from the European Commision to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup of March 18, 2020 – Coordinated economic response to the COVID-19 outbreak, EUR-Lex – 52020DC0112.

8 Regulation (EC) No 651/2014 of June 17, 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, Official Journal of the European Union 2014 L 187/1.

ible with the internal market. It is worth mentioning that such a framework has only been introduced once – during the 2008 financial crisis.[9]

The aforementioned provisions of the TFEU regarding state aid proved to be insufficient for coping with the economic crisis, since they required notification to the EC and other prerequisites. Only the positive decision of the EC enabled the application of the measure.

In case of article 107(2)b TFEU, even though it may appear to be a suitable provision for all COVID-related cases, it can be inferred from the decisional practice of the European Commission that aid granted on its basis must satisfy three criteria: exceptionality, causality and proportionality. The Commission has narrowed the scope of interpretation of Member States by declaring that the outbreak of COVID-19 qualifies as an "exceptional occurrence" for the purpose of Article 107(2)(b) of the TFEU.[10] However, in practice it remains much more difficult to fulfill the remaining two requirements.[11]

The impediment to the application of Article 107(3)c TFEU is the need for the measure to be in concordance with the strict criteria set out by the Rescue and Restructuring Guidelines,[12] in particular with the principle 'one-time, last time', which means that aid can be granted to undertakings in difficulty in respect of only one restructuring operation. Moreover, it must be shown that the aid is truly in the public interest in the sense that saving the undertaking would prevent social hardship or address market failures.[13] Although in certain cases

9 Communication (EC) – Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis of January 22, 2009, Official Journal of the European Union 2009 C 16/1.

10 Decision (EC) of March 12, 2020, SA.56685, Denmark.

11 Phedon Nicolaides, "Application of Article 107(2)(b) TFUE to Covid-19 Measures: State Aid to Make Good the Damage Caused by an Exceptional Occurance," *Journal of European Competition Law & Practice* 11, no. 5–6(2020): 238–43, https://doi.org/10.1093/jeclap/lpaa026.

12 Communication (EC) of July 31, 2014 – Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Official Journal of the European Union 2014 C 249/01.

13 Paulina Kubera, "The State Aid Instruments In Response to the COVID-19 Crisis," *The Journal of Organizational Management Studies*, no. 1(2021): 7, article 930488, https://doi.org/10.5171/2021.930488.

it was possible to prove the fulfillment of these requirements,[14] the number of decisions taken on the basis of this provision remained the lowest.

As for the other forms of permitted state aid, the *de minimis* Regulation limits proved to be insufficient[15] and the scope of the General Block Exemption Regulation did not cover the demand for state aid in the situation of pandemic.

The need for a new legal framework was therefore identified and on March 19, 2020 the Temporary Framework for state aid Measures to support the economy during the COVID-19 outbreak[16] as well as six developments to it were announced. Like many other legal acts adopted by the EC the Temporary Framework (hereinafter: TF) is soft law, which means it does not establish directly effective law, but rather a set of guidelines for member states. It presents the terms that allow for receiving the EC's approval for state aid in response to COVID-19. Without such an act, it would be much more difficult to predict whether a particular measure would be accepted by the EC. Even though state aid based on the TF still requires notification to the EC, the unification of its rules and allowing only aid schemes without individual aid projects made the whole procedure more efficient. The first EC decisions were approved after mere days and later decisions did not take longer than a few weeks.

It should be noted that the five first amendments to the TF have already been extensively analysed in literature.[17] More detailed information on the subject will

14 For instance, decision (EC) of June 10, 2020, SA.57369, Portugal.

15 Under this regulation grants of up to €200,000 over a 3-year period do not constitute State aid. In the road freight transport sector, the threshold is €100,000 over a 3-year period. For agriculture and fisheries, the threshold amounts to €25,000 and €30,000.

16 References in this article are based on the informal consolidated version of the Temporary Framework of November 18, 2021, accessed August 11, 2022, https://competition-policy.ec.europa.eu/system/files/2021-11/TF_consolidated_version_amended_18_nov_2021_en_2.pdf.

17 The analysis of the TF, in particular of its first amendments was the subject of extensive research by, among others: Agnieszka Alińska, "Publiczne pakiety stymulacyjne i działania pomocowe ograniczające skutki pandemii COVID-19 w krajach Unii Europejskiej," *Finanse Publiczne* 1, no. 13(2021): 83–95; Aleksandra Kopeć, "Pomoc publiczna w dobie pandemii COVID-19," *Internetowy Kwartalnik Antymonopolowy i Regulacyjny*, no. 1(2021): 81–99; Anna Dobaczewska, "Pomoc publiczna na zwalczanie ekonomicznych skutków pandemii COVID-19 w kontekście prawa Unii Europejskiej," *Prawo i Więź* 2,

be provided with the addition of the sixth amendment that turned out to be the last modification of the TF before it was phased out by the EC on May 12, 2022.

The very first version of the TF provided the conditions for approval of aid schemes and state aid in form of direct grants, repayable advances or tax advantages (section 3.1 TF), guarantees on loans (section 3.2 TF), subsided interest rates for loans (section 3.3 TF), guarantees and loans channeled through credit institutions or other financial institutions and short-term export credit insurance. The TF was intended to remain in force until the end of 2020.

The first amendment to the TF was adopted on April 3rd 2020 and this broadened its scope by adding five new measures: aid for COVID-19 relevant research and development (section 3.6 TF), investment aid for testing and upscaling infrastructures (section 3.7 TF), investment aid for the production of COVID-19-relevant products (section 3.8 TF), aid in the form of deferrals of tax or of social security contributions and aid in the form of wage subsidies for employees to avoid lay-offs during the COVID-19 outbreak (section 3.10 TF). Some other changes and clarifications were also introduced by the sections 3.1 to 3.5 TF. It is worth mentioning that the measures from sections 3.6–3.8 TF are assessed on the basis of the article 107(3) c TFEU, while all other measures from this document are assessed on the basis of 107(3) b TFEU.

On May 8, 2020, the second amendment was published. It introduced the criteria based on which Member States can provide recapitalisations and subordinated debt to companies in need (section 3.11 TF). It should be noted that it is the only measure in the TF that allows individual aid projects.

The third amendment from June 29, 2020 enabled Member States to provide support under the Temporary Framework to all micro and small companies, even if they were already in financial difficulty on December 31, 2019.

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no. 36(2021): 72–82, https://doi.org/10.36128/priw.vi36.275; Aleksander Werner, "Pomoc państwa w obliczu COVID-19 na przykładzie instrumentów wykorzystywanych w Polsce," *Kwartalnik Nauk o Przedsiębiorstwie* 62, no. 5(2021): 63–75, https://doi.org/10.33119/KNoP.2021.62.5.6; Wiktor Żochowski, "Pomoc publiczna dla przedsiębiorców przed oraz w okresie trwania pandemii COVID-19," *Pracownik i Pracodawca* 1, no. 6(2021): 67–82, https://doi.org/10.12775/PiP.2021.005.

Heretofore, state aid based on TF could only be provided in case of financial difficulties due to COVID-19.

On October 13, 2020, the fourth amendment was adopted. The main alteration was the prolongation of all sections until June 30, 2021 and the section to enable recapitalisation support was prolonged until September 30, 2021. Moreover, aid in the form of support for uncovered fixed costs (section 3.12 TF) and some other minor changes was introduced.

Due to the appearance of new variations of coronavirus and to the lack of possibilities to respond to the economic crisis on January 28, 2021, the EC published the fifth amendment to the TF, which kept it in force until December 31, 2021. Another important aspect of it is the increase in the frameworks set out in the TF for limited amounts of aid.

The last amendment of the TF was adopted on November 18, 2021 and it prolonged the TF until June 30, 2022. Moreover, two new measures were introduced: investment support towards a sustainable recovery (section 3.13 TF) and solvency support (section 3.14).

It is worth noting that the TF was the legal basis for the vast majority of decisions that were taken by the EC. The analysis of the legal basis of decisions taken in Polish cases confirms this pattern.

Table 1. The amount of the EC's decisions on the particular legal basis

Legal basis	107 (2) b	107 (3) b	107 (3) c	TF	In total
Amount of decisions EU/Poland	104/4	28/2	4/0	724/29	860/35

Source: author's own data elaboration, based on data from the website of the European Legal Commission (Coronavirus outbreak – list of Member State Measures approved under Articles 107 (2) b, 107 (3) b, 107 (3) c TFEU and under the State Aid Temporary Framework[18]).

18 "State Aid Rules and Coronavirus," European Commision, accessed August 11, 2022, https://competition-policy.ec.europa.eu/state-aid/coronavirus_en.

Another interesting aspect is the choice of the legal basis within the TF. Taking Poland as an example, it can clearly be seen that almost 2/3 of all of the measures were approved under section 3.1 of the TF. The reason for this is the high financial limit per undertaking (EUR 2.3 mln).

Table 2. The amount of the Polish aid measures approved by the EC on the particular legal basis

Legal basis	3.1	3.2	3.3	3.4	3.5	3.6	3.7	3.8	3.9	3.10	3.11	3.12	107(2)b	107(3)b	In total
Amount of measures	40[19]	4	6	–	–	1	1	1	2	3	1	1	4	3	62

Source: author's own data elaboration, based on data from the website of the Polish Office of Competition and Consumer Protection (Lista instrumentów pomocowych związanych z COVID-19).

As mentioned above, in May 2022 the EC announced that the TF will not be extended beyond the current expiry date – June 30, 2022.[20] However, some of the measures were in force for a longer period of time. Investment support (section 3.13 TF) was possible until December 31, 2022 and solvency support was possible (section 3.14 TF) until December 31, 2023. Member states also retained the possibility to convert repayable instruments like guarantees or loans granted under the TF into other forms of aid, such as direct grants under certain conditions until June 30, 2023.

Most significantly, after February 24, 2022 the EU faced a further crisis triggered by Russia's aggression to Ukraine. What is worth mentioning when considering the question of state aid is that on March 24, 2022 the EC adopted the Temporary Crisis Framework for State Aid, which was withdrawn with the effect from October 27, 2022, and on March 9, 2023 the Temporary Crisis

19 One decision might encompass more than one measure.

20 "State Aid: Commission Will Phase Out State Aid COVID Temporary Framework," European Commision, accessed Augist 12, 2022, https://ec.europa.eu/commission/presscorner/detail/en/statement_22_2980.

and Transition Framework was introduced.[21] Both frameworks are based on article 107(3)b TFEU, as in the case of the COVID-19 Temporary Framework. In conclusion, it can be stated that the concept of a "Temporary Framework" seen as a set of guidelines for member states proved effective enough to serve as a general pattern to respond to an economic crisis and subsequently was adopted for the third time in EU history.

Legal Response to the Crisis – Poland

Legislation – the "Anti-Crisis Shield"

The rapid spread of the COVID-19 pandemic and the subsequent detection of the first infection case in Poland on March 4, 2020 led the Polish government to implement a series of measures aimed at limiting citizens' mobility. Due to the large number of measures implemented after the detection of the first infection and the multi-aspectual character of the regulations, the present section will be limited to an analysis of a selected range of the most significant questions.

The character of state aid rapidly changed to become more universal.[22] The first measures were introduced on March 24, 2020 by means of a regulation of the Health Minister[23] and on March 31, 2020 by a regulation of the Council of Ministers.[24] These measures encompassed the following restric-

21 Communication from the Commission – Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia of 24 March 2022, Official Journal of the European Union 2022 C 131 I/1.

22 See Jabłońska et al. "Public Aid and Entrepreneurship During the Covid-19 Pandemic in the European Union Countries," 64 (footnote 40).

23 Rozporządzenie Ministra Zdrowia z dnia 24 marca 2020 roku zmieniające rozporządzenie w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu epidemii [Regulation of the Health Minister of March 24, 2020 announcing the "state of pandemic" on Polish territory], Journal of Laws of 2020, item 522.

24 Rozporządzenie Rady Ministrów z dnia 31 marca 2020 roku w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii [Regulation of the Council of Ministers from March 31, 2020 on the establishmenet of limitations, obligations and prohibitions in relation to the state of pandemic], Journal of Laws of 2020, item 566.

tions: mandatory quarantine for hotel guests, lockdown on barber shops, tattoo and piercing studios, interdiction of leaving home for reasons other than grocery shopping, doctor visits, medication purchase, outdoor physical activity and exceptional situations. The above limitations to economic activity affected numerous sectors of the economy, causing major social unrest, in particular among entrepreneurs. In response to these social expectations of state aid compensating incurred losses, the government announced the implementation of the "anti-crisis shield" – a set of different measures introduced in various legal acts providing a legal basis for state aid. In the following passages, an overview and analysis of the shield will be presented.

First of all, it should be highlighted that the "anti-crisis shield" should not be regarded as a uniform, static legal act but as a whole range of legal acts that were multiply amended over the course of 2020 and 2021. The first version of the shield – the "anti-crisis shield 1.0" – was introduced on April 1, 2020[25] and was immediately followed by a series of amendments that came into force on April 18, 2020[26] under the name "anti-crisis shield 2.0." According to the information preannounced by the Polish Development Fund on April 15, 2020, the shield focused on five key aspects (with a total budget of 45.6 billion euro): preserving and securing employment (6.5 billion euro), support for entrepreneurs (16 billion euro), healthcare (1.6 billion euro), strengthening the financial system (15 billion euro), and public investment (6.5 billion euro).[27]

The most significant aspect taking into consideration its economic magnitude and social perception was supporting entrepreneurs. According to the Polish Development Fund, the shield had the following aims in this respect:

– providing small and medium-sized enterprises with preferential financing, largely non-returnable, to ensure liquidity and stability during

25 "Tarcza antykryzysowa," gov.pl, accessed July 20, 2020, https://www.gov.pl/web/tarczaantykryzysowa.
26 "Tarcza antykryzysowa."
27 "Tarcza antykryzysowa."

times of major disruptions in the economy due to the effects of the COVID-19 pandemic;
- transfer of financial compensation to entrepreneurs in the form of lost income or additional costs incurred as a result of the COVID-19 pandemic;
- counteracting disruptions in the functioning of the economy during the economic crisis caused by the COVID-19 pandemic;
- financial stabilization of small and medium-sized enterprises in order to protect jobs and financial security of citizens;
- providing financial assistance to sectors particularly hard hit by the effects of the COVID-19 pandemic.[28]

The above listed aims were to be achieved through the implementation of a series of specific measures. According to a selection carried out by A. Łopatka and K. Fedorowicz,[29] the most significant of these aims were:

- Micro companies employing no more than 9 workers received a loan of PLN 5,000. The loan paid out by the Labour Fund was non-refundable if the company did not lay off its employees over the next 3 months.
- If a term of a working capital loan taken out by a company came to an end, the entrepreneur was able to renew it automatically. Thanks to the regulations of the Financial Supervision Commission, banks could calculate creditworthiness based on financial data as of the end of 2019.
- By the end of 2020, micro-, small and medium-sized enterprises had the opportunity to obtain a loan with *de minimis* guarantee of up to PLN 3.5 million. The amendment allowed the guarantee to cover up to 80 per cent of the loan amount.

28 Polski Fundusz Rozwoju, *Przewodnik Antykryzysowy dla Przedsiębiorców* [Anti-crisis Guide for Enterpreneurs] (Polski Fundusz Rozwoju, 2020); "Tarcza Finansowa dla Firm," PFR, accessed July 20, 2022, www.pfr.pl/tarcza; "Tarcza antykryzysowa – materiały," gov.pl, accessed July 20, 2022, https://www.gov.pl/web/tarczaantykryzysowa/materialy.

29 Agnieszka Łopatka and Karol Fedorowicz, "Evaluation of the Effectiveness of State Aid Offered to Enterprises During the COVID-19 Pandemic," *Procedia Computer Science* 192, 2021: 4828–36. https://doi.org/10.1016/j.procs.2021.09.261.

- Medium and large companies could obtain a capital increase or bond financing from the PFR Investment Fund – with a total value of PLN 6 billion.
- The loss incurred in 2020 was deductible from the taxpayer's income earned in 2019. To do so, taxpayers filed a correction to their 2019 return. This was available for those whose 2020 income fell by at least 50 per cent compared to the income earned in 2019. A loss of up to PLN 5 million was deductible from 2019 income (the excess will be deductible in subsequent years).
- The taxpayer did not incur the fee for deferring the tax payment deadline or spreading the tax payment into instalments, or deferring or spreading into instalments the payment of tax arrears with interest. Furthermore, the entrepreneurs were exempt from the necessity to pay the prolongation fee in the following cases: contributions to be collected by Social Insurance Fund; concluding an agreement on deferring the date of payment of contributions; or an agreement on splitting the due amount into instalments.
- Micro, small and medium-sized companies that benefited from the support from EU funds could count on more favourable terms of capital repayment. New rules were introduced, which include, an additional grace period in repayment, 4-month loan holidays, reduction of loan interest rates, and no interest charges.
- Entrepreneurs who took out a loan to develop their tourism-related business could apply for more favourable repayment terms due to loss of liquidity. Business owners could apply for an extension of the repayment grace period, credit holidays, or a reduction in interest rates.[30]
- It might be significant to briefly analyze the evolution of the measures that came into force as the "anti-crisis shield." The socio-economic

30 Łopatka and Fedorowicz, "Evaluation of the Effectiveness of State Aid Offered to Enterprises During the COVID-19 Pandemic."

> situation in Poland changed multiple times over the course of 2020, 2021 and 2022, which resulted in the numerous revisions and amendments to the initial state aid measures implemented by the "anti-crisis shields" 1.0 and 2.0 that are the focus of this section. As an example, major changes were introduced by the "anti crisis-shield" 3.0: standstill benefits were granted to certain entrepreneurs and wider groups of entrepreneurs could benefit from the forms of state aid introduced by the "anti-crisis shield" 2.0.[31]

It has to be highlighted, however, that in several cases the extensive regulations implemented by the subsequent "anti-crisis shields" sparked significant legal controversies that needed to be resolved through judicial interpretation. Such a situation will be discussed in section 3.2., using the example of the public debate regarding the so-called 'PKD classification'.

The Role of the Judiciary on the Example of the Judgement of the Administrative Court in Opole I SA/Op 97/21 from April 23, 2021 That Resolved the Legal Controversies Regarding the 'PKD Classification'

Even though the measures themselves were widely supported, the regulations concerning eligibility caused certain controversy, as they linked the process of being granted state aid to the Polish Classification of Activities (PKD).[32] The PKD classification is a conventionally adopted, hierarchically structured set of socio-economic activities that are carried out by economic entities and is related to the National Official Business Register (REGON). In this classifica-

31 "Nowe wnioski na PUE ZUS w związku z rozwiązaniami tzw. Tarczy Antykryzysowej 3.0," ZUS, pubished May 25, 2020, https://www.zus.pl/-/nowe-wnioski-na-pue-zus-w-zwiazku-z-rozwiazaniami-tzw-tarczy-antykryzysowej-3–0.

32 Ustawa z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych [Act of March 2, 2020 on the specific measures to prevent, counteract and fight COVID-19 and other contagious disease as well as the crises caused by them], Journal of Laws of 2021, item 2095.

tion, economic entities are ranked according to PKD sections (from A to U), which include PKD divisions. The allocation of the PKD division depends on the type of activity the entity performs. Examples can be found below:

- Division 55 – hotels and similar accommodation, holiday and other short-stay accommodation, camping grounds (including trailer parks) and tent fields, other accommodation,
- Division 56 – restaurants and other food service establishments, mobile food service establishments,
- Division 93 – sports activities, operation of sports facilities, operation of sports clubs, operation of fitness centers, other sports-related activities, entertainment and recreation activities, amusement parks and theme parks, other entertainment and recreation activities.[33]

In order to be eligible to receive support from the "anti-crisis shield," entrepreneurs needed to be registered under at least one of a series of PKD divisions.[34] The list of PKD divisions eligible for state aid changed several times over the course of the pandemic. Making PKD registration one of the criteria that had to be fulfilled in order to receive state aid caused a series of inconveniences, since before the outbreak of the pandemic PKD divisions had barely had practical relevance. In certain cases, they remained unchanged from the moment of registration of a particular firm, regardless of the character of the activity performed by a given company.

The fact that eligibility for state aid was assessed based on the PKD divisions under which entrepreneurs operated and not on the activity that they actually performed caused widespread resentment among those who provided services that made them eligible for state aid but who failed to register their activity under the corresponding PKD divisions and were thus denied financial support. The legal

33 Rozporządzenie Rady Ministrów z dnia 24 grudnia 2007 roku w sprawie Polskiej Klasyfikacji Działalności (PKD) [Regulation of the Council of Ministers from December 24, 2007 on the Polish Classification of Activities (PKD)], Journal of Laws of 2007, no. 251, item 1885.

34 Ustawa z dnia 2 marca 2020 r. o szczególne szczególnych rozwiązaniach związane związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych.

acts implementing the "anti-crisis shield" did not provide an answer to whether the decisive aspect when it comes to state aid eligibility was being registered under a given PKD division or whether it was the activity that was actually being carried out. The Polish Social Insurance Institution (ZUS) in its decisions over the course of 2020 consequently denied state aid to entrepreneurs who failed to register their activity under a PKD division listed in the legal acts introducing the "anti-crisis shield." Subsequently, a decisive role was played by the case-law, since numerous decisions were challenged by entrepreneurs and courts had to rule either in favour of formal registration or of the activity that was *de facto* carried out.

The judgement of the Administrative Court in Opole I SA/Op 97/21 from April 23, 2021[35] that was posteriorly regarded as a landmark decision by other courts[36] can serve as an illustration of the above. When it comes to the facts, the entrepreneur A.C. was denied by the Polish Social Insurance Institution the right to be exempt from paying contributions from July to September 2020, as despite the activity performed being among the ones listed in the act introducing this form of state aid, there was no registration under the corresponding PKD division. While interpreting the "anti-crisis shield" act listing the PKD divisions, this resulted in one of the most significance aspects being the analysis of the phrasing of article 31, paragraph 8 of the Act on the specific measures to prevent, counteract and fight COVID-19 and other contagious disease, as well as the crises caused by them from March 2, 2020. This article listed a series of PKD divisions and stated that entrepreneurs whose "predominant activity"

35 Judgement of the Administrative Court in Opole of April 23, 2021, I SA/Op 97/21.

36 The judgement was often cited by other courts and the arguments presented in it were adopted by them. A direct reference to the judgment of the Administrative Court in Opole of April 23, 2021, I SA/Op 97/21 can be found in the text of numerous judgements, as the ones cited beneath: Judgement of the Administrative Court in Poznań of December 7, 2021, III SA/Po 793/21; Judgement of the Administrative Court in Opole of February 23, 2022, I SA/Op 547/21; Judgement of the Administrative Court in Opole of January 21, 2022, I SA/Op 398/21.

matched given PKD divisions could be exempt from paying social insurance contributions from July 1, 2020 to September 30, 2020.[37]

The court repealed the decision of the Polish Social Insurance Institution interpreting the term "predominant activity" in favour of entrepreneurs defining it as "the activity with the largest share indicator (e.g. value added, gross production, sales value, employment volume or remuneration) characterizing the activities of the entity"[38] and not the one under the registered PKD division. The reasons behind this interpretation were firstly, that the Regulation of the Council of Ministers from December 24, 2007 on the Polish Classification of Activities provided a legal definition of the term "predominant activity,"[39] and secondly, the *ratio legis* of the act. Moreover, the significance of previous judgments of the Polish Supreme Court should not be omitted.[40] As it was stated in the judgement, "proper definition of the concept of predominant activity is therefore of great importance also in the context of the aim of the anti-crisis shield, which is to respond to the negative effects of the COVID-19 pandemic. The purpose of these legal regulations is to provide real support for entities that actually bear the effects of the COVID-19 pandemic (for instance, by incurring losses caused by restrictions on the economic activity carried out by them). Therefore, the point is that support should be granted to entities actually

37 Ustawa z dnia 2 marca 2020 r. o szczególne szczególnych rozwiązaniach związane związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych.

38 Judgement of the Administrative Court in Opole of April 23, 2021, I SA/Op 97/21.

39 The regulation stated that "the predominant activity of a statistical unit is the activity with the largest share indicator (e.g. value added, gross production, sales value, employment volume or remuneration) characterizing the activities of the entity. Rozporządzenie Rady Ministrów z dnia 24 grudnia 2007 roku w sprawie Polskiej Klasyfikacji Działalności (PKD).

40 The Polish Supreme Court in judgements of January 7, 2013 and of November 23, 2016 when analyzing the legal significance of PKD divisions stated that "information on the type of activity resulting from the REGON [PKD divisions] register does not create any legal status, but only is to confirm the factual situation according to the statement of knowledge of the entity conducting such activity."See Judgement of the Supreme Court of the Republic of Poland of January 7, 2013, II UK 142/12; Judgement of the Supreme Court of the Republic of Poland of November 23, 2016, II UK 402/15.

conducting at a given date as the predominant activity in the indicated scope an activity according to the given PKD."[41]

It can thus be concluded that jurisprudence responded to the dissonance between formal registration and actual carrying out of a given economic activity in favour of the *status quo* of entrepreneurs, according to the aim and *ratio legis* of the "anti-crisis shield."

Conclusions

Besides highlighting the swift reaction to the COVID-19 crisis by both the EU and individual member states, it should be noted that member states put in place unprecedented support measures to preserve the financial integrity of companies through the various waves of the pandemic. The TF served as a catalyst to these processes and increased their efficiency. The Polish case study shows that local aid schemes such as the "anti-crisis shield" can work effectively and even though interpretative doubts might arise they can be clarified by case-law.

Although some scholars emphasise that if the recovery was funded directly by the EU, there would be less distortions within the internal market and more common goals achieved,[42] the implementation of the Temporary Crisis Framework for State Aid (providing support following the Russian aggression against Ukraine) suggests that there will be no significant changes in the mechanism of providing state aid in times of crisis. Thus, in conclusion, it has to be said that both the COVID-19 TF and the Polish "anti-crisis shield" served as landmark schemes and were followed by similar sets of regulations aimed at tackling the crisis caused by Russia's aggression towards Ukraine.[43] Since the economic and

41 Judgement of the Administrative Court in Opole of April 23, 2021, I SA/Op 97/21.

42 Irene Agnolucci, "Will COVID-19 Make or Break EU State Aid Control? An Analysis of Commission Decisions authorizing Pandemic State Aid Measures," *Journal of European Competition Law & Practice* 13, no. 1(2022): 3–16, https://doi.org/10.1093/jeclap/lpab060.

43 Christian Rusche and Samina Sultan, "Beihilfen im Lichte der Coronapandemie," *Wirtschaftsdienst* 103, no. 3(2023): 206. Moreover, what is particularly significant is that the measures taken on a national level also strictly follow the pattern adopted over the

political reality of the EU is subject to dynamic change, state aid schemes based on the TF offer the chance to reach a balance between responding to sudden crisis situations and preserving the integrity of the internal market.

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Tourist Events During the COVID-19 Pandemic in Light of Polish Consumer Law

Abstract: The COVID-19 pandemic brought a new perspective on travel. This applies not only to their practice but also to the legal standpoint, with all the associated consequences. This article aims to present the most relevant aspects related to the organization of package travels during the COVID-19 pandemic. This problem, in these extraordinary circumstances, is a major challenge for both tour operators and tourists. The article will raise current issues related to the cancellation of the trip from both the tour operator and the tourist, as well as matters linked with incurring additional, previously unforeseen costs.

No less important, also from the legal-practical point of view, is the issue of compliance of national regulations with the EU provisions in this area. The Polish legislator's transgression of EU law could potentially result in financial liability of the Republic of Poland not only towards EU authorities for breach of procedures but also, and perhaps most importantly, towards citizens pursuing their claims in court proceedings.

Keywords: package travel, COVID-19, domestic law, EU law, withdrawal from a contact

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Introduction

The outbreak of the coronavirus meant that, for safety reasons, various restrictions and limitations were imposed. This means that the trip that awaited tourists would be quite different from the ones they were deciding on before the pandemic. Therefore the consumer was not offered the same standards and conditions that they had decided to pay for. As a result of COVID and the security measures in different countries, travel abroad completely changed its shape during the times of coronavirus pandemic.

The article aims to present specific problems related to the application of Polish consumer law concerning key issues faced by both consumers and tour operators during the coronavirus pandemic. These include the issue of withdrawal from/cancellation of a travel contract or incurring additional, previously unforeseen costs. This includes such detailed issues as who bore the cost of a coronavirus test.

Another no less essential element of this article, in which Polish consumer law implements European Union (EU) law, is the issue of reimbursing a consumer for the costs of package travel. Poland, in its legislation, has introduced postponing the effectiveness of withdrawal from an agreement and refunding money after 194 days from the termination of an agreement. However, the European Commission did not agree with such measures and considers them to be contrary to the EU directive, which is also a vital and recurring problem for consumers and tour operators.

To properly present this issue, reference will also be made to the facts which may also be helpful in daily tourist situations. To better understand the issue, an exemplary and interesting court judgment will be presented in this context.

The EU Directive 2015/2302 on Package Travel and Linked Travel Arrangements and the Act of 24 November 2017 on Package Travel and Linked Travel Arrangements

The EU passed Directive 2015/2302 on package travel and linked travel arrangements (hereinafter referred to as: PTD).[2] Under the PTD, the organizer of package travel is responsible for the performance of all services forming part of the package, irrespective of whether those services are to be performed by the organizer itself or by other service providers. COVID-19 triggered the application of the PTD provisions concerning: "unavoidable and extraordinary circumstances" which are defined in art. 3(12) PTD as "a situation beyond the control of the party who invokes such a situation and the consequences of which could not have been avoided even if all reasonable measures had been taken." Significant risks to human health, such as the outbreak of a serious disease at the travel destination or its immediate vicinity, should have been qualified as such unavoidable and extraordinary circumstances.[3]

Art. 5(1) PTD, entitled "Pre-contractual information," provides that Member States shall ensure that, before the traveller is bound by any package travel contract or any corresponding offer, the organiser and, where the package is sold through a retailer, also the retailer shall provide the traveller with the main characteristics of the travel services (a) and information that the traveller may terminate the contract at any time before the start of the package in return for payment of an appropriate termination fee, or, where applicable, the

2 Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (Official Journal of the European Union, L 326/1).

3 European Commission, *Report from the Commission to the European Parliament and the Council on the Application of Directive (EU) 2015/2302 of the European Parliament and of the Council on Package Travel and Linked Travel Arrangements* (2021), 1, 14, accessed June 7, 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0090&from=EN.

standardised termination fees requested by the organiser, in accordance with art. 12(1) PTD (g).

According to art. 12(2) PTD the traveller has the right to terminate the package travel contract before the start of the package without paying any termination fee in the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination. While it remains unclear which particular area is covered by the term "immediate vicinity," it seems probable that this kind of right to terminate the contract would apply to COVID-19 circumstances, such as a high risk of infection at a destination, a hotel/restaurant operation ban in that place, or a landing ban for flights departing from the destination country, etc.[4]

The Court of Justice of the European Union (CJEU), in judgment of February 29, 2024 in Case C-299/22, stated that art. 12(2) PTD, read in the light of art. 3(12) thereof, must be interpreted as meaning that the finding that "unavoidable and extraordinary circumstances" have arisen at or in the immediate vicinity of the destination of a journey is subject to the condition that the competent authorities have issued an official recommendation advising travellers against travelling to the area concerned or an official decision classifying that area as a "risk area." Moreover, the CJEU added that the concept of "unavoidable and extraordinary circumstances" significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination' of the trip in question, covers not only circumstances which make it impossible to perform that package but also circumstances which, without preventing such performance, mean that the package cannot be performed without exposing the travellers concerned to risks to their health and safety,

4 Michael Wukoschitz, "Tour Organisers and Suppliers: Partners or Opponents in the Crisis?," in *Legal Impacts of COVID-19 in the Travel, Tourism and Hospitality Industry*, ed. Carlos Torres and Francisco Javier Melgosa Arcos (ESHTE-Estoril Higher Institute for Tourism and Hostel Studies, 2022), 80.

taking into account, where appropriate, personal factors relating to the individual situation of those travellers. The assessment of such effects must be made from the perspective of an average traveller who is reasonably well-informed and reasonably observant and circumspect on the date of termination of the package travel contract in question.[5]

In the other judgement from the exact same day, in case C-584/22, the CJEU added that in order to determine whether "unavoidable and extraordinary circumstances" which have consequences "significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination", within the meaning of that provision, account must be taken only of the situation prevailing on the date on which that traveller terminated his or her travel contract. Importantly, in this case the request was made in proceedings between QM and Kiwi Tours GmbH concerning the right to a full refund of the payments made by the traveller concerned under his package travel contract, including a refund of the termination fees charged to him, following the termination of that contract by that traveller on account of the health risk associated with the spread of COVID-19.[6]

What is more, the CJEU in judgment of February the 29, 2024 in Case C-299/22, stated that art. 12(2) PTD must be interpreted as meaning that it requires a travel organiser to inform the traveller of his or her right to terminate the contract. The dispute in the case pertained to a traveller who had purchased from the tour operator Tuk Tuk Travel a tourist trip for two people, the destination of which was Vietnam and Cambodia, with the departure from Madrid. The contract for the tourist trip stipulated that it could be terminated before the departure date for a fee. In contrast, there was no mention in the contract of the possibility of termination without payment due to unavoidable and extraordinary circumstances occurring at the destination, as mentioned in Directive 2015/2302 on package travel. The traveller paid almost half of the total

5 Judgement of the Court of Justice of the European Union of February 29, 2024, C-299/22.
6 Judgement of the Court of Justice of the European Union of February 29, 2024, C-584/22.

price of the event contract. The CJEU added that the national court, under certain conditions, may *ex officio* inform the traveller of his right to terminate the travel contract in the event of extraordinary circumstances such as a pandemic, without charge.[7]

The EU Member States were obliged to implement the PTD in their own legal systems.[8] Accordingly, Poland passed the Act of 24 November 2017 on package travel and linked travel arrangements (hereinafter: APT).[9] According to its art. 47(4), a consumer may withdraw from the contract due to unavoidable and extraordinary circumstances at the venue or its immediate vicinity that significantly affect the execution of the package travel or the transportation of travellers to the destination. However, the traveller may only demand a refund of the payments made for the package travel, without compensation or redress in this regard.

Neither APT nor PTD define these „extraordinary circumstances" in more detail. There is only a reference in the so-called preamble of PTD regarding point no. 31, which says: "This may cover for example warfare, other serious security problems such as terrorism, significant risks to human health such as the outbreak of a serious disease at the travel destination, or natural disasters such as floods, earthquakes or weather conditions which make it impossible to travel safely to the destination as agreed in the package travel contract."

Consequently, interpretation has been left to the courts, administrative bodies, and, in the main, tour operators and travellers. The coronavirus pandemic can be considered as an „unavoidable and extraordinary circumstance." It can be argued that the coronavirus pandemic is not a *force majeure*. It is important to remember that this term does not imply the absence of fault and is

7 Judgement of the Court of Justice of the European Union of September 24,2024, C-83/22.

8 More on the different forms of transposing PTD see Łukasz Maszewski, "The Scope of Regulation of Access to Activities in the Field of Organizing Tourist Events and Facilitating the Purchase of Related Tourist Services in Polish Law. Selected Issues," *Review of European and Comparative Law* 43, no. 4(2020): 57–63, https://doi.org/10.31743/recl.6159.

9 Act on Tourist Events and Related Travel Services of 24 November 2017 (Journal of Laws of 2017, item 2361).

one of the exonerative categories associated with strict liability. Incidentally, it may be pointed out that the provisions in travel agency contracts that do not refund money in the event of force majeure or an epidemic are null and void.[10]

In one of the cases, a district court dismissed the claim because of circumstances that must have significantly affected the execution of the package travel. The court determined that the outbreaks of coronavirus infection found in late February 2020 in some regions of Italy, however difficult to avoid and foresee, did not affect the inability to carry out the package travel contract at the destination. During the period when the plaintiffs were supposed to be on the ski trip, there were no outbreaks of coronavirus in the region, and even more so in the destination resorts, and all the ski resorts and hotels there were operating smoothly, as was the transportation of people to the resorts. It should be borne in mind that the Trentino region, although formally part of Italy and bordering both Lombardy and Veneto, is a territory with a considerable area, and the ski resorts where the defendant organized the package travel were located at a considerable distance from the coronavirus outbreak centres.[11]

Nevertheless, APT does not require that the circumstances completely prevent the departure or enjoyment of travel services at the destination. It is only required that the extraordinary and unavoidable circumstances have a significant impact on the performance of the package travel or carriage. In one of the cases there was not only a fear of the effects of the pandemic, but there was an actual cancellation of the main part of the event, i.e. the Caribbean cruise, for the reasons stated in the statement of withdrawal. One of the district courts adjudicated that cancellation of the cruise conclusively establishes that the defendants' fears were legitimate and completely justified, and the withdrawal

10 Wioletta Dudziec-Rzeszowska, "Prawo odstąpienia podróżnego od umowy o udział w imprezie turystycznej na tle ustawy o imprezach turystycznych i powiązanych imprezach turystycznych," *Studia Iuridicia Toruniensia* 26, 2020: 134–35, http://dx.doi.org/10.12775/Sit.2020.006.

11 Judgment of the District Court in Bydgoszcz of September 29, 2021, XIV C 172/21. Likewise: judgement of the District Court in Poznań-Grunwald and Jeżyce of November 23, 2022, I C 299/22.

from the contract protected them from the additional consequences of having to undergo quarantine upon their return to Poland.[12]

In this case, the consumer is not charged with the cancellation costs. Thus, the tour operator is not entitled to deduct any costs from the amount paid for the package travel. However, the consumer is not eligible for any compensation or damages from the organizer. The tour operator must return the money to the consumer within 14 days of the effective date of cancellation (art. 47 (6) of APT).

Withdrawal From/Cancellation of a Travel Contract – Special Domestic Regulations

The Act of March 2, 2020, on special solutions related to preventing, counteracting, and combating COVID-19, other infectious diseases, and crises caused by them, (hereinafter referred to as: Shield 2.0.)[13] introduced special regulations concerning withdrawal by a consumer from a contract from participation in package travel due to the COVID-19 epidemic and termination by an entrepreneur of a contract concerning the organization of a cultural, entertainment, or sports event due to the COVID-19 epidemic.

According to art. 15k of Shield 2.0. the cancellation of the participation agreement by a consumer, or the termination of the participation agreement by the tour operator, that is directly related to the outbreak of the SARS-CoV-2 virus shall be effective as of 180 days from the date of the traveller's notification of the cancellation or the tour operator's notification of termination. A consumer has a choice, and instead of waiting for a refund within the above-mentioned period, may agree to receive in return from the tour operator a voucher to be redeemed against future travel events within a year from the date on which

12 Judgement of the Provincial Court in Wrocław of August 2, 2023, II Ca 2833/22.

13 Ustawa z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych (Journal of Laws of 1945, item 374).

the travel event was to take place (art. 15k (2)). The value of the voucher may not be less than the amount paid towards the performance of the existing contract for the travel event (art. 15 (3)). These regulations are *lex specialis* to those from art. 47 (4–6) APT. Importantly, under the procedure of directive implementations, domestic provisions could not be less favorable for consumers than PTD rules.[14]

Such postponement of the effectiveness of the declaration makes it necessary for the organizer to reimburse the fees and payments made by the traveller within 14 days from the date on which the declaration becomes effective, and the effectiveness of the declaration becomes effective 180 days after the date of the notification of withdrawal. This means that the claim for reimbursement of fees and payments is due after a total of 194 days from the date of notification of cancellation by one party to the other or from the date of conclusion of the agreement on cancellation.[15] Because of that *lex specialis*, in the event of a cancellation of a package travel contract due to an outbreak of disease, the tour operator shall not be obliged to reimburse payments made by the traveller within 14 days of the cancellation of the contract.[16]

The second option for consumers was to obtain a voucher from the tour operator. It may be concluded that the voucher referred to in Shield 2.0. was a specific type of document, attesting to the existence of certain rights of a person named in it, and resulting from the legal relationship linking the issuer of the voucher and the obligor of the document are the parties to the legal

14 That issue is a separate problem that would not be covered in this article, for more detailed discussion along with possible consequences of multifarious collisions between Polish and EU regulations, see Szymon Szmak and Kacper Szmak, "Odroczenie skuteczności odstąpienia od umowy o udział w imprezie turystycznej – regulacja art. 15k ustawy COVID-19 w świetle dyrektywy 2015/2302," *Transformacje Prawa Prywatnego*, no. 3(2021): 87–90, 94–97.

15 Judgement of the District Court in Szczecin-Centrum in Szczecin of February 17, 2022, I C 796/21. Likewise: Katarzyna Marak, "Regulacje prawne wprowadzone w celu przeciwdziałania skutkom epidemii wirusa SARS-CoV-2 w zakresie wykonania umów o udział w imprezie turystycznej oraz skutki tych regulacji dla organizatorów turystyki i podróżnych," *Iustitia*, no. 4(2020): 203.

16 Judgement of the Provincial Court in Gliwice of October 24, 2021, III Ca 1105/21.

relationship between the person named in the voucher and the person named therein. The issuer of the document who was obliged to provide the service was the tour operator, and the entitled person – the beneficiary – is the traveller who previously agreed to participate in a package travel. The voucher had a specific monetary value, and it could not be exchanged for cash. In case of loss of the voucher, it was possible to issue a duplicate.[17]

However, possibly narrowing the abovementioned domestic regulations, CJEU in the judgment of June 8, 2023 in Case C-407/21, adjudicated that article 12(2) and (3) of Directive 2015/2302 must be interpreted as meaning that where, following the termination of a package travel contract, the organiser of that package is required, under that provision, to provide the traveller concerned with a full refund of any payments made for the package, such a refund refers solely to the reimbursement of those payments in the form of a sum of money.[18] In the light of this CJEU judgment, Polish legislation, which does not provide for the possibility of refunding money to travellers without undue delay, appears to be incompatible with EU law. The above makes it possible for persons who had to cancel their package tours due to the COVID-19 outbreak, and who were offered vouchers (vouchers) instead, to consider applying for a refund.

Case Study

The following presents a few examples of practical issues that could have risen around problems of package travel during the COVID-19 pandemic – in the form of short Q&A.

I had purchased a trip to Cyprus. Departure was to take place on July 1, 2020. However, it turned out that under the decisions of the Cyprus govern-

17 Marak, "Regulacje prawne wprowadzone w celu przeciwdziałania skutkom epidemii wirusa SARS-CoV-2 w zakresie wykonania umów o udział w imprezie turystycznej oraz skutki tych regulacji dla organizatorów turystyki i podróżnych," 205.

18 Judgement of the Court of Justice of the European Union of June 8, 2023, C-407/21.

ment only tourists would be allowed who had a certificate, issued by a private or public institution within 72 hours before departure, confirming that they had undergone a coronavirus test, and the result is negative. Since I was to spend my vacation with my family (4 people in total), taking the test was a big financial burden for me. In addition, no one could guarantee that I would be able to receive the test results and certificate within 72 hours before departure. Could I cancel the trip at no cost?

The APT contains provisions that give a consumer the possibility to terminate the contract at no cost in case of extraordinary circumstances and force majeure. The need to take expensive tests at your own expense (with four people this amounts to about 2000 PLN) and the high probability of not receiving the results of these tests and a certificate within 72 hours is among these circumstances.

At the end of 2019, I booked a trip abroad. Unfortunately, as it turns out, many restrictions were waiting for me on the spot - closed attractions, limited possibility to use the beach, the need to walk in masks, and disinfecting hands. I do not like the idea of such a vacation – my trip was supposed to look completely different. Are these grounds for a cost-free withdrawal from the contract?

The coronavirus outbreak resulted in various restrictions and limitations being put in place for safety reasons. This means that the trip that awaits tourists was significantly different from the one they decided on before the time of the pandemic. Therefore the consumer was not offered the same standards and conditions that they had decided to pay for. As a result of COVID and the security measures in place in various countries, overseas trips had completely changed their shape.

A consumer would be in a different legal position if he or she had decided to purchase a trip at a time when an outbreak had already occurred. Such a decision means that the customer was aware of the COVID situation and possible risks (such as the availability of attractions on site and other restrictions)

during the trip. In such a case, we cannot speak of the occurrence of unavoidable and extraordinary circumstances, and therefore the consumer would not be able to withdraw from the contract on this basis at no cost.

The country I am traveling to requires that I submit a COVID test. Who covers the cost of this test?

Individual countries, fearing an increase in the incidence of coronavirus, chose to introduce restrictions for visitors. Some of them introduced the requirement for visitors to have a negative COVID test result, with the proviso that such a test was valid for a specific period (e.g. 72 hours). The obligation to test was imposed by individual country authorities, not by tour operators. It was therefore the responsibility of the consumer to take the test and pay for it. The additional steps and costs associated with the need to conduct a COVID test constituted additional and unforeseen expenses. Therefore, in such a situation, the consumer could have withdrawn from the contract at no cost based on art. 47 (4) APT.[19]

At the conclusion of this section, an intriguing factual scenario and subsequent ruling will be presented, illustrating one of the recent judgments issued by a Polish court.[20] On December 8, 2019, the plaintiff agreed with the defendant company to participate in an eight-day pilgrimage to Israel, which was to take place from March 9–16, 2020. The total cost of the pilgrimage was set at 790 USD and 1650 PLN. Because of the planned trip, the claimant made advance payments in the amounts of 1650 PLN and 590 USD. On March 3, 2020, the plaintiff, due to the prevailing COVID-19 pandemic, rescinded her contract with the defendant, and the defendant acknowledged acceptance of the rescission.

On March 6, 2020, the organizer of the pilgrimage announced on a social media platform that the planned pilgrimage to the Holy Land had been canceled due to the prevailing pandemic. Additionally, he informed pilgrim-

19 M. Miś, *Problemy konsumenckie w dobie epidemii koronawirusa* (Wrocław, 2020), 6–8, 9.

20 Judgement of the District Court in Szczecin-Centrum in Szczecin of November 23, 2021, IC 525/21.

age participants of this fact in writing. In a letter dated on 23 April 2020, the defendant company informed the claimant that they would receive a refund within 14 days after 180 days from the date of withdrawal from the agreement, i.e., on 12 September 2020 at the earliest. By letter dated 15 September 2020, the defendant informed the claimant that it was extending the settlement deadline to 31 December 2020. At the same time, the defendant offered the claimant to exchange the current liabilities for a voucher, whose value would be increased by 50 PLN. The claimant did not agree to the defendant's proposal.

In the judgement of the District Court, the claimant's impatience and intransigence, lack of understanding and consideration of the consequences of the epidemic situation not only for the tourism industry, but also for the entire world, as well as her refusal to accept the respondent's proposals for settlement in the form of a voucher, constitute an abuse of rights referred to in art. 5 of the Civil Code,[21] and thus her claim for payment of interest on the principal amount was dismissed.

The Tourist Refund Fund (TRF)

From October 1, 2020, the provision of art. 15ka-15kc of the so-called Shield 5.0. took effect.[22] It allowed travellers to apply for a refund for a travel event not made due to the COVID-19 pandemic. According to its art. 15ka the tour operator had to make a payment of 7.5% of the total value of the disbursements covered by his application. Additionally, they shall make a payment of 2.5% or 4.1% (depending on the size of the entrepreneur) of the total value

21 Art. 5: "One cannot exercise one's right in a manner contradictory to its social and economic purpose or the principles of community life. Acting or refraining from acting by an entitled person is not deemed an exercise of that right and is not protected." Act of 23 April 1964 Civil Code (Consolidated text, Journal of Laws of 2024, item 1061).

22 Ustawa z dnia 17 września 2020 r. o zmianie ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych oraz niektórych innych ustaw (Journal of Laws of 2020, item 1639).

of the disbursements covered by the application submitted by them. The applications were handled and verified by the Insurance Guarantee Fund (IGF). Applications could only be submitted via the Fund's website after a user account had been set up. The person entitled to receive a refund was the traveller who had agreed to participate in the package travel.

The IGF, after receiving applications from the tour operator and the traveller, examined whether they were complete and whether the data given by the organizer and the traveller were consistent. The IGF had 30 days from the date of receipt of the latest of these applications, considering the availability of funds in the TRF. If further investigation was required, the deadline was extended to 4 months from the date of receipt of the latter of these applications. If the review was successful, the Fund had 14 days under the Act to make the refund to the traveller's account. Under the law, refunds could be claimed up to December 31, 2020, but verification of claims was still ongoing until the end of March 2021.

The TRF operating at the IGF was a form of assistance not only for travellers affected by the pandemic but also for the entire tourism industry. Companies and tour operators did not have sufficient funds to settle with customers for canceled trips. They had already made advance payments to airlines and hotels while booking their services, and when the pandemic broke out, they had trouble recovering the money from foreign contractors who hid behind their costs.

In connection with the issue of deadlines for the return of payments to travellers from the TRF, the following conclusions arise. First, the procedure was completely unknown to the PTD and led to an extension of the time limit reimbursement of prepayments in a manner incompatible with it. Second, even though the traveller had made such an attempt, that procedure did not provide a guarantee to the traveller that they would receive a refund of the deposit. Thus, it was in some way an uncertain procedure (in which case general solutions remain for the traveller, just as if they had not used the procedure at all).

Third, for reasons that are difficult to understand, the procedure was in practice realistically only available to a fraction of travellers, as not every traveller could submit the relevant application via the website of the IGF website. Thus, this solution, which was also available to certain parties, once again leads to an extension of the time limit for repayment payments to travellers and for that reason, having regard to the requirement of the abovementioned art. 12(4) of the PTD, it must be assessed critically from the point of view in question.[23]

Summary

The organization of package travels during the COVID-19 pandemic has been, and remains to some extent due to the three-year statute of limitations (Article 50(4) of the APT[24]), an extremely complex issue for both tour operators and travellers. Due to the multifaceted nature of this topic, only the most important – in the author's opinion – issues are presented, among which practical aspects were emphasized. The abovementioned regulations related to travel events in the era of coronavirus appear to be temporary, but their reuse in other pandemics that may affect our societies cannot be ruled out.

From the point of view of the interests of travel agents, the existing regulations in the Polish legal system, regardless of the question of their abovementioned compliance with European law, in practice result only in postponing the fulfilment of tourist entrepreneur's services. Aid to the travel industry means some limited assistance for clients of travel agencies, but concerning tour operators themselves, it is not direct material assistance. The question arises as to whether the tour operator may claim compensation from the State

23 Piotr Cybula, "Prawidłowa implementacja prawa unijnego czy wsparcie przedsiębiorców? O dylematach regulacyjnych w czasach Covid-19 na przykładzie problemu terminu zwrotu przedpłat podróżnym przez organizatorów turystyki," *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 19, 2021: 67, https://doi.org/10.26106/dkrm-m820.

24 However, the end of the statute of limitations is on the last day of the calendar year, unless the statute of limitations is less than two years (art. 118 of the Civil Code).

Treasury and on what basis. However, the answer to such question, although extremely important, exceeds the framework of this article.

On the other hand, it should be noted that the legislative support for tour operators, which was justified in principle and necessitated by the outbreak of the coronavirus, was introduced using inappropriate methods. In the long term, in addition to the possible difficulties of recovering the money paid by travellers, the regulation may result in a decrease in consumer confidence in both the state and tour operators. In such a situation, it is impossible not to get the impression that the applied solution, despite its short-term effectiveness, had the opposite effect to the one intended.

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Specific Instagram Works

Abstract: Universal access to social media platforms, the vast number of users, and the resulting diversity of published content have created challenges regarding the recognition of materials as subject matter of copyright and the protection of users' creativity on these platforms. Within the legal publishing market, there is a noticeable lack of comprehensive consideration of the issues surrounding creative works on Instagram. Therefore, the aim of this article is to provide a legal analysis of the aforementioned issue and to examine the specific types of content shared by Instagram users based on existing concepts and institutions of copyright law. To achieve this, the article assesses the potential recognition of Instagram users as authors and explores whether materials posted on Instagram may constitute subject matter of copyright.

Keywords: Instagram works, copyrights, social media, Instagram, subject matter of copyrights

Introduction

Over the years, social media have become an integral part of life for most people worldwide. In many cases, it is through their prism that we explore the world around us, communicate with each other, sharing snippets of our

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daily lives, and occasionally create an idealized reality. Social media platforms serve as virtual spaces where, upon creating a profile, users can share a variety of content, often drawn from their private lives, communicate with friends, and establish new contacts, thereby forming a space for active interaction on a broad scale.[2]

According to the definition by Boyd Danaher and Nicole B. Ellison, social media platforms are online services directed at individuals and characterized by three specific attributes: the ability to create a public or partially public profile within a defined platform, the capability to compile a list of users who are connected in some manner, and the opportunity to track the activities of other users of the service.[3] Among the most frequently utilized social media platforms are Facebook, YouTube, TikTok, and Instagram. Nonetheless, Instagram remains one of the social media platforms that, despite its establishment several years ago amidst the emergence of numerous new services offering increasingly novel functionalities, continues to enjoy significant popularity among users. It plays a crucial role in communication, marketing, and promotion, contributing to the continuously growing number of individuals opting to become part of the "Instagram community" by creating profiles on this platform.[4]

The functions available on Instagram and the nature of this platform have led users to share their creations through it, disseminating materials

2 Izabela Stańczuk, "Dane osobowe jako „waluta" związana z uczestnictwem w mediach społecznościowych," in *Media w erze cyfrowej. Wyzwania i zagrożenia*, ed. Katarzyna Chałubińska-Jentkiewicz et al. (Wolters Kluwer, 2021).

3 Iga Małobęcka-Szwast, *Big Data and the Abuse of a Dominant Position by Data-Driven Online Platforms under EU Competition Law* (C.H. Beck, 2021), quoted by: Danah M. Boyd and Nicole B. Ellison, "Social Network Sites: Definition, History, and Scholarship," *Journal of Computer-Mediated Communication* 13, no. 1(2008): 211, https://doi.org/10.1111/j.1083-6101.2007.00393.x. The nature and terminology of these connections may differ from site to site. See also: Aleksandra Gebicka and Andreas Heinemann, "Social Media & Competition Law," *World Competition* 37, no. 2(2014): 152; Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Wolters Kluwer, 2016), 12–13.

4 Anna Lojza and Radosław Wolniak, "Media społecznościowe jako narzędzie komunikacji marketingowej na przykładzie serwisu Instagram," *Management and Quality – Zarządzanie i Jakość* 3, no. 3(2021): 37–59.

they have generated, such as photographs, videos, or graphics, in the form of posts, reels, or InstaStories. However, the type of content posted, as well as the functionality of the platform, affect the specific nature of the content posted on Instagram. This gives rise to the need for an analysis of the challenges surrounding Instagram creativity. It should be noted that in the legal publishing market lacks comprehensive examination of these issues. Therefore, the aim of this article is to analyze Instagram creativity from the perspective of existing legal concepts and institutions, as well as the tools developed by Instagram.

It should be pointed out that in Poland, the creation, content, and determination of intellectual property rights, including copyright, "are subject to the law of the country in which the right is exercised, as stated in Article 46(1) of the Act of 4 February 2011—Private International Law.[5] Additionally, paragraph 3 of the aforementioned regulation emphasizes that the law of the country providing protection shall apply to the protection of these rights. Therefore, issues concerning copyright on Instagram will be governed by individual national legal systems.

According to Polish law, pursuant to Article 5 of the Act of 4 February 1994 on Copyright and Related Rights,[6] these provisions apply to Instagram authors who are citizens of or residents in a Member State of the European Union. They also apply to works of Instagram authors first published in the territory of the Republic of Poland, or simultaneously in this territory and abroad, or those first published in the Polish language. Nevertheless, since content is posted on a social media platform, users will also be subject to internal provisions specifically created for the particular service, such as Instagram.[7]

5 Consolidated text: Journal of Laws of 2023, item 503, hereinafter: PIL.

6 Consolidated text: Journal of Laws of 2022, item 2509, hereinafter: Copyright Act.

7 Anna Podolska, "Portale społecznościowe, blogi i vlogi a prawo autorskie," in *Prawo autorskie w praktyce. O prawach twórców i odbiorców utworów*, ed. Ewelina Szatkowska (Wolters Kluwer, 2022), 296–300.

The History of Instagram

To conduct an analysis of Instagram creativity, it is first necessary to consider the nature of the platform itself, which may influence the perception of user activities on the service, as evidenced by the platform's history of creation.

Meta Platforms Inc.,[8] which also owns Facebook, currently owns Instagram. The service was founded in 2010 in San Francisco by Kevin Systrom and Mike Krieger. Considering the available applications at the time, the creators inferred that a platform enabling users to share photos and communicate would perfectly meet societal needs and fill a previously unexploited area.[9]

The name "Instagram" accurately reflects its key function, i.e. allowing users to share photos, which is reminiscent of the instant communication made possible by telegrams.[10] The invented term may also symbolize the speed and efficiency of the interactions facilitated by the platform.

The debut material on Instagram, then known as *Codename*, was published on July 16, 2010, on a profile named *kevin* and consisted of five photographs. However, in the literature, the first shared content is recognized as a photograph of a golden retriever dog, whose name was not disclosed, taken near a food stall called *Tacos Chilakos*. The photograph also featured a foot, most likely belonging to the partner of its author—Nicole Systrom. The first published post was captioned with the description "test." The author of the photograph and the first post was Kevin Systrom, who, as was mentioned, is also one of the creators and innovators of the entire service.

Initially, Instagram had only basic, simple functions that evolved over time with technological advancements. Starting from the ability to solely observe other users' profiles and share photographs, capabilities expanded to include photo editing features such as filters and overlays, as well as the ability to geotag photos.

8 Since the latter part of 2021, the name Meta Platforms, Inc. has been in effect (formerly known as Facebook, Inc. from 2005 to 2021 and as TheFacebook, Inc. from 2004 to 2005).

9 Katarzyna Grzybczyk, "Instagram – jak zostać influencerem," in *Rozrywki XXI wieku a prawo własności intelektualnej* (Wolters Kluwer, 2020), 155.

10 Grzybczyk, "Instagram – jak zostać influencerem," 155.

Hashtags were also introduced, i.e. "phrases preceded by the # sign, which in Internet communication are used to mark content (posts, photos, videos) so that they can be searched more easily."[11] They were intended precisely to facilitate the discovery of content of interest. Although the service offers numerous tools, it continues to undergo modifications and updates in response to emerging changes and societal needs, thereby influencing the distinctive nature of the content shared through its platform.

Instagram Author

Universal access to the internet and social media has enabled practically anyone to create a profile on various platforms, including Instagram. However, there are exceptions in this regard, as per Instagram's Terms of Service: "Users must be at least 13 years old."[12] Therefore, to access the service and create a profile, individuals must meet the age criterion.

In Poland, upon reaching the age of thirteen, according to Article 15 of the Civil Code dated April 23, 1964,[13] hereinafter referred to as the Civil Code, individuals attain limited legal capacity. Limited legal capacity primarily means that such individuals participate in legal transactions personally or are represented by a legal representative; importantly, there are also cases where such individuals cannot act at all. According to Article 20 of the Civil Code, a person who has reached the age of thirteen has the ability to independently conclude contracts that are commonly made in minor, everyday matters of life. Additionally, under Article 21 of the Civil Code, such individuals may dispose of their earnings without the consent of a legal representative, unless the guardianship court decides otherwise for important reasons.

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11 Keyword: "Hashtag," Wielki Słownik Języka Polskiego, accessed April 25, 2023, https://wsjp.pl/haslo/podglad/86506/hasztag.

12 "Instagram Terms of Service," Instagram, accessed April 25, 2023, https://www.facebook.com/help/instagram/581066165581870.

13 Consolidated text: Journal of Laws of 2023, item 1610, as amended.

A natural person, upon becoming a user of a service, gains access to its tools, primarily enabling them to share their created content, such as photos, videos, or graphics with individuals who follow their profile. Collectively, this activity can be defined as creativity, attributable to active users—natural persons—many of whom can be considered authors under the Act of 4 February 1994 on Copyright and Related Rights.

The Act does not provide a strict definition of the author; however, this term is indirectly described in Article 8 of the Copyright Act. According to paragraph 1 of this provision: "Unless otherwise provided for in this Act, the holder of copyright is the author."[14] The second paragraph of the article further states that: "It is assumed that the author is the person who is named as such on the copies of a work or whose authorship has otherwise been communicated to the public in association with distribution of a work."[15]

From the cited provision, it follows that, as a general rule, copyright belongs to the creator who is the author of a given work. Therefore, only a human being— a natural person—can be considered an author.[16] In this respect, factors such as age, competence, education, awareness, or the degree of legal capacity are irrelevant.[17]

An attempt to define the term author was made by the Regional Administrative Court in Warsaw in a judgment dated December 4, 2015, IV SA/Wa 2455/15 according to which: "A creator is considered to be the author of a work of art or a scientific study, the subject of a creative act, completed by bringing to life a work of a singular nature, which has not existed before and which, at the time it is made available, has the value of novelty. (…) The author gives the work artistic, aesthetic or cognitive value and individual

14 Act of February 4, 1994 on Copyright and Related Rights (consolidated text: Journal of Laws of 2022, item 2509).

15 Act of February 4, 1994 on Copyright and Related Rights (consolidated text: Journal of Laws of 2022, item 2509).

16 Ewa Ferenc-Szydełko, ed., "Art. 8," in *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz* (C.H. Beck, 2021).

17 Ferenc-Szydełko, ed., "Art. 8."

character. An author is only a person, contributing original artistic or cognitive invention."[18] In addition, the legislator, in the provision of Article 8(2) of Copyright Act, introduced a presumption that the person whose name is indicated on a copy of the work or made available to the public in a manner related to the dissemination of the work is considered the creator of the work, nevertheless, according to the position presented in the doctrine and case law, this presumption may be rebutted, using all means of evidence, because: "the wording of the provision and logical interpretation lead to the conclusion that the inclusion of the name of a certain person on a work as the author cannot prejudge the issue of authorship conclusively"[19] (*vide*: the Supreme Court in its judgment of December 21, 1979, I CR 434/79).

Therefore, in order to recognize the author of a work as an author, it is not necessary for them to possess any exceptional qualities, skills, or competencies; the sufficient criterion is solely the possession of legal capacity, which is inherent to every human being from birth.[20] Nevertheless, factors such as age, mental state, or legal incapacity may affect the ability of the author to exercise or dispose of their copyright. Therefore, while the author may hold the status of an author, the execution of their copyright may necessitate the involvement of third parties, particularly legal representatives,[21] however, this issue is not the subject of this article's focus.

In summary, according to the Instagram Terms of Service, the purpose of creating an account on the platform, and consequently becoming a participant in this medium, requires reaching the age of thirteen. In Poland, individuals achieving this milestone are granted limited legal capacity. Therefore, natural persons who are users of Instagram possess the prerequisites to be considered authors under Article 8 of the Copyright Act, as this status is granted irrespective of age or mental state. The potential challenge in this context could pertain

18 Judgment of the Regional Administrative Court in Warsaw of December 4, 2015, IV SA/Wa 2455/15, LEX no. 2327035.

19 Judgment of the Supreme Court of December 12, 1979, I CR 434/79, OSNC 1980, no. 9, item 171; and Ferenc-Szydełko, ed., "Art. 8."

20 Adrian Niewęgłowski, "Art. 8," in *Prawo autorskie. Komentarz* (Wolters Kluwer, 2021).

21 Niewęgłowski, "Art. 8."

solely to the independent execution of significant legal acts, which, however, falls outside the scope of this analysis.

The Subject Matter of Copyright Protection on Instagram

As has been emphasized, social media platforms are filled with a vast array of content posted by users, and their quantity increases every day. Depending on the user's intentions and the nature of the platform, these include photographs capturing everyday moments, portraits, landscapes, artistic photos, as well as illustrations, graphics, and textual content. Currently, short video clips are also gaining significant popularity.

On Instagram, one can find content in practically every form mentioned above, which is posted using all the available functions offered by the platform. As indicated earlier in this work, users can share their creations by posting photos, videos, or instastories. However, a question arises as to whether such materials are subject to copyright and will enjoy the copyright protection guaranteed by the Act on Copyright and Related Rights.

In light of the provision contained in Article 1(1) of the Copyright Act, the subject matter of copyright is a work, understood as any manifestation of creative activity, characterized by individuality and expressed in any form, regardless of its value, purpose, or manner of expression.[22] Accordingly, copyright protects intellectual property, meaning that under the regulation of the Copyright Act, for example, a literary work is not the physical book as a collection of bound sheets of paper, but rather the specific intellectual creation it embodies, created by the author.[23] Therefore, the physical carriers of works are not covered by copyright protection.[24]

22 Act of February 4, 1994 on Copyright and Related Rights (consolidated text: Journal of Laws of 2022, item 2509).

23 Ewelina Szatkowska, "Utwór jako przedmiot prawa autorskiego. Zagadnienia podstawowe," in *Prawo autorskie w praktyce. O prawach twórców i odbiorców utworów*, ed. Ewelina Szatkowska (Wolters Kluwer, 2022), 19.

24 Ewa Ferenc-Szydełko, ed., "Art. 1," in *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz* (C.H. Beck, 2021).

In legal doctrine, it is consistently accepted that the determination of which intangible goods can be defined as works under Polish law is achieved through two methods of definition. One method is based on enumerating specific goods that are under copyright protection, while the other method involves indicating general criteria that condition the granting of copyright Protection.[25]

As previously indicated, the second method stipulates that to consider a specific intangible good as the subject of copyright, it must be the result of human activity, constitute a manifestation of creative activity, possess individual character, and be fixed. By fulfilling these criteria, a work, regardless of its value, purpose, and manner of expression, will be subject to protection. In this aspect, the intention behind its creation, its purpose, or its utility are irrelevant.[26]

Instagram Works

Users of the Instagram platform post various types of content daily, utilizing the different functionalities provided by the portal, such as posts, reels, or instastories. By doing so, they enhance their profiles with new components that affect the overall perception of their profile, often with the aim of brand building. Moreover, these materials can belong to different categories, classified according to various criteria. Many of these materials can be granted the status of a work within the meaning of copyright law. Some of them are works that can be classified under the examples in the catalog contained in Article 1, Section 2 of the Copyright Act, including works expressed in words, graphic symbols, photographs, or audiovisual works.[27] However, there are also types of creative works that do not fit within the existing established frameworks. These include

25 Jacek Sobczak, *Prawo autorskie i prawa pokrewne* (Iuris, 2000), 34.

26 Judgment of the Supreme Court—Civil Chamber of February 21, 2020, I CSK 513/18, OSNC 2020, no. 12, item 104.

27 Act of February 4, 1994 on Copyright and Related Rights (consolidated text: Journal of Laws of 2022, item 2509).

specific Instagram creations that are not explicitly listed in the aforementioned catalog but satisfy the criteria of Article 1, Section 1 of the Copyright Act.

Works Expressed in Words or Graphic

On Instagram, practically every post is accompanied by a description. As practice shows, these descriptions supplement the visual content by communicating information about the posted material or providing a narrative related to it. Descriptions help build relationships with followers and convey specific content, stories, or general messages. It turns out that these descriptions can often play a crucial role or, at the very least, be a significant element of a post or reel.

On Instagram, one can also find content where the message is expressed in words or through graphic symbols, taking the form of an image with such elements. These creations can constitute works expressed in words or graphic symbols in accordance with Article 1, paragraph 2, point 1 of the Copyright Act.

The works listed in Article 1, Paragraph 2, Point 1 of the Copyright and Related Rights Act (PrAut) are diverse, belonging to various fields. However, according to the position of E. Ferenc-Szydełko, "they are all characterized by a common feature - their primary form of expression is recorded on a paper or electronic medium."[28] The expression of a work in words relates to the method of perceiving such a creation through the sense of sight, thereby including materials in written form, such as widely disseminated printed books or manuscripts, as well as in electronic form—presented through computer program code, messages,[29] Instagram post descriptions, or images containing textual elements. Works expressed through graphic symbols are created using letters, graphics, symbols, or emblems. It is also accepted that, provided the

28 Ewa Ferenc-Szydełko, ed., *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz* (C.H. Beck, 2021).

29 Ewa Laskowska-Litak, "Art. 1," in *Komentarz do ustawy o prawie autorskim i prawach pokrewnych*, in *Ustawy autorskie. Komentarze. Tom 1*, ed. Ryszard Markiewicz (Wolters Kluwer, 2021).

criteria outlined in Article 1, Paragraph 1 of PrAut are met, this category would also include messages utilizing so-called emojis.[30]

The provision contained in Article 1, Paragraph 2, Point 1 of the Copyright Act, besides stipulating the appropriate method of expressing a work and meeting the general criteria of a work indicated in Paragraph 1, does not foresee additional requirements necessary for categorizing a creation within the discussed category. Therefore, it follows that works not explicitly listed in the regulation are also subject to copyright protection in this respect.[31] Certainly, due to the nature of the Instagram platform, one will not find content that qualifies as literary works; instead, one encounters materials more akin to journalistic works addressing current topics, especially social, cultural, or political issues. According to doctrinal interpretations, particularly that of R.M. Sarbiński, these are so-called „non-fictional" works, where the author draws from existing components in the world but expresses them in an individual, creative, and original manner.[32]

On Instagram, we encounter materials on a daily basis that are expressed through words and graphic symbols. However, due to the nature of the medium, such content typically consists of short statements, which makes it difficult to fulfill the criteria of Article 1, Paragraph 1 of the Copyright Act and demonstrate their creative and individual character. Nonetheless, achieving this is not impossible.[33]

Photographic Works

The primary and fundamental type of content shared on Instagram was photographs, which aligned with the initial premise of its creators—that participants would communicate with each other through photos. This premise proved suc-

30 Laskowska-Litak, "Art. 1."
31 Laskowska-Litak, "Art. 1."
32 Rafał M. Sarbiński, "Art. 1," in *Prawo autorskie i prawa pokrewne. Komentarz*, ed. Wojciech Machała and Rafał M. Sarbiński (Wolters Kluwer, 2019).
33 Sarbiński, "Art. 1."

cessful for many years, and over time, additional platform functionalities were introduced to improve its operation and appeal to users. Despite the development of the platform and new introduction of new possibilities, the original idea of communicating through photos remains relevant and widely used by participants of the Instagram community.

The term "photography" should be understood as "the capturing of images using a photographic camera."[34] However, not every photograph will constitute a photographic work as defined in Article 1(2)(3) of the Copyright Act. For this purpose, it is necessary for the photograph to meet the general criteria set forth in Article 1(1) of the Copyright Act, meaning it must be a manifestation of creative activity by a human being, and it must exhibit a creative idea, innovation, and uniqueness.[35] As adopted by the Court of Appeals in Bialystok in its judgment of April 11, 2018 in the case I ACa 1009/17: "The photographic work is a subjective vision of reality, as it reflects the author's way of seeing the world. (…) 'Creativity' within the meaning of Article 1(1) of the Copyright Act can be recognized in the field of photography as the conscious choice of the moment of shooting, the point of view, the composition of the image (framing), lighting, determining depth, sharpness, and perspective, applying special effects, and techniques aimed at giving the photograph a specific character."[36] Additionally, the Court pointed out that the uniqueness of a photograph can also be manifested in the composition and arrangement of photographed objects, subjects, or people, as well as the obtained colors or background. The creative nature of the actions taken can occur at the time of taking the photograph, but also before and after it, particularly in terms of introducing modifications.[37]

34 Keyword: "Photograph," Słownik języka polskiego PWN, accessed April 30, 2024, https://sjp.pwn.pl/slowniki/fotografia.html.

35 Judgment of the Court of Appeals in Lublin of September 12, 2016, I ACa 942/15, LEX no. 2209926.

36 Judgment of the Court of Appeals in Białystok of April 11, 2018, I ACa 1009/17, LEX no. 2658034.

37 Judgment of the Court of Appeals in Białystok of April 11, 2018, I ACa 1009/17, LEX no. 2658034.

According to R. Markiewicz, when analyzing a photograph to determine its creative character, verification should be made regarding three aspects:

- the photographed subject, in terms of arrangement, composition, or lighting,
- the execution of the photograph, involving the choice of moment, place, photographer's setup, or applied technique,
- editing of the photograph after it was taken, including modifications, frame adjustments, application of effects, or even development techniques.[38]

Due to the ubiquity and multitude of photographs taken, creating a completely unique and unparalleled photograph may seem potentially impossible. However, in reality, many photographs do exhibit elements that mean they satisfy the required criteria. Therefore, in order to classify a photograph as a photographic work within the meaning of Article 1(2)(3) of the Copyright Act, it is necessary to verify the aforementioned criteria. For certain types of photographs, this examination will be relatively straightforward and lead to unequivocal findings. For others, however, it may prove challenging and, at times, even subjective.

Photographs of Human Profile

In the Instagram space, one of the most frequently shared types of photographs are those depicting people in various situations. These range from posed shots taken by professionals to spontaneous images from everyday life or vacations, including selfies and portraits. Despite their diversity, not all of these photographs will qualify as photographic works within the meaning of Article 1(2)(3) of the Copyright and Related Rights Act.

First and foremost, it should be noted that photographs taken for documents such as passports or identity cards do not constitute subject matter pro-

38 Ryszard Markiewicz, *Ilustrowane prawo autorskie* (Wolters Kluwer, 2019), 109.

tected by copyright. As indicated by the Court of Appeals in Białystok, photographs taken according to a pre-defined schema imposed primarily by law, as in the case of document photos, lack sufficient manifestations of creative individuality or creativity, and therefore do not qualify as works.[39] A similar situation arises with template photographs, often portraits, where identifying creative expressions can be very challenging, although it is not impossible under the right conditions.

On Instagram, one can find many photographs that appear to meet the criteria allowing them to be recognized as photographic works within the meaning of Article 1(2)(3) of the Copyright Act, as they stand out for their originality and uniqueness, which is evident in the very concept of the photograph. Additionally, they often feature distinctive compositional arrangements, background, lighting, positioning of subjects, and even the location from which the frame was captured is not incidental. All these components of the photographs may determine their qualification as subject matter protected by copyright.

Audiovisual Works

Currently on Instagram, there has been a significant rise in sharing not only photographs but also video materials posted as so-called *reels*. It should be noted that, in addition to classic short videos that do not stand out among others with specific features, unique and distinctive content also appears on Instagram, which may constitute audiovisual works within the meaning of Article 1(2)(p) of the Copyright Act.

An audiovisual work, as indicated by M. Poźniak-Niedzielska, is "a collection of sequences of images usually combined with sound, evoking in the viewer's consciousness the impression of motion."[40] Both legal doctrine and

39 Judgment of the Court of Appeals in Bialystok of February 19, 2016, I ACa 955/15, LEX no. 1998958.

40 Maria Poźniak-Niedzielska, *Autorstwo dzieła filmowego. Studium cywilnoprawne* (Wydawnictwo Prawnicze, 1968), 52–53.

case law that the key element of such materials is their ability to evoke in the audience a sense of image movement.[41] It should be emphasized that for an audiovisual work to be recognized as a work, it must also fulfill the general requirements provided in Article 1(1) of the Copyright Act, namely uniqueness and creativity. This position was confirmed by the Court of Appeal in Łódź, which indicated that "not every recording of an event with a camera constitutes an audiovisual work and may be treated as an object of copyright protection only when it meets the general criteria of a work."[42]

Instagram *reels*, despite often having a short form and being recorded with a phone camera, can result from significant creative effort. Authors often dedicate time not only to conceptualizing the entire material but also to the recording process itself—especially capturing appropriate shots, often from a special and unconventional position of the recording person, framing, and then editing individual shots, and adding special effects, including sounds and texts. All of this ultimately contributes to the unique and original character of the film, as well as its complexity due to the multitude of components involved.

The individual character of a work is one of the key criteria for copyright protection. *Reels*, through their form, content, and presentation style, can exhibit individual features that reflect the personality and style of the author. For example, the narrative style, choice of music, arrangement of scenes, framing, and the use of various editing techniques can make a particular video recognizable and attributed to a specific creator.

It is important to note that the legal provisions do not specify requirements regarding the minimum length of a work. This means that even a short video, such as a reel lasting only a few seconds may be subject to copyright protection if it meets the conditions specified in Article 1(1) of the Copyright Law. The short form of *reels* does not exclude them from legal protection, as what

41 Anna Wojciechowska, *Autorskie prawa osobiste twórców dzieła audiowizualnego* (Zakamycze, 1999), 56–57.

42 Judgment of the Court of Appeals in Lodz of December 17, 2002, I ACa 254/02, LEX no. 535064.

matters is their creative, individual, and original character, rather than the duration of the work.

It is significant that *reels* may contain various elements that can independently be protected by copyright, such as music, texts, photographs, or graphics. The combination of these elements in one audiovisual form creates a new work, which also appears to be eligible for copyright protection. *Reels* on Instagram may be considered works under copyright law because they can meet all the necessary criteria: originality, individual character, and result from the creative activity of the author.

Taking the above into account, and analyzing video materials posted on the Instagram platform, including *reels*, some of them will certainly qualify as audiovisual works and therefore be subject to copyright protection.

Multiformat or Multicreation Works

Analyzing individual categories of works listed in Article 1(2) of the Copyright Law, as well as considering the general criteria outlined in paragraph 1 of this provision, one can conclude that an Instagram post treated as a cohesive hybrid creation consisting of several elements could also, in certain situations, be recognized as a subject of copyright.

It seems that the possibility of classifying the entirety of a post as a work is influenced by the fact that it is ultimately created using the Instagram platform, involving several stages:

- incorporating the "base" of the post in the form of material expressed through graphic symbols, photographs, or audiovisual works,
- making creative modifications and editing of the work using the platform's functionalities, particularly by applying selected filters, overlays, special effects, and optionally adding a musical background, thereby giving the materials their final form,

– accompanying the materials with a description, which enriches the content with a kind of narrative or conveys a specific message, thus potentially constituting a work expressed in words.

Such a post, when considered as a whole, may constitute a distinct, unnamed work, and due to the multitude of components contributing to its creative, individual, and original character, could be classified as a "multiformat work" or "multicreative work."[43] Both suggested terms include the phrase "multi", and its use is deliberate. This term signifies "the prefix in compound words indicating multiplicity, multitude, or a large quantity of something."[44] Therefore, its use in the name aims to denote the diversity and variety of elements that make up the entire work.

The term "multiformat" includes a phrase known in copyright law, referring to a television format, which, while not subject to copyright itself, is recognized in the doctrine as a set of characteristic features and elements of a particular television program.[45] Based on this format, individual episodes of a series or programs are created.[46] Similarly, the proposed term for the work also arises from a specific framework, somewhat conditioned by the functionality of Instagram. However, by using it, the author imparts creative and individual characteristics to the resulting work, justifying the use of the discussed phrase. In the second proposal, the term "multicreative" "incorporates the notion of creation, meaning the act of producing something, usually a work of art."[47] It is a more general term relating to the nature of this potential type of

43 These are suggestions from the author regarding the naming of specific Instagram creativity.

44 Keyword: "Multi," Słownik Języka Polskiego PWN, accessed May 4, 2024, https://sjp.pwn.pl/sjp/multi;2568576.html.

45 Marta Cyran, "Czy możliwa jest ochrona tzw. formatów telewizyjnych w polskim prawie autorskim: zarys zagadnienia w ujęciu komparatystycznym," *Palestra* 51, no. 3–4(579–580) (2006): 38–55.

46 Cyran, "Czy możliwa jest ochrona tzw. formatów telewizyjnych w polskim prawie autorskim: zarys zagadnienia w ujęciu komparatystycznym."

47 Keyword: "Creation," Słownik Języka Polskiego PWN, accessed May 4, 2024, https://sjp.pwn.pl/sjp/kreacja;2564875.html.

creativity, encompassing several aspects of the creative process. It should be emphasized that the proposed names are merely suggestions resulting from an analysis of the content posted on Instagram.

In summary, it seems possible to recognize that a post treated as a "multiformat/multicreative work," meeting the required criteria such as creative and individual character, may be considered a hybrid work under copyright law. However, this is only a potential legal interpretation and only applies to a minority of Instagram posts.

Posts with Multiple Visual or Audiovisual Works and the User Profile Feed as a Collection of Works

In the case of Instagram creativity, one can encounter content that can be classified as a compilation under the provisions of Article 3 of the Copyright Act. Such a compilation, according to A. Niewęgłowski, should meet two criteria: "it should be organized for a specific purpose and conducted according to non-random criteria."[48] Additionally, the creation of such a compilation should result from the creative activity of the author. On Instagram, examples of works meeting these criteria include posts containing multiple visual or audiovisual works, as well as the user profile feed—understood as a collection of posted photos, known as the feed.

Instagram allows users to post content that may include multiple elements—visual works such as photographs or graphics, or audiovisual materials. This function is widely utilized by participants, fulfilling various roles, particularly the opportunity to present materials that are somehow related—addressing specific topics or originating from similar periods. Additionally, such materials, understood as a whole, are created as a result of the author's creative activity, characterized by uniqueness, originality, and reflecting the intention conceived in their imagination. Thus, in this case, compilations of such works

48 Adrian Niewęgłowski, "Art. 3," in *Prawo autorskie. Komentarz* (Wolters Kluwer, 2021).

may constitute subject matter of copyright under Article 3 of the Copyright Act, as collections.

Analyzing the issue of collections of works, it is possible to identify characteristic features for this type of category of copyright objects also in the feed of posts on a user's profile. The profile feed on Instagram is a graphical presentation that displays all the materials published on a given profile—posts and reels. Currently, a cohesive, aesthetic feed created according to a specific concept plays a significant role in building one's image and gaining new followers, particularly emphasized by professional account holders such as influencers or brands.

An example can be seen in the Instagram account of the fashion house Balenciaga under the username *balenciaga*, where during a specific period, photographs illustrating a particular clothing collection are posted.[49] Such a feed created according to a non-obvious concept, selecting specific photographs to showcase elements of the clothing assortment in an innovative, original manner, suggests that it could potentially be recognized as a collection of works under Article 3 of the Copyright Act.

Conclusion

The photographs, videos, graphics, and texts appearing on Instagram, in the form of posts, reels, or stories, are examples of content that increases daily in quantity. Some of these are repetitive, templated, or even derivative. However, while browsing Instagram content, we may also come across distinctive, unique works that capture our attention. Upon analysis, it can be determined that these may constitute works under Article 1(1) of the Copyright Act. Additionally, some of them can be classified into categories explicitly listed in Article 1(2) of the Copyright Act, such as photographic works, works expressed in words or graphic symbols, or audiovisual works.

49 Profile feed of the user named *balenciaga* on Instagram, accessed April 18, 2024, https://www.instagram.com/balenciaga/?hl=pl.

Furthermore, the study allows for the identification of collections of works, in the form of posts with multiple visual or audiovisual elements, and even the concept of a "profile feed."

Exploring the functionalities of the platform and the actions taken by its participants, while conducting a detailed verification of the prerequisites necessary to recognize certain content as a work, leads to the conclusion that an Instagram post, treated as a whole, composed of visual or audiovisual elements, descriptions, as well as introduced improvements and modifications, may constitute a specific, hybrid type of work. It combines various categories of works specified in Article 1(2) of the Copyright Act, as well as other unclassified works. The diversity of potential components of such a creation warrants describing it with the proposed term "multiformat/multicreation work."

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The Tribulations of Polish Judges (2015–2023) or the Sally-Anne Test of Judicial Independence

Abstract: The issue of judicial independence in Poland has deservedly attracted attention in academic circles in recent years. In this article, I address this issue by examining how the stress test of constitutional democracy proceeded within the Polish judiciary. I argue that developments in Poland exposed weakness in an important constitutional doctrine of judicial independence. Therefore, I seek to complicate the picture by bringing to light some older developments, pre-2015, but also by referring to a psychological experiment dealing with false beliefs (the Sally-Anne test). This article is an attempt to show what lessons can be drawn from Poland's democratic backsliding, focusing particularly on why the issue of judicial independence failed to generate electoral change after 2015 and how the legalists' reliance on legal proceedings proved ineffective. The concept of *constitutional fracking* is introduced to show how the Polish Allied Right ruling bloc exploited inconsistencies in the concept of judicial independence.

Keywords: judicial independence, penal populism, democratic backsliding, courts

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"The constitution and laws of a State are rarely attacked from the front,
it is against secret and gradual attacks that a Nation must chiefly guard."
Emmerich de Vattel, The Law of Nations, 1758

Introduction

Consider Poland, who was once handsome and tall as you (paraphrasing T.S. Eliot). We have seen "the unprecedented rapidity of Poland's descent into authoritarianism, with Poland having been identified as the world's most autocratising country for the period 2010–2020 by democracy experts."[2] A significant part of the constitutional breakdown in Poland in the 2015–2023 period involved multifaceted efforts to subjugate the judiciary by the Allied Right regime, of which PiS – the *Law and Justice* party – was the dominant coalition member. As of mid-2024, we have probably entered a prolonged transitional period. Although the democratic opposition forces cumulatively won the parliamentary election in October 2023 and successfully formed a new government, the Allied Right remains a formidable parliamentary minority supported both by millions of voters and by Andrzej Duda, the President of the Republic, who will remain in power till 2025. What happened in Poland after the autumn of 2015 when PiS won the parliamentary election may be considered a stress test of constitutional democracy. It exposed weaknesses in important constitutional doctrines and dogmas, like the virtues of the constitutional review and the independence of the judiciary. This essay is an attempt to complicate the picture by bringing to light some earlier developments and tensions in the doctrine of judicial independence.

The process of subjugating Polish judges to harsh political control would not be possible without the false beliefs of the Polish citizenry regarding the proper role of the courts, which were distorted by penal populism. A coherent

2 Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case* (Swedish Institute for European Policy Studies, 2021), 64.

legal theory of mind is required to see through the Allied Right deception regarding judges' autonomy, hence the reference to a psychological experiment dealing with false beliefs (the Sally-Anne test). In this essay, I argue that this heightened understanding will also lead to challenging the term "judicial independence" which in Poland was earlier emptied of any significant normative meaning.

The Tribulations of Polish Judges Since 2015

The process of seizing control of the judiciary by the political group led by PiS began in earnest in 2017 after the Constitutional Tribunal was subjugated and disempowered.[3] Huge efforts were made to subdue Polish judges, an important stage of which was taking over the National Council of the Judiciary (NCJ) which has the sole right to nominate judges for appointment by the President of the Republic. By using the previously "reformed" Constitutional Tribunal and the newly staffed NCJ, the ruling bloc was able to continue the process of seizing control of the judiciary and of repressing disobedient judges from within. The report "Justice under pressure" drawn up by judges from the Polish Judges' Association "Iustitia" and a prosecutor from the "Lex Super Omnia" Association of Prosecutors gives testimony to the scale of the hard and soft repressions used against Polish judges in the years 2015–2019.[4] Apart from many disparate sources,[5] the book "Poland's Constitutional Break-

3 See Tomasz Tadeusz Koncewicz, "The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux," *Review of Central and East European Law* 43, no. 2(2018): 116–73, https://doi.org/10.1163/15730352-04302002.

4 See generally Jakub Kościerzyński, ed., *Justice Under Pressure – Repressions as a Means of Attempting to Take Control over the Judiciary and the Prosecution in Poland. Years 2015–2019* (Stowarzyszenia Sędziów Polskich „Iustitia", 2019), https://n.iustitia.pl/wp-content/uploads/2020/02/Raport_EN.pdf.

5 See, inter alia: Ewa Łętowska, *Defending the Judiciary: Strategies of Resistance in Poland's Judiciary*, Verfassungsblog, published September 27, 2022, https://verfassungsblog.de/defending-the-judiciary/; Piotr Radziewicz, "Judicial Change to the Law-in-Action of Constitutional Review of Statutes in Poland," *Utrecht Law Review* 18, no. 1(2022): 29–44, https://doi.org/10.36633/ulr.689.

down" by Wojciech Sadurski presents a comprehensive account of the collapse of Poland's constitutional democracy up to October 2018, including in the field of the judiciary.[6] In 2021, three experienced commentators stated that "Poland can now be considered the first EU Member State to no longer have an independent judicial branch following years of sustained attacks deliberately targeting Polish courts, judges and prosecutors."[7] Although the Polish Constitution devoted a whole chapter to "Courts and Tribunals" – with explicit assertions that courts should be independent of other branches of power, and furthermore that judges, within the exercise of their office, should be independent and subject only to the Constitution and statutes – these seemingly robust guarantees were largely disregarded or circumvented.

The PiS government's targeting of the judiciary should not have come as a surprise, considering that the PiS-led coalition intended to shake up the Polish political system. The number of judges that openly resisted the pressure from the new PiS regime could be counted in dozens rather than thousands. Any indications of resistance were met with swift reprisals, both in the form of official disciplinary measures and informal personal harassment. One should also not overestimate the scale of public support for the independent judiciary in Poland. Though thousands of people protested in cities across Poland against judicial reforms in 2017, these crowds rather quickly shrank to a handful of activists. Meanwhile, the ruling party's approval rating in the polls hovered above 40%. In 2019, PiS won a second term in office with over 43% of the votes (although PiS lost its majority in the Senate, the second and less important house of the parliament). In 2023, PiS lost the parliamentary elections, but won the most votes for a single party in the Sejm (the dominant chamber of parliament).

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6 See generally Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019).

7 Laurent Pech et al., "Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action," *Hague Journal on the Rule of Law* 13, no. 1(2021): 3, https://doi.org/10.1007/s40803-021-00151-9.

A simple explanation of the government's intrusion into the judiciary is provided by Samuel Issacharoff, who points out that populist regimes attempt to curtail any challenge to the executive authority: "Not surprisingly, the courts are a frequent irritant to the populist agenda. No less surprising, the courts become the targets for political attack, most clearly in countries such as Poland and Hungary where curtailing the power of the courts is a central plank of the populist agenda."[8] With the benefit of hindsight, a well-organized script may be discerned: "One may go as far as to speak of a recipe for constitutional capture being followed in one state after another, a process which results in a systemic undermining of the key components of the rule of law such as independent and impartial courts."[9]

Judge Paweł Juszczyszyn became a well-known target of such an attack. In February 2020, the Disciplinary Chamber attached to the Supreme Court suspended Judge Juszczyszyn from official duties and reduced his remuneration by 40%. The next day, Paweł Juszczyszyn lost access to his court's IT system and to most of the rooms in the court building.[10] The case of Judge Juszczyszyn was arguably the most obvious one but concurrently many other judges faced sanctions and disciplinary proceedings due to, for instance, participating in an educational moot court, wearing a T-shirt saying "Constitution" or requesting a preliminary ruling from the ECJ. For instance, Judge Monika Frąckowiak, who publicly criticized the violation of rule of law standards, was presented with 172 allegations of disciplinary misconduct. An incident which occurred in October 2019 during a mundane proceeding at a court in Poznań is a good illustration of the change in perception regarding judges in recent years. After the judge issued a decision in an alimony case, the defendant walked out of the courtroom feeling insulted. He called the police, who came to the court-

8 Samuel Issacharoff, "Populism versus Democratic Governance," in *Constitutional Democracy in Crisis?*, ed. Mark A. Graber et al. (Oxford University Press, 2018), 451.

9 Laurent Pech and Kim Lane Scheppele, "Illiberalism Within: Rule of Law Backsliding in the UE," *Cambridge Yearbook of European Legal Studies* 19, 2017: 9.

10 The case of Judge Juszczyszyn is explained in more detail in the report *Justice Under Pressure*, 36–38.

house with flashing lights. A police unit entered the courtroom in which the next court session was being held and tried to check the judge's identity card.[11]

A symbolic sign of the helplessness of the judges who stood against contravening the rule of law was the appointment of the new Chief Justice in May 2020, when the term of office of Chief Justice Małgorzata Gersdorf ended. When the General Assembly of the judges of the Supreme Court convened, members of the two new chambers who were nominated by the neo-NCJ took part in the proceedings and votes. The "old" judges raised many legal objections to this and to the way this multi-day meeting was chaired by two subsequent chairmen chosen by President Duda. Not surprisingly, the chairmen did not allow voting on these issues. In January, these "old" judges decided that the persons appointed to the office of judge on application of the neo-NCJ were unlawfully appointed. Iustitia's president, Judge Markiewicz, logically concluded that it follows from this decision that members of the two new chambers of the Supreme Court are not allowed to pass any new judgement – "Is anyone, who may not pass judgements, entitled to select the most important judge in Poland – the Chief Justice of the Supreme Court? Allowing this to happen would be a topsy-turvy reasoning."[12]

Obviously, these and other objections went unheeded. A good commentary was provided by Ewa Siedlecka, a journalist who has been writing about the system of administration of justice for many years. In 2018, she wrote that some moral, symbolic and even specific achievements of civic resistance were unable to change the reality of the situation: PiS was able to create a legal quagmire in Poland, in which it gets harder and harder to move. By breaking the Constitution, PiS shaped the law in such a way that any attempts to rescue the rule of law while obeying the law risked breaking the law even further and entailing contradictions.[13] Two years later this pessimism was only deepened when E. Siedlecka wrote: "More and more actions

11 Piotr Żytnicki, "Policja wtargnęła na salę rozpraw," *Gazeta Wyborcza*, October 24, 2019, 7.
12 Ewa Ivanova, "Sąd Najwyższy musi walczyć," *Gazeta Wyborcza*, April 22, 2020, 3.
13 Ewa Siedlecka, "Lewe prawo," *Polityka*, July 11, 2018, 13.

of the authorities are tainted by the original sin of unconstitutionality. How to deal with this? Legal 'fundamentalists' increasingly turn into 'pragmatists': illegal, but within acceptable limits."[14]

Broadly speaking, these developments may be summarized as follows. The ruling bloc unsuccessfully tried to seize control over the judiciary using rapid and resolute actions. This lack of immediate success was influenced by street protests, the stance of EU institutions and clear resistance from some judges, yet what proved successful was a tactic of patient and gradual pressure, in both institutional and personal dimensions.

The pressure applied to judges on a personal level warrants separate discussion, because judges who openly tried to protect the independence of the judiciary fell victim to blistering attacks which could be called "character assassination." The authorities and the media favorable to them depicted judges as thieves, compared them to Nazi collaborators, accused them of taking millions of Polish citizens hostage and of being a caste above the law. The harassment of the most troublesome individual judges was, however, more sweeping and interfered in family and intimate affairs. This could be seen very clearly in the case of Judge Waldemar Żurek, who, in recent years, became arguably the most vocal and articulate representative of independent judges. Attacks on Judge Żurek carried out in pro-government media and in anonymous hate messages concerned his marital issues, relationships with his children, and allegations of asset concealment.

As it turned out, personal attacks on Judge Żurek and his family were just a part of a greater smear campaign. In August 2019, the independent media revealed that since the autumn of 2016 the personal files of judges stored in the Ministry of Justice were used on the internet and in the pro-government media to vilify the most defiant judges, such as Judge Żurek and Judge Markiewicz. As a repentant informer revealed, a group of judges with ties to the Ministry of Justice, claiming to be an underground resistance group, formed a closed and clandestine online clique called "The Caste" to fight the ostensible

14 Ewa Siedlecka, "Jak oswoić bezprawie?," *Polityka*, June 3, 2020, 19.

judicial caste. Some readers may be confused since I previously described the governmental actions targeted against Polish judges, whereas the Iustitia Association, alongside the Themis Association of Judges, was the key part of the resistance to the increasingly autocratic regime, and yet now I mention a resistance group of judges who stood up to "the judicial caste." This is, precisely, an important part of the whole story. Although it could be reasonably claimed that the system for persecuting judges who opposed the democratic backsliding consisted of government agencies, pro-government media and internet hatemongers, judges also played an important role in this scheme. These were the judges who held strategic positions in the state apparatus, such as disciplinary prosecutors and judges delegated to the Ministry of Justice, and they were largely appointed before the autumn of 2015.

In an important book from 2018 that describes the assault on the judiciary as seen through the eyes of the Polish judges themselves, one of the harassed judges, Judge Igor Tuleya, says: "By and large, the committed judges are in the minority. Ten percent of judges landed in the Ministry and the NCJ or became presidents of the courts. Ten percent oppose the Ministry. Eighty percent remain indifferent."[15] In October 2020, Judge Maciej Czajka from Krakow addressed the judges' community – apparently comprising ninety percent of judges – with an open letter in which he accused judges of indifference and of betraying their ideals. A month later Judge Tuleya was also suspended by the Disciplinary Chamber.

The fact that a group of judges, who knew both the law and their community well, took part in the process of seizing control of the judiciary had two important consequences. As this happened from within the judiciary, there was no need for the conspicuous use of state force or placing judges under arrest. Instead, the authorities were able to apply tailor-made legal solutions that were concocted and adopted by people who knew how to exert pressure on their fellow judg-

15 Ewa Siedlecka, *Sędziowie mówią. Zamach PiS na wymiar sprawiedliwości* (Czerwone i Czarne, 2018), 446.

es. Moreover, using judges to discipline defiant judges allowed the politicians from the ruling bloc to evade responsibility for the dirty business. The case of "The Caste" hate group showed it clearly. Those who believed that a scandalous affair has been exposed (akin to Watergate, as personnel files from the ministry used to oppress inconvenient judges) were surely surprised when it turned out that the whole thing had been efficiently swept under the rug, with minimal public relations losses for the government. The spin from the government and the ruling bloc about this situation was that this was a personal quarrel in the judges' community and, in fact, the judges supporting the new regime were the victims, because they tried to eradicate the pathologies inside the court system. The simple message to the public reiterated in the pro-government media went like this: did we not tell you that those judges are depraved?!

The Disputed Meaning of Judicial Independence in Poland

My cursory description of the developments in the Polish judicial system since 2015 may appear one-sided. Especially when we consider Mark Tushnet's remarks that "treating efforts to transform the courts as a strong point – 'assaults on judicial independence' – against populism is a defense of the failed status quo, not a politically neutral defense of a central component of every good constitution."[16] Therefore, in this essay, I seek to complicate the picture not only by bringing to light some older developments, pre-2015, but also by referring to a classic psychological experiment dealing with false beliefs and theory of mind.

The experiment I refer to is called the "Sally-Anne test" as it involves two doll protagonists, Sally and Anne. Sally has a basket; Anne has a box. There is also a marble (a little ball-shaped toy) and a subject being tested, usually a child, who is watching a short scene enacted by these dolls and is then asked

16 Mark Tushnet, "Comparing Right-Wing and Left-Wing Populism," in *Constitutional Democracy in Crisis?*, 644.

about the marble. The experiment goes like this. First Sally places a marble in her basket. Then Sally leaves. Anne takes the marble from the basket and hides it in her box while Sally is away. When Sally re-enters the scene the subject is asked, "Where will Sally look for her marble?" If the subject points to the box which is the marble's current location, then he or she fails the Belief Question by not taking into account the doll's belief (Sally is unaware that the marble has been transferred).[17] After PiS and its allies took power in 2015 there were numerous intrusions upon the judiciary of which I have described only a fraction here to support the claim that the constitutional requirement that "The courts and tribunals shall constitute a separate power and shall be independent of other branches of the power" (Article 173 of the Polish Constitution) was deliberately contravened in many instances. However, the Allied Right bloc persistently claimed that it was working towards strengthening the independence of the judiciary and that its actions contravened neither the Constitution nor EU law. The first association with the Sally-Anne test is therefore as follows. Scholars striving to avoid advancing criticism that may seem unscholarly are like the subject of this test who needs a coherent theory of mind to see through the fact that the marble has been transferred without Sally realizing – by which I mean that the independence of the Polish judiciary has been seriously compromised and it has very little to do with an attack on some former supposedly corrupt elites.

Wojciech Sadurski used an idea similar to the "Sally-Anne test" which he called a "Martian's test": "would an intelligent and otherwise well-informed Martian, having for herself all the information culled only from the formal structures of government, and knowing none of the practice, discern the non-democratic character of the regime" – the answer given by W. Sadurski is "probably not," since new populists, in Poland and other places, skillfully use the legitimating value of formal legality.[18] The issue of the independence

17 Simon Baron-Cohen et al., "Does the Autistic Child Have a 'Theory of Mind'?," *Cognition* 21, no. 1(1985): 41–42, https://doi.org/10.1016/0010-0277(85)90022-8.

18 Sadurski, *Poland's Constitutional Breakdown*, 6–7.

of the judiciary was strongly emphasized by the parliamentary opposition and by the judges. And yet PiS was able to maintain stable public support. It was not only a matter of an outsider "Martian" who does not know the practice. The winning electoral majority of citizens in 2015 and 2019–2020 elections was either indifferent to the issue of the independence of the judiciary and the well-known practice, or accepted the ruling parties' message that it is only they who were able to ensure the "real" independence of the judiciary by getting rid of all naysayers like Judge Juszczyszyn. This is like a second layer of the Sally-Anne test: in 2019–2020, more than half of the subjects, that is, the winning electoral majority, were convinced that the marble had not been transferred by Anne and everything was in order. Whereas people like Judge Markiewicz of the Iustitia Association, who urged that the actions of the unlawfully appointed judges should not be accepted, increasingly seemed like radicals and troublemakers – this was precisely the message that the government's media machinery hammered into the population. One must bear in mind that it is possible to expose one *Hauptmann von Köpenick* or a few of them, that is, persons who are deemed to be impostors, as unlawfully appointed officials, but a larger number become a part of the system. Reaching the tipping point does not even require that those "newcomers" outnumber the preceding ones. All it takes is to secure their presence sufficiently to make it look lawful.

This false sense of orderliness is related to an important facet of the process of seizing control of the judiciary by the ruling bloc. As I mentioned, the authorities chose not to resort to using any violence that would draw attention: there were no attempts to arrest judges or to remove them by force from judges' chambers, despite the harsh rhetoric. Presumably it was acknowledged that, for instance, media reports with pictures of a handcuffed Judge Juszczyszyn would be a PR problem which would hinder playing games with the European Union. Handcuffs were not needed, as Judge Juszczyszyn was effectively removed from the bench by blocking his access to the court's IT system and by revoking his security access card. R. Daniel Kelemen insightfully noted that

authoritarian enclaves may persist within democratic unions like the Europe's quasi-federal union. These regimes are unlikely to be particularly repressive, but rather hybrid regimes, whose leaders may rely on financial support from the union and therefore have reasons to avoid blatantly authoritarian practices in order not to provoke federal interventions.[19]

This is another lesson coming from Poland. Most of the time, authoritarian populists dismantling the Polish democracy relied on legal or quasi-legal tools when seizing state power. This greatly reduced the cost of the assault on liberal constitutionalism. The authorities were able to consolidate their own power without needing to resort to violence, thus managing to explain to their constituents and abroad that all the changes in the judiciary were simply reforms intended to improve the efficiency of the courts and to democratize them by means similar to those used in other EU countries. The helplessness of Polish legalists was succinctly explained some years ago in a general way by Sylvie Snowiss, who rightly claimed that we persist unthinkingly in bringing to the Constitution the inappropriate enforcement conceptions of ordinary law. "There is, however, a basic unbridgeable difference between the two. Selective enforcement of ordinary law can be remedied with a change of executive policy or administration. Enforcement of fundamental law, on the other hand, requires the voluntary cooperation of the potential violator."[20] On the whole, it would be hard to point out a single instance in which the legalists' reliance on legal proceedings proved lastingly effective before the elections in 2023. Quite the opposite, the only small victories were achieved when the legalists disregarded the laws passed by PiS and the authorities were not prone to use coercive power.

If one does not defer to the vision presented by the Allied Right, in which the pious and laborious Polish national community is threatened by sinister

19 R. Daniel Kelemen, "Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union," *Government and Opposition* 52, no. 2(2017): 213–15, https://doi.org/10.1017/gov.2016.41.

20 Sylvie Snowiss, *Judicial Review and the Law of the Constitution* (Yale University Press, 1990), 104–05.

forces like migrants spreading parasites, judges stealing sausages, or LGBT people hell-bent on undermining "normal" marriages and exploiting children, then one is able to analyze the importance of deception and outward lies in the current populist surge. As Steven Levitsky and Daniel Ziblatt noted, keeping authoritarian politicians out of power requires the filtering out of authoritarian lies by democracy's gatekeepers.[21] We are used to deception in the way politics is made and presented, so we even have a special term for it: spin. I believe that the Polish democratic backsliding provides us with another valuable lesson which goes far deeper than the familiar spin.

The problem is that constitutional legal scholars tend to conceptualize their area of study using terms and ideas that nowadays, at best, have a tenuous connection to reality. Commonly used terms like the separation of powers, the sovereignty of the people, or the independence of judges do not hold up under scrutiny despite the reverence they are treated with. Focusing on the more limited inquiry into the so-called independence of the judges, which is the crux of the matter presented here, we may begin with Sanford Levinson's question: how "independent" a judiciary do we really want? The French Academy is remarkably "independent" in the sense that it is a self-perpetuating body. When a vacancy occurs among the forty "immortals," the remaining ones select a new member. Would we endorse a judiciary that operated under the rules of the French Academy? It is also a settled reality that almost all judges face the prospect of their decisions being appealed to higher authority. As Sanford Levinson lucidly elaborates, built into our standard definition of the rule of law is precisely the notion that "inferior" judges will feel bound by the decisions of their "superiors". Why then would anyone describe such judges as "independent"?[22] These are no semantic charades. The issue of whether judicial members of the NCJ may be appointed not by judges but by parliamentarians is the one on which the validity of the whole NCJ and all subsequent ju-

21 Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Crown, 2018), 24.

22 Sanford Levinson, *Framed: America's Fifty-One Constitutions and the Crisis of Governance* (Oxford University Press, 2012), 245–48.

dicial nominations made by the neo-NCJ depends. I mentioned Judge Monika Frąckowiak, against whom 172 allegations of disciplinary misconduct were presented. Let me quote the relevant part of the Iustitita Report:

> The prosecutor presented to the judge 172 allegations of disciplinary misconduct, consisting in exceeding the statutory time limits for drafting written justifications for judgements, making protracting proceedings in civil cases and causing invalidity of the proceedings due to procedural errors.[23]

It seems quite obvious that the disciplinary proceedings against Judge Frąckowiak resulted from her active involvement in the defense of judicial independence, but, regardless of the false pretenses, the charges against Judge Frąckowiak were based on her strictly judicial activity, especially on the issue of promptly drafting justifications for judgements and this is the issue for which Polish judges have been routinely evaluated.

This is just a small example, for generally speaking, the Polish judiciary since 1989, like many other European courts, has been built upon premises which Martin Shapiro discussed in his classic book. Polish judges are usually not recruited from among experienced practitioners. They enter into judicial service a few years after getting their law degree, starting at the lowest judicial rank and working their way up to higher judgeships. They are subjected to a great deal of discipline by their superiors, who control both their promotions in rank and their transfer to better courts in better places. It could also be argued that Polish judges are seen, and see themselves, as government officials who form one branch of a national higher civil service.[24]

There were some attempts by judges to loosen ties with other civil servants and the Ministry of Justice. Polish constitutional scholars and judges con-

23 Kościerzyński, ed., *Justice Under Pressure*, 28.

24 Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, 1986), 150–52.

vened a conference in 2013 on the relations between judicial power and other powers. A book with expanded papers from this conference was published in 2015, with an introduction that leaves no doubt as to the feeling among judges (at least those connected to Iustitia) before 2015. On the first page it stated:

> The constant pressure that judges are put under, as well as inadequate theoretical discussions about the relation between judicial power and political power, prompt the pressing need for systematizing knowledge about the current legal position and for evaluating it critically (…) Attempts to influence judicial decisions under the guise of administrative supervision must be prevented (…).[25]

Contributors to this book described many instances of attempts to undermine judicial independence in Poland before 2015. Importantly, most of these attempts had a statutory basis, particularly in the primary statute concerning Polish judges – the Law on the Organization of Common Courts. As the editor of the aforementioned book and a well-respected scholar, Professor Ryszard Piotrowski stated: "There are essential inconsistencies between constitutional as well as doctrinal determinants of the status of a judge and the Law on the Organization of Common Courts."[26] and that "The Law on the Organization of Common Courts creates a chain of dependence which is hard to reconcile with the Polish Constitution."[27] Strong ties with executive power were also provided in a statute regulating the training of judges. The systemic dependence of the Polish judiciary on political powers before 2015 was overwhelming. The Polish judiciary was not independent in normative, organizational, personal, or financial terms. Law students were also taught for years that this

25 Łukasz Piebiak, "Wstęp," in *Pozycja ustrojowa sędziego*, ed. Ryszard Piotrowski (Lex a Wolters Kluwer business, 2015), 13.

26 Ryszard Piotrowski, "Status ustrojowy sędziego a zakres i charakter zarządzeń nadzorczych," in *Pozycja ustrojowa sędziego*, 176.

27 Piotrowski, "Status ustrojowy sędziego a zakres i charakter zarządzeń nadzorczych," 178.

supposed "independence" does not really mean "independence" or lack of dependence at all. In a leading constitutional law textbook, one of the co-authors, Bogumił Naleziński, explained:

> The principle of the independence of the judiciary, considered as to other state organs, may be formulated in two complementary areas – organizational and functional. In both of them the implementation of the principle is not absolute and may be restricted but without breaking the principle.[28]

Viewed from this perspective, this principle does not require any real independence, restrictions are welcomed, just handle with care. Certainly, this is not just a local Polish deviation, there is no judicial Shangri-La in other jurisdictions either. Christopher M. Larkins noted that, "despite an almost universal consensus as to its normative value, judicial independence may be one of the least understood concepts in the fields of political science and law."[29] Similarly, a Polish scholar, Maciej Jakub Zieliński, in his thorough contemporary study on the independence of the judiciary, opined that there is a certain terminological havoc in this field.[30]

It is also worthwhile noting that the independence of the judiciary was considered by the Constitutional Tribunal in several high-profile cases decided in the years 2009–2013. All these rulings by the Constitutional Tribunal were unfavorable to the judges and they permitted substantial intrusions in the sphere of judicial independence by the legislative and the executive powers. The way the Constitutional Tribunal wrestled with doctrinal difficulties surrounding the idea of judicial independence was visible in judgement K 31/12

28 Bogumił Naleziński, "Organy władzy sądowniczej," in *Prawo konstytucyjne RP*, ed. Paweł Sarnecki (Wydawnictwo C.H. Beck, 2014), 391.

29 Christopher M. Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis," *The American Journal of Comparative Law* 44, no. 4(1996): 607.

30 Maciej Jakub Zieliński, *Niezależność władzy sądowniczej a model stosunku służbowego sędziego* (Wolters Kluwer, 2024), 128.

issued in 2013.[31] The NCJ challenged the law amending the Law on the Organization of Common Courts enacted in 2011. Beside two procedural challenges, the main challenge dealt with the core substantive matter of ministerial supervision over the administrative activities of courts exercised through newly empowered courts' directors. In regard to this matter, the Constitutional Tribunal majority relied on the distinction between the organizational (a separate system of courts) and functional (administration of justice) understanding of judicial power. Therefore, the majority ruling stated that the judiciary is not isolated from other state authorities and ministerial supervision is not forbidden unless it influences the functional aspect, that is, the administration of justice. Proceeding this way, the majority found that most of the new provisions did not contravene the constitutional guarantees of the independence of the judiciary. I am stressing here "the majority," for eight out of 15 judges filed opinions dissenting in part from the Tribunal's judgement, and that revealed considerable differences between the judges. Conspicuously downplayed in all these opinions but one was the challenge regarding the NCJ not being properly consulted with. Another rather downplayed issue was the NCJ complaint in regard to provisions introducing a professional development plan for judges. Judge Piotr Tuleja touched on this point in his dissent, stating that it is unconstitutional to subject judges to evaluation while allowing the executive power to develop criteria for this evaluation. In the last paragraph of his dissenting opinion, Judge Tuleja also stated that it is still problematic, under the Polish Constitution, to mark the boundaries of the administration of justice as opposed to the administration of courts.

The ramifications of this problem were taken up in the dissenting opinion by Judge Andrzej Wróbel, which is the most interesting one for the purposes of this essay. Judge Wróbel was the only one who construed the constitutional principle of judicial independence in an uncompromising fashion. Dissent is

31 Judgement of the Constitutional Tribunal of the Republic of Poland of November 7, 2013, K 31/12.

inherently an expression of difference, but it is quite remarkable how different Judge Wróbel's views on this matter were from other judges. In short, Judge Wróbel's reasoning was straightforward. The distinction the Tribunal made between the organizational and functional understanding of judicial power has no basis in the Constitution's text. The activities recognized as the organizational activities of the courts are either tied to the administration of justice or are part of it. There should be a constitutional presumption that the activities of judges performed while holding office are activities within the scope of the administration of justice. It is therefore unconstitutional, concluded Judge Wróbel, to allow these activities to be supervised by the minister of justice or courts' directors. It seems fair to say that the lonely voice of Judge Wróbel proves that the way the constitutional provision that the courts shall be independent of other branches was interpreted by the Tribunal's majorities (in this and similar cases) was neither strict nor literal. Before 2015, the dominant view in the jurisprudence of the Constitutional Tribunal and in legal academia was that courts are neither separate nor independent in any meaningful sense of both terms. Since the absolute understanding of independence was almost universally rejected, all that was left were the attempts of the Constitutional Tribunal to mark out the boundary between permissible intrusions into the business of courts and unacceptable ones. In reality, the question was not how independent the Polish judiciary should be but to what degree dependence is desirable and may be tolerated by the judges themselves. In this regard, even the rather modest expectations and concerns presented in Judge Tuleja's dissent were deemed too radical by the majority.

The "independence" of the Polish judiciary was not really respected long before 2015. Judges felt they were under assault before the Allied Right populist offensive. Populist streaks which affected the authorities' attitude towards the rule of law and the judiciary have been present in Polish politics since at least 2005. It would be too risky, however, to suggest that the developments in the judiciary since 2015 were caused by or grounded in earlier events, for such

a causal theory would require a thorough study. There is definitely a difference in kind between the past and the ongoing anti-constitutional counterrevolution. Bearing in mind this difference, several remarks can be made.

Exploiting Inconsistencies in the Concept of Judicial Independence

One could see clearly before 2015 that steps made by politicians to increase judicial dependence were relatively risk-free and these politicians faced no penalty at the ballot box. The countermeasures judges were able to employ proved insignificant, especially when legislative changes were persistently ratified by the Constitutional Tribunal. In fact, it could be argued that the Allied Right government could feel surprised in the post-2015 era both by judges' recalcitrance and by the scale of the street protests. As Ewa Siedlecka reminds us, even in the late 1990s politicians and the media started to harshly criticize the courts (overburdened and understaffed) and accuse judges (underpaid) of idleness under the slogan that judges should be independent, but not of work. Accordingly, the public expected successive ministers of justice to urge judges to work.[32] Sujit Choudhry quotes Professor Marcin Matczak, one of the sharpest and most articulate critics of the Allied Right regime, who admitted that the Polish opposition failed to persuade the public in the court of public opinion in the last few years.[33]

I believe there is also another factor, rather neglected, which helps explain why ultimately the issue of judicial independence failed to generate electoral change in 2019–2020 elections, although arguably this issue was the shibboleth of the democratic opposition during this time. This factor is the penal populism which has been all the rage in Poland since the Constitution of 1997 was adopted. This phenomenon was thoroughly discussed by Michalina Szafrańska

32 Siedlecka, *Sędziowie mówią*, 24.

33 Sujit Choudhry, "Will Democracy Die in Darkness? Calling Autocracy by Its Name," in *Constitutional Democracy in Crisis?*, 579.

in her book on penal populism and media. She convincingly claims that in Poland ample opportunities have been provided for penal populism to grow and prosper. The interplay between the commercial interests of media outlets, politicians' efforts to communicate with voters and to convince them of their parties' responsiveness to collective needs, the personalization of politics with leaders taking advantage of the affects and presenting themselves as full of empathy for victims and tough on criminals, as well as the infantilization of the media and of the public discourse, has all made penal populism a reliable device for politicians to get media attention and voters' support, especially considering that this device is always available, for crime is an integral part of social life. All Polish political parties resorted to this device and in the instance of one particular party, Solidarna Polska, argues M. Szafrańska, penal populism was used to build the party's identity.[34] It should be mentioned that the Solidarna Polska party is part of the Allied Right bloc whereas the leader of the party and its founder became the Minister of Justice in November 2015. An important part of Polish penal populism is the faulty system frame, that is, the dissemination of the belief that crime is a product of irrationally liberal criminal law as well as a lenient and ineffective judiciary. What is particularly relevant here is the type of penal populism that M. Szafrańska calls the "internal enemy of the people," based on exclusionary rhetoric against social groups portrayed as destroyers of the social order built by decent people.[35]

It would not be too much to say that in the post-2015 era the ruling bloc channeled the accumulated energy of "enemy of the people" propaganda and skillfully exposed the judges themselves as "folk devils" or subversive troublemakers deserving comeuppance in the form of the reform of the judiciary. The picture of Polish judges as Nazi collaborators or commies presented by the Polish Prime Minister and the President apparently fits well with Polish voters' visceral understanding that "[l]egal interpretation takes place in a field of pain

34 See generally Michalina Szafrańska, *Penalny populizm a media* (Wydawnictwo Uniwersytetu Jagiellońskiego, 2015).

35 Szafrańska, *Penalny populizm a media*, 29.

and death," as Robert M. Cover famously stated, which also means that legal interpretive acts made by judges occasion the imposition of violence upon others.[36]

Another layer of the ideological narrative disseminated by the PiS party has been insightfully exposed by Adam Sulikowski, who demonstrated that this political group reappropriated leftist critical thought and perverted its methods and proposal in order to develop its own legal ideology.[37] As a side note, I shall also briefly mention that since the 1990s many right-wing Polish politicians, most of who ended up in PiS, were avid students of Newt Gingrich-style politics based on the idea of destroying institutions in order to save them, that is, to reclaim the power by intensifying public hatred of official bodies.[38]

The inter-branch hostilities that afflicted the judiciary before 2015 had a side effect whose value cannot be overstated. The judicial community had a strong incentive to unite, at least partially, to build their own structures, to coalesce around leaders. Since the 1990s, the Iustitia Association has been committed to improving the working conditions of judges, to professional training and to integrating judges. Increasingly, the Iustitia took a harsher stance, which prompted some judges to form Themis, a less confrontational association, in 2010. The Iustitia spokesman, Judge Bartłomiej Przymusiński recalled these times, saying that nowadays the former dissonance between lower-ranking judges and the "palaces" or "Byzantium," that is, the top judges, has been obliterated. Before 2015, many lower-ranking judges felt there was a glass ceiling and they were bitterly disappointed by the Constitutional Tribunal's rulings which were unfavorable to the judiciary.[39] Since judicial resistance was galvanized at that time, it was easier for the judges to rise up in an organized manner in defense

36 Robert M. Cover, "Violence and the Word," in *Narrative, Violence, and the Law: The Essays of Robert Cover*, ed. Martha Minow et al. (University of Michigan Press, 1995), 203.

37 Adam Sulikowski, "The Return of Forgotten Critique: Some Remarks on the Intellectual Sources of the Polish Populist Revolution," *Review of Central and East-European Law* 45, no. 2–3(2020): 376–401, https://doi.org/10.1163/15730352-bja10009.

38 Thomas E. Mann and Norman J. Ornstein, *It's Even Worse Than It Looks: How the American Constitutional System Collided with the New Politics of Extremism* (Basic Books, 2012), 33.

39 As quoted in Siedlecka, *Sędziowie mówią*, 394–99.

of the Constitution and rule of law when a far graver threat to the whole constitutional system emerged in 2015.

As I alleged above, my coherent legal theory of mind allows me to not succumb to deception and to recognize that the independence of the Polish judiciary has been compromised. Yet I also claim that the term "independence of judiciary" was earlier emptied of any significant normative meaning. This leads me to an observation that the strategy employed in Poland by the ruling bloc under the slogan "good change" may be described as *constitutional fracking*. Fracking is a very successful technique for recovering gas and oil by injecting special high-pressure liquid into rock to create or enlarge fissures and cracks through which oil and gas can flow. The analogy here consists of the deliberate method of pumping impurities into a seemingly stable system to exploit its internal weaknesses in order to extract power. Look at the way Ewa Siedlecka, a very keen observer, described how the Constitutional Tribunal was subdued by the PiS party:

> The Tribunal was a testing ground for PiS. It was then that PiS employed a method, for the first time, which turned out to be useful in the whole process of "good change," especially where expertise is required to assess what the authorities say. This method involves flooding the public with opinions, legally bizarre, also adding that there are as many opinions as there are lawyers. Along with persuading them that the law is not physics where there are objective rules. That in law there are no fixed points and everything relies on interpretation. This strategy, coupled with a flood of lies and distortions, which the media could not fact-check despite their efforts, proved very successful. The public has become convinced that nothing is certain and this is all too complicated to settle who is right.[40]

40 Siedlecka, *Sędziowie mówią*, 136.

In less troubled times, inconsistencies and gaps in the concept of judicial independence could stimulate scholarly activity and occasional moderate outbursts of judges' frustration. When this concept was subjected to deliberate fracking by populists who had a whole lot of law for their enemies and a number of bizarre legal opinions to shore up their actions, it turned out that it is hard to form a clear-cut argument against "judicial reforms" after 2015 that could appeal to the masses. After all, it was always considered normal, not only in Poland, that parliament could make laws regulating the judicial branch. As Ivan Krastev noted, what makes the rise of Eastern European populism in the form of "illiberal democracy" particularly dangerous is that it is an authoritarianism born within the framework of democracy itself.[41] Similarly, the notion of judicial independence, as a semiotic code, is attractive not only to the democratic opposition, but also to the Allied Right bloc which used it to justify subsequent changes in law and to dismiss the opposition's charges by presenting itself as the champion of "real" judicial independence.

Conclusions

Coming back to the Sally-Anne test of judicial independence – are we, scholars and legal practitioners, really able to claim that the marble has been transferred or even that there was a marble to begin with? In other words, can we assert that judicial independence has been compromised in Poland? Can we rely on a concept of independence that for many years in Poland has been chipped away by many intrusions into the judicial sphere, some of which were encouraged by legal academia and the Constitutional Tribunal? It appears that if we are trying to rely on the concept of judicial independence, what we end up with is only some kind of a bad tendency test. Manifold interferences in the judiciary, both from the outside and the inside (in the form of appeal proceedings), are accepted unless a bad tendency may be attributed to them. The sheer scale of the repression

41 Ivan Krastev, "Eastern Europe's Illiberal Revolution," *Foreign Affairs* 97, no. 3(2018): 56.

and intimidation of Polish judges shows this bad tendency quite clearly, but this test is probably too subjective to retain any usefulness. The main thrust of my argument here goes forward not backward. I certainly do not intend to justify the tribulations of Polish judges with some previous irregularities. Instead, I argue that the notion of judicial independence, a clear misnomer, proved ineffective when subjected to constitutional fracking. It also hinders judges' ability to articulate the needs of their branch, for judges' attempts to assert their "independence" and to protest against intrusions into the judiciary are censured as politicking. Instead of relying on a fuzzy and unrealistic notion of independence, a reasonable and substantive standard of judicial dependence should be developed. Abandoning the obfuscating dogma of independence does not mean abandoning higher values, if we consider Anna Harvey's findings that "democracies with more accountable courts have higher levels of economic and political rights than do those whose courts are less accountable (and more independent)."[42]

In this regard, some important initial steps have been taken by the European Court of Justice since the *Portuguese Judges* case in 2018. As Laurent Pech and Dimitry Kochenov have documented in their study, the Court made a decisive contribution to the fight against rule of law backsliding and strengthened the EU Member States' obligations "via the progressive crystallisation of a renewed and more detailed substantive understanding of the principle of judicial independence."[43]

A clearer and meaningful standard of judicial dependence will prove to be particularly useful in Poland in the transitional period during the current wave of democratization, because it is very probable that any efforts to clean up the judiciary after the current constitutional crisis will be met with fierce resistance under the banner of judicial independence, especially in the Supreme Court. Possibly many of the arguments of present-day legalists will be reversed

42 Anna Harvey, *A Mere Machine: The Supreme Court, Congress, and American Democracy* (Yale University Press, 2014), xiv.

43 Pech and Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice*, 16.

by the beneficiaries of the Allied Right camp and used to their advantage. It also remains to be seen whether judges whose resistance has been galvanized during the Allied Right regime will accept a mere return to the multifaceted dependence they were subjected to pre-2015.

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Monopoly and Its Varieties: Conceptual Framework for Economic Governance in Law

Abstract: The article explores the concept of monopoly from legal and economic perspectives, and aims to develop a unified analytical framework for assessing monopolistic structures within economic governance systems. The author categorizes monopolies into three types: factual, natural, and legal, analysing their features and interrelations in the context of European and Polish law. Special attention is given to the interaction between legal regulations and economic realities, proposing that the notion of a "monopoly system" integrates these categories. The article provides a conceptual framework aligned with EU law principles, emphasizing the need for compliance with proportionality and internal market rules. Examples from Polish law, such as the currency monopoly and the organization of sports competitions, illustrate the discussion.
Keywords: monopoly, factual monopoly, natural monopoly, legal monopoly, monopoly system, economic regulations, internal market, European Union law, proportionality, Polish law

Introduction

The legal concept of monopoly is not extensively covered in theoretical legal scholarship. The majority of legal works on this topic focus primarily on

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analysing specific cases, and treat the concept of monopoly as a pre-existing concept,[2] often providing only a brief definition or referring to the economic understanding of this concept. This article aims to clarify the terminology concerning monopoly and propose a definition that can be more widely applied in the analysis of legal systems regulating the economy.

The article begins by examining European and national regulations that create a legal framework for understanding monopoly, which will serve as a foundation for further discussion. Next, the paper explores the main contexts in which the term "monopoly" is used, categorizing them into three "adjectival monopolies": factual, natural, and legal. A key aspect of this analysis is integrating both economic and legal perspectives, as legal-economic analyses often require terms that relate to economic phenomena. As such, a clear and precise definitional structure is necessary, one that takes account of the different ways the term "monopoly" is applied in various contexts.

The goal of this paper is to propose a unified conceptual framework that outlines the monopoly system and its relationships with the "adjectival monopolies," offering a clearer understanding of how these terms interact within both legal and economic discussions.

Monopolies in EU Law

EU law applies varying degrees of rigor to fiscal and administrative monopolies, as well as to commercial and service monopolies. Commercial monopolies, which involve exclusive import and export rights, are fundamentally incompatible with the principles of the common market and free trade. Consequently, their reorganization is mandatory.[3] Based on the purpose for which monopolies are established, they can be categorized as fiscal or administrative.[4]

2 An implicitly understood term, present and established in the culture, used in legal texts, typically without a statutory definition, relying instead on its customary understanding.

3 Volker Emmerich, "Monopole i przedsiębiorstwa publiczne," in *Prawo gospodarcze Unii Europejskiej*, ed. Manfred A. Dauses, trans. Anna Rubinowicz (C.H. Beck, 1999), 866–78.

4 Artur Żurawik, "Monopol prawny," in *Wielka Encyklopedia Prawa, vol. XVII: Prawo publiczne gospodarcze*, ed. Roman Hauser (Fundacja „Ubi Societas, Ibi Ius," 2019), 175.

Fiscal monopolies, created to generate additional government revenue, are viewed unequivocally negatively. These monopolies, established in any sector with the primary goal of increasing budgetary income, lack justification in terms of serving a significant public interest. Since revenue generation can be achieved through taxes, excise duties, or other public levies, fiscal monopolies are similarly considered incompatible with the principles of the common market.[5]

Administrative monopolies, by contrast, are established to protect significant public interests[6] and are not prohibited under EU law. However, their operation ought not to be in conflict with the functioning of the internal market as it is regulated by treaty provisions, particularly the fundamental freedoms. These monopolies must adhere to the principle of proportionality, which allows them to operate only when they are intended to achieve significant public objectives and when those objectives cannot be achieved by other means.[7] A special subset of administrative monopolies includes those engaged in activities involving the exercise of public authority or conducted in the general economic interest[8] (Article 106(2) TFEU). Such enterprises are subject to the provisions of the Treaties, including competition rules, insofar as their application does not legally or practically obstruct the fulfillment of their specific public tasks.

If an administrative monopoly in the services sector includes activities classified as commercial services unrelated to the exercise of public authority,[9]

5 Emmerich, "Monopole i przedsiębiorstwa publiczne," 900–01.

6 Cf. Katarzyna Grotkowska, "Paternalizm prawa a hazard," *Państwo i Prawo*, no. 10(2015): 42–56.

7 Emmerich, "Monopole i przedsiębiorstwa publiczne," 886.

8 Agata Jurcewicz-Gomułka and Tomasz Skoczny, "Wspólne reguły konkurencji Unii Europejskiej," in *Prawo Gospodarcze Unii Europejskiej*, ed. Jan Barcz (Instytut Wydawniczy EuroPrawo, 2011), VI–218–24.

9 Stanisław Biernat, "Działalność gospodarcza poddana reglamentacji w świetle orzecznictwa Trybunału Sprawiedliwości (na przykładzie prowadzenia gier hazardowych)," *Przegląd Prawa i Administracji* 114, 2018: 420, https://doi.org/10.19195/0137-1134.114.26; Grzegorz Skowronek, *Reglamentacja obszaru hazardu w krajowym porządku prawnym na tle prawodawstwa Unii Europejskiej* (Wrocław, 2012), 241–42; Marek Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej* (Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora," 2005), 99, 136–38.

the provisions of Article 51(1) TFEU and Article 106(2) TFEU do not apply. Nevertheless, Member States retain the discretion to establish such monopolies provided that the principles of non-discrimination, a legitimate justification based on public interest,[10] and the prevention of abuse of a dominant position by the monopolist are upheld.[11]

The general legal framework for assessing such monopolies is defined by Article 56 TFEU (freedom to provide services) and Article 49 TFEU (freedom of establishment), along with the prohibition of discrimination (Article 18 TFEU) and competition rules (Articles 101–109 TFEU). Furthermore, under Article 106(1) TFEU, there is a prohibition on discriminatory practices and the imposition of other unjustified restrictions.[12]

Monopolies in Polish Law

The Polish Constitution addresses the establishment of monopolies by stipulating a formal requirement: they must be created by statute (Article 216(3)). However, along with the principle of proportionality, material requirements should also be taken into account. These include the implementation of a particularly significant public good, the efficiency of the monopoly in achieving its intended public purpose, and the necessity of this form to achieve the stated objective.[13] Furthermore, domestic legislators must adhere to the principles of EU law outlined above.

10 Skowronek, *Reglamentacja obszaru hazardu w krajowym porządku prawnym na tle prawodawstwa Unii Europejskiej*, 241–43; Kazimierz Strzyczkowski, *Prawo gospodarcze publiczne* (Wolters Kluwer, 2023), 311; S. Biernat, "Działalność gospodarcza poddana reglamentacji w świetle orzecznictwa Trybunału Sprawiedliwości (na przykładzie prowadzenia gier hazardowych)," 418–19.

11 Marek Szydło, *Swobody rynku wewnętrznego a reguły konkurencji. Między konwergencją a dywergencją* (Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora," 2006), 330–33.

12 Dariusz Barwaśny, "Zasady świadczenia usług w zakresie gier hazardowych w prawie Unii Europejskiej," *Folia Iuridica Wratislaviensis* 3, no. 1(2014): 143.

13 M. Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej*, 207–08.

As in EU law, fiscal monopolies are generally prohibited in Poland. The state cannot secure financial resources by restricting the constitutional right of individuals to engage in and conduct business activities. Such monopolies are incompatible with the principle of proportionality. This stance is supported by the doctrine of the "tax state," which asserts that the state can and should fund its public expenditures through taxes, customs duties, fees, and other traditional sources. Nevertheless, fiscal monopolies do exist in practice, and their existence is deemed permissible only in two exceptional cases: when explicitly provided for in the Constitution or when they existed in the legal system before the introduction of norms establishing the freedom of economic activity.[14]

By contrast—and again, in accordance with EU law—administrative monopolies are treated differently. Their establishment is justified by the pursuit of specific, significant public objectives. Such monopolies are permissible if they meet the criteria for restricting rights and freedoms: they must be introduced by statute, be necessary to protect a specific public good, and comply with the principle of proportionality. In Polish law, the framework for regulating monopolies exists only at the constitutional level. The *Law on Entrepreneurs* does not include provisions on monopolies. The establishment of a monopoly is always regulated by specific legislation concerning a particular sector and is not addressed in Chapter 4 of the *Law on Entrepreneurs*, which covers general rules for regulating business activities (such as licenses, permits, or registration in a regulated activity register).

Examples of Monopolized Domains in Contemporary Polish Law[15]:

- issuance of currency: This monopoly is reserved for the National Bank of Poland (NBP),[16]
- issuance and withdrawal of postage stamps and postal stationery: This includes items such as postal cards made of stiff paper with printed

14 A. Żurawik, "Monopol prawny," 175.

15 Zbigniew Ofiarski, "Komentarz do art. 216," in *Konstytucja RP, Vol. 2, Komentarz. Art. 87–243*, ed. Marek Safjan and Leszek Bosek (C.H. Beck, 2016), Legalis.

16 Art. 4 Ustawy z dnia 29 sierpnia 1997 r. o Narodowym Banku Polskim (consolidated text Journal of Laws of 2022, item 2025).

postage stamps, marked with the words "Polska" or "Rzeczpospolita Polska" in any grammatical case, or envelopes with printed postage stamps and the same markings. This monopoly is assigned to the designated postal operator,[17]

– organization and management of sports competitions: This includes competitions for the title of Polish Champion or the Polish Cup in a given sport, the establishment and enforcement of sports, organizational, and disciplinary rules for sports competitions organized by sports associations, the appointment of national teams, and their preparation for such events as the Olympic Games, Paralympic Games, Deaflympics, World Championships, or European Championships. Representation in international sports institutions is also within the purview of Polish sports associations.[18]

These examples illustrate the specific contexts in which monopolies are applied under Polish law, demonstrating their alignment with constitutional and statutory requirements while also reflecting sector-specific needs.

Factual Monopoly

In the realm of economic theory, a factual monopoly is defined as a market structure wherein a single supplier operates exclusively, while the consumer base (in the context of this analysis, consumers of gambling services) is highly atomized. Individual consumers make independent purchasing decisions.[19] The monopolist unilaterally determines the scope of services and their pricing, guided by the profit. The establishment of such a monopoly can function as an administrative barrier to market entry.[20] In the absence of legal

17 Art. 24 Ustawy z dnia 23 listopada 2012 r. Prawo pocztowe (consolidated text Journal of Laws of 2023, item 1640).

18 Art. 13 Ustawy z dnia 25 czerwca 2010 r. o sporcie (consolidated text Journal of Laws of 2022, item 1599 as amended).

19 Marek Dietl, *Proces monopolizacji i niepewność* (Instytut Sobieskiego, 2010), 42.

20 Dietl, *Proces monopolizacji i niepewność*, 43.

constraints, a monopolist freely sets prices and employs a range of pricing strategies.[21]

Economic analyses posit that a monopoly arises when the product offered is unique and lacks substitutes capable of fulfilling consumer needs in a comparable manner. In such circumstances, the product no longer serves as a competitive tool among producers (or sellers). Competitive advantage is inherently derived from the ability to produce this unique good within the specific conditions and structure of the market.

From the standpoint of market structure, a pure monopoly exists under the following conditions:

- Products are either homogeneous or differentiated, with no close substitutes available;
- The market comprises numerous buyers and a single seller (a supply monopoly), or a single buyer and multiple sellers (a demand monopoly);
- Perfect market information is available, implying that a supply monopolist understands the demand for its product, while a demand monopolist understands the supply of the good in question;
- Significant barriers exist that prevent entry into the monopolized activity;
- The monopolist retains full discretion over pricing.

The aforementioned characteristics pertain to a factual monopoly—an already existing market structure (irrespective of its origins) in which a single entity dominates the supply side.

A market under monopoly exhibits a centralized structure.[22] The presence of a monopoly may enhance societal welfare if its formation leads to sufficiently significant cost reductions that outweigh the decline in consumer surplus.[23] In cases where a monopoly is legally sanctioned, the monopolist is exempt

21 Dietl, *Proces monopolizacji i niepewność*, 44–47.

22 Eugeniusz Toczydłowski, *Optymalizacja procesów rynkowych przy ograniczeniach* (Akademicka Oficyna Wydawnicza Exit, 2003), 43.

23 Dietl, *Proces monopolizacji i niepewność*, 55.

from incurring expenses to safeguard its market position. The welfare implications of a monopoly for society can be assessed by examining the combined value of consumer surplus and the profits of the monopolistic entity.[24] It is a widely held principle that societal welfare is generally greater under conditions of competition than in a monopolized market. This assertion provides a critical rationale for regulatory intervention aimed at optimizing monopolistic markets.

However, it is also essential to recognize that in certain scenarios, a monopoly may achieve greater efficiency than alternative market structures.[25] Despite this, as a general rule, monopolization does not boost economic efficiency.[26] Therefore, any evaluation of the economic effects of a factual monopoly must be contextualized within the specific regulatory and market frameworks prevailing in a given jurisdiction and time.

Natural Monopoly

A natural monopoly is typically understood as an economic situation in which it is unprofitable for competitors to enter a market due to the relationship between entry costs and the aggregated expected profits.[27] This phenomenon is often linked to significant barriers to market entry (rendering investment economically unviable) or the monopolist's exclusive or predominant access to scarce resources critical to the relevant activity.[28] The emergence of such market conditions may be influenced by cultural, historical, geographical, or

24 Dietl, *Proces monopolizacji i niepewność*, 57.

25 Bożena Borkowska, *Regulacja monopolu naturalnego w teorii i praktyce* (Wydawnictwo Uniwersytetu Ekonomicznego, 2009), 155–56; Dietl, *Proces monopolizacji i niepewność*, 66.

26 Dietl, *Proces monopolizacji i niepewność*, 71–72.

27 Alfreda Kamińska, "Monopol naturalny i jego regulacja," *Rocznik Naukowy Wydziału Zarządzania w Ciechanowie* 3, no. 1–2(2009): 55.

28 David R. Kamerschen et al., *Ekonomia*, trans. Piotr Kuropatwiński (Fund. Gosp. NSZZ „Solidarność", 1991), 587–88.

political factors.[29] A natural monopoly may, in certain cases, be formalized through the imposition of a legal monopoly.[30]

A contentious issue is whether legal regulations can serve as the source of a natural monopoly. The solution to this question appears to depend on the analytical perspective. A legal-historical approach, which examines the evolution of a given monopoly over time, may conclude that specific legal measures enacted during a particular period led to the creation of a natural monopoly either contemporaneously (e.g., by ensuring exclusive access to particular resources) or subsequently (through their impact on economic and social processes). In economic theory, legal provisions may likewise be identified as the source of a natural monopoly. For instance, granting exclusive legal access to unique raw materials essential for producing certain goods could constitute such a case. In this sense, a legal monopoly may be seen as an external cause of a natural monopoly's development.[31]

However, the existence of a legal monopoly is not a necessary condition for the maintenance of a natural monopoly, especially concerning the provision of services or production of goods subject to such monopolization. Natural monopolies may persist independently of direct legal sanction, as they are often sustained by economic realities inherent to their operation.

Legal Monopoly

According to Żurawik,[32] a legal monopoly arises when a single entity operates as the sole supplier in a market, occupying a monopolistic position, with entry barriers preventing competitors from challenging that position. This occurs through the conferment of exclusive rights by a competent state authority to

29 Borkowska, *Regulacja monopolu naturalnego w teorii i praktyce*, 160–64; Andrzej Powałowski, "Monopolizacja," in *Prawo publiczne gospodarcze*, ed. Andrzej Powałowski (C.H. Beck, 2020), 248.

30 Borkowska, *Regulacja monopolu naturalnego w teorii i praktyce*, 124–27.

31 Dietl, *Proces monopolizacji i niepewność*, 47, 73.

32 Żurawik, "Monopol prawny," 174.

engage in a specific type of economic activity. K. Strzyczkowski offers a complementary view, defining a legal monopoly as the statutory prohibition of engaging in certain types of business activities, which are reserved for the state, a public entity, or a designated private actor, even when other entities could technically engage in those activities.[33] In this framework, legal monopolies are distinct from natural monopolies in scope and character.

A. Powałowski provides a slightly different notion, describing a legal monopoly as the attainment of functional exclusivity (either full or partial) within a given relevant market. This exclusivity may have a statutory origin, arising directly from legislative measures, or it may derive from administrative practices (e.g., licensing policies), even in the absence of explicit regulatory provisions.[34] Powałowski further distinguishes a legal monopoly from a factual monopoly, which arises from the actions of an enterprise without any legal guarantees of monopolistic status. Conversely, a natural monopoly may have legal or factual origins but is inherently tied to the exploitation of environmental features, local resource availability, or specific public utility characteristics. Such conditions render the operation of a competing supplier economically, financially or organizationally irrational in a given area.[35]

While Strzyczkowski's definition suggests a mutual exclusivity between legal and natural monopolies, Powałowski claims that a natural monopoly may arise from either legal or factual monopolies, provided other contributing factors are also present. Notwithstanding these distinctions, the common element in all definitions of a legal monopoly is the presence of a legal norm guaranteeing the monopolist's position. This legal guarantee serves as the defining characteristic of a legal monopoly.

33 Kazimierz Strzyczkowski, *Prawo gospodarcze publiczne* (LexisNexis, 2011), 280; cf. Borkowska, *Regulacja monopolu naturalnego w teorii i praktyce*, 154.

34 Powałowski, "Monopolizacja," 247–48.

35 Powałowski, "Monopolizacja," 248.

The Interrelationship Between Legal, Factual, and Natural Monopolies

Outlining the interrelationship between legal, factual and natural monopolies reveals the complexity of these concepts in the context of regulatory and economic analysis. A legal monopoly arises when specific economic activities are exclusively reserved for a designated entity by statutory provisions, ensuring a monopolistic position through explicit legal guarantees. In contrast, a natural monopoly develops due to the intrinsic characteristics of a market, where economic conditions—rather than legal constraints—render competition economically unviable, often because of inefficiencies or prohibitive entry costs. Meanwhile, a factual monopoly describes a market structure in which a single entity dominates the supply side, regardless of whether this position is supported by formal legal guarantees.

A particularly intricate scenario occurs when a factual monopoly results from exclusive licensing arrangements that grant a single entity the right to operate in a specific sector without a statutory monopoly guarantee. Although such a structure formally retains the characteristics of a licensing regime, it often creates a de facto monopolistic market structure with all its economic and social consequences. If such an arrangement persists over time, and there is no political will to extend similar licensing rights to other entities, it effectively constitutes a monopoly. In these cases, the licensing regime may become symbolic rather than substantive. The fluidity of terminology and the diversity of administrative mechanisms necessitate understanding such situations as monopolistic systems created through licensing techniques. While these do not constitute "legal monopolies" in the strict legislative sense, they function as economic monopolies secured through regulatory practices and administrative interpretation.

The practical significance of these distinctions aligns with the jurisprudence of the Court of Justice of the European Union, which emphasizes the actual market impact of state regulations over their formal legal design when assessing com-

pliance with EU law.[36] Consequently, legal protection for monopolistic positions may arise either explicitly through statutory provisions or implicitly through administrative enforcement and application. A monopoly system may also emerge when legal guarantees reinforce the dominance of natural or factual monopolies. These arrangements often provide political or fiscal advantages, particularly in sectors requiring substantial public oversight, such as gambling, where regulation ensures centralized control and mitigates associated risks.[37]

It is crucial to distinguish between factual monopolies with legal safeguards and those without such protection. While unprotected factual monopolies may maintain dominance over extended periods, their legislative and regulatory treatment fundamentally differs. In sectors such as gambling, the inherently high-risk nature of the activity makes purely factual monopolies without legal guarantees unsustainable. Regulatory oversight is indispensable to managing the social and economic risks associated with such industries, reinforcing the need for legal guarantees in these contexts. Consequently, any meaningful analysis of monopoly structures must consider both the legal framework and its practical application.[38]

Monopolistic arrangements concentrate control within a single entity, which may be a state, public institution, or private actor, conferring exclusive competence over a specific economic activity.[39] This centralization extends beyond organizational forms to encompass strategic decision-making and operational oversight. While monopolists may delegate specific functions to subordinate entities, these entities typically operate under contractual obligations and remain accountable to the monopolist. Ultimately, the monopolist bears the economic

36 E.g. case C49/16, Judgment of the Court of Justice of the European Union (CJEU), *Unibet v. Nemzeti*; cf. Tomasz Skoczny, "Państwowe monopole handlowe w prawie wspólnotowym," *Studia Europejskie*, no. 3(1997): 51.

37 Borkowska, *Regulacja monopolu naturalnego w teorii i praktyce*, 161; Emmerich, "Monopole i przedsiębiorstwa publiczne," 894–95, 900–01.

38 Dietl, *Proces monopolizacji i* niepewność, 82–84.

39 Strzyczkowski, *Prawo gospodarcze publiczne* (2023), 311; Żurawik, "Monopol prawny," 174–75.

and regulatory risks associated with the activity and must ensure compliance with the regulatory framework and objectives defined by public authorities.

This framework offers a systematic approach to analyzing monopolistic structures by clarifying the distinctions and interrelations among legal, factual, and natural monopolies, as well as the overarching concept of monopoly systems. Legal monopolies pertain to exclusive rights enshrined in statutory law, while natural monopolies emerge from market conditions that inherently favor monopolization. Factual monopolies describe market structures dominated by a single entity, regardless of legal or natural factors. The concept of a monopoly system integrates these dimensions, capturing the interplay between economic realities and legal or administrative practices. This integrated approach provides analytical clarity and facilitates nuanced evaluations of monopolistic arrangements, particularly within the context of European Union law. It aligns with the principles established in the EU Treaties and the jurisprudence of the Court of Justice, ensuring compatibility with the regulatory and economic objectives of the Single Market.

Conclusion

In conclusion, this analysis has sought to systematize the concepts of factual, natural, and legal monopolies, as well as the broader notion of a monopoly system, while delineating the relationships between these constructs. A factual monopoly refers to a market structure in which monopolistic conditions are empirically observed, irrespective of the underlying legal or natural origins. Its defining characteristic lies in the existence of a monopolistic structure, rather than its legal status or historical genesis. Factual monopolies may arise due to regulatory interventions or through market dynamics that naturally favor concentration.

A legal monopoly, by contrast, derives its existence from formal legal provisions that guarantee exclusivity to a single supplier. Typically, this ex-

clusivity is enshrined in statutory law, which explicitly precludes competition within a defined market or sector. Natural monopolies, on the other hand, emerge from the inherent characteristics of a market where economic efficiency dictates monopolistic outcomes. These situations often arise in markets with high fixed costs or network effects, where competition becomes structurally unsustainable.

The concept of a monopoly system integrates these perspectives, uniting the legal and economic dimensions of monopolistic structures. A monopoly system may exist where a factual monopoly is explicitly sanctioned through legal mechanisms or sustained through administrative practices. Importantly, the presence of a natural monopoly is neutral to this framework: a monopoly system may legitimize a natural monopoly or, conversely, create monopolistic conditions in markets where no natural monopoly exists.

This conceptual framework provides a coherent basis for analyzing monopolistic structures within a legal-economic context, ensuring clarity and avoiding definitional ambiguities. It also aligns with the principles underpinning European legal frameworks, particularly those enshrined in the EU Treaties and the jurisprudence of the Court of Justice of the European Union. The proposed notion of a monopoly system reflects the complex interplay between economic realities and legal constructs, offering an analytically robust tool for understanding the regulatory and market implications of monopolistic arrangements within the Single European Market.

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Legal Effects of Environmental Taxation in Tackling Greenhouse Gas Emission in Nigeria: The Need for a Comprehensive Legal Framework

Abstract: Reducing greenhouse gas emissions has emerged as a significant undertaking undertaken by nations worldwide, driven by the urgency to address the escalating global climate change and its widespread impacts. However, Nigeria has exhibited limited progress in tackling the challenges of climate change and other environmental issues inside its borders. This article focuses on examining environmental taxation as a potential strategy for addressing environmental concerns in Nigeria. It draws upon examples from several European countries that have effectively utilised environmental taxation as a means of achieving notable achievement in environmental protection. The study is relevant in the current context, as it is imperative to promptly explore strategies for overcoming the environmental difficulties faced by Nigeria. It is also crucial to promptly intensify the implementation of environmental taxation in Nigeria to effectively discourage individuals or entities from engaging in activities that contribute to environmental degradation. This measure will ultimately lead to a significant reduction in environmental pollution throughout the country, thereby addressing the issue of greenhouse gas emissions, which

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are primarily responsible for global climate change. The subject of environmental taxes and their implications in addressing environmental concerns, particularly in the context of Nigeria, has garnered significant attention in academic discourse. Like many other nations, Nigeria has pressing environmental issues that necessitate the implementation of effective policies and regulations. In this regard, the role of environmental laws and their potential impact on mitigating climate change is the subject of scholarly investigation. This paper concludes by stating that there is no comprehensive legal framework on environmental taxation in Nigeria and thereby recommends a standardised law on environmental taxation.

Keywords: environmental taxation, environmental challenges, greenhouse gas emission, environmental laws, climate change

Introduction

The environmental challenge is not exclusive to Nigeria; it is a global phenomenon.[3] One of the primary considerations regarding this subject pertains to the relationship between environmental pollution and taxation. It is widely held that governments the world over levy taxes on individuals and corporations primarily for the purpose of generating revenue, and this is indeed one of the fundamental objectives of taxation.[4] It is crucial to emphasise there is a significant crossover between environmental legislation and taxation. In this context, taxes are levied by the governing authorities with the aim of fostering the development of an environmentally sustainable society. There is a need to regulate human activities that negatively impact the environment. Therefore, it is imperative to enact strict regulations to ensuring the responsible use of

3 Muano Nemavhidi and Ademola Oluborode, "Carbon Tax as a Climate Intervention in South Africa: A Potential Aid or Hindrance to Human Rights?," *Environmental Law Review* 25, no. 1(2023): 11, https://doi.org/10.1177/14614529221149836.

4 "Taxes & Government Revenue," World Bank, accessed August 24, 2023, https://www.worldbank.org/en/topic/taxes-and-government-revenue.

the environment, thereby encouraging sustainable development. Failure to regulate the use of the environment will result in adverse consequences for future generations, while the current generation will also experience negative repercussions.[5]

For nations to achieve the sustainable development objectives, in particular, goals six and fifteen, which pertain to environmental protection, it is imperative that governments worldwide take significant action on to environmental concerns, namely, in the realm of environmental protection.[6] The extent to which climate change is causing devastation globally, including Nigeria, is a matter of great concern, as it is resulting in significant adverse impacts that are experienced daily.[7] The escalation of climate instability in Nigeria has led to an increase in the occurrence of intense and frequent downpour events. The severity of flash floods, landslides, and gully erosion has grown, exacerbating the soil condition in one of the top ten countries exhibiting heightened susceptibility to the impacts of climate change. By the year 2009, it was projected that around 6,000 gullies in both rural and urban regions of Nigeria were causing significant damage to residential structures, pipelines, and transportation infrastructure.[8] The terrible weather disasters have elicited feelings of fear and grief among a significant number of Nigerians.[9] Additional consequences include elevated temperatures, intensified storms, heightened drought conditions, growing health hazards, socioeconomic impoverishment and population displacement, as well as intensi-

5 Lawrence Asekome Atsegbua et al., *Environmental Law in Nigeria: Theory and Practice* (Ababa Press, 2004).

6 Asekome Atsegbua et al., *Environmental Law in Nigeria*.

7 Adeola Olufunke Kehinde, "Environmental Problems in Nigeria: Pollution in Focus," *Economics & Law* 3, no. 2(2021): 9, https://doi.org/10.37708/el.swu.v3i2.2.

8 Kehinde, "Environmental Problems in Nigeria."

9 Oladipo Airenakho, "Land, Soil and Climate Change: How Nigeria Is Enhancing Climate Resilience to Save the Future of Its People," World Bank, published October 19, 2022, https://www.worldbank.org/en/news/feature/2022/10/18/land-soil-and-climate-change-how-nigeria-is-enhancing-climate-resilience-to-save-the-future-of-its-people#:~:text=Increasing%20climate%20variability%20in%20Nigeria,countries%20to%20climate%20change%20impacts.

fied precipitation and storms.[10] Thus, the issue of environmental protection should not be taken for granted by any nation.[11]

The issue of climate change has endured for an extended period and is currently recognised as one of the most urgent global challenges. Regardless of our awareness, it is widely acknowledged by specialists that the actions of humans can have detrimental effects on global climate systems, ultimately contributing to the phenomenon of global warming.[12] It is widely recognised that the global nature of climate change requires collective efforts rather than individual actions. Pollution constitutes a significant environmental concern in Nigeria.[13] This includes air pollution, water pollution, soil contamination, electrical pollution, and other forms connected with the phenomenon of global warming.[14]

To attain environmental sustainability and address the issue of climate change, it is imperative to reduce greenhouse gas emissions,[15] and conscious measures are required to mitigate such emissions.[16] The Paris Agreement has imposed a global obligation to reduce greenhouse gas emissions to 1.5 degrees Celsius by the end of this century.[17] The 2018 study conducted by the Intergovernmental Panel on Climate Change (IPCC) under the auspices of the United Nations (UN) stated that it is imperative to bring about a 45%

10 Adeola Olufunke Kehinde and Olufemi Abifarin, "Legal Framework for Combating Climate Change in Nigeria," *Kutafin Law Review* 9, no. 3(2022): 395, https://doi.org/10.17803/2713-0525.2022.3.21.395-414.

11 Shawkat Alam et al., "Introduction," in *Routledge Handbook of International Environmental Law*, ed. Erika Techera (Routledge, 2012), https://doi.org/10.4324/9780203093474.

12 Kemal Dervis, "Climate Change Threatens the Development Gains Already Achieved," UN Climate Change Learning Partnership, accessed June 21, 2023, https://www.uncclearn.org/wp-content/uploads/library/undp30.pdf.

13 Asekome Atsegbua et al., *Environmental Law in Nigeria*.

14 Kehinde, "Environmental Problems in Nigeria."

15 Dervis, "Climate Change Threatens the Development Gains Already Achieved."

16 "Environmental Tax," World Bank, accessed June 21, 2023, https://www.worldbank.org/en/programs/the-global-tax-program/environmental-taxes.

17 "The Paris Agreement," United Nations Climate Change, accessed June 21, 2023, https://unfccc.int/process-and-meetings/the-paris-agreement.

reduction in carbon dioxide (CO2) emissions by 2030[18] relative to the levels recorded in 2010. Based on the latest scientific findings from the IPCC, as presented in their recent publication taking 2019 as a reference point, it is imperative to achieve a 43% reduction in greenhouse gas (GHG) emissions by the year 2030.[19] Conscious efforts must be made by all nations of the world to mitigate the most detrimental consequences of climate change, and to achieve the objective outlined in the Paris Agreement,[20] as noted by Sameh Shoukry, the Egyptian Minister of Foreign Affairs. This article will demonstrate the efficacy of one measure aiming to mitigate greenhouse gas emissions, namely, greenhouse tax regimes implemented in various regions worldwide.

Research Methodology

The method of research employed in writing this paper was primarily doctrinal in nature. The process involves comprehensive research in libraries, utilising both primary and secondary sources of information. The primary sources included the Constitution of the Federal Republic of Nigeria (1999), Environmental Impact Assessment Act 2022, National Environmental Standards and Regulations Enforcement Agency (NESREA) Act 2007, Nigerian Minerals and Mining Act 2007 and the National Climate Change Act 2021. Secondary materials such as scholarly publications, articles, and newspaper stories were consulted, with the internet playing a significant role in this task.

18 "Special Climate Report: 1.5oc Is Possible but Requires Unprecedented and Urgent Action," United Nations, published October 8, 2018, https://www.un.org/sustainabledevelopment/blog/2018/10/special-climate-report-1-5oc-is-possible-but-requires-unprecedented-and-urgent-action/.

19 "Climate Plans Remain Insufficient: More Ambitious Action Needed Now," United Nations Climate Change, published October 26, 2022, https://unfccc.int/news/climate-plans-remain-insufficient-more-ambitious-action-needed-now.

20 "Climate Plans Remain Insufficient."

Environmental Challenges in Nigeria and Efforts to Combat Them

Nigeria is confronted with several environmental concerns. The country has faced challenges in effectively addressing these concerns, particularly reducing greenhouse gas emissions as outlined in the Paris Agreement. For several decades, its oil and gas industry has contributed heavily to such emissions due to its practice of gas flaring. While these challenges may not be unique to Nigeria, the approach taken by the Nigerian government and other stakeholders in the environmental sector to solve these issues is alarming. The nation of Nigeria has had challenges in effectively addressing environmental safety concerns, particularly in relation to the reduction of greenhouse gas emissions as outlined in the Paris Agreement.[21] For several decades, the oil and gas industry in Nigeria, renowned for its practise of gas flaring, has made a substantial contribution to the worldwide escalation of greenhouse gas emissions.[22]

In 2021, Nigeria enacted the Climate Change Act as part of its efforts to address the challenges posed by climate change.[23] It might be argued that this legislation is the most extensive set of municipal regulations meant to tackle the issue of climate change in Nigeria. It establishes an institutional and legal framework for implementing programmes and policies to mitigate greenhouse gases. The objectives of the Act include balancing greenhouse gas emissions by 2050–2070, a target which aligns with Nigeria's global obligations in addressing the issue of climate change.[24] The Climate Change Act established the

21 Adeola Olufunke Kehinde, "Water Pollution in Nigeria and Its Effect on Agriculture: A Case Study of Niger Delta," *Research and Science Today* 1, no. 23(2022): 21, https://doi.org/10.38173/rst.2022.23.1.2:21-31.

22 Uzuazo Etemire, "The Future of Climate Change Litigation in Nigeria: COPW v NNPC in the Spotlight," *Carbon & Climate Law Review* 15, no. 2(2021): 158, https://doi.org/10.21552/cclr/2021/2/7.

23 Muhammed Tawfiq Ladan, "A Review of Nigeria's 2021 Climate Change Act: Potential for Increased Climate Litigation," International Union for Conservation of Nature, published June 28, 2022, https://www.iucn.org/news/commission-environmental-economic-and-social-policy/202203/a-review-nigerias-2021-climate-change-act-potential-increased-climate-litigation.

24 Section 1 (f) of the Climate Change Act 2021.

National Council on Climate Change, endowing it with legal personhood and granting it the capacity to initiate legal proceedings both as a plaintiff and a defendant under its corporate identity. In Nigeria, there exists the authority to establish regulations and conduct investigations concerning changes in climatic conditions. The Council is responsible for supervising the attainment of sector-specific goals and proposals for regulating greenhouse gas emissions and other anthropogenic factors contributing to climate change. Additionally, it is tasked with authorising and monitoring the implementation of the National Climate Action Plan, as well as overseeing the allocation of funds designated for this purpose.[25]

To limit the global temperature increase to an average of 2°C and work towards achieving a target of 1.5°C above pre-industrial levels, it is imperative for governmental parastatals responsible for environmental and land use planning to establish a carbon budget. Similarly, the Council is required to formulate a comprehensive action plan on climate change at the national level every five years, in collaboration with the parastatals. The initial plan is required to be submitted within several months of the effective date of the Act.[26] However, like its predecessors, the effectiveness of this legislation will be weakened without proactive measures to guarantee rigorous adherence.[27] Hence, based on previous observations inside the nation, addressing the issue of climate change using this approach may provide challenges, particularly in terms of adhering to the specified timeframe for mitigation outlined in the Paris Agreement. In accordance with internationally recognised best practices, it is imperative to implement additional measures aimed at addressing environmental concerns.

Scholars have observed that the courts in Nigeria should enforce the right to a healthy environment, as stipulated in the 1999 Constitution, to ensure

25 Section 3 (1) Climate Change Act 2021.

26 Kehinde and Abifarin, "Legal Framework for Combating Climate Change in Nigeria," 398.

27 Zainab Akintola et al., "A Review of Nigeria's Climate Change Act, 2021," Aluko & Oyebode, published January 24, 2022, https://www.aluko-oyebode.com/insights/a-review-of-nigerias-climate-change-act-2021/.

comprehensive environmental preservation throughout the country.[28] In certain instances, the Nigerian judiciary has determined that the government should address specific concerns arising from environmental exploitation by certain corporate entities, particularly when such activities have a significantly negative impact on individuals' lives. The courts' efforts in this matter should be acknowledged due to the absence of explicit provisions for environmental rights in Nigeria's laws.[29] Furthermore, Section 20 of the Constitution,[30] which pertains to environmental preservation, is non-justiciable.[31] The following cases exemplify the efforts of Nigeria's courts in addressing environmental issues, highlighting the courts' recognition that the emission of greenhouse gases by non-compliant companies can be addressed as a violation of fundamental human rights, as stipulated in the Nigerian Constitution and other international human rights treaties. It has also been argued that there is a need to access environmental justice in Nigeria to guarantee environmental protection, as we shall consider in the below cases.[32]

The case of Jonah Gbemre vs Shell Petroleum Development Company Nigeria Ltd & Others[33] involved applicants seeking the enforcement of their fundamental rights to life and human dignity in the face of this company's gas flaring activities. The court held that Shell's gas flaring activities in the affected community resulted in a significant violation of the applicants' constitutional

28 Rhuks Ako et al., "Overcoming the (Non)Justiciable Conundrum: The Doctrine of Harmonious Construction and the Interpretation of the Right to a Healthy Environment in Nigeria," in *Justiciability of Human Rights Law in Domestic Jurisdictions*, ed. Alice Diver and Jacinta Miller (Springer, 2015), 123.

29 Onyeka K. Anaebo and Eghosa O. Ekhator, "Realising Substantive Rights to Healthy Environment in Nigeria," *Environmental Law Review* 17, no. 2(2015): 82, https://doi.org/10.1177/1461452915578831.

30 1999 Constitution of the Federal Republic of Nigeria, Cap C23, LFN 2004.

31 Section 6 (6) (c) 1999 Constitution of the Federal Republic of Nigeria.

32 Muhammed Ladan, *Trend In Environmental Law And Access To Justice In Nigeria: Recent Trends In Environmental Law And Access To Justice In Nigeria* (LAP LAMBERT Academic Publishing, 2012).

33 2005 AHRLR 151.

rights to life, including the right to reside in a healthy environment, and the preservation of human dignity, as enshrined in Nigeria's Constitution.[34]

The case specifically declared gas flaring to be unconstitutional,[35] a groundbreaking development within the Nigerian context. The 1999 Constitution of the Federal Republic of Nigeria ensures the provision of the right to a healthy environment. The matter pertains to the essential human rights to life and dignity, as outlined in Sections 33(1) and 34(1) of the Constitution. Consequently, it falls within the purview of legal recourse, in contrast to Section 20 of the Constitution, which is not susceptible to judicial review due to the provisions of Section 6(6)(C) of the Constitution.

Despite the favourable nature of the judgement, it is disheartening to note the lack of enforcement. This unfortunate situation can be seen as a deliberate attempt to hinder the judiciary's efforts to address environmental issues in Nigeria. The judgement does not seek financial compensation from the court, but rather aims to rectify regulatory deficiencies in Nigeria's history as a nation.[36] This observation highlights the lack of political resolve among Nigerian authorities to address environmental concerns.[37]

In Centre for Oil Pollution Watch vs NNPC,[38] May 13, 2005 the Centre asserted that the Nigerian National Petroleum Corporation (NNPC) had contravened international law through its involvement in an oil spillage. This oil spill took place at ACHA Village, in Abia State, Nigeria. As a result, the case was brought before the Lagos Division of the Federal High Court. The defen-

34 1999 Constitution of the Federal Republic of Nigeria, Cap C23, LFN 2004.

35 James R. May and Tiwajopelo Dayo, "Dignity and Environmental Justice in Nigeria: The Case of *Gbemre v. Shell* (2019)," *Widener Law Review* 25, 2019.

36 BukolaFaturoti et al., "Environmental Protection in the Nigerian Oil and Gas Industry and *Jonah Gbemre v. Shell PDC Nigeria Limited*: Let the Plunder Continue?," *African Journal of International and Comparative Law* 27, no. 2(2019): 225, https://doi.org/10.3366/ajicl.2019.0270.

37 Ayodele Morocco-Clarke, "The Case of *Gbemre v. Shell* as a Catalyst for Change in Environmental Pollution Litigation," *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 12, no. 2(2021): 28.

38 (2019) 5 NWLR (Pt 1666) 518.

dant was accused of being responsible for the oil spill, which was attributed to the corrosion of their pipeline resulting from a lack of proper maintenance and care. The primary water sources in the settlement were compromised because of contamination caused by the accidental burst in a nearby mineral oil container, leading to its entire contents entering neighbouring lneh/Aku streams. The plaintiff contended that the respondent was negligent in both the origin and the control of the oil leakage, resulting in adverse consequences for human health, marine organisms, natural resources, and other activities associated with the Ineh/Aku streams. It should be noted, however, that the defendant did take measures to address the surface spill and restore the affected streams and river. The defendant raised concerns regarding the plaintiff's locus standi to seek the dismissal of the lawsuit. On February 9, 2006, the trial court rejected the action for lack of jurisdiction due to the absence of any actual harm suffered by the plaintiff because of the alleged oil leak. Furthermore, the court found no evidence to support the claim that the plaintiff had experienced more severe harm than any other resident of Acha hamlet. On January 28, 2013, the Court of Appeal issued a decision confirming the judgement of the trial court, resulting in the dismissal of the lawsuit. On March 9, 2013, the plaintiffs filed an appeal with the Supreme Court. On July 20, 2018, the Supreme Court gave a unanimous decision to grant the appeal.

The court held, among other things, that the appellant non-governmental organisation possessed the lawful entitlement (locus standi) to initiate the legal proceedings. It was further established that individuals and entities who adhere to the law exercise the prerogative to bring forth legal complaints against pertinent public officials and private corporations. This serves to ensure compliance with relevant legislation by the latter and to facilitate the remediation, restoration, and preservation of the environment by the former.

According to Aka'ahs (Justice of the Supreme Court), it is evident that there is a growing concern regarding various environmental issues such as climate change, ozone layer depletion, waste management, flooding, and global

warming. Justice Aka'ahs strongly believes that the court, being a policy court, should broaden the scope of the Plaintiff/Appellant's legal standing to bring forth lawsuits. This is because both nations and organisations, on a national and international level, are increasingly implementing more stringent measures to preserve and protect the environment for the present and future generations. The Supreme Court has rendered a ruling affirming the justiciability of Section 20 of the Nigerian Constitution, pertaining to the State's responsibility to protect the environment. The Supreme Court officially recognised the inherent entitlement of all individuals to a secure and salubrious environment, as stipulated in Section 33 of the Constitution which guarantees the right to life. It is crucial to emphasise that the court's decision carries significant ramifications for environmental legislation, since it endows non-governmental organisations (NGOs) with the power to take measures aimed at protecting the environment.[39]

In The Social and Economic Rights Action Centre and The Centre for Economic and Social Rights v Nigeria,[40] the applicant asserted that the Nigerian government bore responsibility for the environmental pollution inside the Ogoni people's area, which was caused by the Nigerian National Petroleum Company disposing hazardous waste into the environment. The adverse impact on the health of the Ogoni people resulted from the contamination of water, land, and air due to oil leaks. The applicant asserted that the government had failed to enforce mandatory safety protocols for oil firms and had utilized Nigerian military personnel, resulting in the incineration and devastation of Ogoni villages and food resources. The applicant presented several purported instances of rights infringements under the African Charter on Human and Peoples' Rights, including the right to life, health, and a pristine environment.

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39 Miriam Chinyere Anozie and Emmanuel Onyedi Wingate, "NGO Standing in Petroleum Pollution Litigation in Nigeria—*Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation*," *The Journal of World Energy Law & Business* 13, no. 5–6(2020): 490, https://doi.org/10.1093/jwelb/jwaa031.

40 *SERAC v. Nigeria*, Decision, Comm. 155/96 (ACmHPR, October 27, 2001).

The Commission reached the verdict that the government's failure to prevent extensive killing of the Ogoni people, as well as environmental pollution and degradation, constituted violations of Articles 4 (pertaining to the right to life), 16 (pertaining to the right to health), and 24 (pertaining to the right to a clean environment). Moreover, it was established that Nigeria had infringed the Ogoni people's entitlement to exercise their right to freely manage their wealth and natural resources, as stipulated in Article 21. This violation is evident in the government's active role in facilitating the destruction of Ogoniland.

Selected Laws Relating to Environmental Taxation in Nigeria

As mentioned earlier in this article, the idea of environmental taxation is not new in the history of Nigeria. In addition to the 1999 Constitution of Nigeria and the 2021 Climate Change Act discussed in this paper, other laws can be related to environmental taxation in the Nigerian context. The question is whether these laws have been effective in tackling environmental challenges in Nigeria? Can it be said that Nigeria has a comprehensive legal framework on environmental taxation? Can these laws be compared to what we have in other developed/developing countries of the world, who strive to achieve environmental sustainability? The answer is negative. Several of the existing laws relating to environmental taxation will be considered here:

1) The National Environmental Standard and Regulations Enforcement Agency Act[41] is a legislative framework that governs the operations of the National Environmental Standard and Regulations Enforcement Agency. The primary purpose of establishing the Agency is to assume responsibility for safeguarding and promoting the environment, conserving biodiversity, and ensuring sustainable development of Nige-

41 The National Environmental Standard And Regulations Enforcement Agency Act Cap 301 LFN 2010.

ria's natural resources. This includes managing environmental technology and facilitating collaboration with relevant stakeholders, both domestically and internationally, to enforce environmental standards, regulations, rules, laws, policies and guidelines. This law makes provision for certain taxes on the environment, in which it prescribes penalties for noncompliance with environmental regulations.[42]

2) The Environmental Impact Assessment (EIA) Act[43] was enacted to evaluate the environmental impact of any project and to require the Federal Ministry of Environment to issue an EIA report. The process of Environmental Impact Assessment involves identifying any adverse effects that may stem from the placement of specific projects in a particular area. It also involves establishing mechanisms to contain, curtail and mitigate these adverse effects, as well as providing restitution to parties who are adversely affected. Therefore, the EIA should guarantee that the relevant government authorities have thoroughly identified and evaluated the environmental implications of the proposed activities within their jurisdiction and control before granting approval for any project. Additionally, affected citizens should be afforded the opportunity to assess the proposed project and communicate their opinions to the decision-makers. This law makes provision for specific fees for EIA and penalties for noncompliance with EIA.[44]
3) The Federal Inland Revenue Service (FIRS) Act[45] empowers FIRS to collect taxes and levies on behalf of the federal government, including environment-related taxes. However, it does not specifically mention an environmental tax in the sense discussed in this article.

42 Section 23 The National Environmental Standard And Regulations Enforcement Agency Act Cap 301 LFN 2010.
43 Environmental Impact Assessment Cap E12, LFN 2004.
44 Section 12 Environmental Impact Assessment Cap E12, LFN 2004.
45 The Federal Inland Revenue Service Act, Cap F36, LFN 2010.

4) The Pollution Control (Fees and Penalties) Regulations[46] provides for the imposition of pollution control fees on industries.[47]
5) The Customs and Excise Tariff (Consolidation) Act, 2003[48]: This law imposes a 5% duty on any materials imported into Nigeria which are hazardous in nature.
6) The National Oil Spill Detection and Response Agency (NOSDRA) Act[49]: This law was promulgated in 2006 in response to the need to tackle oil spills in Nigeria. It regulates oil spills by imposing fees and penalties. It imposes a penalty on operators for failure to comply with regulations,[50] and further imposes a fine on them for noncompliance with the Act.[51]

Environmental Taxation

The concept of environmental taxation refers to the practice of imposing taxes on activities or products that have negative impacts on the environment.[52] Environmental taxes, also referred to as "green taxes," "pollution taxes," or "ecotaxes," encompass a range of fiscal measures imposed by governments on firms and individuals with the aim being to mitigate environmentally detrimental actions. When employed in conjunction with other instruments, environ-

46 The Pollution Control (Fees and Penalties) Regulations Cap P26, LFN 2004.
47 Regulation 10 of The Pollution Control (Fees and Penalties) Regulations Cap P26, LFN 2004.
48 Customs and Excise (Consolidation) Tariff Act, Cap C 49 LFN 2004.
49 National Oil Spill Detection and Response Agency (Establishment) Act, Cap N161 LFN 2010.
50 Section 26 National Oil Spill Detection and Response Agency (Establishment) Act, Cap N161 LFN 2010.
51 Section 29 National Oil Spill Detection and Response Agency (Establishment) Act, Cap N161 LFN 2010; Soala Ariweriokuma, *The Political Economy of Oil and Gas in Africa: The Case of Nigeria* (Routledge, 2009), http://ci.nii.ac.jp/ncid/BA88338774.
52 "What Are Environmental Taxes?," Envirotech Online, published April 2, 2015, https://www.envirotech-online.com/news/air-monitoring/6/breaking-news/what-are-environmental-taxes/34066.

mental taxes have the potential to facilitate the necessary transformations required to tackle the prevailing environmental and climatic challenges. Environmental taxes have the potential to effectively tackle various dimensions of environmental safeguarding and preservation.[53] Environmental taxation is a strategy employed to incentivize customers towards making environmentally conscious choices.[54] The underlying concept of environmental taxation is to incorporate the costs associated with environmental damage, sometimes referred to as negative externalities, into the pricing mechanism. This approach aims to shape production and consumption decisions towards more environmentally sustainable alternatives.[55] Tax policies can be used to mitigate the effects of climate change, specifically pollution, environmental strain resulting from resource consumption and biodiversity decline, as well as contributing elements such as emissions from petrol and the utilisation of potentially harmful compounds.[56] Environmental taxes offer several notable advantages, including enhanced economic productivity, the capacity to generate public revenue, increased transparency, and improved environmental effectiveness.

Various forms of environmental taxes exist, serving diverse purposes, such as penalising persons who emit hazardous substances and incentivizing those who adopt environmentally good practises. The following methods are enumerated below:

1) Industrial pollution taxes: Industrial pollution taxes are levied on industries that typically release significant amounts of carbon emissions, which adversely affect the local environment. One potential approach to implementation is through a carbon tax, wherein a fee is

53 Newman U. Richards, "Overview of the National Tax Policy and Its Implication for Tax Administration in Nigeria," *Nnamdi Azikwe University Journal of International Law and Jurisprudence* 10, no. 2(2019): 42.

54 "Understanding Environmental Taxation," Think Tank European Parliament, accessed June 19, 2023, https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2020)646124.

55 Leyira Christian Micah et al., "Tax System in Nigeria – Challenges and the Way Forward," *Research Journal of Finance and Accounting* 3, no. 5(2012): 9.

56 Micah et al., "Tax System in Nigeria – Challenges and the Way Forward."

levied on the amount of carbon present in the fossil fuels used within a certain industrial facility. The method described has been widely observed in regions of Europe, Australia, and India since the year 2010.[57]

2) Individual revenue-based taxes: The primary focus of these taxes is to mitigate environmental harm by targeting private persons rather than large corporations and industries. For example, measures that can be used to address traffic congestion include the implementation of congestion fees, the imposition of different forms of car taxation, or the increase of gasoline taxes. While these measures may not currently enjoy widespread popularity, their benefits are shown by historical data. Since its introduction in 2003, the congestion charge in London has been associated with a notable reduction of 30% in traffic volume and a corresponding fall of 20% in carbon dioxide (CO2) emissions.[58]
3) Incentivized taxation: In contrast to the aforementioned two forms, this tax is applied to both domestic and commercial endeavours. Rather than criticising individuals for their excessive production of harmful gases, the approach advocated here is to incentivize individuals for embracing environmentally sustainable practices. For example, subsidies for installing solar panels, along with subsequent tax reductions, act as an incentive for both residential and commercial property owners to adopt sustainable practices. While these efforts may lead to a slight rise in pollution, the rate of increase per individual is expected to be lower. The increase observed in the number of polluters requires stringent regulation due to the corresponding decrease in pollution output per entity.[59]

57 “What Are Environmental Taxes?”
58 “What Are Environmental Taxes?”
59 “What Are Environmental Taxes?”

The Significance of Environmental Taxes

The field of ecology has experienced notable impacts in recent decades due to the world's growing population.[60] The extensive use of restricted natural resources and the escalating levels of pollution have led to the substantial release of greenhouse gases into the atmosphere.[61] Ecological mismanagement generates several significant issues, including climate change, the proliferation of chronic diseases, rising sea levels, and adverse economic consequences. Environmental taxes, often known as green taxes or eco taxes, play a crucial role in discouraging individuals, organisations, and other entities from engaging in activities that harm the environment.[62] The need for environmental levies stems primarily from the imperative to save the environment. Nevertheless, there are other rationales for environmental fees. The promotion of energy efficiency and the utilisation of renewable sources are among the strategies that might be employed. By addressing the negative externalities associated with enterprises, there is an opportunity to foster innovation in sustainable practises and discourage anti-environmental behaviour.

In short, environmental taxes aim to impose penalties on polluters for the detrimental effects they cause to the environment and society, thus ensuring a just and equitable system of punishment. Moreover, the primary objective is to provide direct compensation to emissions producers as a financially efficient strategy to incentivize them to mitigate their pollution levels, perhaps reaching a threshold where further reductions could be economically unfeasible.[63]

60 Richards, "Overview of the National Tax Policy and Its Implication for Tax Administration in Nigeria," 42.

61 "Environmental Taxes: Types of Environment Taxes," BYJU'S, published December 14, 2022, https://byjus.com/current-affairs/environmental-tax.

62 Akinleye Gideon Tayo and Olaniyan Niyi Oladipo, "The Effect of Environmental Tax on Pollution Control in Nigeria," *Farabi Journal of Social Sciences* 8, 2022: 63–70, https://doi.org/10.26577/fjss.2022.v8.i1.09.

63 Tayo and Oladipo, "The Effect of Environmental Tax on Pollution Control in Nigeria."

Some of Europe's Most Effective Green Taxes

This section explores the efficacy of environmental taxes as a tool employed by Europe to address and mitigate environmental concerns. In recent times, various entities, including the OECD and the European Commission, have provided guidance to countries regarding the redistribution of tax responsibilities from employees to individuals or entities who are parties to environmental pollution. Green taxes have the potential to discourage environmentally and socially harmful behaviour, such as plastic pollution, air quality degradation among others. This analysis will briefly explore certain European countries, focusing on the effects of environmental taxation in ensuring that the environment is adequately conserved.

Plastic Bag Tax in Ireland

A point-of-sale charge for plastic bags was introduced in Ireland in 2002, with an initial price of €0.15. Subsequently, in 2007, the charge was increased to €0.22. The objective was to reduce consumption and mitigate the adverse environmental impacts associated with the disposal of plastic bags. Consequently, the proportion of litter pollution attributed to abandoned plastic bags declined from 5% in 2001 to 0.13% in 2015. During a period of 12 years, this tax generated a total revenue of €200 million. These funds were allocated towards financing environmental initiatives across the country. The Irish plastic bag tax is widely seen as the most effective and impactful environmental initiatives to date.[64]

Fishing Licences in Ireland

In response to the depletion of its salmon stocks, in 2007 the Irish government raised the fees for both commercial and recreational salmon fishing licences. This change resulted in a decrease in fishing activity targeting salmon populations, thus alleviating the pressure on their runs. The revenue generated

64 Mauro Anastasio, "The 5 Most Successful Environmental Taxes in Europe," META, published July 3, 2018, https://meta.eeb.org/2017/11/23/the-5-most-successful-environmental-taxes-in-europe/.

by this programme was subsequently allocated towards initiatives focused on conserving natural resources and habitats. This resulted in the stabilisation of salmon populations, hence yielding a positive outcome. However, it is crucial to note that this intervention played a significant role in the rehabilitation of riparian zones and the enhancement of riverine ecosystems, hence yielding favourable outcomes for the overall environmental well-being.[65]

The Landfill Tax in the United Kingdom

To address the ecological costs of landfilling, including the emission of greenhouse gases, and to effectively reduce trash generation while promoting recycling, in 1996the United Kingdom introduced a landfill tax. The amount of waste deposited in landfills decreased significantly from fifty million tonnes in 2001 to twelve million tonnes in 2015, which can primarily be attributed to the implementation of this tax policy.[66]

The imposition of a NOx tax in Sweden

In 1992, the Swedish government implemented a tax on nitrogen (NOx), a pollutant linked to acid rain and respiratory ailments. To mitigate the adverse effects of soil acidification, which poses a significant risk to agricultural and pasture productivity, a tax was implemented on energy use related to space heating, electricity generation, and industrial operations. Implementing this tax policy led to a significant reduction in NOx emissions of approximately 30–40%. The first tax rate for all types of fuel was established at SEK 40 per kilogramme of NOx released. Subsequently, in 2008, this fee was raised to SEK 50 per kilogramme, which was approximately equivalent to €5 at that time. To promote energy efficiency and mitigate potential negative impacts on competitiveness, the revenue generated was allocated to compensating taxed plants that emit moderate amounts of NOx.

65 Anastasio, "The 5 Most Successful Environmental Taxes in Europe."
66 Anastasio, "The 5 Most Successful Environmental Taxes in Europe."

Environmental Tax in South Africa

South Africa is the primary source of greenhouse gas (GHG) emissions in Africa, emitting the highest amount of GHGs compared to other countries in the continent.[67] The GHG emissions, excluding forestry and other land use, saw a significant increase of over 67 percent between 1990 and 2019. In 2019, the energy sector was responsible for approximately 86 percent of the emissions, having played a role in nearly 91 percent of the growth in greenhouse gas emissions over the preceding three decades.[68] The country's National Development Plan 2030 already includes the integration of a green and climate resilient economy. The carbon tax was introduced in 2019 as a significant policy tool to support the country's efforts to reduce greenhouse gas emissions.[69] The tax adheres to the polluter-pays-principle and is levied on fuel inputs according to emission factors and procedures that align with the standards established by the Intergovernmental Panel on Climate Change. The initial carbon tax rate was officially established at R120 (equivalent to approximately $7 per tonne of CO2e). By the end of 2022, it was raised to R134 (or about $8). Nevertheless, considering the amount of carbon tax money collected, the predicted rate of effectiveness was below R7 per tonne of CO2e for the fiscal year 2021–2022.[70]

What follows are some of South Africa's laws in this regard:

1) Carbon Tax Act 2019[71]: The Act is a significant piece of legislation on environmental taxation in South Africa. An exhaustive examination of the legislation shows that it enforces a carbon tax to diminish greenhouse gas emissions and alleviate the effects of climate change.

67 International Monetary Fund. African Dept., *South Africa Carbon Pricing and Climate Mitigation Policy* (International Monetary Fund, 2023), https://doi.org/10.5089/9798400245350.002.

68 International Monetary Fund. African Dept., *South Africa Carbon Pricing and Climate Mitigation Policy*.

69 International Monetary Fund. African Dept., *South Africa Carbon Pricing and Climate Mitigation Policy*.

70 International Monetary Fund. African Dept., *South Africa Carbon Pricing and Climate Mitigation Policy*.

71 Carbon Tax Act, 2019 (Act No. 15 of 2019).

Legislation incentivises corporations to shift towards more environmentally friendly energy sources and reduce their carbon emissions. This law is significant, as it brings South Africa in line with global initiatives aimed at tackling climate change. Ultimately, the legislation promotes sustainable development and the establishment of a low-carbon economy, a significant step for South Africa towards reduced greenhouse gas emissions and a more sustainable future.

2) National Environmental Management Waste Act 2008[72]: This law makes provisions for waste management levies and fees.
3) National Environmental Management Act 1998[73]: This law incorporates environmental management into all facets of government and societal decision-making. The minister of environmental affairs is granted the authority to enforce environmental taxes and fines. Since its enactment in 1998, the legislation has undergone several revisions, including the National Environmental Management Amendment Act, 2003 (Act No 46 of 2003) and the National Environmental Management Amendment Act, 2014 (Act No 25 of 2014), among others.
4) Air Quality Act 2004[74]: The law is significant because it effectively decreases greenhouse gas emissions, making a valuable contribution to South Africa's efforts to address climate change. Furthermore, it fosters sustainable development by promoting eco-friendly actions, greener energy sources, and sustainable industrial processes.
5) CUSTOMS and Excise Act 1964[75]: The Act makes provisions for environmental levies on imported goods such as plastics and batteries.

Examining all these laws enacted in South Africa with respect to environmental taxes, it is important to note that before the implementation of the Carbon Tax, most of the existing tax instruments relating to the environment were

72 National Environmental Management Waste Act 2008 (Act No. 107 of 1998).
73 National Environmental Management Act 1998 (Act No. 107 of 1998).
74 Air Quality Act 2004 (Act No 39 of 2004).
75 Custom and Excise duty Act 1964 (Act No 91 of 1964).

designed primarily to generate income, rather than to prioritise environmental concerns.[76]

Implementation of Environmental Taxation Policies Within the Context of Nigeria

Salisu Dahiru, the DG of the Council for Climate Change in Nigeria, has publicly announced the country's intention to implement a carbon taxing policy and budgeting system in accordance with the provisions outlined in the Climate Change Act of 2021. He posits that the tax serves as an incentive for individuals to adopt ecologically sustainable fuels, employ innovative technologies, and reduce emissions to circumvent the tax obligation. Furthermore, he contends that this tax not only helps the government by generating revenue but also contributes to the objectives.[77]

It is important to acknowledge that the concept of taxes in Nigeria is not a recent development, but rather a longstanding practice that has encountered a range of obstacles, as highlighted by certain scholars.[78] One of the issues pertains to the heightened necessity of augmenting IGR (Internally Generated Revenue), which has led to the use of taxation authorities to the detriment of taxpayers who bear the burden of various taxes, thus exceeding their anticipated tax obligations.[79] Furthermore, there is a lack of sufficient information provided to taxpayers regarding the necessary criteria for tax compliance. This deficiency can result in ambiguity and potential vulnerabilities within

76 International Monetary Fund. African Dept., *South Africa Carbon Pricing and Climate Mitigation Policy*.

77 Abdulkareem Mojeed, "Climate Change: FG to Unveil Carbon Tax System for Nigeria," Premium Times Nigeria, published February 13, 2023, https://www.premiumtimesng.com/news/more-news/581752-climate-change-fg-to-unveil-carbon-tax-system-for-nigeria.html.

78 Iliya Garba and Kennedy Gunawardana, "Barriers and Challenges of Introducing Environmental Taxation in Nigeria, for Future Sustainability," in *Proceedings of 12th International Conference on Business Management, 7th and 8th December 2015, Colombo, Sri Lanka* (SSRN Electronic Journal, 2015), https://doi.org/10.2139/ssrn.2699779.

79 Micah et al., "Tax System in Nigeria – Challenges and the Way Forward," 9.

the tax system. Additionally, the timely refund of excess taxes to taxpayers is hindered by the absence of efficient systems, such as computerised and data capturing mechanisms.[80] Furthermore, the transfer of revenue authorities to third parties is made worse by the lack of defined policy directives, norms, and procedures relevant to tax matters in Nigeria.

This delegation ultimately leads to increased costs associated with tax compliance. Implementing an environmental tax in Nigeria has the potential to effectively mitigate greenhouse gas emissions.[81] The emergence of environmental pollution and degradation can be attributed to the indiscriminate environmental damage resulting from anthropogenic activities undertaken by individuals in their pursuit of growth. If these activities are not effectively regulated, there will be an increase in carbon emissions. One potential strategy for mitigating this issue involves the implementation of taxation measures targeting the entities accountable to produce those emissions.[82]

Major Benefits of Introducing Environmental Taxation

Introducing a carbon tax in Nigeria can have an exceptional and positive impact on the economy, environment and the economy. An environmental tax is essential due to its numerous benefits. Firstly, carbon pricing mechanisms effectively mitigate pollution by incentivising companies and individuals to minimise their environmental footprint through imposing higher costs on polluting activities.[83] When a tax is imposed on CO2 emissions in Nigeria, the country will be forced to reduce its reliance on fossil fuel and mitigate climate change. Additionally, such

80 Garba and Gunawardana, "Barriers and Challenges of Introducing Environmental Taxation in Nigeria, for Future Sustainability," footnote 54.

81 Kayode Oyende, "Carbon Taxation as a Lever for Advancing Environmental Pollution Control in Nigeria," *The Gravitas Review of Business and Property Law* 13, no. 3(2022).

82 Rotimi Oladele, "Environmental Tax and Pollution Control in Nigeria," *KIU Interdisciplinary Journal of Humanities and Social Science* 2, no. 1(2021): 280.

83 Zhengyan Wang et al., "The Impact of Environmental Taxes on Economic Benefits and Technology Innovation Input of Heavily Polluting Industries in China," *Frontiers in Environmental Science* 10, 2022: article 959939. https://doi.org/10.3389/fenvs.2022.959939.

a tax promotes sustainable growth by fostering eco-friendly activities and the adoption of cleaner technologies.[84] Likewise, the implementation of an environmental tax leads to a decrease in pollution, which subsequently enhances public health and lowers healthcare expenses.[85] It promotes innovation by fostering the development of clean technologies and sustainable practices.[86] Implementing an environmental tax is crucial, as it contributes to income generation, hence stimulating the country's economy.[87] It has been noted that environmental taxes encourage energy conservation,[88] which will also lead to an increased investment in renewable energy, since it motivates investments in clean technologies and energy efficiency.[89] This, in turn, will contribute to job creation by creating new employment opportunities for young people across Nigeria.

The National Environmental Standards and Regulations Enforcement Agency (NESREA), which serves as the primary governing body responsible for environmental protection in Nigeria, lacks the necessary resources and capabilities to effectively impose environmental fees, however.[90] As a result, the Federal Government of Nigeria should establish a tax system that enables the implementation of environmental tax policies. This would ensure that taxation is strategically designed to target individuals or entities responsible for causing specific

84 Zhe Tan et al., "An Overview on Implementation of Environmental Tax and Related Economic Instruments in Typical Countries," *Journal of Cleaner Production* 330, 2022: article 129688. https://doi.org/10.1016/j.jclepro.2021.129688.

85 Wang et al., "The Impact of Environmental Taxes on Economic Benefits and Technology Innovation Input of Heavily Polluting Industries in China."

86 Giovanni Occhiali, "Obstacles and Appeal of Environmental Taxation: Insights from Sub-Saharan Africa," *Environmental Development* 51, 2024: article 101037, https://doi.org/10.1016/j.envdev.2024.101037.

87 Micah et al., "Tax System in Nigeria – Challenges and the Way Forward," 9.

88 Joseph Brown, "Impact of Environmental Taxation on Environmental Sustainability in Nigeria," *Texila International Journal of Academic Research* 9, no. 3(2022): 11–20, https://doi.org/10.21522/tijar.2014.09.03.

89 Erica Rustico and Stanko Dimitrov. "Environmental Taxation: The Impact of Carbon Tax Policy Commitment on Technology Choice and Social Welfare," *International Journal of Production Economics* 243, 2022: article 108328, https://doi.org/10.1016/j.ijpe.2021.108328.

90 C. N. Okubor, "Legal Issues on Environmental Protection," *Ajayi Crowther University Law Journal* 1, no. 2(2016).

environmental issues. Given the gravity of these environmental hazards and their substantial impact on human lives, it is imperative to address this matter.[91]

Lessons Nigeria Should Learn from Europe and South Africa

In contrast to the extensive efforts implemented in Europe to mitigate greenhouse gas emissions, Nigeria has made limited progress in the realm of environmental protection with regard to reducing such emissions. Nigeria should draw on lessons from Europe, a developed region, and implement more legislative measures and administrative strategies like those employed in Europe to tackle the issue at hand. Nigeria ought to adopt a more systematic and purposeful approach in dealing with the issue. Despite the ongoing efforts implemented thus far in Europe, this region continues in its efforts to mitigate greenhouse gas emissions. It is imperative for Nigeria to address the issue proactively, as has been effectively undertaken in Europe and other economically advanced nations.

In the same vein, most of the laws on environmental levies in South Africa were not targeted towards environmental protection, as is the case in Nigeria. The former saw the need to be proactive in cutting greenhouse gas emission and enacted a Carbon Tax Act, which has helped the country significantly in addressing environmental challenges. However, it is still making efforts to reduce its greenhouse gas emissions and ensure a green and resilient economy by the year 2030. Nigeria should follow South Africa's lead and ensure there is a standard and all-encompassing legal framework on environmental taxation.

Recommendations and Conclusion

As this study reveals, there is no comprehensive legal framework on environmental taxation in Nigeria. Moreover, the available laws related to environmental tax-

91 Tayo and Oladipo, "The Effect of Environmental Tax on Pollution Control in Nigeria."

es lack enforcement mechanisms, and in some instances, the penalties attached to such laws are insufficient to curb environmental problems.

In summary, this study has investigated Nigeria's current state in terms of climate change and GGEs, with a significant gap existing between Nigeria and other countries. The study provides further insights into the significance of environmental taxation and emphasises the need for countries worldwide to implement such measures to mitigate environmental exploitation. It also elucidates the advantageous outcomes that Europe has derived from implementing environmental taxation. It is imperative for Nigeria to adopt a proactive stance in addressing the matter of environmental preservation: merely observing passively no longer suffices. It is crucial to make further efforts to curtail greenhouse gas emissions effectively, along with the stipulations outlined in the Paris Agreement.

It is hereby recommended that there is a need to swiftly enact comprehensive legislation on environmental taxes, as seen from the example of Europe. This continent has adopted a very strong legislative approach towards environmental taxation, which has been of considerable benefit.

It is of utmost importance to prioritise the reduction of greenhouse gas emissions, mitigate deforestation, and reduce reliance on fossil fuels and fuel wood. It is recommended that there is a need to implement afforestation and novel technology. Moreover, to significantly reduce reliance on wood and paraffin, it is crucial to conduct feasibility studies on grid-connected solar power plants, transportation systems powered by natural gas, and computerised Environmental Impact Assessments (EIAs). Moreover, it is crucial to adhere to environmental protection judgements given by courts.

It is imperative to expeditiously establish specialised courts dedicated solely to addressing issues related to environmental protection. This measure is crucial to guarantee the prompt resolution of such cases. Finally, it is vital to ensure effective implementation and enforcement of environmental taxation legislation in Nigeria.

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Corporate Sustainability Reporting: Regulations of the International Sustainability Standards Board and the European Union

Abstract: The disclosure of enterprises' achievements in the field of sustainable development requires the use of a specific set of indicators framed in a coherent reporting system. The aim of this article is to present and assess two international regulations that create systems for reporting social, environmental, including climate and management issues by enterprises. These are the standards developed by the International Sustainability Standards Board and legal regulations, including reporting standards adopted in the European Union. The discussion in the article shows that although both systems differ in their degree of maturity, they meet the basic challenges related to the need to inform about the goals and achievements of enterprises in the field of their sustainable development. Therefore, there is a chance for these systems to converge in the future.

Keywords: sustainable development, corporate reporting, ESG reporting, reporting standards

Introduction

Standardising the reporting of corporate sustainability performance is an extremely pressing challenge for many organisations around the world today.

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This need is driven by the imperative to communicate much more effectively than before the progress made by companies in implementing sustainability, as well as widespread criticism of the current practice of reporting on this area of activity by business entities. Examples of efforts to unify systems for reporting social, environmental and management achievements are the new regulations and standards introduced by the International Sustainability Standards Board (ISSB) and the European Union. These organisations have developed new corporate reporting solutions. There are many similarities between these solutions; however, they differ on many issues. This can cause controversy as to their proper understanding and practical application, and certainly lead to a lack of comparability of some of the content reported by companies relying on different reporting systems. It is this situation that inspired this article, which aims to present the new solutions for corporate sustainability reporting developed by the ISSB and the EU. This makes it possible to compare and evaluate them from the point of view of the possibilities and effects of implementation in practice. The paper introduces the main issues and outlines indicator-based measurement of sustainable development.

The paper provides an introduction to the main issues discussed by outlining indicator-based measurement of sustainable development. The paper was prepared on the basis of the literature on the subject as well as legal acts and reporting standards. A critical analysis of literature sources and legal regulations along with a comparative method were used. The legal status as of 31 December 2024 was taken into account.

Indicative Measurement of Sustainable Development

The function of a sustainability report is to measure the level and rate at which a company's sustainability objectives are achieved, and also to signal the risks it has already encountered or may encounter in the near future. A prerequisite for a sustainability report is the adoption of a specific set of indicators of this

development. These indicators should not only make it possible to give an opinion on how sustainable particular development is, but also to assess the degree to which the company's principles and strategic objectives are being met.[2]

Depending on their methodology and the scope of their content, sustainable development indicators include aggregate indicators, also called synthetic indicators (constructed on the basis of at least two diagnostic variables), and cross-sectional indicators.[3]

Synthetic indicator measurement methods use a single measure combining all areas considered in assessing the sustainability of an enterprise. Their merit lies in their making it easier to interpret the indicators established and to evaluate a company by comparing it with others in its environment. An example of such a method is the sustainable value (SV) method developed by F. Figge and T. Hahn,[4] which solves the problem of the multidimensionality of measuring sustainability. The SV concept starts from the premise that an investment is profitable when the new value created is greater than the opportunity cost. This means that the sustainability of an enterprise is achieved when, by using all the resources consumed, the enterprise creates more value than would have been created using the same resources in an alternative or reference solution.[5] The literature also points out the disadvantage of this method, which is that the value created by a firm depends directly on the scale of the firm's operations. Firms with high profits and/or high resource consumption will have absolute

2 Tadeusz Borys, "Jak mierzyć postępy we wdrażaniu zrównoważonego rozwoju?," in *Barometr zrównoważonego rozwoju 2008/2009*, ed. Krzysztof Kamieniecki and Bożena Wójcik (Instytut na rzecz Ekorozwoju, 2009), 57–67.

3 Krzysztof Kompa, "Budowa mierników agregatowych do oceny poziomu społeczno-gospodarczego," *Zeszyty Naukowe SGGW – Ekonomika i organizacja gospodarki żywnościowej*, no. 74 (2009): 5–26, https://doi.org/10.22630/EIOGZ.2009.74.14.

4 Frank Figge and Tobias Hahn, "Sustainable Value Added: Measuring Corporate Contributions to Sustainability Beyond Eco-Efficiency," *Ecological Economics* 48, no. 2(2004): 173–87, https://doi.org/10.1016/j.ecolecon.2003.08.005.

5 The calculation of the sustainable value created by a company requires the determination of the surplus value generated by the use of the i-th resource in the company compared to its use in alternative (benchmark) applications. (Krzysztof Posłuszny, "Metody oceny zrównoważonej działalności przedsiębiorstw przemysłowych," *Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu*, no. 491(2017): 336, https://doi.org/10.15611/pn.2017.491.31).

SV values different to those of small firms, even though the efficiency of resource transformation may be similar. In order to compare the efficiency of an operation and to decouple its magnitude from the scale of operation, it would be necessary to normalise the SV magnitude by relating it to the benchmark efficiency.

Most measurement methods are based on sets of multiple indicators measuring different aspects of a company's activities relevant to sustainability. While the report prepared on their basis is comprehensive and analytical in nature, this unfortunately makes it difficult to interpret this information unambiguously. A set of multidimensional indicators to measure sustainability has been proposed by international and national organisations promoting corporate reporting systems. Over the past twenty-odd years, these organisations have developed frameworks and reporting standards. A reporting framework is understood as guidelines for the structure of information, the way it is prepared and the scope of topics covered, all based on general principles derived from a conceptual framework. Standards, on the other hand, define specific, detailed and repeatable requirements for what should be reported on each topic, including specific relevant indicators. Standards enable the production of reports that are comparable, consistent and reliable.[6]

Legislation of a normative nature has emerged in various countries and regions of the world to clarify the obligations of companies to report sustainability aspects. The guiding principle behind these regulations was that they should be universal and applicable to different companies, although some regulations contain individual guidelines for specific sectors (e.g. the financial sector). The stated objectives of these regulations are similar. They are to help companies measure, monitor and communicate their progress towards sustainability using a variety of indicators and practical working procedures useful for making capital allocation decisions. All regulations emphasise the need to

6 Ryszard Kamiński, *Polityka bilansowa a ocena działalności przedsiębiorstwa* (Ars boni et aequi, 2003), 37.

provide and disclose high-quality, verifiable information; some require independent auditing of the information reported.

International Sustainability Standards

As already stated, the existence and practical application of multiple sustainability reporting regulations results in a problem regarding the comparability of disclosed reports. Hence, initiatives have emerged to converge these reporting concepts. Actions in this direction have been taken, among others, by the International Financial Reporting Standards (IFRS) Foundation. This organisation established the International Sustainability Standards Board (ISSB) in 2021. It is understood that the ISSB's objective is to develop high-quality, comprehensive and globally accepted sustainability disclosure standards, taking into account the needs of investors and financial markets.

The ISSB's activities build on the legacy of existing reporting initiatives, mainly SASB and TCFD, as well as IIRC and CDSB.[7] The ISSB's activities resulted in the development and dissemination in June 2023 of the first two sustainability reporting standards – one on general requirements (S1)[8] and the other on climate (S2).[9] The main basis for developing the S1 and S2 standards was the TCFD framework for climate-related disclosures (used in countries such as Canada, Switzerland and Japan). This framework assumes that there is consistency between sustainability and financial information. Standards S1 and S2 will apply for the first time in annual reports for 2024. This means that companies' first disclosures according to these standards will appear in 2025. The ISSB intends to develop further non-financial reporting standards in the

7 "SASB: Your Pathway to ISSB," SASB, accessed February 11, 2024, https://sasb.ifrs.org/sasb-your-pathway-to-issb/.

8 International Sustainability Standards Board, *IFRS S1 IFRS® Sustainability Disclosure Standard, General Requirements for Disclosure of Sustainability-Related Financial Information* (June 2023).

9 International Sustainability Standards Board, *IFRS S2 IFRS® Sustainability Disclosure Standard Climate-Related Disclosures* (June 2023).

future, both thematic and industry-specific. The ISSB's announcement of the new standards was welcomed by the business community and international organisations, including the G20 and the UN, as they were seen as a route to standardising sustainability reporting worldwide.

Standard S1 sets out the general requirements for how companies must prepare and report sustainability-related financial disclosures. According to this standard, companies should disclose information on all sustainability risks and opportunities that can be expected to affect their cash flows, access to finance or cost of capital – in the short-, medium- or long term.

In particular, this information relates to:

1) Governance (on such aspects as governance processes, controls and procedures used to monitor and manage sustainability risks and opportunities and, in addition, the governing bodies, such as boards or committees, or those responsible for overseeing sustainability risks and opportunities).
2) Strategy (on such aspects as the sustainability risks that may materially affect the future of the company in the short, medium or long term, as well as how the company has responded to these risks; information on the resilience to sustainability risks, including the resilience of the adopted strategy and business model, as well as information on how the risk assessment was carried out and its time frame, and an analysis of possible scenarios for the development of risks and resilience to them, should be disclosed here).
3) Risk management (which is intended to provide an understanding of the company's processes for identifying, assessing, prioritising and monitoring sustainability risks, including whether and how these processes are integrated and inform the entity's overall risk management process; this requires information to be provided on the sources of data and how the nature, likelihood and magnitude of risks are assessed and how scenario analysis is used to identify sustainability risks).

4) Measures and targets (which will disclose any sustainability risks that can be expected to affect the entity's prospects; this requires stating the indicators and metrics that the entity uses to measure and monitor sustainability, including those linked to specific business models, activities or other characteristics of the industry in which the company operates).[10]

Sustainability-related financial disclosures may be included in a management report (commentary) or similar report if it forms part of the overall financial statements. It is accepted that the management report may have different (and already used) names, e.g. 'management report', 'discussion and analysis', 'operational and financial review', 'integrated report' or 'strategic report'. According to paragraph B27 of Appendix B of Standard S1, it is the company's responsibility to ensure transparency of financial disclosures related to sustainability, which should be presented in conjunction with relevant, reliable and credible non-financial information on the topic. In turn, the financial data and assumptions included in the sustainability disclosures must be consistent with the corresponding financial data and assumptions used in the preparation of the entity's financial statements, where possible, taking into account the requirements of IFRS or other standards e.g. GAAP (Generally Accepted Accounting Principles). Of course, any sources of guidance used by the entity should be indicated.

Standard S2 is the first thematic standard and addresses climate change risks. It requires an entity to disclose information about climate-related risks and opportunities that is useful to key users of financial statements. This obligation applies to information about risks and opportunities that can be expected to affect an entity's cash flows, access to finance or cost of capital in the short-, medium- or long term.

These risks include:

10 Paula Galbiatti Silveira, "Understanding the ISSB Standards," Enhesa, accessed April 2, 2024, https://www.enhesa.com/resources/article/understanding-the-issb-standards/.

- physical risks, related to specific events resulting from climate change (such as storms, floods, drought or heat waves), or chronic risks resulting from long-term climate change, such as changes in precipitation and temperature, sea level rise, reduced water availability, loss of biodiversity, changes in soil productivity;
- transition risks (arising from efforts to transition to a sustainable economy), including political risks, liability risks, technological risks, market and reputational risks.

Standard S2 requires disclosure of a number of indicators of a technical nature, including greenhouse gas emissions. This is to be done in accordance with the instruction Greenhouse Gas Protocol: a Corporate Accounting and Reporting Standard (GHGP).[11] In addition to this, Standard S2 requires an entity to disclose information related to carbon emissions, investment expenditure related to climate risk and information showing whether and how climate issues are factored into executive remuneration. The S2 standard is also complemented by the industry-based guidance on its implementation in practice 'Part B-Industry-based Guidance for IFRS S2',[12] which presents methods for identifying, measuring and disclosing information related to specific business models, activities or other typical characteristics of an entity's participation in an industry. This industry-based guidance is taken from SASB standards, which are accepted by the ISSB.

It should be added that the ISSB has proposed several measures to alleviate the burden of reporting GHG emissions, namely:

11 World Business Council for Sustainable Development and World Resources Institute, *Greenhouse Gas Protocol: A Corporate Accounting and Reporting Standard* (World Business Council for Sustainable Development and World Resources Institute, 2004), accessed February 11, 2024, https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf.

12 "2023 – Issued Standards, Part B – Industry-based Guidance for IFRS S2," IFRS, accessed February 12, 2024, https://www.ifrs.org/issued-standards/ifrs-sustainability-standards-navigator/sustainability-pdf-collection/?language=en&issue-type=%2Fcontent%2Fcq%3Atags%2Fifrs%2Fproduction%2Fissue-type%2Fissued&year=2023&layer=%2Fcontent%2Fcq%3Atags%2Fifrs%2Fproduction%2Fstandard-layer%2Fbase.

- a temporary exemption from the application of the GHGP standard for the first annual reporting period where an entity has previously used another method to measure GHG emissions;
- relief allowing an entity to use an alternative method of measuring GHGs if required in the country in which it operates;
- a temporary exemption from disclosure of Scope 3 emissions[13] in the first annual reporting period in which the entity applies the S2 standard.

Standard S1 requires an entity to consider its application in reporting on the issues mentioned above but is not required to do so if it establishes that the issues do not apply to it. Similarly, under Standard S2, entities are required to consider the applicability of industry guidance, but are not required to apply the specific indicators in that guidance.

The ISSB also provides 'for the omission of commercially sensitive information on sustainability opportunities from sustainability-related financial disclosures under certain conditions'. However, an entity using this exemption is required to disclose this fact. The ISSB also notes that an entity 'will not be able to use commercial sensitivity as a broad justification for non-disclosure or omit information about sustainability risks'.

For both the S1 and S2 corporate standards, reporting information should be disclosed in accordance with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD). There is a presumption that reports prepared on the basis of the S1 and S2 standards should be attested in accordance with the requirements of the respective jurisdictions.

13 Scope 3: Other indirect greenhouse gas emissions is an optional reporting category that applies to all other indirect emissions. Emissions in this group are a consequence of a company's activities. These emissions are upstream and downstream GHG emissions other than Scope 2 emissions (i.e. from sources that the reporting entity does not own or directly control and may include, but are not limited to, purchased goods and services, business travel, employee commuting and processing and use of sold products). These emissions can be calculated using primary emissions data from entities in the value chain or using secondary data such as industry averages or proxy data (World Business Council for Sustainable Development and World Resources Institute, *Greenhouse Gas Protocol*, 25).

An entity may be required to apply both Standard S1 and Standard S2 for annual reporting periods beginning on or after 1 January 2024, but the specific date of application of the standards will depend on the jurisdiction in which they are adopted. Earlier application of standards S1 and S2 is permitted. In this case, the entity is required to disclose that it applies these standards and apply both standards concurrently. Alternatively, an entity may choose to apply the aforementioned interim exemption for sustainability-related disclosures. This exemption is intended to give companies more time to align the reporting of sustainability-related disclosures with their financial statements. If the entity intends to use the interim exemption, it will have to disclose this fact.

It is likely that many countries may be required to apply the S1 and S2 standards. The ISSB's work has the support of the G7 and G20, the International Organization of Securities Commissions (IOSCO), the Financial Stability Board, governments of many countries, and central bank governors from over 40 jurisdictions.[14] So far, countries that have indicated that they are establishing mechanisms to consider applying the ISSB standards include Australia, Canada, Hong Kong, Malaysia, New Zealand, Nigeria, Singapore, and the United Kingdom.[15] In addition, several countries, such as Japan and South Korea, have sustainability standards boards that are likely to be interested in working with the ISSB and may be implementing the ISSB standards in their own laws. An example of the introduction of S1 and S2 standards into national regulation is Brazil, where in October 2023 the Brazilian Securities Commission (Comissão de Valores Mobiliários – CVM) adopted a resolution to incorporate the ISSB standards into the Brazilian regulatory framework, establishing their voluntary application from 2024 and their future mandatory application from 1 January 2026 for listed companies.[16]

14 Galbiatti Silveira, "Understanding the ISSB Standards."

15 Raxhelle Toplensky, "Pro Take: Forget the SEC, International Climate Reporting Standards Could Become the Global Baseline," *Wall Street Journal Pro Sustainable Business*, updated June 26, 2023, https://www.wsj.com/articles/pro-take-forget-the-sec-international-climate-reporting-standards-could-become-the-global-baseline-ea01d05a.

16 Galbiatti Silveira, "Understanding the ISSB Standards."

EU Regulations on Sustainability Reporting

Information relating to the impact on the environment and methods of its protection and social issues related to the activities of companies located in the EU have been disclosed since 2017 on the basis of Directive 2014/95/EU of the European Parliament and of the Council.[17] In 2022, they were replaced by new regulations on corporate reporting on sustainable development, namely, Directive EU/2464/2022 of the European Parliament and of the Council (CSRD).[18] Its aim is to improve reporting on the sustainable development of companies by:

- expanding the circle of entities obliged to report, which is to meet the growing information needs of interested recipients,
- increasing the comparability of data from different entities,
- increasing the credibility, availability and detail of published information on sustainable development.

According to the CSRD directive, the following entities are required to report on sustainable development:

a) all large entities that meet at least two of the following three requirements on the balance sheet date: balance sheet total above EUR 20 million, net sales revenue above EUR 40 million, average number of employees in the financial year above 250,
b) small and medium-sized entities (SMEs) listed on a regulated market of a Member State, other than micro entities,
c) entities outside the EU that generate net sales revenues in the EU exceeding EUR 150 million and have at least one branch or subsidiary in the Union.

17 Directive 2014/95/EU of the European Parliament and of the Council of October 22, 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (OJ EU 2014 L 330/1).

18 Directive 2022/2464/EU of the European Parliament and of the Council of December 14, 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU as regards corporate sustainability reporting (Text with EEA relevance), PE/35/2022/REV/1 (OJ L 322, 16.12.2022).

Directive EU/2464/2022 has significantly expanded the scope of mandatory sustainability reporting. It is estimated that this will apply to around 50,000 companies in total.

The new directive also requires companies to audit their sustainability information. Reports will be verified by a certified auditor or an independent accredited certifier, including in terms of their compliance with the European Sustainability Reporting Standards (ESRS) presented below. Ultimately, it is planned to achieve a similar level of assurance in sustainability reporting, as in the case of financial reporting.

It should be emphasized that Directive EU//2464/2022 introduced the principle of 'double materiality' in determining what content is to be disclosed, i.e. financial materiality and environmental and social materiality. According to this principle, the following should be done:

- firstly, to identify and disclose matters concerning sustainable development that are material to the financial situation of the company and its value (in addition to those matters that have already been disclosed in the financial statements) and;
- secondly, to identify and disclose actual or potential significant impacts on people and the environment related to the company's own activities and its value chain (upstream and downstream).

This means that companies are required to provide not only information to the extent "necessary to understand" the company's development, results and situation, but also information necessary to understand the impact of the company's activities on environmental and social issues, respect for human rights, anti-corruption and bribery matters.

Companies were required to submit a report on the following areas:

a) strategy and business model in relation to sustainable development;
b) management and organisation in relation to sustainable development;
c) assessment of the significance of impacts, risks and opportunities related to sustainable development;

d) implementing measures, including policies, objectives, actions and action plans, resource allocation;
e) performance indicators.

The CSRD Directive assumes that information on the reporting of sustainable development is to be included in the reports on the activities of the entity. The CSRD Directive also assumes that the reports on activities will be published in XHTML format.

The timetable for implementing the CSRD Directive into practice is set out in Article 4, which states that the Directive shall apply from 1 January 2024 for financial years starting on or after 1 January 2024 in four stages:

Phase 1 – for 2024 – entities that are subject to the current Directive 2014/95/EU will report. They will be required to apply the European Sustainability Reporting Standards (ESRE) in full.

Phase 2 – for 2025 – all other large listed and unlisted entities and other large capital groups (i.e. parent entities of all sizes within large capital groups) will report. These entities will be required to apply the ESRS in full.

Phase 3 – for 2026 – small and medium-sized listed companies will report. They will have the option to choose the full or simplified version of the ESRS.

Phase 4 – the directive will cover companies from third countries; the obligation to apply CSRD will apply from the financial year starting on 1 January 2028 and after that date.

Non-financial reports of companies prepared so far could be based on international, European or national guidelines. This situation did not serve the comparability of information on sustainable development. Therefore, at the request of the European Commission, the European Financial Reporting Advisory Group (EFRAG) prepared the European Sustainability Reporting Standards.[19] These were adopted by the European Commission in July 2024 in the form of a delegated

19 "European Sustainability Reporting Standards," EFRAG, accessed January 15, 2023, https://www.efrag.org/News/Project-579/EFRAG-publishes-today-the-last-PTF-ESRS-Cluster-Working-Paper.

act to Directive 2013/34/EU.[20] These standards consist of 12 documents describing in detail the requirements in the areas of environment, social and corporate governance, as well as cross-sectionally describing general issues. Although the standards are separate documents, they are closely related to each other.

The first two standards, ESRS 1 and ESRS 2 (so-called cross-cutting standards), formulate the principles of sustainability reporting and overarching requirements for disclosure. They are mandatory for all organizations. ESRS 1 contains general principles for using the rules, basic concepts, the structure of the standards and basic principles for creating ESG reports. ESRS 2, on the other hand, contains a set of mandatory indicators (12 required disclosures). They constitute guidelines for creating an ESG report and concern issues such as:

- general information about the company,
- the company's business model and strategy,
- sustainable development objectives,
- implemented policy and processes related to achieving these objectives,
- the role and composition of the company's bodies competent in the matter of sustainable development,
- ESG due diligence procedures,
- the process of identifying material areas and risk management,
- metrics.

The ESRS cross-cutting standards are divided into topics and subtopics, which specify detailed requirements for disclosure. Individual areas of disclosure are marked with the letters E, S, G. The following standards apply to the environmental area:

ESRS E1 – climate change. (This concerns the ways in which a company prepares for climate change and attempts to mitigate it. It should disclose in the report information on its carbon footprint and energy consumption, as well as a strategy for decarbonising the company's operations).

20 Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council with regard to sustainability reporting standards, C(2023) 5303 final (OJ L, 2023/2772, 22.12.2023).

ESRS E2 – pollution. (This concerns various types of pollution, including air, water, soil, living organisms, and food. The standard also discusses the issue of potentially hazardous substances and substances of great concern. Its aim is to prompt reflections on how a company affects pollution emissions and what actions it has taken to prevent them, what risks are associated with the pollution generated, and what plans and goals it has for reducing pollution).

ESRS E3 – water and marine resources. (This standard covers the extraction and use of marine resources, water consumption, water collection and discharge. According to this standard, companies must describe how they affect water and marine resources, what actions they have taken to prevent negative impacts, and what plans they have for the protection of water resources).

ESRS E4 – Biodiversity and Ecosystems. (This standard covers direct factors affecting the loss of biodiversity, the status of species, and the range and condition of ecosystems. According to the E4 standard, companies should disclose how they affect biodiversity and ecosystems, what actions they have taken to prevent negative impacts, and what plans they have to reduce their impacts on biodiversity and ecosystems).

ESRS E5 – Resource Use and Circular Economy. (This standard covers resources, waste, creating a circular economy focused on durability, optimal use or reuse, refurbishment, product regeneration, recycling, and nutrient cycling).

The following four standards address social issues:

ESRS S1 – own employees. (This addresses all employee issues. The aim of the standard is to show the management of employee matters, including job security and stability, freedom of association, social dialogue, and work-life balance. The standard also addresses issues of equal treatment and equal opportunities for all, employment and integration of people with disabilities, measures to prevent mobbing, and opportunities to develop skills through training. This standard covers both people employed in the enterprise under a contract and the self-employed).

ESRS S2 – employees in the value chain. (This addresses the same issues as in the ESRS S1 standard. However, it applies to people performing work

in the enterprise's value chain at an upstream or downstream level, including logistics or distribution service providers, franchisees, retailers).

ESRS S3 – affected communities. (It addresses the economic, social, cultural, political, and civil rights of a given community, including the right to housing conditions, and freedom of speech and assembly. Another important issue to discuss concerns the rights of indigenous peoples, including the preservation of their culture, as well as the impact of communities on the company, which, on the one hand, can damage its reputation or disrupt its operations, and on the other, can bring many business benefits, e.g. easier recruitment at the local level).

ESRS S4 – consumers and end users. (This concerns consumers and end users, and in particular, their rights to privacy, freedom of speech, access to high-quality information, security. This standard assumes that the services of a given company cannot be discriminatory, inaccessible to a given community, and marketing practices should be responsible).

The issue of corporate governance is regulated in the ESRS G1 standard – business practices. It concerns what is broadly understood as corporate culture (e.g. management of relationships with suppliers, protection of whistleblowers, good payment practices), as well as prevention, detection of corruption and bribery. It should be added that significant number of issues related to corporate governance are also included in the mandatory ESRS 2 standard.

Currently, the European Commission, in cooperation with EFRAG, is conducting activities aimed at developing standards dedicated to companies from the SME sector listed on the stock exchange and sectoral (industry) standards. These are planned to enter into force in 2026.

The requirement to apply these standards will be gradually introduced for different types of companies. The first year in which companies will apply the new standards is 2024 (reports based on these standards will be published in 2025). This applies to the largest entities. Other listed companies will be required to apply the standards at later dates to help them prepare properly for

this obligation. For companies with fewer than 250 employees, special transitional periods are provided for the first year of disclosure of information on greenhouse gas emissions in Scope 3 (ESRS E1), although they will still have to set up the necessary systems to collect data and design and implement the required processes. For all companies, there is also the possibility to report only after the first year of operations on certain topics, including those related to employment (ESRS S1) and expected financial impacts related to non-climate-related environmental issues (pollution, water, biodiversity and resource use).

Another relief introduced by the European Commission regards treating some mandatory reporting information as voluntary. For example, transitional plans for biodiversity in accordance with ESRS E4 on biodiversity and ecosystems and some indicators on persons performing work for the company in accordance with ESRS S1 on employment may be disclosed voluntarily.

To conclude the outline of the most important elements of the new EU regulations on sustainability reporting by a company, it is worth mentioning a very important regulation related to Directive EU/2494/2022, which is the Communication from the Commission: Guidelines on reporting on non-financial information: Supplement on reporting climate-related information (2019/C 209/01).[21] This Communication contains non-binding guidelines and therefore does not create new legal obligations: it is something of an interpretation of Directive EU/95/2014 on the disclosure of climate-related information. The European Commission added that companies using these guidelines may also rely on international, EU or national frameworks. The Commission considers this paper not to constitute a technical standard and neither the preparer of the non-financial statements nor any other party – acting on behalf of the preparer or otherwise – should rely on the compliance of the non-financial statements with its content.

It can be concluded that the introduction of the CSRD directive into the practice of companies will not only increase their business transparency,

21 Communication from the Commission – Guidelines on reporting non-financial information: Supplement on reporting climate-related information (2019/C 209/01).

but above all will force a change in the way they are managed. Company managers will be required to describe how they assess the business opportunities and risks related to sustainability issues (including the impact of companies on the environment and society), as well as the expected impact of these issues on financial results. In particular, there will be a need to explain whether and how the company's overall strategy takes into account sustainability factors and their financial effects, as well as how it plans to improve its performance in the area of sustainability. All this information will have to be documented and published in a single report, which investors and other stakeholders will undoubtedly use for their comparative analyses. In a situation where the company's management does not take due care in assessing sustainability issues and planning its activities in this area, the reporting information disclosed may give the impression that the company is facing undesirable financial and legal consequences. In addition, companies will also have to plan their operations in advance to ensure the identification and collection of relevant information and the implementation of the necessary data management and control frameworks. Importantly, CSRD requires external verification of reports. As such, appropriate systems and controls are needed to ensure that data is verifiable.

The new EU regulatory system for information on sustainable development of enterprises is extremely complex in terms of the content of the provisions, which are contained in many interconnected legal acts. This makes respecting the established regulations a very difficult task. Regardless of this fact, it should be recognized that the general and specific assumptions of the new enterprise reporting system are strongly justified. Implementing ESRS standards will certainly pose a challenge for companies with little or no experience in creating ESG reports. It seems that these entities should start working as early as possible on adapting their business model to the challenges related to sustainable development, in order to meet the ESG reporting requirements (compliant with ESRS) in a few years. The data disclosed within these

areas should help them understand what impact they have on the sustainable development of their company and the external environment (industry, sector, the entire economy).

Conclusion

The ISSB and EU regulations on corporate sustainability reporting appeared at the same time, but their level of "maturity" is different. The European Union regulations are more advanced. As one might assume, this is due to the fact that this organization already has many years of experience in conducting activities for sustainable development. It is the undisputed leader in this area on a global scale. For years, EU bodies have been determined to implement the principles of sustainable development announced by the UN in the 2030 Agenda in the Member States.[22] Therefore, the reasons for introducing new reporting regulations are primarily ideological. They are an expression of the desire to achieve the fundamental principles, i.e. the sustainable and balanced development of the societies of the EU Member States.

The sustainability reporting standards developed by the ISSB are less advanced. This is chiefly due to the positioning of the Board within the entire structure of all the largest international organizations operating in the area of financial and non-financial reporting of enterprises. The goal of the ISSB is to bring about a convergence of existing reporting systems by developing unified standards, which – by their very nature – must constitute a compromise between various organizations with their own interests, not only ideological ones, but above all business interests. It seems that one can be moderately optimistic about the further intentions of the ISSB aimed at developing further sustainability reporting standards and their effective promotion and application around the world – as was the case with the IFRS standards.

22 United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development*, gov.pl, accessed October 22, 2020, https://www.gov.pl/web/rozwoj-technologia/agenda-2030.

The common feature of the standards introduced by the ISSB and the EU is the emphasis on mandatory reporting of climate issues (which will probably force companies to establish cooperation with external experts in the field of climate change and accounting for carbon dioxide emissions). This seems to indicate a deep understanding of the problem of threats resulting from climate change and determination in making efforts to interrupt or delay this process. This is an optimistic conclusion and all the more valuable because it is likely that the above-mentioned organizations and other entities will take joint action to converge climate reporting standards on a global basis. This would be a natural process and possible to carry out due to the subject of reporting, which is the same all over the world. The process of unifying standards in this area would be facilitated due to the common starting point of the ISSB and EU Standards, which are the recommendations on disclosing climate-related information developed by the Task Force on Climate-related Financial Disclosures. The convergence of standards would allow double preparation of reports by companies using both the ESRB and IFRS S1 and IFRS S2 to be avoided.

The regulations presented here also show similarity in terms of the process of their implementation into practice. This process has been spread over time, and the scope of reporting obligations is already or is to be adapted to the size and capabilities of the companies preparing the reports. This is not surprising considering the complexity of the introduced regulations, the need for companies to prepare for this type of reporting (including external cooperation with entities in their value chain – often using different and not yet standardized methodologies for collecting and recording non-financial data), as well as the diversification of the human, organizational and financial potential of companies covered by the new reporting obligations. The market for services in the field of sustainable development reporting and report attestation will probably develop in the preparatory period for adopting these obligations. It is obvious that the costs of operating companies will increase in connection with the new information and reporting challenge. In response to this fact, one can

only state that the lack of such an obligation could result in increased threats related to the unsustainable development of companies and, as a result, lead to damage significantly exceeding the expected reporting costs.

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The Extraordinary Complaint in the Polish Legal System. Selected Remarks on the Admissibility of the Extraordinary Complaint in Bankruptcy Proceedings

Abstract: This article analyses the possibility of utilizing the institution of an extraordinary complaint, which constitutes one of the extraordinary means of appeal in the Polish legal system, as a legal tool available to individuals in bankruptcy proceedings. The article also indicates that an extraordinary complaint, when examined from a systemic perspective within the Polish legal order—particularly in light of the judgment of the European Court of Human Rights in Strasbourg in *Wałęsa v. Poland*—is a measure that raises certain legal concerns and prompts some political controversies. However, in the author's opinion, this does not contradict the fact that, regardless of the emerging doubts and controversies (and irrespective of potential future legislative changes regarding this institution), such a measure is extremely important from the perspective of individuals (as subjects of freedoms and rights derived from such conventions as the Constitution of the Republic of Poland and the Convention for the Protection of Human Rights and Fundamental Freedoms, including the right to a fair trial). State authorities should make every possible effort to ensure that this measure is fully effective, efficient, and accessible to individuals at the relevant moment—both in theory and in practice.

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The article aims to determine whether and to what extent an extraordinary complaint may be applied in bankruptcy proceedings, where the primary objective is to satisfy creditors and organize the debtor's obligations. At the same time, considering the postulate of ensuring the full effectiveness and efficiency of this means of appeal available to individuals, the author also seeks to examine whether such a measure can be applied in bankruptcy cases that concern the sale of an enterprise under a pre-pack procedure.

The article highlights that, despite the formal possibility of filing extraordinary complaints in bankruptcy proceedings, in practice, public authorities do not make use of this measure in relation to rulings issued during bankruptcy proceedings. The article emphasizes how the lack of such action contradicts the constitutional principles of a modern democratic state (including the principle of a democratic state governed by the rule of law that implements the principles of social justice, as indicated in Article 2 of the Constitution of the Republic of Poland, as well as the resulting principle of protecting citizens' trust in the state and its legal system). An extraordinary complaint should be a fully effective and efficient remedy, also within bankruptcy proceedings.

The conclusions indicate that an extraordinary complaint in bankruptcy proceedings should also be admissible in situations where the bankrupt's assets are sold (including cases of enterprises sold under the pre-pack procedure), particularly when such actions may lead to violations of the constitutional freedoms and rights of individuals (both creditors and the debtor). In the author's opinion, the possibility of filing such a complaint should be analysed on a case-by-case basis, taking into account the legal consequences of decisions made in the course of the liquidation of bankruptcy assets.

Keywords: extraordinary appeal, bankruptcy proceedings, bankruptcy law, protection of civil rights, appeals against judgments

Extraordinary Complaint in the Polish Legal System: Assumptions and Practice of Applying the Institution of Extraordinary Complaint

The extraordinary complaint is a special means of appeal in the Polish legal system, allowing for the correction of final judgments issued by common and military courts—institutions responsible for administering justice in Poland—that cannot be overturned or modified through other extraordinary means of appeal. This measure can be applied when: (1) the ruling violates the principles or the rights and freedoms of individuals as defined in the Constitution; (2) the ruling grossly violates the law due to its incorrect interpretation or improper application; (3) there is an obvious contradiction between the court's essential findings and the content of the evidence collected in the case.

The institution of extraordinary complaint serves to review and overturn final court rulings. It is a relatively new institution in Polish law, having been introduced by the Act of December 8, 2017 on the Supreme Court.

In the draft of the Act[2] on the Supreme Court of December 8, 2017 (hereinafter: Supreme Court Act), the President of the Republic of Poland—exercising the right of legislative initiative in relation to this Act—indicated that the introduction of this institution was a response to emerging demands for supplementing the existing system of extraordinary means of appeal with a new remedy. This necessity arose from the confrontation with "grossly unjust rulings based on misinterpreted legal provisions, contradictory to the court's essential findings derived from the evidence gathered in the case," leading to the conclusion that "the stability of a ruling cannot be defended at all costs."

The introduction of the extraordinary complaint into the legal system was also intended as a response to the "very low public trust in the judiciary" and aimed to fill a gap in the system of extraordinary means of appeal. These existing instruments were deemed "insufficient to protect constitutional freedoms and citizens' rights in cases where court rulings violated them," due to

2 Draft Act of December 8, 2017, on the Supreme Court, 8th Sejm Term, document no. 2003.

the fact that "final judgments appear in legal circulation that fall far short of expected standards."[3]

It is important to emphasize that in the draft of the act introducing the extraordinary complaint, the legislator highlighted that the stability of final court rulings is undoubtedly a fundamental value rooted in the Constitution of the Republic of Poland.[4] This principle serves as a starting point for determining the position of the extraordinary complaint within the hierarchy of extraordinary means of appeal. In this hierarchy, the extraordinary complaint ranks below both ordinary and extraordinary means of appeal, taking precedence only over the complaint for a declaration of non-compliance of a final judgment with the law. Unlike a cassation appeal or a motion for the reopening of proceedings, the extraordinary complaint does not overturn final judgments.[5]

From a formal perspective, the extraordinary complaint is an extraordinary means of appeal, the resolution of which allows the Supreme Court to modify or annul the contested ruling or limit itself to declaring that the challenged ruling was issued in violation of the law.[6] It is admissible if the party does not have the right to file a cassation appeal or another extraordinary means of appeal, or if such a right existed but the decision issued following its application did not lead to the modification or annulment of the contested ruling in a way that, in the complainant's view, would eliminate its defects.[7]

From the above, it follows that the extraordinary complaint has a relatively subsidiary nature, which, in simple terms, means that it is admissible when, at the time of its submission, there is no possibility of overturning or modifying a final judgment through other extraordinary means of appeal.[8] The relatively

3 Draft Act of December 8, 2017.

4 Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws of 1997, no. 78, item 483).

5 Judgment of Supreme Court of December 17, 2019, case no. I NSNc 5/19.

6 Tadeusz Zembrzuski, "Wpływ wprowadzenia skargi nadzwyczajnej na skargę o stwierdzenie niezgodności z prawem prawomocnego orzeczenia," *Przegląd Sądowy*, no. 2(2019): 20–38.

7 Lidia Bagińska, *Skarga kasacyjna i nadzwyczajna w postępowaniu cywilnym* (Wydawnictwo C.H. Beck, 2018), 290.

8 Judgment of Supreme Court of June 3, 2019, case no. I NSNc 7/19.

subsidiary nature of the extraordinary complaint in relation to other extraordinary means of appeal is also evident in the fact that the fundamental premise justifying the initiation of a review of a final judgment through any extraordinary means of appeal is the existence of a defect in the court ruling, with the goal being its elimination from legal circulation.

However, it should be noted that the extraordinary complaint also serves a broader public-law function, which involves ensuring the effective protection of individuals' rights and freedoms as guaranteed by the Constitution in cases where they are violated by court rulings issued in individual cases.[9] It is important to emphasize, however, that this public-law function of the extraordinary complaint does not preclude its realization, even incidentally, through other legal remedies, including a cassation appeal. This is particularly relevant, since the grounds for filing a cassation appeal and an extraordinary complaint partially overlap. According to Article 398^3 of the Act of November 17, 1964—Code of Civil Procedure, a cassation appeal may be based on a violation of substantive law through its incorrect interpretation or improper application, as well as on a violation of procedural provisions if such an irregularity could have had a significant impact on the outcome of the case.

Comparing the grounds for filing a cassation appeal with those for filing an extraordinary complaint, as specified in Article 89 § 1(2) of the Supreme Court Act, which identifies the extraordinary complaint's specific basis as a gross violation of the law, leads to the conclusion that both these extraordinary means of appeal share certain similarities, with their legal grounds partially overlapping.

In summary, the extraordinary complaint should be regarded as a supplementary extraordinary means of appeal that does not replace other extraordinary remedies. It has been rightly emphasized in the jurisprudence of the Supreme Court that the extraordinary complaint serves as a kind of "safety valve," an absolutely exceptional measure that should be filed by an authorized entity only in the situations specified by law—when correcting a final

9 Judgment of Supreme Court of November 25, 2020, case no. I NSNc 48/19.

judgment to ensure its compliance with constitutional principles is no longer possible or was never possible through other extraordinary means of appeal.[10]

Regarding the practical application of the extraordinary complaint in the first years after its introduction, statistical data indicate that between April 2018 and November 2022, a total of 429 extraordinary complaints were lodged. Among them, 58 complaints were submitted by the Ombudsman, which—as noted in the legal doctrine—suggests that the Ombudsman's Office exercised its prerogatives prudently. Meanwhile, the Prosecutor General filed 348 complaints, accounting for 81% of all cases reviewed. The remaining seven authorized bodies submitted a total of 23 complaints.[11] This analysis must also take into account the fact that when examined from a systemic perspective within the Polish legal order—especially in light of the European Court of Human Rights (hereinafter: ECtHR) judgment of November 23, 2023 in the pilot case *Wałęsa v. Poland* (application no. 50849/21), which is discussed in detail later in this article—the extraordinary complaint remains a legally contentious instrument, generating certain political controversies. The institution has increasingly become the subject of public debate in Poland, with ongoing discussions on proposed reforms and potential future legislative changes to its framework.[12]

It is essential to emphasize that despite the rationale behind introducing the extraordinary complaint—justified by the need to supplement the existing system of extraordinary means of appeal—the measure has been relatively

10 Judgment of Supreme Court of June 24, 2020, case no. I NSNc 41/19; Decision of Supreme Court of June 30, 2021, case no. I NSNc 61/20.

11 Marek Antoni Nowicki, "Uchylenie przez Izbę Kontroli Nadzwyczajnej i Spraw Publicznych Sądu Najwyższego (IKNSP) na skutek skargi nadzwyczajnej prokuratora generalnego prawomocnego wyroku w sprawie o zniesławienie wydanego dziesięć lat wcześniej na korzyść skarżącego. Wałęsa przeciwko Polsce [wyrok—23 listopada 2023 r., Izba (Sekcja I), skarga nr 50849/21]," *Palestra*, no. 1(2024): 106, https://doi.org/10.54383/0031–0344.2024.01.8.

12 Joanna Hetnarowicz-Sikora, "Europejski Trybunał Praw Człowieka w Strasburgu wobec kryzysu praworządności w Polsce – cz. 2," *Iustitia*, no. 1–2(2023): 76.

negatively evaluated both within Polish legal doctrine[13] and internationally. Polish legal scholars argue that the broad scope of the extraordinary complaint does not contribute to the stability and predictability of legal transactions. On the international stage, the European Court of Human Rights has explicitly criticized the institution, stating that it functions defectively and that the state must adopt appropriate legislative measures to eliminate the use of the extraordinary complaint as a concealed ordinary appeal and prevent its instrumentalization for political purposes.[14]

Criticism of the extraordinary complaint intensified particularly after the issuance of the aforementioned judgment by the European Court of Human Rights in the case *Wałęsa v. Poland*. This ruling highlighted the systemic issues associated with how the extraordinary complaint functions, emphasizing the threat it poses to the principles of legal certainty and the protection of individual rights. The ECtHR stressed that the extraordinary complaint was designed in a manner that allows public authorities to interfere in judicial proceedings while bypassing the standards of judicial independence and impartiality. A particularly significant concern was the selective use of this institution, which creates the risk of it being instrumentalized for political purposes.

In its judgment, the ECtHR also highlighted how the ability to overturn final court rulings through the extraordinary complaint could lead to a violation of the principle of equality of arms in judicial proceedings. In practice, it is specific public bodies that determine which cases are re-examined, which may result in unequal treatment of citizens and uncertainty regarding the finality of court judgments.

In light of the ECtHR's critical assessments and the positions expressed by representatives of Polish legal doctrine, calls for reforming—or even completely abolishing—the extraordinary complaint are increasingly common. It is

13 Tadeusz Ereciński and Karol Weitz, "Skarga nadzwyczajna w sprawach cywilnych," *Przegląd Sądowy*, no. 2(2019): 7–19.

14 Judgment of European Court of Human Rights (First Section) of November 23, 2023, in the case of *Wałęsa v. Poland*, application no. 50849/21.

argued that its current design is flawed, creates risks of abuse, and thus may undermine the fundamental standards of human rights protection and the rule of law in Poland.

However, in the author's view, this does not contradict the fact that, regardless of the concerns and controversies surrounding the extraordinary complaint (and irrespective of potential future legislative changes), this type of legal remedy remains crucial from the perspective of individuals' rights and freedoms under the Polish Constitution and the European Convention on Human Rights (hereinafter: ECHR), for example, including the right to a fair trial.[15] In this context, following European Court of Human Rights case law, public authorities should make every possible effort to guarantee that this remedy is fully effective, efficient, and accessible to individuals in particular judicial proceedings concerning their rights and freedoms. This must be ensured both in theory and in practice at the relevant time.

In this context, given the doubts and controversies surrounding the institution of the extraordinary complaint, situations in which public authorities arbitrarily deprive individuals of access to such complaints (without a clear legal basis in statutory provisions) should be regarded as particularly undesirable. In this regard, it is worth citing the following judgment of the European Court of Human Rights, issued in the context of the principle of exhaustion of domestic remedies, as referred to in Article 35 § of the ECHR, which demonstrates the necessity of ensuring that the extraordinary complaint is (both in theory and in practice) an effective remedy available to individuals at the relevant time:

> The Court wishes to recall that the principle of exhaustion of domestic remedies, as indicated in Article 35 § 1 of the Convention, is based on the assumption that an effective remedy appropriate to the alleged violation exists within the domestic legal system. It is the Government, assert-

15 This right is enshrined in Article 45(1) of the Constitution of the Republic of Poland and Article 6(1) of the ECHR.

> ing that remedies have not been exhausted, that must convince the Court that the remedy in question was effective and available in both theory and practice at the relevant time, meaning that it was accessible, capable of providing redress in relation to the applicant's claims, and offering a realistic prospect of success (see Akdivar and Others v. the United Kingdom [Grand Chamber], application no. 24888/94, § 57, ECHR 1999-IX).
> (…) The Court must realistically take into account not only the existence of formal remedies in the legal system of the Contracting State concerned but also the general context in which those remedies operate, as well as the personal situation of the applicant (see *İlhan* v. Turkey [Grand Chamber], application no. 22277/93, § 59, ECHR 2000-VII).[16]

Scope of Application of the Extraordinary Complaint in the Polish Legal System

Article 89 § 1 of the Supreme Court Act explicitly states that only rulings that conclude proceedings are subject to extraordinary complaints, unequivocally demonstrating that an extraordinary complaint is available "against a final ruling of a common court or a military court that concludes proceedings in a case." This issue is also addressed in legal doctrine and the jurisprudence of the Supreme Court.[17]

In the jurisprudence of the Supreme Court, it is emphasized in this context that adopting a different stance would mean that in any situation where the deadline for filing an extraordinary complaint has expired, it would be sufficient to obtain any ruling (even one dismissing a complaint or motion) in any incidental matter related to the main case for the deadlines for filing an extraordinary complaint to start running anew.

16 Judgment of the Grand Chamber of the European Court of Human Rights in the case of *D.H. and Others v. the Czech Republic*.
17 Decision of Supreme Court of May 27, 2021, case no. I NSNk 11/20.

At the same time, it should be noted that the institution of the extraordinary complaint includes certain restrictions regarding its admissibility. In terms of subject-matter jurisdiction, the group of entities entitled to use this exceptional legal instrument has been narrowed by introducing an exhaustive list in Article 89 § 2 of the Supreme Court Act of public authorities authorized to file an extraordinary complaint. These include the Prosecutor General, the Commissioner for Human Rights, and, within their respective competences, the President of the General Counsel to the Republic of Poland, the Commissioner for Children's Rights, the Commissioner for Patients' Rights, the Chairperson of the Financial Supervision Authority, the Financial Ombudsman, the Commissioner for Small and Medium Enterprises, and the President of the Office of Competition and Consumer Protection.

Regarding its substantive scope, Articles 90 § 3 and 4 of the Supreme Court Act exclude the use of extraordinary complaints against judgments declaring the non-existence of marriage, annulling a marriage, or granting a divorce if at least one of the parties has entered into another marriage after the ruling became final, as well as against decisions on adoption and in cases concerning misdemeanours and fiscal offences. In terms of time limitations, Article 89 § 3 of the Supreme Court Act generally limits the deadline for filing an extraordinary complaint to five years from the date the challenged ruling became final and to one year from the date of the decision on a cassation appeal or cassation complaint. It is also inadmissible to consider an extraordinary complaint to the detriment of the accused if it was filed more than one year after the ruling became final or more than six months after the cassation appeal or cassation complaint was decided. Additionally, pursuant to Article 90 § 1 of the Supreme Court Act, an extraordinary complaint may be filed against the same ruling in the interest of the same party only once.

In light of these considerations, doubts may arise as to whether and to what extent an extraordinary complaint can be applied in bankruptcy proceedings. The next part of the article will be devoted to addressing this issue.

Extraordinary Complaint in the Context of Bankruptcy Proceedings

Bankruptcy proceedings are a distinct type of judicial proceedings aimed at satisfying the creditors of an insolvent debtor and organizing their obligations. The regulations concerning this matter are comprehensively outlined in Poland's current legal framework in the Act of February 28, 2003—the Bankruptcy Law. It should be noted that a characteristic feature of bankruptcy proceedings is the fact that, as a rule, the separate stages of the proceedings conclude with the issuance of a ruling.

This represents a significant difference from the model case of civil proceedings, which typically conclude with a judgment (and only marginally with a ruling, e.g., in cases concerning the discontinuation of proceedings). Rulings in bankruptcy proceedings may pertain to such matters as the appointment of a trustee or the approval of a debt repayment plan.

What is particularly important in bankruptcy proceedings is the ruling on the declaration of bankruptcy, which, in fact, initiates the proper bankruptcy proceedings under Article 51(1) of the Bankruptcy Law, as well as the ruling on the sale of an enterprise under the pre-pack procedure. Such proceedings can generate irreversible legal effects and have a significant impact on the freedoms and rights of individuals affected by the bankruptcy proceedings, particularly on the property rights of the debtor's creditors, which are guaranteed under Article 64(1) of the Constitution of the Republic of Poland and Article 1 of the Additional Protocol to the ECHR.

It should be noted that the type of ruling issued and the stage at which it is made during the bankruptcy proceedings have considerable practical significance regarding the possibility of challenging such rulings using the appeal mechanisms available in the Polish legal system. A particularly important issue in the practical application of law is whether rulings issued in bankruptcy law cases can be challenged through extraordinary remedies, including extraordinary complaints.

Although the legislator has not excluded the possibility of challenging rulings issued in the course of bankruptcy proceedings through an extraordinary complaint, in practice, public authorities seem to exercise considerable caution and reluctance in using this extraordinary remedy in relation to rulings issued in bankruptcy proceedings.

This practice of public authorities—who have the exclusive right to file an extraordinary complaint—somewhat contradicts the constitutional principles of a modern democratic state, including the principle of a democratic state governed by the rule of law, as expressed in Article 2 of the Constitution of the Republic of Poland, and the derived principle of protecting citizens' trust in the state and the laws it enacts (Vertrauenschutz).

At the same time, considering the necessity of ensuring the full effectiveness and efficiency of such a remedy available to individuals, as in the case of the extraordinary complaint, the author wishes to examine whether such a measure could be applied in bankruptcy cases concerning, for instance, the sale of an enterprise—particularly when such actions could lead to violations of the constitutional freedoms and rights of individuals (both creditors and the debtor). In the author's opinion, the possibility of filing an extraordinary complaint should always be analysed with regard to the legal consequences resulting from decisions made when liquidating the bankrupt's assets.

Exceptions to the applicability of the extraordinary complaint—arising from the Supreme Court Act—should not be interpreted broadly, especially if they define the scope of restrictions on individual freedoms and rights (including the property rights of the bankrupt's creditors in bankruptcy proceedings). It can be argued that public authorities, when considering the need to ensure an adequate standard of legal protection for individuals and guided by the aforementioned principle of protecting trust in the state, should, in principle, refrain from adopting interpretations that would significantly hinder the application of generally binding legal provisions in cases concerning individuals, or even nullify procedural institutions such as the extraordinary complaint in bank-

ruptcy cases (and should, in fact, avoid such practices in applying the law). In legal doctrine, the prevailing view remains that the proper interpretation of legal provisions aims to ensure the coherence of statutory solutions, and the entity interpreting them should resolve any contradictions that may arise, while avoiding objectively irrational conclusions and findings.

In this context, it is also worth noting a view which, while formally related to the institution of a complaint for a declaration of unlawfulness of a final ruling, can also be applied to the extraordinary complaint. This view demonstrates that existing legal provisions should, as far as possible, be interpreted in a manner that allows for the effective filing of a complaint, ensuring that affected individuals have a real instrument necessary to seek compensation for unlawful actions by state authorities.[18]

This view leads to the conclusion that entities authorized to file an extraordinary complaint are entitled to do so in situations where the admissibility of such a complaint has not been excluded under Article 90 § 3 and 4 of the Supreme Court Act. They should not interpret the law in a way that expands the list of cases in which filing an extraordinary complaint is inadmissible. Therefore, final rulings that conclude proceedings and are not explicitly excluded under the Act of December 8, 2017 on the Supreme Court—including certain bankruptcy proceedings—should be subject to challenge through an extraordinary complaint. In this regard, particular attention should be given to the concept of a ruling that concludes proceedings. While the admissibility of challenging a final judgment through an extraordinary complaint is undisputed, the admissibility of challenging final decisions that conclude proceedings requires a particular analysis.

In civil proceedings, the concept of a decision that concludes proceedings is understood as a decision that "closes the path to issuing a ruling by the court of a given instance that resolves the substance of the case in a trial (by

18 Zembrzuski, "Wpływ wprowadzenia skargi nadzwyczajnej na skargę o stwierdzenie niezgodności z prawem prawomocnego orzeczenia," 20–38.

judgment) or in non-litigious proceedings (by decision), as well as decisions that conclude the case as a whole, meaning they pertain to the entirety of the case and constitute the final rulings issued in the proceedings."[19] Simply put, decisions that conclude proceedings are those whose finalization permanently closes the path to resolving the case on its merits by the court of the given instance.[20]

Regarding the interpretation of the concept of a ruling that concludes proceedings—specifically in the context of bankruptcy law—legal doctrine emphasizes the distinction between the termination and completion of bankruptcy proceedings. Bankruptcy law provides for three ways to complete bankruptcy proceedings: by discontinuance, conclusion, or annulment. The reasons leading to each of these methods of completion differ, yet their effects are essentially identical. In all cases, the completion of bankruptcy proceedings results in an official announcement (Article 362 of the Bankruptcy Law), the deletion of bankruptcy-related entries in land and mortgage registers and other registries (Article 363 of the Bankruptcy Law), the restoration of the debtor's right to manage and dispose of their assets, and the return of the debtor's property, books, correspondence, and documents (Article 364 of the Bankruptcy Law).[21]

From the above, it follows that rulings that conclude bankruptcy proceedings should be subject to challenge through an extraordinary complaint. However, identifying a precise list of rulings issued after the declaration of bankruptcy but before the completion of bankruptcy proceedings proves problematic.

At this juncture, it should be noted that the primary objective of bankruptcy proceedings is to satisfy creditors and, if possible, to allow the debtor's business to continue operating. Therefore, an analysis of the admissibility of filing an extraordinary complaint should focus on rulings issued during bank-

19 Resolution of a panel of seven judges of the Supreme Court of October 6, 2000, case no. III CZP 31/00.

20 Decision of Supreme Court of October 12, 2007, case no. I CNP 56/07.

21 Resolution of the Supreme Court of January 27, 2006, case no. III CZP 126/05.

ruptcy proceedings that directly impact the financial situation of individuals involved in the proceedings, including the bankrupt's creditors. These financial interests are protected by broad guarantees of property rights and other proprietary rights (Article 64(1) of the Constitution of the Republic of Poland and Article 1(1) of the Additional Protocol to the ECHR).

In this regard, particular attention should be given to rulings concerning the sale of assets in bankruptcy proceedings, including the sale of movable property, real estate, or an entire enterprise. According to Article 306 of the Bankruptcy Law, after bankruptcy is declared, the trustee immediately proceeds with the inventory and valuation of the bankruptcy estate and preparing a liquidation plan. The trustee submits the inventory list along with the liquidation plan to the supervising judge, specifying the methods proposed for selling the bankrupt's assets. As a result of this process, the trustee sells individual components of the bankruptcy estate with the effect of an execution sale (Article 313 of the Bankruptcy Law).

The answer to the question of whether an extraordinary complaint can be filed against rulings issued during bankruptcy proceedings, particularly regarding the sale of assets from the bankruptcy estate, should be provided by the Supreme Court ruling of February 16, 2022 (case no. I NSNc 601/21).[22] This ruling was issued in a case concerning an extraordinary complaint filed by the Prosecutor General regarding the disposal of real estate in bankruptcy proceedings.

Although the subject of the complaint was not strictly the real estate sale itself, but rather the legal consequences of the sale—specifically, the transformation of cooperative ownership rights to a separate ownership title and the permissibility of transferring liability for a mortgage encumbering the cooperative's real estate—this matter was inextricably linked to bankruptcy proceedings.

An analysis of the aforementioned ruling leads to the conclusion that any sale conducted during bankruptcy proceedings should be subject to challenge

22 Decision of Supreme Court of February 16, 2022, case no. I NSNc 601/21.

through an extraordinary complaint if it results in a violation of fundamental principles, freedoms, or human and civil rights as defined in the Constitution of the Republic of Poland. This is particularly relevant when the sale leads to a gross infringement of the freedoms and rights of a creditor or the bankrupt party—especially their property rights.

In this context, a highly questionable issue observed at times in legal practice is the arbitrary exclusion by public authorities of the possibility of filing extraordinary complaints in various types of bankruptcy proceedings. This includes cases concerning the sale of an enterprise during bankruptcy proceedings through the pre-pack procedure. In the author's view, this is a striking example of a situation in which such a ruling should be considered a decision concluding the proceedings, particularly given that it may produce irreversible legal effects (such as the sale of the bankrupt's enterprise) and definitively determine the property rights of the bankrupt's creditors. This is especially significant in cases where there are serious legal doubts regarding procedural irregularities during the proceedings or when the approved sale conditions do not result in the most advantageous offer being selected, namely, the one that maximally satisfies the claims of the bankrupt's creditors.

In this regard, a highly questionable issue—and one that lacks a clear basis in statutory provisions—would be the assertion that such rulings issued during bankruptcy proceedings are merely incidental and therefore cannot be considered rulings concluding proceedings within the meaning of Article 89 § 1 of the Supreme Court Act. However, such an interpretation finds no explicit support in the provisions of the Supreme Court Act. Consequently, restrictions on individual freedoms and rights in this regard fail to meet the requirement of sufficient legal precision, as emphasized by the Constitutional Tribunal. This raises concerns in terms of the principle of legal certainty, which is one of the fundamental principles of proper legislation derived from Article 2 of the Constitution of the Republic of Poland.

Conclusion

In conclusion, despite the minimal activity of public authorities in filing extraordinary complaints against rulings issued in bankruptcy proceedings, it would be unwarranted to assert that the possibility of filing such a complaint is excluded in bankruptcy proceedings. While it remains a fact that the mere sale of assets by the trustee does not conclude the proceedings, thereby excluding the filing of an extraordinary complaint, such sales, particularly of real estate, often lead to the initiation of subsequent proceedings, including land and mortgage register proceedings, and trigger further factual events that may have irreversible effects on the legal status of the property (such as property division or the demolition of buildings), resulting in irreversible legal consequences. It should also be emphasized that in bankruptcy proceedings, the trustee is obliged to undertake actions enabling the completion of liquidation within six months from the date of the bankruptcy declaration. This relatively short period may contribute to overly hasty decisions regarding asset disposal, which may, in turn, lead to violations of constitutionally protected rights and freedoms (including the property rights of the bankrupt's creditors within bankruptcy proceedings).

Thus, the admissibility of filing an extraordinary complaint in the context of selling a bankruptcy estate should always be analysed in light of the consequences of such a sale, including the proceedings initiated as a result of the sale, their outcomes, and the legal effects produced by the transaction. There is a strong argument in favour of allowing extraordinary complaints against rulings related to the sale of the bankruptcy estate, particularly in cases where the sale was conducted with gross violations of the law, and the consequences of the sale constitute an infringement of the property rights of individuals in bankruptcy proceedings, including those of the bankrupt's creditors.

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