The selected contemporary aspects of human rights

Alcide De Gasperi University
of Euroregional Economy in Józefów

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Edited by Bronisław Sitek, Łukasz Roman

Józefów 2016

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ISBN 978-83-62753-74-1

Quantity printed: 70 copies. Capacity: 13,5 sheets. ed.

Publisher: Alcide De Gasperi University of Euroregional Economy in Józefów
05-410 Józefów, 4 Sienkiewicza Str.
Tel. +48 22 789 19 03
wydawnictwo@wsge.edu.pl
www.en.wsge.edu.pl

Projekt okładki / Cover:
Jadwiga Popowska

Typesetting, type-matter:
Jadwiga Popowska

Druk i oprawa / Printing and binding
INTER-BOOK
Paulina i Grzegorz Indrzejczyk S.C.
Wiejca 51
05-085 Kampinos

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Introduction

We could witness the massive migration since the beginning of human existence. In modern times, the migrations were mainly limited to movement within the country, rarely between the countries. Basically, they have had the political or economic nature. The great migrations in the nineteenth and twentieth centuries was caused mainly by economic and (in totalitarian systems) political factors. During this period, a result of colonial policy, many people from Africa and Asia migrated to the Western Europe and the USA.

Europe is aging rapidly. The average life expectancy is longer, while simultaneous drastic drop in the number of births. A major problem is therefore a question of interchangeability of generations, care for the elder people, and many others.

The global exchange of information raises new human needs, ranging from simple living needs and ending with the goods of a higher order. Among others, thanks to the mass media, the universal awareness of the citizen's right to information about activities of state bodies, to the so-called freedom rights, is growing. At the same time, the meritocracy, it means conditioning the man's position in the society based on knowledge and skills, is reinforcing.

The issues of migration as well as the growing needs of citizens toward the growing political and economic immigration raise the question about the possibility limits of the Member States and the European Union itself, particularly about the financial and organizational limits. The USA have been facing these problems for at least 100 years.

The authors of the publications contain in this book are looking for the best solutions, in the areas circled by the human needs, for the citizens and the non-citizens, in connection with the possibilities of: the social security system, labour market, health care, homeland national and international security and the smooth functioning of state structures.

Editors

The right to a fair trial and the (dys–)functionality of justice system

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Abstract
In the public discourse in Poland and in Europe, quite often, there is complaining about the dysfunctionality of justice system. The need of its correction is increasingly common element of the public discourse. An inadequate implementation of the right to fair trial due to the too high fees or excessive length of proceedings is shown. The response to this kind of evaluation of justice system should be based on the analysis of statistical data on the number of cases on the docket (case-list) in Poland and Polish law in the European Court of Human Rights and on the analysis of the existing procedural or organizational solutions.

Keywords: *human rights, justice system, the European Court of Human Rights, the right to a fair trial, irregularities in the functioning of the court.*

Introductory issues

One of the basic human rights in a democratic state is the right to court. This right is normatively reflected in instruments of international and national law. Its base in the Polish legal system are the articles 45, 77 and 78 of the Constitution of the Republic of Poland.

The number of Polish, EU and international regulations, and thus the studies concerning the right to a court is so significant that it is impossible to analyse and to discuss them all in one study. Hence, it is necessary to limit them to the selected cases related to common media and political statements indicating the dysfunction of the judiciary, such as lengthiness proceedings or too high legal fees (Dammacco 2011, pp. 102–129).

The subject of study is to analyse the law and jurisprudence through the prism of statistical data in the confrontation with the existing stereotypes regarding the functioning of justice system in Poland. The aim is to confirm or deny these often populist opinions.

The content of the right to court in the light of the provisions of law and stereotypes

The right to a court guaranteed to every person access to the courts, and fair and open examination of a case without undue delay by a competent, independent and impartial court (Kluz, Lech, *Nowoczesne…* 2015, pp. 289–296). In the light of article 6, paragraph 1 of the European Convention on Human Rights and Fundamental Freedoms of 1950 as well as the article 10 of the Universal Declaration of Human Rights of 1948 and the article 14, paragraph 1 of the International Covenant on Civil and Political Rights of 1966, the following rights of every person connected with the right to a court may be pointed out:

- equal access to the courts and tribunals;
- fair and public examination of a case;
- obtaining legal aid;
- the possibility of compensation for the excessive length of proceedings or for the legislative tort or issuing the wrong decision.

The Polish legislator, in article 45 of the Constitution guaranteed to everyone the same level of protection of the right to a court, which is guaranteed in acts of international law. According to the Polish Constitution, everyone has the right to a fair and public trial without undue delay. The Court should be competent, impartial and independent. An important constitutional guarantee of the right to a court is a provision of the article 77, paragraph 2 of the Constitution, which states that even the Act cannot close the access to courts in an investigation alleging infringement of freedoms or rights. The legislator did not foresee any exceptions provided here – for example: the fact of martial law or the state of war.

However, these extremely precious statutory provisions intended to ensure enforceability of the right of everyone to the court may be subject to functional justice. In the scientific discussions (Dybowski, 2009, p. 89–105),

the media discussions (Deska, 2014) or in the current political discourse (Wojciechowski, 2014), and often at meetings with friends or family, we talk about the dysfunction of law, implicitly the Polish law and consequently, about the dysfunction the Polish justice system. A statement the Secretary of State in the Ministry of Justice Patryk Jaki may be an example of such public discourse. He believes that the quality of justice in Poland is very low. A negative feature of the Polish justice system, according to Deputy Minister, is the excessive length of proceedings, rare met in Europe. In his view, this phenomenon inhibits economic development. Therefore, Deputy Minister announces decisive fight against this and other dysfunctions of justice system (Patryk Jaki, 2016).

Also other statements of other participants of public and private disputes may be quoted here. Those disputes, a priori, accept the thesis about the dysfunction of the judiciary in Poland and reflect on how to improve the legal and the judiciary system in Poland? They also deliberate on the issue what these systems should be, to be fair. Is it enough to change the organizational structure of the courts, or whether it is necessary far-reaching reform of the Code of Civil Procedure? Such formulated questions, concerns or proposals contain a defined research hypothesis. They, a priori, accept the assertion of the dysfunctionality of laws (procedures) and organizational system of justice, and most often it is about inadequate protection of human rights.

The imposed, by public discourse, research hypothesis includes the assumption that the system of law and justice in Poland is inefficient and dysfunctional. It creates a negative stereotype of the judiciary in Poland, often as the needs of current policies or to justify negative emotions of entities who lost the case.

The key to this discussion is the word dysfunction. According to the dictionary of the Polish language, the term means maladjustment of something to perform specific goals, objectives, expectations and disorder or maladjustment (Słownik Języka Polskiego). Dysfunction is therefore, an evaluative term, the entirely negative, even provoking the notion of decisive action to change the designate to which it refers, in this case – the justice system.

In this perspective, it is logical to ask the question on *how to improve the justice system and the system of legal means in Poland*. Indirectly, also, to define the Polish justice system as dysfunctional, suggests the need for a discussion on the assessment of the legal situation in Poland in the field

of human rights protection and, consequently, taking the legislative actions in order to provide better and more effective protection. The discourse about the dysfunction of the law and the judiciary is of particular importance in the case of human rights to court and thus to pursue their case before an independent state office. P. Kluz states that: an effective judiciary means easy access to the courts, where the really effective legal protection can be obtained in the most convenient way, in a reasonable period of time (Kluz, Lech, Ocena pracy sędziów…2015, p. 324).

The new proposals as a remedy for dysfunction of the judiciary in Poland

As part of the repair of the judicial system in Poland, the various solutions to improve the effectiveness of enforcement of the right to court are proposed. One of them is the proposal to expand the properties of cassation, through the possibility of writing it by everyone if the lawyer does not want to write it. Another proposed new solution is to introduce a general remedy of the legal protection (general effective remedy). There is also a proposal to implement amendments to the Criminal Code, understood in this case as an instrument to identify and combat dysfunction of the legal system and judicial practice.

However, it is necessary to ask the question of whether a change in law or the introduction of new remedies is a necessary remedy for any violation of human rights? The legitimacy of this question stems from the observable in Poland fact where there is the legislator's excessive tendency to introduce new regulations in each occurrence of new social, economic or political problems. Through such practice, the legal system becomes unreadable and increasingly confusing. In addition, in Poland, the lack of professional legislative base can be seen and therefore, the regulations are of quite low quality (Zielona Księga 2013, p. 105). Over-regulation does not actually solve these problems. Rather, we should strive to create a good law also by applying the principles of interpretation of existing regulations, eliminating all the dysfunctions, especially in the functioning of the judiciary.

Without denying the need for the academic, social and political discussion about the dysfunctions of law and justice in the protection of human rights, including the right to a court, however, it is necessary to try to analyse and

evaluate the Polish system of law and justice in optics of realization of the right to court. This need stems, of course, not only from a priori grounds, but also from the static data on the number of complaints to the Polish justice, as they are brought before the European Court of Human Rights.

The effectiveness of the right to a court in the light of the ECHR's data

According to the statistical data of the European Court of Human Rights of 2015, there were 64 850 court cases in progress. In the same year, there were 40 650 new cases and among them 27 050 cases were recognize as the inadmissible complaints (Analysis of Statistics, 2015). The biggest number of complaints was brought against Russia, Ukraine and Turkey. Among all this cases, there were 22,15% of the admissible complains on the right to court based on the article 6 of the Human Right Convention of 1950. This is the biggest group pf cases. The cases concerning the use of tortures and the restrictions of the right to freedom and security were on the second place (*The ECHR*, 2015).

The number of Polish cases brought to the ECHR systematically decreases in the period of last years. In 2013, there were 3968 such cases brought to the ECHR and in 2015, there were only 2182 such cases (Analysis of statistics 2015). The significant portion of if this cases was recognized as the inadmissible complaints. Also, in this situation, the biggest number of complains was about the functioning of the justice system. In 2013, Poland was only on 12 place in Europe in terms of the number of new complaints.

The number of pending cases and the new cases brought annually before the ECHR, including cases from Poland, reflects rather high availability to justice system. Many of these issues are settled, so the state governments, including Poland, facing the threat of proceedings before the ECHR, agree to end case in a different way – it means way beneficial to the citizen. In 2013, 123 cases were completed with the settlement concluded between Poland and the complainant entities. The number of cases and the apparent downward trend indicate a fairly universal access of citizens to the courts of law in Poland, and to the ECHR.

The analysis of statistical data shows that in Europe, including in Poland, there is a fairly wide access to justice. Virtually, every citizen can join the complaint to the ECHR.

However, one should be aware that the number of cases is not always the primary criterion showing the size of the human rights violations in the country or occurring dysfunction of the legal system or the administration of justice. B. Gronowska of the Nicolaus Copernicus University in Torun, lists the following reasons or factors affecting the size of the number of cases considered by the ECHR, with which it is difficult not to agree:

- gradual increase in the number of states parties to the EC,
- greater awareness and „faith" of the community of these countries about the real possibility of obtaining redress in the ECHR
- the so-called avalanche of cases means serial, and so successive cases involving the same problem in terms of the practices or national law, the existence of which was confirmed in the first sentence of the series (Gronowska 2010, s. 12–13).

Yet, it is worth pointing to the fact that the courts in the oral motives of judgment quite often refer to the European Convention on Human Rights, even if ultimately, it is not recalled *expresis verbis* in a written justification to judgment. This practice may be evidence of the impact of the Strasbourg case, not only on the position of the Court of Justice of the European Union, but also on the national judicial authorities and it is in all possible instances (Gronowska 2010, p. 11). In this way, the model standards and human rights, developed under authority of the Council of Europe is implemented (Gronowska 2010, p. 11).

The importance of the case law of the ECHR also leads to questions about the role of this Court in the system of European and national justice. B. Gronowska of Nicolaus Copernicus University in Torun, writes that *the ECHR is the first international court for the protection of the rights and freedoms of individuals, equipped with the right to rule on individual cases, as well as on a consequence of the liability of States Parties* (Gronowska 2010, p. 10). It cannot be forgotten, however, that the ECHR acts as a subsidiary body and it does not replace the Polish justice system. Also, it does not eliminate a Polish systems of compensation, and the judgment of the ECHR cannot be the basis for the resumption of proceedings in the Polish justice system.

Equal access to the courts and tribunals

The basic criterion for assessing the functionality of the judiciary is to guarantee universal and equal access of every person to court. This law is based on the constitutional principle of equality of all citizens before the law expressed in the article 32, paragraph 1 of the Constitution. In turn, the article 31, paragraph 1 of the Constitution has guaranteed the legal protection of the freedoms and rights of every human being. In the article 42 of the Constitution there is a guarantee of the rights of defence and the presumption of innocence. The combination of these rules is a constitutional guarantee of equal access of citizens to the court. Appropriate safeguards are also present in the numerous acts and in the legal regulations based on these acts.

The amount of the fees and court costs

In practice, however, a citizen can meet with tangible barriers, which can be considered a form of limiting equal access to the courts and tribunals. The legal fees and the amount of the costs of legal representation may be one of them. In the media, it can be heard or read that the financial status of many citizens does not always allow to carry out these costs (Jaraszek 2009). But, is it real case? The answer to this question can be obtained by reference to their height and to relation to average earnings in Poland. According to the Act of 28 July 2005 on the court costs in civil cases (Journal of Laws of 2010, no. 90, item. 594), the fees for providing information, issuing copies, extracts and certificates from the National Court Register are between 5 and 60 Polish zlotys, and in the case of registration proceedings, range from 40 to 500 Polish zlotys. Higher fees are for the activities of lawyers and legal advisers done before the organs of justice in civil matters. Their amount depends on the amount of the value of the dispute. The value of the dispute above 200,000 PLN generates a rate of 7200 PLN (Regulation of the Minister of Justice of 2015).

Even, if the amount of attorneys' and solicitors' fees may be for some people too high, what happens in the poorer regions of Poland, for example in Masuria or in southern Poland, however, the Polish legislator foresaw the possibility of incurring the costs of unpaid legal assistance by the State Treasury.

When it comes to the legal fees in civil cases, they are in height from 30 to 600 Polish zlotys. In matters of the labour law and the social security, the court fee is 30 Polish zloty. These charges, in relation to the charges applied in other European Union countries are relatively low. Additionally, the legislator, on the basis of article 100, paragraph 2 of the Act of 2005 may the party, in whole or in part, exempt from court fees.

In the judicial practice, the courts often exempt from court fees (Górski, Walentynowicz 2007, p. 117 and the following). This is particularly true in penitentiary cases, where some prisoners run simultaneously 600 or more cases against the State Treasury. In most of these cases, the courts are inclined to the requests for full and not only partial exemption from court fees and for the granting of legal aid. In this perspective, it is difficult not to agree with the assertion that the practice of Polish courts is therefore extremely flexible and citizen friendly. This attitude of the courts is also apparent through practice of recovery terms and extending deadlines for filing a pleading.

From the preclusion of evidence to the judge's discretionary power in the hearing of evidence

One of the mechanisms which cause disturbances to equal access to justice may be inappropriate use of the evidence preclusion, which determine the final deadline for reporting the evidence and citing facts. This situation occurred in the case of separate proceedings in commercial cases, governed by the article 479^{1}–479^{27} of the Code of Civil Procedure (Journal of Laws of 1964, no. 43, item. 296; Górski, Mądrzak 1999, p. 250–254).

Until the amendment of the Code of Civil Procedure by the Act of 16th September 2011 on amending the Act – Code of Civil Procedure and some other acts (Journal of Laws of 2011, no. 233, item. 1381), which entered into force on 3rd May 2012 r., all the evidence in the economic proceedings had to be brought in the lawsuit or at the latest at the first meeting. Thus, the legislature limited the possibility of establishing new allegations and evidence during the proceedings in economic cases, accepting the argument according to which the entrepreneur is not only a professional in his or her action, but also in the activities before the court. This line of reasoning, of course, was wrong and introduced de facto inequality of the parties in

proceedings before the court. The other side often had an advantage through the application of professional legal assistance.

The amendment of 2011 of the Code of Civil Procedure abolished the separate proceedings in economic matters, and at the same time the article 217 of the Code of Civil Procedure was amended. Currently, in the hearing of evidence, there is the principle of concentration of evidence, which requires greater activity of the parties and at the same time the caring for their case in accordance with the principle of *vigilantibus iura sunt scriptis (*Panfil 2013, p. 108–109).

Based on the article 217, paragraph 1 of the Code of Civil Procedure, the party may bring up facts and evidence on the reasons for its conclusions or to refute the conclusions and assertions of the opposing party up to the closure of the hearing. At the same time, the discretionary power of judge was expanded. It means that the judge may reject the statements and evidence belated (article 217, paragraph 2 of the CCP), or invoked only for the unjustified prolongation of the proceedings, or if they are related to circumstances that were already sufficiently clarified during the procedure (article 217, paragraph 3 of the CCP). A Party may, therefore, request evidence before closing the case but it cannot, however, be an opportunity to bring new claims as to the facts of the case (Panfil 2013, p. 108–109).

This implies that the Polish courts does not come up too formally to the issue of evidence preclusion probative, but rather the tendency of liberal approach to this issue can be observed, which is an expression that the courts value more the investigation of material truth than the procedural formalism In addition, the courts in civil proceedings may spontaneously allow evidence from the office, acting as a party, which is also an expression of superiority of the material truth over the procedural formalism (Gruszecka 2015, p. 24–25).

Informatisation of the courts as the way to easier access to the courts

An important element of the right to court is to increase funding for the computerization of the judiciary. This process began in the 90s of the twentieth century introducing the possibility of electronic – it means the very rapid communication of the applicant with courts. Different kinds of software facilitating the communication between courts or between the court

and the parties or their representatives are implemented or they are in the implementation phase. This allows that the applicant, as well as his or her representative may learn about the progress of the case at any time, especially, they may seek the information about the dates of meetings. The plans for changes go even further, that we can even talk about the electronic evolution in the courts. It is created the opportunity to submitted the writings in the electronic form and in the near future, in the administrative courts (in the future also in the civil court) records of the proceedings will be conducted exclusively in electronic form.

Also, the access to databases, such as the electronic land registers is an important element of computerization of courts. This makes possible to update the relevant data on a regular basis. In addition, the judges during the hearings have access to the criminal records or to the National Court Register. The informatisation, carried out in this way, allows for streamlining operations and increasing the efficiency of justice (Kluz 2013, p. 367–389).

In the context of the informatization of the courts, the Act of 10th July 2015 on the amending the Act – the Civil Code, the Act – Code of Civil Procedure and some other acts (Journal of Laws of 2015, item 1311) amended the Code of Civil Procedure. The article 130, paragraph 6 of the Code of Civil Procedure introduced the possibility of submitting letters to the courts in electronic form and the electronic delivery of those documents to parties and to their representatives. Next, according to the article 9, paragraph 1, the parties and participants of the case can receive protocols and the statements in electronic form using the data communications system supporting the judicial proceedings. In the amended article 125 paragraph 2^1 was added, which introduces the possibility of an electronic copy of the document done by acting as the representative of a party who is an advocate, legal adviser, Attorney advisor or patent attorney.

The changes introduced by the 2015 amendment definitely improved performance of the judiciary in Poland, and also they brought considerable savings for the state budget. Thus, Poland implements processes which has been ongoing in the European Union for a long time (Gołaczyński 2009, p. 13 and fallowing).

The equal access to the courts could still experience the obstacles by organizational or physical restrictions of access to the courts. In the first

case, it may be the information foreclosure. In Poland, they are still area sparsely covered with the Internet access. But each year their range is smaller. In the second case, they are not known, however, the situations of physical limitations of access to the ordinary courts in Poland or the Court of Human Rights in Strasbourg caused by the public authorities in Poland. The lack of understanding of the language might appear as an obstacle in communication but as it was said, in such cases the court office establishes an interpreter. The ignorance of the law is mitigated through the legal assistance, including a new system of free legal aid, which entered into force on 1st January 2016 (Act of 5th August 2015 on free legal aid and legal education – Journal of Laws of 2015 item 1255).

Righteous and public examination of the case

The right to court implies a fair and public examination of the case, and the legislator guarantees this right in the article 45, paragraph 1 of the Constitution. Hence, the right of the court is carried out not only by allowing the applicant to submit a complaint to the court but by the substantive and fair settlement of the case.

With the right to a fair hearing we have to do if the court proceedings is conducted in accordance with the statutory deadlines – without undue delay and the case is examined by the competent, independent, impartial court. The exclusion of openness to public can only take place in exceptional cases, in certain cases, such as considerations of morality, national security, public order, protection of private life or an important public interest. These constitutional values are reflected in the provisions of Acts, but also it is the implementation of the provisions of international law, including the Convention on Human Rights and Fundamental Freedoms (Pagiela 2003, p. 125–144).

Courts in Poland use the favourable interpretation for people pursuing their rights in terms of the court proceedings, even in situations at least questionable. The well–known example of Ms. Kinga Jasiewicz can be use here. She sued the State Treasury – Regional Examination Board in Cracow in connection with her opinion on understated assessment of matriculation. Further, she argued that she was deprived of the chance of full-time studies on pharmacology. The damage suffered by her are very tangible, because

of school fees correspond to what the plaintiff must bear to attend to extramural payed studies. The case was recognized by the District Court in Cracow I C 1835/14. In this case, it seemed pretty obvious that if there is no possibility of court proceedings in the case administrative examination therefore the lawsuit should be dismissed. Meanwhile, the Regional Court in Cracow decided otherwise and the case was carried on. Finally, the court ruled that the according to the current legal situation, the complaint cannot be resolved. In order to have better understanding of solutions, it can be compared to a situation where the student pays a claim for compensation for the damage suffered in connection with the situation where, in his or her opinion, the received on master's exam grade was understated. The final assessment on the diploma deprives him or her to have the chance for a well-paid job.

The above-mentioned example is the exemplification of abuse of right to court by citizens, which is quite assiduously raised by the media, politicians and citizens as evidence of the dysfunction of the justice system.

Tort of the lawsuit or undue delay

The concept of court tort lies within the responsibility of the State Treasury for the damage caused by activities undertaken in the area of *imperium* by state or local government (article 417 of the Civil Code), or for damage caused by the issuance of a final judgment (article 417^1, paragraph 2). In this case, however, the compensation can be claimed when the victim obtains the statement about illegality of the decision in separate proceedings. Analogously, the compensation may be claimed if the judgment was given on the basis of a provision which was subsequently found to be unconstitutional. In both of these cases, the fault of functioning government official, in this case, the fault of the judge issuing the sentence, is not considered. The responsibility of the Treasury has been objectified and it is based on the premise of unlawfulness of the action and not on the fault of the official as it is defined in the article 415 of the Civil Code (Rąpała 2010, p. 46).

However, the most often mentioned dysfunction of the judiciary in Poland is the excessive length of the proceedings. Such an event occurs when there is undue delay in the proceedings. Based on statistical data prepared by the Ministry of Justice, it can be shown that in 2015, the Polish courts

received 15.15 million cases. This is a significant increase compared to 2011, when the courts received approx. 13.6 million cases. In 2015, there were 15.1 million completed cases and 2.3 million cases in progress, including those that remained from previous years. The number of cases that that, in 2015, lasted more than a year in the first instance is 13%, while the number of cases that lasted longer than three years is 1%. As it was noticed based on the analysis of statistical data, approx. 6% of the cases were a double decreed. This situation took place when the case was transferred to the courts of another property and there was registered under a different number. Despite this negative phenomenon, it is difficult to build a thesis about the excessive length of judicial proceedings in Poland.

Polish judicial practice, in regard to the protection of human rights, particularly with regard to respect for the right to court, in practice, goes further than it is provided in the European Convention on Human Rights. The proof of this is in the existence, in the Polish legal system, the emergency measure in the form of a claim for compensation for harm inflicted by the issuance of a final judgment (article 417^1, paragraph 3 of the Civil Code).

The undue delay in court proceedings may be grounds for compensation on the part of the victim. For this purpose, the Polish legislator has introduced appropriate solutions in the Act of 17th June 2004 on the complaints about the violation of the right to a trial within reasonable time. The legislature attaches to this issue a very high priority. Firstly, this is indicated by court of competent jurisdiction (the court superior to the court which carried the case) and secondly, it is indicated by the deadline for issuing a ruling (the court shall issue a decision within two months from the date of the complaint).

The complainant may request a new action in the same case after 12 months. The party whose complaint has been allowed may, in separate proceedings, claim compensation for damage resulting from the unreasonable length from the State Treasury, or jointly from the State Treasury and the bailiff. The statement granting the complaint binds the court in civil proceedings for damages or compensation, in relation to determine about the unreasonable length of proceedings. There is objectively low fee – 100 zlotys connected with submitting the claim. In addition, in order to obtain compensation for the excessive length there is no need of prejudication and this issue is examined the

court hearing the case. In addition, in accordance with the article 16 of above-mentioned Act, the party, which has not lodged a complaint on the length of proceedings in accordance with the article 5, paragraph 1, may claim – under the article 417 of the Act of 23th April 1964 – Civil Code (Journal of Laws of 1964, no. 16, item 93 with subsequent amendments) – to remedy the harm due to excessive length after the final conclusion of the proceedings as to its merit.

Conclusions

Quite often repeated in public discourse hypothesis about the various forms of dysfunction of the judiciary in Poland is not reflected in the statistics analysed above, nor in the analysis of the law and the existing normative solutions. The right to court is pretty well guaranteed by the Polish legislator.

Obviously, this does not mean that the legal protection of human rights in Poland, in the area of substantive and procedural law should not be improved. This discussion is very necessary and important if only because of the inherent and inalienable dignity of the person, which is mentioned in the article 30 of the Constitution of the Republic of Poland.

References

Analysis of statistics 2015, p. 4, Online text: http://www.echr.coe.int/Documents/Stats_analysis_2015_ENG.pdf [access: 2016-05-30].

Dammacco F., *Globalization, human rights and international justice. On the role of international Jurisdiction*, [in:] B. Sitek and others (ed.), *Human rights, spiritual values and global economy*, South Jordan 2011, p. 102–129.

Deska W., *Dysfunkcje polskiego Wymiaru Sprawiedliwości*, 2014, Online text: http://pressmix.eu/2014/07/08/dysfunkcja–polskiego–wymiaru–sprawiedliwosci/ [access 2016-05-30].

Dybowski M., *Dysfunkcjonalność polskiego wymiaru sprawiedliwości,* [in:] *W drodze do demokratycznego państwa prawa. Polska 1989–2009*. Materiały pokonferencjyne, Warszawa 2009, p. 89–105, Online text: https://www.rpo.gov.pl/pliki/12440173220.pdf [access: 2016-05-31].

Gołaczyński J. (ed.), *Informatyzacja postępowania sadowego w prawie polskim i w wybranych państwach*, Wolter Kluwert, Warszawa 2009.

Górski A., Walentynowicz L., *Koszty sądowe w sprawach cywilnych. Ustawa i orzekanie. Komentarz praktyczny*, Wolters Kluwer, Warszawa 2007.

Gronowska B., *Pięćdziesiąta rocznica powstania Europejskiego Trybunału Praw Człowieka z perspektywy Polski*, Prokuratura i Prawo, 1–2/2010, p. 12–13.

Gruszecka D., *Prawo dowodowe*, Uniwersytet Wrocławski, Wrocław 2015, p. 24–25. E–Book: https://prawo.uni.wroc.pl/sites/default/files/students–resources/eBook%20–%20prawo%20dowodowe%20(1).pdf [access: 2016-05-31].

Jaraszek A., *Wysokie opłaty sądowe w Polsce ograniczają dostęp do wymiaru sprawiedliwości* [in:] gazetaprawna.pl from 20.10.2009. Online text: http://prawo.gazetaprawna.pl/wywiady/362868,wysokie-oplaty-sadowe-w-polsce-ograniczaja-dostep-do-wymiaru-sprawiedliwosci.html [access: 2016-05-31].

Kluz P., Lech M., *Nowoczesne standardy wymiaru sprawiedliwości*, Journal of Modern Science 2/25/2015, p. 289–296.

Kluz P., Lech M., *Ocena pracy sędziów w Polsce w świetle norm międzynarodowych,* Journal of Modern Science, 1/24/2015, p. 321–331.

Kluz P., *Wymiar sprawiedliwości – tradycyjny czy nowoczesny?* Journal of Modern Science, 4/19/2013, p. 367–389.

Mądrzak H., Krupa D., Marszałkowska–Krześ E., *Postępowanie cywilne*, H.C. Beck, Warszawa 1999.

MSZ: Polska wykonała 146 ugód w wyroków dot. Skarg do Strasburga.

Pagiela A., *Zasada „fair trial" w orzecznictwie Europejskiego Trybunału Praw Człowieka*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 2/2003, p. 125–144.

Panfil M., *Prekluzja dowodowa a dyskrecjonalna władza sędziego w procesie z udziałem przedsiębiorców*, Nowoczesny Bank Spółdzielczy, 3/2013, p. 108–109.

Patryk Jaki: Jest wielu przyzwoitych sędziów. Problemem są „elity", 1 czerwca 2016 [in:] WP wiadomości from 1.06.2016, Online text: http://wiadomosci.wp.pl/kat,1329,title,Patryk-Jaki-jest-wielu-przyzwoitych-sedziow-Problemem-sa-elity,wid,18359226,wiadomosc.html [access: 2016–06–02].

Rąpała A., *Bezprawność jako przesłanka odpowiedzialności za szkody wyrządzone przy wykonywaniu władzy publicznej,* Roczniki Nauk Prawnych 2/2010, p. 37–54.

Słownik Języka Polskiego, s.v. *dysfunkcja*, Online text: http://sjp.pl/dysfunkcja [access: 2016-06-08].

The ECHR in facts & figures, 2015, Online text: http://www.echr.coe.int/Documents/Facts_Figures_2015_ENG.pdf [access: 2016-05-30].

Wojciechowski J., *Program PiS – jak naprawić sądy. Wymiar sprawiedliwości nie może być państwem w państwie. Sprawiedliwość jest dla ludzi, a nie ludzie dla sprawiedliwości!,* 16th February 2014 wpolityce.pl, Online text : http://wpolityce.pl/polityka/185756-program-pis-jak-naprawic-sady-wymiar-sprawiedliwosci-nie-moze-byc-panstwem-w-panstwie-sprawiedliwosc-jest-dla-ludzi-a-nie-ludzie-dla-sprawiedliwosci [access: 2016-05-30].

Zielona Księga. System stanowienia prawa w Polsce, no 30, October 2013, editor: Kancelaria Prezydenta RP, Warszawa 2013.

The sources of Law:

Ustawa z 5 sierpnia 2015 r. o nieodpłatnej pomocy prawnej oraz edukacji prawniczej (Dz.U. 2015 poz. 1255).

Ustawy z dnia 23 kwietnia 1964 r. – Kodeks cywilny (tekst jedn. Dz. U. 2016 poz. 380).

Rozporządzenie ministra Sprawiedliwości z 22 października 2015 w sprawie ponoszenia przez Skarb Państwa kosztów nieopłaconej pomocy prawnej udzielonej przez adwokata z urzędu (Dz.U 2015 poz. 1801)

The scope of the rights to life and health of prisoners serving sentences in Polish prisons and the influence exerted in the field by the judgments of the ECHR

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Abstract
In each year as far as since 1999 the global prison population is growing. In 2015 it certainly exceeds 10,3 million. In many countries, including European, in the last decades there has been a record of overcrowding in penitentiary units, which certainly has negative implications for the welfare of prisoners. Ways of dealing with those incarcerated who are kept in penitentiary isolation might vary between countries, but it is enough to say that the axis of the division of penitentiary systems runs across the belief or disbelief in the social reintegration of prisoners. The process of achieving rehabilitative goals by be hinder by prison's worsening conditions.
This articles discuses the right of the incarcerated people to maintain their health and well-being, taking into account the impact on the interpretations that have been exerted in this area by the judgments of the European Court of Human Rights.

Keywords: *imprisonment, human rights, prisoners rights, ECHR, Polish Enforcement Code, international law provisions.*

Introduction

Although a slight decrease in the global population of convicted inmates was recorded for the first time in many years in 2015 (J. Gutter, R. Harding, 2016), the number of convicts in the world's prisons is still significant, and certainly exceeds 10 million (EUROSTAT 2016). Among the countries where populations are by far the largest, in the first place there is a need to distinguish the United States (about 1/5 of the world's prison population are serving their prison sentence in U.S. prisons, jails and detention centers).

Second place in the rating belongs to China (approx. 1.6 million sentenced inmates according to official statistics), then Russia and Brazil, with a similar number of incarcerated persons, oscillating in the range of 400–450 thousand (EUROSTAT, 2013). Poland ranks in 20th place in the ratings, with a population of approx. 80 thousand (Reports of the Prison Service from 2014 and 2015). In many countries, including European, in the last decades there has been a record of overcrowding in penitentiary units, which certainly has negative implications for the welfare of prisoners. Ways of dealing with those incarcerated who are kept in penitentiary isolation might vary between countries, but it is enough to say that the axis of the division of penitentiary systems runs across the belief or disbelief in the social reintegration of prisoners. In countries where the penitentiary systems tend to aim at the rehabilitation of prisoners (including the United States, Australia and most of the European countries), there is a perception that convicted persons must exercise certain rights, but the scope of these rights varies among the penal systems. As already mentioned above, overcrowding in prisons can greatly hinder achieving the goals of social reintegration, and call into question the actual implementation of the rights of prisoners.

The purpose of this article is to analyze the provisions of Polish penal codes with regard to the rights of prisoners to life and health, taking into account the impact on the interpretations that have been exerted in this area by the judgments of the European Court of Human Rights.

Fundamental rights of prisoners

The fundamental rights of incarcerated persons serving prison sentences in Poland are guaranteed by the provisions of the Constitution, Penal Codes and other regulations, and, last but not least, by a number of international agreements.

Among these it is enough to mention:

- the International Covenant on Civil and Political Rights adopted by the UN General Assembly on 16 December 1966, and opened for signature in New York on 19 December 1966;
- the Convention of the Protection of Human Rights and Fundamental Freedoms, opened for signature in Rome on 4 November 1950; the European Convention for the Prevention of Torture and Inhuman or

Degrading Treatment or Punishment, opened for signature in Strasbourg on 26 November 1987;
– the European Agreement relating to persons participating in proceedings of the European Court of Human Rights, opened for signature in London on 6 May 1969.

In Europe, particularly important provisions are those of the above-mentioned European Convention on Human Rights, since there have been countless complaints from prisoners based on them before the European Court of Human Rights (the basis of complaints is art. 34 of the ECHR). It should be stressed that the standards contained in the Convention were not specifically developed to protect the rights of prisoners. Therefore, the Court decides on matters concerning them based on general standards. This interpretation, which is nowadays followed by the Court, has its roots in the case Golder v. United Kingdom, 1975 (considered to be a milestone ruling and a major contribution to the legal protection of prisoners' rights).

The Polish legislator *expresis verbis* provided the need to respect the rights of prisoners in the Penal Enforcement Code of 1997. All prisoners must be considered as human beings who have inherent dignity, which means that they should be treated humanely, and that there is a prohibition of torture, and inhumane and degrading treatment and punishment. The literature emphasizes that the distinctive feature of the Polish Enforcement Penal Code of 1997 is that this act in the first place mentions the rights of those who are convicted, and then their duties. This is exactly the opposite situation compared to that of the Enforcement Penal Code of 1969, in which the duties of the convicted were followed by the regulations of their rights – those rights were mention in general terms, without specifying any mechanism for sanctioning violations of them (Szymanowski, Migdał, 2014).

The catalog of rights belonging to a convicted person is vast, and in this area art. 102 of the Penal Enforcement Code has special significance. Some of the rights are explicitly indicated in the text of the Code, while some must be derived from the spirit of that Act and other laws. Amongst the latter category of rights – according to a view that is established in the literature and in the case law of Polish courts – one can indicate the right of every prisoner to personal safety (Szczygieł, 2009).

It is important to stress that every convicted person, right after being settled in prison, should be immediately informed of his/her rights and his/her duties. In particular there is an obligation to enable him/her to familiarize himself/herself with the provisions of the Penal Enforcement Code and other legal norms, for instance the Rules on the organization of the enforcement of imprisonment (hereinafter RegWykKPW), and to undergo appropriate medical examinations and sanitary practices (art. 101 of the Penal Enforcement Code). In this regard, § 2 RegWykKPWis of particular importance, indicating that any convict admitted to prison should be informed of the possibility of the occurrence (while in prison) of threats to his/her personal safety, and that they may also experience some manifestations of negative behaviors characteristic for the prison setting. In any such case the prisoner should be aware of the need to notify prison authorities of any such incidents if it threatens his/her well-being, or that of other inmates. This basic information must be given to the convicted person immediately upon his/her placement in the so-called cell of transition.

The main aim of this article is to synthetically discuss the rights of prisoners to life, health and well-being, in accordance with their human dignity, while placed in correctional facilities.

The scope of the rights of prisoners to life and health – the most important issues

In the light of art. 3 of the Convention on Human Rights, any State which is a Party to the Convention is obliged to ensure such conditions of prison isolation which do not violate the human dignity of an incarcerated person, and also that the penalty does not causes excessive physical suffering or psychical distress inevitably associated with the fact of being deprived of his/her liberty as a punishment. In particular, the life and health of the incarcerated person must be protected by all adequate measures. However, not all of the possible risks to the life or health of the person that is held in custody may provide a basis for a claim for compensation before the ECHR. The ECHR has repeatedly stated that such a claim can be made only in cases when the competent authorities (first of all the prison's administration) were aware of the existence of immediate and real threats towards the life

or health of one or more persons, and did not undertake any attempts to eliminate or at least to reduce such risks.

The right to life and health, as well as to the well-being of inmates, consists of many particular legal guarantees. Some of them are listed and described below.

Inmates' medical care

All adequate medical services are provided for incarcerated persons free of charge, as well as medicines and sanitary articles (art. 115 of Penal Enforcement Act). However, unlike non-convicts, inmates cannot choose their doctor or nurse of primary care, or their dentist, ambulatory health care institution or hospital. Prostheses, orthopedic aids and other similar supplies are also delivered free of charge in cases when they are necessary to allow an inmate to adjust to prison conditions. In other cases this medical equipment is provided but needs to be paid for. All medical support is provided by public correctional healthcare facilities. Other non-correctional medical institutions are obliged to cooperate when necessary.

Only in exceptional cases can the director of the prison – after consulting a doctor that is a staff member of a correctional healthcare facility – allow an inmate (at his/her own expense) to choose a doctor other than a correctional facility staff member for treatment, or to use some additional medicines or other medical products. The daily and weekly schedule of medical practice is formulated by the director of the correctional institution (§ 14 and § 15 RegWykKPW). Inmates receive medical care every day according to the predetermined schedule. In an emergency situation every convict can seek immediate off-schedule treatment.

In practice, the main source of concern is no longer legal provisions, but rather their implementation, which indicates, in particular, a lack of proper information flow between all the medical facilities involved in the protection of the health of inmates, correctional authorities and the courts (which are also involved in the decision-making process). Another main issues to focus on is the assessment of the proper technical conditions of medical facilities' buildings and infrastructure, and also of equipment, which is often much used and outdated (Ejchart, Wiśniewska, 2013; NIK report 2013, also see: Dzieciak v. Poland 2008; Kaprykowski v. Poland 2009).

Inmates' diet

Proper nutrition is an important factor in maintaining good health and well-being while in prison. In this regard, the provision of art. 109 of the Penal Enforcement Act has a central role. According to this article, each convict in prison or in jail receives 3 times daily a drink (usually it is water, a cup of tea, or coffee made from roasted wheat bran) and a food portion that meets the Dietary Reference Intakes (normally about 2,600 cal per day). Inmates working in particularly burdensome conditions are served with additional food portions during the working week.

At least one of the daily meals must be served hot. Nutrition must be appropriate to age, health status and type of work. Religious diets should also be available to inmates. A convict that is involved in actions outside the prison's setting (for example being escorted to court for trial) must be provided with a suitable amount of dry food supplies and drinks (also appropriate to his/her age, health status and religious beliefs). Types of meals and drinks, and their nutritional values are described by the ordinance of the Ministry of Justice of 19 February 2016 (Official Journal 2014, pos. 302).

To consume their meals the inmates may use their own metal cutlery, with the exception of those held in maximum security prisons, who are allowed to use only plastic cutlery.

Most claims to the ECHR regarding food relate to hunger strikes by those held in custody. Incarcerated persons claimed that they were forced fed, or that prisons authorities used other forms of coercion toward them (for instance Nevmerzhitsky v. Ukraine, 2005, application no. 54825/00).

Accommodation conditions

Amongst the obstacles that hinder the correct reintegration of inmates, the one that is most often mentioned in the literature is overcrowding in prisons (S. Lelental 2009). This phenomenon is defined as an excessive number of inmates relative to the general capacity of the correctional institution. In Poland 2/3 of the prison infrastructure was built before the 1st or 2nd World War. Currently, the penitentiary system is facing serious problems in terms of modernization (some of the buildings are considered to be historical monuments). Inmates' health and well-being is to a great degree affected by his/her accommodation conditions. The right to proper living conditions is

provided by art. 110 of the Penal Enforcement Act, which states that a convict should be placed in a one-person cell or in a multiple occupancy cell. An average of 3 $m^2$of living space must be provided per prisoner. It is, however, allowed to place an inmate for a fixed term period of 14 or up to 90 days in a cell where living space is between $2m^2$ and $3m^2$. This may happen only in strictly defined cases (see art. 110 § 2a and 2b of the Penal Enforcement Code).

All cells are equipped with adequate pieces of furniture (bed, cabinets, stools, and so on), so as to ensure that the convicted persons have: a separate place for each inmate to sleep, adequate conditions of hygiene, an adequate supply of air, and appropriate temperature (depending on the season), as well as lighting adequate for reading or working. Everything should be in accordance with the legal standards laid down, for instance, in § 28 sec. 1 of RegWykKPW. A particular issue in this field is the right location and technical conditions of sanitary equipment. The complaints of imprisoned persons that have been made to the national courts and the ECHR concern in particular the conditions of a so called "bathroom corner", usually partitioned only by wooden panels or plastic curtains. In the opinion of the applicants, this does not provide any level of privacy (the requirement to respect their privacy is not met by this – see for example Szafrański v. Poland, 2015).

Within the cell the convicted persons may have documents relating to the criminal proceedings of which they are a participant, some food supplies – the total weight of this must not exceed 6 kg, tobacco, personal hygiene requisites, personal items, watches, letters and photographs of family members and other loved ones, religious objects, stationery, personal notes, books, newspapers and board games (art. 110 of the Penal Enforcement Code). The director of the prison may allow a convicted person to have in his/her cell audiovisual equipment, a computer and other items, including objects that may enhance the aesthetics of the cell or be an expression of the cultural interests of the convict, on condition that the possession of these items does not violate the principles of order and safety within the prison setting. Inmates cannot have in a cell (or transmit to the deposit) any objects whose dimensions or quantity infringe the existing order or impede the convoy. The number and dimensions of items that the convicted person may have in his/her cell, and how it must be stored, and also, if necessary, the rules of use, is defined by the director of the prison in internal regulations.

Personal hygiene and the hygiene of the cell

All inmates are obliged to maintain adequate personal cleanliness (art. 116 of the Penal Enforcement Code). In order to obtain this aim legal standards are set out in Annex 1 tab. 4 of the ordinance of the Minister of Justice of 28 January 2014 on the living conditions of prisoners in prisons and detention centers (Official Journal of Law of 2014, pos. 200).

Hygiene items are delivered to the convicts by the prison administration. They can be sent in a package from outside, or purchased by inmates in the prison's shops. Penitentiary authorities also provide bed linen, which is changed at least once every two weeks, or more often depending on needs. The authorities are also obligated to deliver any other items that help to maintain proper sanitary standards in cells. (art. 111 of the Executive Penal Code). To maintain personal hygiene, inmates are offered a haircut at least once a month, and may go to the shower at least once a week (in the case of incarcerated women it is at least twice a week, and once a day women in prison can use hot water – § 30 sec. 2 and 3 of RegWykKPW). The schedule of using the shower is specified in internal prison regulations (§ 14 sec 2 of RegWykKPW).

Each incarcerated person receives clothes that are appropriate to the season, and also underwear and shoes, unless the inmate uses his/her own. Replacing underwear occurs every week, or more frequently if it is needed. Depending on needs, outer clothing and footwear is also changed (§ 6 sec. 1 of the ordinance of the Minister of Justice of 28 January 2014). When taking part in criminal procedural activities, during transportation, and in other justified cases, the convicted person uses his/her own clothing, underwear and shoes, unless they are inappropriate for the time of year, or using them is against safety considerations (art. 11 of the Penal Enforcement Code). Persons convicted of an offense motivated by political, religious or ideological beliefs (so called prisoners of conscience) have the right to use their own clothing, underwear and footwear (art. 107 § 1 of the Penal Enforcement Code).

Inmates' right to rest

Rest is essential to maintain the health and well-being of the convicted person. Each incarcerated person has the right to necessary rest. In particular, he/she has the right to walk for one hour per day, and is entitled to an

8-hour period for sleep during the night (art. 112 of the Penal Enforcement Code). Convicted women who are pregnant or taking care of their babies are entitled to a longer walk. The walk takes place under the direct supervision of an officer of the Prison Service in a designated place in the open air.

The schedule of walks, as well as hours dedicated to night rest, are determined by the director of the prison in internal legal regulations (§ 14 sec. 2 of RegWykKPW). At the request of the inmate's doctor, the prison director can change the duration of the walk exercised by the convicted patient (§ 31 of RegWykKPW). The walk of so-called "dangerous inmates" takes place only in designated areas under the strict supervision of Prison Service Staff Members, and separately from other inmates (art. 88b § 6 of the Penal Enforcement Code).

However, all of the above-mentioned rules apply only to offenders that serve their sentences within prisons of the maximum security type. Others, who are serving theirsentences in prisons that are half-open or open, can move around the place without any previous permission, but according to the schedule given in an internal legal regulation (art. 91 and art. 92 of the Penal Enforcement Code), and because they can move freely, for these convicts there are no organized walks.

Inmates' right to safety

The prison administration has an obligation to take appropriate measures to ensure the personal safety of all offenders while serving their sentences. Each incarcerated person is obliged to immediately inform his/her supervisor about risks to his/her personal safety, and must be told how to avoid these risks (art. 108 of the Penal Enforcement Code). The concept of "security" is broad, and primarily includes the inviolability of the human body (thisforbids any physical violence like beating, kicking, jabbing) on the part of both inmates and prison staff. However, in practice it has to be underlined that the main source of threats to prisoners' life, health and well-being is the behavior of other inmates, which is the negative effect of the so-called "second life" in prison. Therefore, the administration of the prison should arrange the serving of a sentence in such a way as to ensure full protection of the rights and safety of inmates, and which avoids suffering caused by inmates committing abuses.

Inmates' right to maintain contact with the outside world

Imprisonment, of course, severely restricts the inmates' contact with the outside world, in particular with relatives and friends. Limiting the right of a convicted person to private life is mainly due to: the limited number of visits that are allowed to the family member; the supervision of all of visits; as well as to the monitoring of telephone calls and to the censorship of the correspondence. The right of offenders to stay in contact with other people, in particular family members and other people close to him/her, is regulated by art. 105 of the Penal Enforcement Code. This act provides that a convicted person should be capable of maintaining relationships primarily through visits, correspondence, telephone calls, parcels and money orders. In justified cases, with the consent of the director of the prison, the offender may use some other means of communication with the outside world. In the case of a convicted foreigner, it is also envisaged that he/she may correspond with a competent consular or diplomatic representative, as well as have the right to be visited by them.

All of the above-mentioned is a clear reference to the provisions of art. 67 § 3 of the Penal Enforcement Code, which states *expressis verbis*" maintaining contacts with family and the outside world is the one of the means of interaction that all convicted persons are allowed in order to help them to achieve the goals of imprisonment". These rights may, however, be limited to some degree by the director of the prison if limitations in this particular area are required for reasons of prison safety or for maintaining public order. These limitations must be notified to the penitentiary judge and the convict. The provisions of Articles 105 and 105b of the Penal Enforcement Code define the conditions under which visits and telephone calls by convicts are conducted. Visits may not last more than 60 minutes, and on any one day the convict is granted only one such visit. In the visit no more than two adults may participate at the same time. There are no limits considering minors, but they may participate in the visit only when supervised by adult visitors. In justified cases the director of a prison may grant a convicted person permission to receive more than two adult visitors at the same time. Any inmate that has the permanent custody of a child under the age of 15 is entitled to an additional visit of the child/children. When a convicted person expresses the willingness to meet with a person who is not a family

member or another person close to him/her, this visit should be authorized by the director of the prison. Each visit in a maximum security prison is held under the supervision of an officer of the Prison Service. Direct contact between the convicted person and a visiting person are allowed that they sit together at a separate table in the visiting room.

The number of visits, the control of telephone calls, and the presence or not of the censorship of correspondence depends on the type of prison in which the convicted person is serving punishment. Inmates in a maximum security prison setting are entitled to two visits a month, and with the permission of the director of the prison may use them at the same time. All visits are under the control of Prison Service staff members, and the correspondence of inmates is subject to censorship. In semi-open prisons convicts can have three visits a month, which, with the permission of the director of the prison, can be combined. Visits to convicts are supervised by the prison administration, and conversations that take place between inmates and visitors may be monitored by the prison administration. The correspondence of those convicted may be subject to censorship. In the open-type prison regime convicts can have an unlimited number of visits, and these take place within the control of the prison administration. Correspondence is not subject to censorship. It has to be underlined that according to the ECHR a blanket system of censorship of correspondence in prison and extensive control is usually not necessary in a democratic society (see, for instance, Savenkovas v. Lithuania, 2008).

The schedule of visits in prison is defined by internal legal regulations, a copy of which should be made available to each offender. In the light of art. 105B of the Penal Enforcement Code, every convicted person has the right to use a telephone at their own expense or at the expense of the caller. In justified cases, the director of the correctional facility may allow a convicted person to use some other means to communicate at the expense of the caller or of the convict, and if the convicted person has no financial resources, at the expense of the prison. Depending on the type of prison where convicts are serving their sentence, their phone calls are under the control of the prison administration (as in the maximum security prison type); they may be monitored at semi-open correctional facilities; or controls are not allowed, as in open-type prisons.

The rights of inmates to religious practices

The right to exercise religious practices (art. 106 of the Penal Enforcement Code) is undoubtedly important for the well-being of the prisoner, and it is included in the more general category of the right to health. According to article 53 sec. 2 of the Constitution of the Republic of Poland, religious freedom includes the freedom to profess, or to accept, a religion by personal choice, and the freedom, either individually or collectively, publicly or privately, to worship, pray, participate in ceremonies, perform rites, or participate in teaching. The inmate's right to practice religion in prison includes the right to religious practices, to join in religious services and to participate in masses celebrated in prison, to listen to church services broadcast by the mass media, and to possess in the cell the necessary religious items, like books, magazines, leaflets and religious objects. The convicted person has the right to participate in prison religion classes, to participate in charitable activities and social activities performed by the church or other religious organizations, as well as the right to individual meetings with priests or members of the religious association to which he or she belongs. Priests may visit convicted persons in their cells. The schedule of the worship celebrations, religious meetings and religion classes are defined in the internal prison regulations (§ 14 sec. 2 of RegWykKPW). The opportunity for so-called dangerous offenders to participate in religious services, religious meetings and religion classes is allowed only within the wing in which they are serving their imprisonment (art. 88b § 3 of the Penal Enforcement Code).

Summary

In comparison to the previously existing regulations, the Penal Enforcement Code that is currently in force explicitly guarantees that the enforcement of the penalty of imprisonment may afflict inmates' rights only in a degree necessary for the implementation of the objectives of this penalty. The rights of a convicted person shall be restricted only when the use of them would undermine the rights of other inmates and would disturb the established order in the prison.

In this area, the right to life and health is especially strongly established, and any violation in this regard means the possibility for an inmate to seek legal action, not only national, but also international. In this context the

particularly important role of the European Court of Human Rights must be emphasized. The ECHR has repeatedly condemned such phenomena – characteristic of the Polish penitentiary system – as overcrowding, inadequate equipment and housing, and automatic (and based on the same premise) extensions of so-called dangerous offender status. The quality of imprisonment in practice depends not only on legal regulations and their enforcement, but also on economic funding for the prison system, which has been under funded for many years. However, it should be noted that in Poland the budget expenditure has increased – average expenditure per year allocated for one convict or detainee is 36 443 zł. Thanks to that, some attempts have been made to counteract the phenomenon of overcrowding, improve the living conditions of prisoners, and improve and expand the range of therapeutic approaches – just to emphasize the most important achievements of the past few years.

References

Legal acts:

The European Convention for the Protection of Human Rights and Fundamental Freedoms, (Rome, 4 November 1950), as amended subsequently Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2, Official Journal 1993, no. 61, pos. 284,

The Polish Constitution of 2 April 1997, Official Journal of Laws 1997, no. 78, pos. 483

Act of 6 June 1997 – Penal Enforcement Code, Official Journal of Laws 1997., No. 90, pos. 557, as amended,

Ordinance of the Ministry of Justice of 25 August 2000 on organizational rules and internal regulations of imprisonment, Official Journal of Laws 2003, no. 152, pos. 1493,

Ordinance of the Ministry of Justice of 28 January 2014 on the living conditions of prisoners in prisons and detention centers, Official Journal of Laws 2014. pos. 200,

Ordinance of the Ministry of Justice of 19 February 2016 on the diet of incarcerated persons in prisons and detention centers, Official Journal of Laws 2016, pos. 302.

The case law of the ECHR

Dzieciak*v.* Poland, judgment of 9 December 2008., application No. 77766/01,

Kaprykowski*v.* Poland, judgment of 3 February 2009., application No. 23052/05,
Marro et al. *v.* Italy, the decision of 8 April 2014., application No. 29100/07,

Szafrański*v.* Poland, judgment of 15 December 2015., application No. 17249/12,

Savenkovas v. Lithuania, 18 November 2008, application No. 871/02

Nevmerzhitsky v. Ukraine, 2005, application no. 54825/00

Bibliography

Ejchart M., K. Wisniewska, "Prison health care. Summary of the activities of the "Healthcare in Polish prisons – striving for compliance with human rights standards" in the Prison Health Service", the report of the Helsinki Foundation for Human Rights, Warsaw 2013.

Information on the results of control "The medical care of incarcerated offenders", ed. NIK, Warsaw 2013 www.nik.gov.pl/plik/id,4619,vp,5950.pdf (access: 03.06.2016).

Lelental S., "The Penal Enforcement Code of 1997. From the perspective of ten years in force" in: X years of the Penal Enforcement Code, S. Lelental, G.B. Szczygieł (ed.), Temida2, Bialystok 2009.

"Annual statistical information for the year 2014", ed. The Ministry of Justice and the Central Board of Prison Serwice, Warsaw 2014 http://sw.gov.pl/Data/Files/001c169lidz/rok-2014.pdf (access: 15.06.2016)

"Annual statistical information for the year 2015", ed. The Ministry of Justice and the Central Board of Prison Service, Warsaw 2015 http: //sw.gov.pl/Data/Files/001c169lidz/rok-2015.pdf (access: 06.15.2016)

Plantage J., R. Harding, "Private prisons" I:n Handbook on prisons, Y. Jewkes, J. Bennett, B. Crewe (ed.), Routledge, New York – London, 2016.

Szczygieł G.B., "The principle of respecting the human dignity of the convicted person and overcrowding of prisons" in: X years of the Penal Enforcemnt Code, S. Lelental, G.B. Szczygieł (ed.), Temida2, Bialystok 2009.

Szymanowski T., Migdał J, Criminal law enforcement and penitentiary policy, Lex, Warsaw 2014.

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Abstract
Tax ethics includes everything that is considered moral in tributaries behavior held by those who, for various reasons, are taking part in the legal relationship.
The obligation to contribute to public expenditure, even before legal, is grounded in an ethical duty, who buys relevance when rises some form of common life. The power to impose taxes, expression of State sovereignty, assumes a particular dimension in the modern legal systems, being anchored to rigorous objective parameters, suitable to reinforce the ethical toll. It is illustrative of the authority exercised by the State on its own territory, in order to achieve the common good, ensuring order, freedom and rights of the individual; the performance of that function gives to the State a "moral legitimacy", founded on freedom and the sense of responsibility.
In the current regulatory system, taxing is bounded by two rigid constitutional parameters, closely related, surging to founding policy of tax arrangements, integrating advanced forms of protection of the rights of the taxpayer: the principle of legality in the imposition (article 23 of Constitution) and the principle of ability to pay (article 53 of Constitution).

Keywords: *tax ethics; taxing powers; obligation to contribute to public expenditure; rule of law; principle of ability to pay.*

Tax ethics, science of human conduct and tax law

The term "ethics" (Pellingra, 1977; Sainz De Bujanda, 1977, p. 236; Higuera Udias, 1982, p. 36; Tremonti – Vitaletti, 1986; Tipke, 1997; Goldstein – Halpern, 2001; Herrera Molina, 2002; Gallo, 2004, p. 3 ff.; Perrucci, 2004, p. 30–31; Fedele, 2006, p. 1 ff.; Moschetti, 2006, p. 39 ff.; Gallo, 2007; Falsitta, 2008; Gallo, 2008, p. 11 ff.; Santagata, 2009; Sacchetto, 2012, p. 831 ff.; more generally, on the relationship between ethics and law, comp.

Longobucco – Deplano, 2012, p. 380 ff.), in its ordinary sense, includes everything that is considered moral in the practice of tax behavior held by those who, for various reasons, are taking part in the legal relationship of tax (on the legal relationship of tax, comp. Giannini, 1937).

The term has the advantage of allowing a legal matter, such as tax law, to confront and deal with non–legal disciplines, such as ethics, like what is happening in other areas of economic and legislative system (Sacchetto, 2006, p. 475).

Moral and ethical aspects, related to tax matters, do not parse only the behaviors required by the taxpayers, but also invest tax policy choices made by the legislature and by the tax authorities (Leotta, 2009, p. 43).

Ethics, from the Greek εθος (ethos, which, in the common sense, means "character", "behavior", "custom", "custom"), is the science of human conduct, «understood as conduct of the end to which tends the behaviour and the tolls to reach that end, or how to search for the motive of same conduct» (Sacchetto, 2006, p. 477; Sacchetto – Dagnino, 2013, p. 618–619; Abbagnano, 2001, p. 437 ff.).

The periphrasis, seemingly with a meaning, can be understood at least in two meanings: one "prescriptive", which considers ethics as science of order to address human conduct, as well as the necessary means to achieve it, what you can deduce from the inherent nature of man; the other "descriptive", which locates in the ethics science of human conduct, aiming to identify reasons and causes the same, through the consideration of facts and abstention from any consideration of merit (Sacchetto – Dagnino, 2013, p. 619).

The difference is obvious: prescriptive ethics presupposes the possibility of identifying moral ideas and values appropriate to assume an absolute size; descriptive ethics, instead, makes relative values, demean them in decisions or resolutions, established by human will (Sacchetto – Dagnino, 2013, p. 619).

Although in everyday language the words "ethical" and "morality" are often used interchangeably, it is, in fact, expressions do not coincide, because morality is based on social behavior, while ethics requires a reflection on this behavior: the moral is a substantial component that gives content and efficacy to norm; ethics, on the other hand, can

remedy the shortcomings of the law, appearing much less defined and circumscribed in relation to morality (sometimes gets confused with habit, use and custom) (Sacchetto, 2006, p. 475 e 481; Uckmar, 2011, p. 153 ff.; Rosenbaum, 2005).

As much as ethics and law, though disjointed at the conceptual level, cannot be separated in the factual reality (Sacchetto, 2006, p. 481; Habermas, 1992); are not miss, however, different reconstructions (Kelsen, 1960, p. 19), designed to separate legal science and ethics, considering the function of a lawyer just to identify and interpret the applicable law (Sacchetto – Dagnino, 2013, p. 620). According to this last conception (Kelsen, 1960, p. 19), legal science would deal subject only, trying to seek what is and how is the right, rather than as it should be or how it could happen: however, nothing ban the jurist to take as a yardstick of investigation, an ethical perspective, considering that, ultimately, ethical analysis may affect the substance of the legislative decisions and speeches critical of the legislation (Sacchetto – Dagnino, 2013, p. 620)

In fact, the law cannot be solved in the formal law, nor coincide with morals, being to them compared, at the same time, autonomous and connected (Sacchetto – Dagnino, 2013, p. 622, nt. 16; Strauss, 1953; Padoa Schioppa, 2007, p. 653 ff.). Not by chance, the application of ethical principles to tax matters has remote origins (Concetti, 1995; Martini, 2000, p. 51; Salvini, 2006, p. 561 ff.), which, while not sinking in the mists of time, date back to the first organized civilization: the oldest historical exhibit is found during the age of the Sumerians (about 6000 b.c.), which forbade the burial until the heirs had not fulfilled the tax liability gardner on the deceased (Uckmar, 2011, p. 154); in the Sacred Scriptures[1] we find then the well–known maxim "render to Caesar the things that are Caesar's and to God what is God's", illustrative of how taxes have always been covered with considerable impact on human history (Adams, 2007), often making from motive of revolutionary movements (think of what has happened to the American and French Revolution).

The biblical aphorism, earlier set out, identify the behavioural model which must abide by the taxpayer in the dual role of citizen, part of a community, and as a believer; this helps to connote, also of moral value, duty to pay tribute (Sacchetto, 2006, p. 476).

The fiscal policy and the foundation of the compulsory contribution to public expenditure

The obligation to contribute to public expenditure, even before legal plan, is grounded in an ethical duty, which rises when comes to be some form of common life (Sacchetto, 2006, p. 476; Forte, 2012): the people are part of an organized group, whose management inevitably involves some expense, to meet the need certain revenue, which retract in part through taxation (Holmes – Sunstein, 2000, p. 37 ff.).

In this context fits the answer given years ago, during an interview, by then Economy Minister Tommaso Padoa–Schioppa, who considered taxes a "beautiful and civilized thing, one way to help everyone along with indispensible as the health, safety, education and the environment".

The ethical analysis of law may be positive or normative: the first hypothesis is to predict the effects of legal rules and understand the consequences of application; the second is to find ethically correct solution, turning to those who, for various reasons, are taking part in legal experience (legislator, jurisprudence and doctrine) (Sacchetto – Dagnino, 2013, p. 623–624).

Anyway, despite the ethical approach, one cannot disregard respect for rule of law, even when it appears morally unjust, with the effect that the same moral viewpoint, although it can be refused, it remains strictly legal binding (Sacchetto – Dagnino, 2013, p. 624).

The advantage of reconstruction, rather than undermine the rule of law (article 23 of Constitution), with a view to "return to ethics", is found in the ethical significance, which becomes a part of the legal phenomenon, acting as a stimulus for the development of new rules of law (Sacchetto – Dagnino, 2013, p. 624).

Ethics, in fact, rather than being the daughter of the law, becomes parent (Sen, 2009; Sen, 2010, p. 369): how authoritatively argued, «the legislature is master of law, but not of jus» (Parlato, 2000, p. 222); however, often the ethical principles become part of positive law, as from the latter received through reference (Sacchetto – Dagnino, 2013, p. 632).

On the ethical level, fiscal policy (*rectius*, taxing powers) (Pontificio Consiglio della Giustizia e della Pace, 2005, p. 618 ff.) serves to make up for the deficiencies of the single in meeting alone needs: to achieve the common good each has a duty, moral and legal, to contribute to public expenditure,

by paying the taxes. The passive individual legal situations on the taxpayer is entitled to claim state tax (article 53, paragraph 1, of Constitution).

So, in this light, the tax base is essential for creating the conditions for shared prosperity: the tribute becomes an active instrument of formation and distribution of resources, enabling any taxpayer to make means aimed at ensuring welfare society (Gallo, 2009, p. 404).

The constitutional principles of tax law: subsidiarity, solidarity and progressive taxation

In the Italian tax law it is possible to identify certain constitutional principles whose ethical appears relevant: subsidiarity, participation and solidarity (Sacchetto – Dagnino, 2013, p. 634).

Subsidiarity (Antonini, 2005; Perlingieri, 2006, p. 433 ff.; Parisi, 2007, p. 974 ff.; Longobucco, 2008, p. 229 ff.), regulated by article 118 of Constitution, is the policy that regulates the relationship within an organized group, making sure that whoever occupies a top position happens only when one is placed in a subordinate position appears inappropriate (Sacchetto – Dagnino, 2013, p. 634).

The application of this principle to tax gives life to the so–called "subsidiary State", characterized by an intermediate between a liberal tax system, which locates in the tribute the consideration of public services offered to citizens and that, therefore, only with considerable difficulty can't accept the idea of a progressive tax, an expression of solidarity and social justice, and a socialist logic, that, recognizing spaces excessive to governmental power, results in increase of proportion of public expenditure, supporting her with onerous and oppressive taxes, restricting individual freedom (Sacchetto – Dagnino, 2013, p. 636–637).

Even democratic participation (direct or indirect) of individuals to public choices, especially with regard to the determination of taxes, by virtue of the principle set out in article 23 of Constitution has a moral order. Therefore, the violation of principle as well as unlawful also appears unjust; from its application, however, the need for more complete information on the payer, the simplification of the tax system to make it more transparent (Grassi – De Braco, 1999), the taxpayer's education so that it can understand the important concepts of the tax system, in order to minimize the "fiscal

illusion" (Sacchetto – Dagnino, 2013, p. 639; for fiscal illusion means the inaccurate perception of the taxpayer, the actual amount of tax burden; it can be resized or deleted through the proper information and transparency: on the topic, comp. Puviani, 1903.).

The participation of the taxpayer, despite having to be effective, must not be excessive and disproportionate in order to hinder the decisions on tax matters: in this context, is part of the article 75, paragraph 2, of Constitution, that prohibiting the referendum of tax laws (Sacchetto – Dagnino, 2013, p. 639).

The same can be made in connection with the principle of solidarity, whose foundation is found not only in articles 2 and 53 of Constitution, but even in the Aristotelian ethics (Aristotele, *Etica Nicomachea*, V, 1, 1129b, 18 ff.), which believes that social justice is implemented through the joint implementation of the common good and of the individual (Sacchetto – Dagnino, 2013, p. 639–640).

Moreover, a connection between subsidiarity and solidarity can be found in the principle of progressivity (Schiavolin, 2006, p. 151 ff), which must be based on fiscal system, pursuant to article 53, paragraph 2, of Constitution: ensure compliance with ethical principles, it must be a progressive right, namely, nor vitiated by defect, nor even to excess, that is realized when the progressiveness is not toned down to the point of losing the function of solidarity, nor accentuated so as to constitute a limit on the freedom of the citizen (Sacchetto – Dagnino, 2013, p. 641).

The dual purpose of the tax claim: the constraint and the equity value. The tax "right" and the obligation to pay the tribute

The tax claim has a dual purpose: on the one hand, restricts freedom, rights owners and the economic potential of the individual; on the other, ensures a fair distribution of wealth, the economic and social inequalities, and promotes an ethic of responsibility (Gallo, 2009, p. 404 and 408).

The protection of the person and his individual rights is to ensure a "fair taxation" (Nagel, 1991; Sen, 1997, p. 25 ff.; Sen, 2000; Arneson, 2001; Krugman, 2001, p. 7 ff.; Dworkin, 2002; Gallo, 2004, p. 39 ff.), an expression of that substantial justice aimed at achieving the common good (Turchi, 2010, p. 462).

In the social doctrine of the Church (Pontificio Consiglio della Giustizia e della Pace, 2004; Galmarini – Giarda, 2004, p. 318; Turchi, 2010, p. 461 ff.) there are other sources where you may encounter the ethical toll: according to Saint Paul[2] payment of taxes rises to obligation of conscience; Saint Augustine condemning the evasion, even if justified by a worthy purpose, as to make donations to the Church, and considers legitimate resistance to pay tributes "unjust", involving an unbearable burden; Saint Thomas, instead, in the "*Summa Theologica*" (Tommaso d'Acquino, *Summa theologiae*, II–II, q. 47, a. 10, ad. 2) processes an embryonic notion of tax, emphasizing the ethical aspect of levy, who holds the prerogative of sovereignty, aimed to achieving the common good (Sacchetto, 2006, p. 475; on the "common good", comp. Rawls, 1972).

The analysis of the relationship between morals and taxation cannot be separated from the reference to the principles of the social doctrine of the Church, contained in part III, section II, of Catechism of the Catholic Church (Leotta, 2009, p. 33–34).

The ethical character of the tax, in the various forms (tax, local tax and contribution), to be analysed from two respects: by the taxpayer, taxable entity, the ethics is justified because the same which is the subject of the services divisible or indivisible, made available to the public, should not shirk the obligation to contribute to public expenditure; from the point of view of the institution, active subject of tax levying entity, the ethical duty of the tribute to prepare a fair tax system, accompanied by a correct use of public money, tended to avoid waste, lightness, errors in public spending, corruption and undue appropriation.

Only when the tax laws elaborated a "fair tax" (Berliri, 1945; Steichen, 2002, p. 243 ff.; Bernardi, 2002, p. 585 ff.; Uckmar, 2005; Miscali, 2009.) is a moral obligation, on the taxpayer, to pay tribute (Leotta, 2009, p. 36); on the legal level, however, he will still have to comply with the monetary claim, regardless of whether it is right or not, only to seek remedies granted by law.

In other words, payment of tax payable is a moral and legal duty of each subsidiary; behaviour of tax evasion or tax avoidance[3] (Cipollina, 1990, p. 220 ff.; Lovisolo, 1989, p. 1 ff.; Tabellini, 1999, p. 545 ff.; Lupi – Sepio, 2007, p. 1 ff.; Tabellini, 1989; Tabellini, 1995; Kruse, 1994, p. 207 ff.; Tabellini, 2007; Fiorentino, 1996; Ficari, 2009, p. 390 ff.; Colli Vignarelli,

2009, p. 677 ff.; De Mita, 2009, p. 393 ff.; Ficari, 2009, p. 997 ff.; Lovisolo, 2009, p. 49 ff.; Marcheselli, 2009, p. 1988; Zizzo, 2009, p. 487 ff.; Melillo, 2010, p. 423; Pedrotti, 2010, p. 597 ff.; Parente, 2011, p. 423 ff.), although prohibited from a legal point of view, they also become immoral only when there is a just tax (Leotta, 2009, p. 43).

On the ethical level, to ensure the common good is necessary, on the one hand, pay the taxes and, on the other hand, avoid forms of waste, to safeguard the respect of the universal destination of goods and the right to private property[4]. The moral characterizes the act of subjects of tax law: the public authority, instead, characterizes the tax authority and the taxpayer (Sacchetto, 2006, p. 476).

The ethical foundation of the tax liability is found «in respect of distributive justice, administered by the authority, and that legal citizens as regards the conduct of individuals in relation to the common good» (Leotta, 2009, p. 34).

In this light, the ethical management of tax ensures to taxpayers a management of tribute thrifty and efficient to what retracts from the exercise of the power to impose taxes; in addition, the same should be allowed to participate, albeit indirectly, through their representatives in Parliament, with the preparation of tax laws.

The right of the State to levy taxes is not unlimited: deferring to the next discussion the purely legal considerations, on ethical profile, the tribute must be fair and addressed to the common good, so as not to encroach on private initiative and encourage tax evasion or tax avoidance behavior (Leotta, 2009, p. 36).

The "fair tax" presents certain particularities: first, the character of proportionality and equity, since the tax burden be distributed according to the real possibility of taxpayers, so as to realize a substantial equality aimed at treating equally unique situations and different situations differently; secondly, the tax burden should not be excessive, resulting in a confiscate tax with expropriation effects (Falsitta, 2008, p. 141 ff.; Gaffuri, 2008, p. 442), such as to compel the taxpayer substantially effects to use their assets to meet the tax liability; additionally, you must respect the principle of subsidiarity, ensuring that the management of the *res publica* can multiply bureaucracy and turn the State into a welfare office (Gentile, 2001, p. 67 ff.),

characterized by inadequate extension of the tasks of the human and financial institutions, waste of energy and increase bureaucratic structures dominated by exaggerated logic rather than by the concern to offer an efficient service; finally, the opportunity to challenge and check the tax claim, by motivating the act of taxation, the adversarial principle recognized in the process of investigation, the correct use of presumptions, the guarantee of judicial protection and transparent and prudent administration of public money, according to the canon of good paterfamilias (Leotta, 2009, p. 36–37).

Administrative transparency must be accompanied by the clarity of the policy in the economic and financial field, so as to monitor the extent of sampling, the expenditure data and the objectives pursued by the proceeds of the revenue (Leotta, 2009, p. 42). Given the part played by the tribute in the context of policies aimed to protecting and promoting the dignity of the person, it is possible to identify in transparency, simplicity and efficiency which characters allow you to believe "fair" a tax system to ensure a withdrawal right (Turchi, 2010, p. 469).

Tax ethics and functions of tax norm: acquisitive, redistributive and promotional function

Tax ethics cannot be separated from the analysis of the primary functions carried out by the tax law, identified in acquisitive, redistributive and promotional purposes (Sacchetto – Dagnino, 2013, p. 641).

The acquisitive purposes takes priority and essential in tax field, being the tribute intended to provide resources to the treasury, in order to finance public spending, aimed to pursuing the interests of the citizen/taxpayer (think of the drafting of laws, administration of Justice, public order and other public services indivisible) (Sacchetto – Dagnino, 2013, p. 642). To do so, is not recommended as much an imposition too low, as a too high: the first could undermine the principle of solidarity, the second that of subsidiarity; the best solution should be identified in practice (Sacchetto – Dagnino, 2013, p. 646).

The redistributive function (Stefani, 1999, p. 43 ff.), implemented through the principle of progressivity of taxation, aims to remove the social and economic inequalities between taxpayers, subjecting the richest for a more than proportional tax in relation to disadvantaged groups; in this way,

the tax system is no longer geared exclusively to the production of public goods and services, but also to the fulfilment of a duty of social solidarity (Sacchetto – Dagnino, 2013, p. 642).

Also with an eye redistributive are discard extreme assumptions: an overly limited redistribution would be contrary to the duty of solidarity by creating social inequality and discontent within the population; high redistribution, however, would increase public spending enormously rewarding who benefits from subsidies without contributing to social progress and encouraging, at the same time, tax evasion, tax avoidance or relocation of the affluent classes who consider such oppressive and unjust to keep people who do not work (Lupi – Turchi, 2011, p. 350 ff.); the right fit must be identified in practice (Sacchetto – Dagnino, 2013, p. 649).

Moreover, related to both the acquisitive and redistributive function is the institute's tax amnesty (Ferlazzo Natoli, 2003, p. 645 ff.), which gives rise to considerable doubts, because if to "cash" in a short time, making the new acquisition interest, compresses distribution to cancel it, arousing injustice and frustration on honest taxpayers (Sacchetto – Dagnino, 2013, p. 649).

More feature of the tax law is that promotional (Dagnino, 2008, p. 23 ff.) aimed to achieving purposes purely extra tributary, such as stability and economic development, through the provision of incentives and penalties that you encourage/discourage conducting certain activities (Sacchetto – Dagnino, 2013, p. 643).

Also facilitating or penalizing instruments should not be excessive, as it could result in an unreasonable State influence in the economy, diverting resources from profitable areas to other less profitable, resulting in infringement of the subsidiarity principle (Sacchetto – Dagnino, 2013, p. 649). Also, the ethical value of promotional rules must contend with the canons of necessity, proportionality and suitability: if the norm is not required would infringe the principle of subsidiarity, because the do not need requires that the aim pursued could be realized even without State intervention; in the absence of proportionality, the rule would be unfair to excess, going beyond what is necessary to achieve the end in charge; if the arrangement is not appropriate would be unfair to fault, because it is not in intensity and quality such that direct the choices of individuals, thus departing unnecessarily from the general rule (Sacchetto – Dagnino, 2013, p. 649–650).

The dimension of the taxing powers and constitutional boundary parameters: the principles of legality and of ability to pay. The phenomenon of self–taxation

The power to impose taxes, an expression of the State sovereignty, in modern legal systems assumes a particular dimension (Lupi, 2007, p. 633–634), being anchored to rigorous objective parameters (Bertolissi, 1992, p. 523–524), suitable to reinforce the ethical toll.

It is illustrative of the authority exercised by the State on its territory, the principal aim of realizing the common good, ensuring order, freedom and rights of the individual; the performance of that function gives the State a "moral legitimacy", founded on freedom and the sense of responsibility (Turchi, 2010, p. 462).

The foundation of *jus impositionis* has been variously rebuilt in different historical periods: during the Roman empire, through the middle ages and up to the time of absolutism, the tribute was an expression of unilateral and unconditional exercise public authority, allowing almost to him who had the power to impose any tribute, giving no account of the intended purpose and use of revenue; currently, however, the *ius impositionis* is characterized by the involvement of taxable persons, participating in the dynamics of taxation by the expression of "consent" to the imposition (Parente, 2013, p. 513).

Thus, over the centuries it has switched from rigid principle of authority to the parameter of "consent" to the imposition, with whom he intended to rebalance the structure of powers and ensuring the integrity of the individual against the will of those who exercise the *jus impositionis* (Parente, 2013, p. 513).

In the current regulatory system, taxing is bounded by two rigid constitutional parameters: the rule of law (article 23 of Constitution); the principle of ability to pay (article 53 of Constitution) (Parente, 2013, p. 514).

The two principles, closely related, surging the founding of tax policy (De Mita, 1987, p. 454), since they integrate advanced forms of protection of the rights of the taxpayer.

The principle of reservation of law (Fedele, 1978; Fedele, 1994; Marongiu, 1995; Fedele, 2005, p. 37 ff.; Cipollina, 2006, p. 163 ff.; Gaffuri, 2006, p. 23 ff.; La Rosa, 2006, p. 7 ff.; Russo, 2007, p. 39 ff.; Amatucci, 1990, p. 1 ff.) is laid down in article 23 of Constitution, which provides that «no personal or

financial performance may be imposed except in accordance with the law» (on the distinction between "personal and financial performance", comp. Fantozzi, 2005, p. 14; Lupi, 2007, p. 636–637; Fedele, 1978, p. 27; Micheli, 1976, p. 55 ff.; Tesauro, 2009, p. 18; Russo, 2007, p. 40–41; Tesauro, 1987, p. 24; Zingali, 1968, p. 700; Micheli, 1973, p. 1082; Bertolissi, 1992, p. 532; Paladin, 1991, p. 186). The term "law" wrong pertains exclusively to formal law, distinguished from the ordinary procedure of approval by Parliament (articles 70–74 of Constitution), but also to acts having the force of law, adopted by the Government, such as decree law (article 77 of Constitution) and legislative decrees (article 76 of Constitution); the use of decree laws on tax matters is circumscribed by article 4 of the Statute of the rights of the taxpayer (Law July 27, 2000, no. 212), which implementing the orientation of consolidated constitutional jurisprudence[5], held that «you cannot have with decree law the establishment of new taxes, nor provide for the application of existing tributes to other categories of persons».

The law becomes, therefore, a primary source of tax rules, governing both the institution that the implementation phases of the tribute (Fantozzi, 2005, p. 46; d'Amati, 2006, p. 7; Zingali, 1968, p. 697 ff.; Giannini, 1956, p. 22; Micheli, 1976, p. 48). In the present case, it is a relative reserve of law (Micheli, 1976, p. 48; Bertolissi, 1992, p. 527; Lupi, 2007, p. 639; d'Amati – Uricchio, 2008, p. 28), because the source of law has the task of defining the principles concerning the essential aspects and basic of matter, while the administrative authority has the power to integrate discipline, within the limits laid down by the law itself, with acts of secondary legislation (Del Giudice, 2011, p. 1019; on the difference between absolute and relative legal reserve, comp. Carlassare, 1990, p. 5–6; Casalena, 2007, p. 609; Martines, 2010, p. 386).

Therefore, the law, despite being a foundation of taxing powers, is not the only source: may not report fully regular tax and bringing to subject sources the discipline of detail items (Bertolissi, 1992, p. 528; Fantozzi, 2005, p. 47–48).

The mandatory minimum content, that should be imposed by law, consists of the elements necessary to identify the tribute[6]: the facts, taxable persons, principles of determination of rates, taxable amount, penalties. Therefore, it would be unconstitutional, for violation of article 23 of Constitution, a law which, by creating a tribute, not determine these elements and decline them to secondary legislation (Lupi, 2007, p. 639; Parente, 2013, p. 517).

The reserve of law in tax matter, underpinning the rule of self–taxation (Bartolini, 1957, p. 3 ff.), is an expression of the classical principles of liberal democracies, synthesized in Latin words «*nullum tributum sine lege*» and «*no taxation without representation*» (Parente, 2013, p. 519): the principles, of nature clearly guarantees, processed in English experience with the *Magna Charta Libertatum*[7] of John Lackland of 1215 and with the *Confirmatio Chartarum* of Edward I of 1297, have spread in the nineteenth–century liberal constitutions, allowing taxpayers to limit the taxing powers, through the expression of consent to the imposition, accomplished by representation within democratic bodies.

The *Magna Charta Libertatum* originated as a result of substantial increases, decided by John Lackland between 1204 and 1214, of the *scutagium*, a substitute tax of military service that the knights were obligated towards the King in the event that they had requested exemption from the obligation to perform military service; beside this tribute was then the *auxilium*, consisting of a pecuniary benefit that the King had the right to ask to meet the extraordinary expenses (Adams, 2007, p. 210; Sacchetto – Dagnino, 2013, p. 637, nt. 59). In doing so, was given effect to the principle, with a significant ethical, democratic participation of partners at the most important choices of society, including those relating to the tax.

Indeed, such requirement has been advised already many centuries before: for example, Aristotle in "*Policy*"[8] considered citizens who had the opportunity to take part in the Government of the *polis*, acting as director and judge and deciding in the assemblies; the same philosopher in the opera "*The Constitution of the Athenians*"[9] showed that as early as the fourth century b.c. was in force a system of indirect participation in tax matters, which today we would consider very similar to that adopted by the *Magna Charta Libertatum*.

In ancient Greece, the tributes were decided by ten parker, along with military funds treasurer and treasurer of the parties; the parker were magistrates, as holders of a public office (*magisterium*), which represented the people, being chosen by drawing lots, one for each tribe. This allowed the people's representatives to fix taxes, depending on the needs of revenue necessary to tackle the public spending (Sacchetto – Dagnino, 2013, p. 638, nt. 62).

However, initially the principle of legality in the imposition was perceived not as an instrument of democracy, aimed to giving to the taxpayers voice in politics, but in the sense that the taxes imposed without their consent took confiscatory nature, destroying the rights owners (Gallo, 2009, p. 400).

From a systematic point of view, the rule summarized in words «*nullum tributum sine lege*» does not simply express a principle of voluntary limitation of the power of the State, but behind the need that the discipline of the tax is contained in a law or another act bears the same effectiveness (Micheli, 1976, p. 49).

In the new legislative background, is net the shift from relationship authority – awe to the human compulsion: the taxable entity must express, albeit indirectly, consent to taxation, thus limiting the political power (Fantozzi, 2005, p. 45).

The system of "checks and balances"

The current fiscal system is characterized by a system of "checks and balances", imposed in order to limit the excessive power in tax matters (Parente, 2013, p. 520).

The mechanism consists of two rounds, structured in logical – chronological connection: on the one hand, citizens – taxpayers are called to elect members of Parliament; on the other, the latter, through the approval of budgetary and tax laws, has control over who holds the executive power, as once exerted on the monarch (Tesauro, 2009, p. 16; Fantozzi, 2005, p. 50; Lupi, 2007, p. 636).

Because the law is made by Parliament, the representative body of citizens, parliamentary control in the field of taxation is an expression of the normative principle whereby every public intervention on the property and the freedom of citizens can only be done by law (liberty and property clause) (Tesauro, 2009, p. 16; Grippa Salvetti, 1998, p. 17 ff.; Fedele, 1978, p. 22, 27 and 126; Parente, 2013, p. 520).

In truth, at the origins, this system could not call fair and democratic: for the absence of universal suffrage, the consensus of contributors to the tax, rather than the will of the people, symbolized the privileges and the strength of the dominant classes, each with their own deductibles

and prerogatives limited the power and slammed the arbitrariness of the monarch (Ricca Salerno, 1897 – 1932, p. 163, nt. 3).

For example, after the adoption of the *Magna Charta Libertatum*, the decision to introduce new taxes, in line with the medieval society, constituted exclusive of nobles and prelates to rank higher and certainly not of the representatives of the people, who, instead, were excluded from opportunities to participate in such decisions (Sacchetto – Dagnino, 2013, p. 638, nt. 62).

Currently, the widespread recognition of the right to vote is an instrument of control, thanks to which the taxpayer, by going to the polls, it could express its disagreement regarding economic, fiscal and spending policies made by the majority that recurs in elections (Gallo, 2008, p. 272).

In addition, due to the principle of democratic participation of individuals at public choices, citizens, besides being equipped with the right to vote, also have the right to overcome bureaucratic, cultural, legal and social obstacles to effective participation, in order to be effectively informed, listened to and involved in the exercise of public functions (Sacchetto – Dagnino, 2013, p. 638).

In our rule of law, by contrast, taxation is not only an expression of State sovereignty, but it has to be justified by law, which is the source of all personal performance or sheet, because the doctrine and case law attribute to the constitutional principle of legality (article 23 of Constitution) the function of protecting the property and the freedom of individuals to avoid the excesses of executive power in tax matters (Giannini, 1950, p. 274; Vanoni, 1962, p. 73 ff.; Amatucci, 1964, p. 10; Longo, 1968, p. 33 ff.; Rastello, 1987, p. 205 ff.; Falsitta, 2005, p. 131 ff.; Parente, 2013, p. 521)[10].

However, the top political authority, which exercises legislative power in tax matters, does not have a boundless discretion: to decide how to raise the financial resources needed to tackle the public spending, the legislature often is forced to operate purely political choices, taking account of a number of variables (asset integrity of individuals; promoting development; excellence of certain sectors of social life; caution against frauds and evasions; mediation between precision of sampling and his simplicity and slenderness) (Lupi, 2007, p. 634).

The ability to pay as a limit on the taxing powers and guarantee for the taxpayer: measurement indices.

In this context fits the second parameter limited, located in the principle of ability to pay (article 53 of Constitution) (Tesauro, 2009, p. 68), which seeks to limit the taxing rights, depending on the taxpayer's warranty (Parente, 2013, p. 522).

The legislature is not free to subject to tax any fact of life, being able to apply the tax only to cases that are expressions of ability to pay (Tesauro, 2009, p. 69; Micheli, 1976, p. 93; Santamaria, 2011, p. 51; Moschetti, 1988, p. 7): this allows you to validate the design ethics of the tribute, orienting the taxing rights, so as to hit the only expressive assumptions of wealth to meet public expenditure.

The tribute shall possess the requisite of ability to pay "to be constitutional, not to be tribute" (Tesauro, 1987, p. 6), because, for positive system tribute is only that conforms to the Constitution, then anchored to the contributory capacity (Bertolissi, 1992, p. 529; Bartolini, 1957, p. 9–10; Parente, 2013, p. 523–524).

Therefore, the ability to pay presents, at the same time, as assumed, limit and measure of taxation (De Mita, 1987, p. 455–456, nt. 1; Moschetti, 1988, p. 2; Manzoni, 1967, p. 13–14 and 73)[11], makes an impassable limitation for ordinary legislature's freedom in choosing of taxable persons, assumption and amount of the tax benefit (Micheli, 1976, p. 94; Moschetti, 1988, p. 2).

This will allow to the taxpayer to gain control over the constitutionality of tax rules, where they are contrary to the principle of ability to pay, not reconnecting that constitutional duty of share of the costs of the community to an economically assessable (Micheli, 1976, p. 94; Lupi, 2007, p. 688).

The principle has the advantage to qualify the activity taxation by reconnecting it to the needs of society: the latter, on the one hand, undergoes a deprivation of their wealth, on the other hand, takes advantage of a strengthening of the rights whose enjoyment is subject to the existence of financial resources (Bertolissi, 1992, p. 529).

In this context, the constitutional norm constrains the ordinary legislator and restricts the discretion, preventing him from typing as social behaviors that are not tax assumptions manifestation of wealth, nor economic strength (De Mita, 1987, p. 455; Parente, 2013, p. 526).

The contributory capacity denotes the suitability of the person to bear the economic burden of taxation and is aimed to identifying the extent of participation of the individual to public expenditure (Del Giudice, 2011, p. 127; Lupi, 2007, p. 687): as two sides of the same coin becomes then a guarantee for taxpayers and limit for the State apparatus (Parente, 2013, p. 526).

The principle also constitutes the audit policy of the adequacy of laws with constitutional principles and, therefore, essential for the interpretation and application of tax law (Santamaria, 2011, p. 52).

In terms of limits, fixed by ability to pay to power to impose taxes, you can check two: an absolute limit, that forces you to select, which requirements of the tax, effective and timely facts likely to manifest economic strength; a relative limit, which constrains the legislature to assume what ratio of the charge, expressed by the assumption, a principle consistent with those found in the legal system, reasonable compared with the purpose of participation in public expenditure (Fantozzi, 2005, p. 26; Micheli, 1976, p. 93).

In sum, the constitutional provision protecting two interests of equal rank: the public interest in the competition of all public expenditure, expressive of the function of solidarity; the interest of the individual to respect for his ability to pay, symptomatic of the function of constitutional guarantees of the law (Fantozzi, 2005, p. 19).

In the absence of a normative notion, in the recent past, the contributory capacity (Griziotti, 1953, p. 351 ff.; Giardina, 1961; d'Amati, 1964, p. 464 ff.; Manzoni, 1967; Micheli, 1967, p. 1530; Gaffuri, 1969; Maffezzoni, 1970; d'Amati, 1973, p. 106 ff.; Moschetti, 1973; Berliri, 1974, p. 114 ff.; La Rosa, 1981, p. 233 ff.; De Mita, 1984; Marongiu, 1985, p. 6 ff.; De Mita, 1987, p. 454 ff.; Moschetti, 1988, p. 1 ff.; Antonini, 1996, p. 274; Perrone, 1997, p. 577 ff.; Batistoni Ferrara, 1999, p. 345 ff.; Fedele, 1999, p. 971 ff.; Russo, 2007, p. 48 ff.; Gaffuri, 2008, p. 429 ff.), based on three legal arguments – the vagueness of the concept; the absolute immunity of legislative choices; the opportunity to report article 53 of Constitution to the tax system as a whole (Moschetti, 1988, p. 5) –, was depicted as a kind of "empty box" (Balladore Pallieri, 1948, p. 63; Giannini, 1950, p. 273; Ingrosso, 1950, p. 158; Balladore Pallieri, 1955, p. 370; Tesauro, 2009, p. 69; Micheli, 1976, p. 93; Fantozzi, 2005, p. 21; De Mita, 1987, p. 454; for critical remarks, comp. Maffezzoni, 1980, p. 1009; Gaffuri, 2008, p. 431; Parente, 2013, p. 527–528).

Considering that a fact is expressive of ability to pay if it is economic in nature, that is when expresses economic force (De Mita, 1987, p. 455–456, nt. 1; Giardina, 1961; Gaffuri, 1969; Lupi, 2007, p. 683), it seems reasonable to assign to the contributory capacity (Tesauro, 2009, p. 69; Gaffuri, 1969, p. 63 ss.; Zonzi, 1976, p. 2218; Lupi, 2007, p. 687; Perrone Capano, 1979, p. 83–95; for a different orientation, comp. Granelli, 1981, p. 30 ff.) the minimum meaning of economic capacity (Moschetti, 1988, p. 6; Maffezzoni, 1980, p. 1009), without identifying the ability to pay with the limited economic capacity of the subject (Parente, 2013, p. 529–530).

In fact, the ability to pay, while assuming the requirement of economic capacity, not identified with it, implying an evaluation in relation to the taxpayer's position and its ability to contribute to the public expenditure (Moschetti, 1988, p. 10; Vanoni, 1937, p. 89–90 and 94): are index of ability to pay the facts expressive of strength or economic potential, namely those who have wealth in a broad sense (Gaffuri, 2008, p. 438)[12].

However, hypothesize generically that the economic facts are expressions of ability to pay is rather an understatement (d'Amati, 2006, p. 31–32; d'Amati – Uricchio, 2008, p. 37; Gaffuri, 1969, p. 88 ff.; Manzoni, 1967, p. 73 ff.), being, however, must indicate, positive and concrete, individual economic facts symptomatic of contribution principle (De Mita, 1987, p. 457; Parente, 2013, p. 530–531).

On the point have formed different currents of thought (Gaffuri, 2008, p. 434–435): a first reconstruction (Basilavecchia, 2002, p. 292; La Rosa, 2000, p. 185)[13] has embraced a subjective notion of ability to pay, referring to the actual suitability of person to cope with the tax duty, through indexes concretely detectors of wealth; a different orientation[14] married a objective view, locating it in whatever economic fact likely to be expression, even without subjective eligibility requirement; in the middle is the thesis that processed a relative notion (Fantozzi, 2005, p. 25), as a function not only of the need for each precondition expresses economic potential, but also expresses the need to differentiate taxpayers and tributes (on the evolution of the orientation of constitutional jurisprudence in the matter, comp. Salvati, 1998, p. 507; Marongiu, 1999, p. 1757).

Among the "direct" indices of contributory capacity (Moschetti, 1988, p. 6; Cosciani, 1977, p. 393 ff.) may be counted the income (wealth

acquired) (Tesauro, 2009, p. 71; De Mita, 1987, p. 457), the heritage (wealth possessed)[15] and its value increases[16], while constitute "indirect" indexes consumption, business and transfer of goods (Tesauro, 2009, p. 71–72; De Mita, 1987, p. 457; Parente, 2013, p. 531–532).

These indexes express the attitude to the contribution, understood as a collection of events and conditions that manifest the ability to cope with the public expenditure by paying tribute (Gaffuri, 2008, p. 430).

In fact, the decision of what hit with the imposition depends on conception of the State, of its role and relations with taxpayers: a classic liberal theory focuses on proprietary rights, respect to the public interest to withdraw (on tax interest, comp. Boria, 2002), while minimizing State intervention; an egalitarian and welfare regulation approach, however, rejects the model of "minimal State", reevaluating the public interest to the levy to the rights owners (Gallo, 2007, p. 19; Gallo, 2009, p. 399).

The link between contributory capacity and person obligated: the debtor, the substitute and tax responsible.

The article 53 of Constitution, stating a principle of substantive tax law, with a programmatic significance norm, features that «everyone is expected to contribute to the public expense because of their ability to pay»: the norm does not restrict the duty insurance to citizens, but extends it to all those who, in relation to the various situations considered by the individual tax laws, are in touch with our legal system (Micheli, 1976, p. 13).

Furthermore, the constitutional enunciation, where has that "everyone" are obliged by virtue of "their" ability to pay, find the connecting factor subsisting between contributory capacity and party responsible (Moschetti, 1988, p. 11).

In short, they are required to contribute to public expenditure only holders affected by the ability to pay tribute, to the extent of such entitlement: result of semantic link between "all" and "their" place in article 53 of Constitution, each taxpayer is required to pay by reason of their ability to pay, not because of an ability to pay in whole or in part attributable to others.

This fact raises the question of the constitutionality of the figures of the substitute and the responsible of tax, hypothesis of "almost tax subjectivity" that pursuing a paramount aim of collective interest, allowing to facilitate the

assessment and collection of taxes: despite the substitute and the responsible are required to pay in connection with a people's ability to pay, the institute of recourse allows you to comply with article 53 of Constitution (Gaffuri, 2008, p. 437).

The ability to pay cannot be generalized, being limited only to taxes to ensure the cost of public services indivisible, included in the concept of sets, not even those who seek to influence the cost of public services divisible, within the concept of tax (Moschetti, 1988, p. 3–4; Maffezzoni, 1980, p. 1012; Micheli, 1976, p. 97; Granelli, 1981, p. 30–31; La Rosa, 1968, p. 51–52; Gaffuri, 2008, p. 430–431; Parente, 2013, p. 533)[17].

The constitutional provision, as is the norm on the principle of legality in the imposition (article 23 of Constitution), cannot be considered divorced from the source system and normative values, but in light of systematic and axiological interpretation, must be coordinated with legislation that recognizes and guarantees the inviolable rights of man and forces the fulfillment of the duties required by political, economic and social solidarity (article 2, paragraph 1 of Constitution), fixed on constitutional State foundation (Micheli, 1976, p. 14 and 92; Moschetti, 1980, p. 3; Santamaria, 2011, p. 51–52; De Mita, 1976, p. 338; Braccini, 1977, p. 1258; Forte, 1980, p. 28–29; Tesauro, 2009, p. 66; d'Amati – Uricchio, 2008, p. 37; Lupi, 2007, p. 689; Parente, 2013, p. 534).

In this view, the duty of every subsidiary to cope with public spending because of their ability to pay becomes a mandatory principle of social solidarity, which descends directly from article 2 of Constitution, by requiring on each member of State community to participate in needs of the community not by virtue of a commutative relationship with the State, but as a member of the community (Micheli, 1976, p. 14; Maffezzoni, 1970, p. 29 ff.; Tesauro, 2009, p. 66–67; De Mita, 1987, p. 455; Maffezzoni, 1980, 1009 ff.; Fedele, 1971, p. 27; Moschetti, 1988, p. 3; Parente, 2013, p. 535).

The value of the setting is that of giving the tribute a function of social justice, making public expenditure contribution to duty of solidarity (Gallo, 2009, p. 403).

The foundation of this theory is found not so much in a benefit that an individual receives from the State, against the fulfillment of general or special services, but as a duty of political solidarity, capable of expressing

the interest of all the creation and life of the public body (Micheli, 1976, p. 13–14; Moschetti, 1988, p. 10; Perrone Capano, 1979, p. 82–83).

In this light, the tribute not expressed the function, typically tax, to raise government revenue, fulfilling also to an extra tax task: implement the principle of social solidarity, through the use of taxation to economic, redistributive, social and extra tax purposes typically (Moschetti, 1988, p. 10; Micheli, 1976, p. 94; Tesauro, 2009, p. 67; for critical remarks, comp. Gaffuri, 2008, p. 436).

Well as the tributes with prominent extra tax purposes, such as environmental objectives (Gallo – Marchetti, 1999, p. 115 ff.; Gaffuri, 2008, p. 437; Selicato, 2008, p. 111 ff.; Uricchio, 2013, p. 731 ff.; Parente, 2015, p. 319 ff.), must comply with article 53 of Constitution, connecting to get expressive ability to pay, refer to facts that are economically significant manifestation of wealth (De Mita, 1987, p. 464; Tesauro, 2009, p. 67; Fantozzi, 2005, p. 25; Maffezzoni, 1980, p. 1023; Gaffuri, 2008, p. 435–436).

Ability to pay requirements: effectiveness, certainty and timeliness

The Constitutional Court[18], to reconstruct the scope of article 53 of Constitution, identified three requirements that must comply with the ability to pay: effectiveness, certainty and timeliness (d'Amati, 2006, p. 32; d'Amati – Uricchio, 2008, p. 37; Micheli, 1976, p. 96; Parente, 2013, p. 537).

Under the first requirement, the link between the fact that expresses ability to pay and tribute should be actual, and not apparent or fictitious, expressing the suitability of assumption with respect to the tax liability, which must be a real economic event, such as to allow the measurement of an existing income and not merely alleged (Santamaria, 2011, p. 54; Tesauro, 2009, p. 73; Fantozzi, 2005, p. 23; De Mita, 1987, p. 463; Micheli, 1976, p. 97; De Mita, 1981, p. 60; Gaffuri, 2008, p. 439; on the exemption of "minimum subsistence", comp. Moschetti, 1988, p. 9; Maffezzoni, 1980, p. 1011–1012).

Like this, the competition at public expense is based on the possession of actual ability to pay and tax eligibility: cannot, therefore, be classified as ability to pay an economic suitability not based on "real facts", but on a "basic dummy"[19] (Moschetti, 1988, p. 13).

The second requirement is closely related to the first, having ability to pay to be effective, in other words certain and current and not merely fictitious[20] (Fantozzi, 2005, p. 23).

Finally, applying the actuality parameter, the tribute should be related to an ongoing ability to pay, not even past or future: it must be when taxation occurs; in this perspective, actuality is an irreducible limit to introduction of "retroactive taxation"[21] (Fantozzi, 2005, p. 25; Tesauro, 2009, p. 75), which are unconstitutional when they lost, at the time of their application, «an appropriate relationship with the then existing wealth, but now probably spent»[22] (Gaffuri, 2008, p. 442).

In fact, the three requirements are inextricably linked: actuality is an explanation of effectiveness, which, in turn, has an affinity with the certainty requirement (Tesauro, 2009, p. 75; Parente, 2013, p. 539).

The actuality parameter excludes the possible adoption of retroactive taxation, which, having to object past situations, refer to an ability to pay current, but not passed (Amatucci, 2005; Mastroiacovo, 2005).

In fact, given the actual connection between premise and taxes also in terms of timing, the legislature cannot impose retroactive duties, as such in contrast with both the actuality principle of ability to pay, than with that of legal certainty[23] (Moschetti, 1988, p. 15).

In any case, in tax matters, the principle of non–retroactivity cannot be interpreted rigidly, being retroactive duties constitutionally legitimate when they hit past events that express an ability to pay still current[24].

In this regard, article. 3, paragraph 1, Law July 27, 2000, no. 212 (Statute of the rights of the taxpayer), entitled "temporal effectiveness of tax rules", enshrined the principle of non–retroactivity in tax matters, ruling that «except as provided by article 1, paragraph 2, the tax provisions do not have retroactive effect. With regard to periodic tributes changes introduced only apply from tax period following that existing on the date of entry into force of the provisions that provide for». Therefore, in the light of this provision, which codified, even in the field in question, the general principle of non–retroactivity of the law, established by article 11, paragraph 1, preliminary provisions to the civil code, has excluded the retroactive application of the law, if retroactivity is not expressly established[25] (Parente, 2011, p. 480, nt. 57).

The category's ability to pay, as a basic constitutional on fiscal matters, aimed to guarantee the taxpayer, can also be used as an interpretative criterion: between multiple interpretations, the interpreter has to stick to the one that face except the connection between tax and assumed (De Mita, 1987, p. 460).

The ability to pay is inextricably linked to the principles of reasonableness (Luther, 1997, p. 341 ff.; Paladin, 1997, p. 900 ff.) and tax equality, connoting ethical value of the tribute: the combination between articles 53 and 3 of Constitution implies that equal situations should be equal taxation regimes and, correlatively, to different situations an unequal tax treatment[26] (Paladin, 1997, p. 305; Micheli, 1976, p. 95; Moschetti, 1988, p. 17; Gaffuri, 2008, p. 430).

The transposition of this principle to the tax matters helps create a fair tax system, characterized by the same regulation of economic facts that express equal ability to pay and from a different discipline for situations which do not exhibit the same wealth (Tesauro, 2009, p. 78).

Therefore, identical or similar taxpayer are treated in, as far as possible, an equal or similar way, by supporting a higher sacrifice for those who demonstrate greater ability to cope with collective expenses, according to reasonably progressive criteria (Commissione Diocesana "Giustizia e Pace", 2000, p. 6).

The principle of progressive improvement models taxes on condition of individual taxpayers, guaranteeing a rational and efficient reallocation of wealth (Turchi, 2010, p. 469).

This allows to ability to pay to be absorbed by the principle of equality, guaranteeing the redistributive wealth, more noble purposes than merely corresponding: this approach made it possible to identify the basis of the tax, initially limited to the fiscal sovereignty of the State, in contribution–related duty, understood as a duty of solidarity, which corresponds the exercise, for the purpose of apportionment, a legislative power of taxation (Gallo, 2009, p. 401).

There are also anomalies, because, by releasing the ability to pay by the existence of an effective wealth on the taxpayer, it gives to legislature the power to allocate tax public loads choosing the taxation assumptions on autonomous reviews of social importance and economic virtuality (Leotta, 2009, p. 37–38.; Gallo, 2007, p. 90).

In this way, the individual would no longer be identified in *homo oeconomicus*, which includes proprietary rights, but in a political, social and moral person, inserted in an institutional and abstractly capable of competing at public expense, as holder of an advantageous position susceptible to economic evaluation, suitable to satisfy needs and requirements (Gallo, 2008, p. 270; Gallo, 2009, p. 402).

References

Abbagnano N., voice *Etica*, in *Dizionario di filosofia*, III[a] ed. updated and expanded by G. Fornero, Torino, 2001, p. 437 ff.

Adams C., *For Good and Evil. L'influsso della tassazione sulla storia dell'umanità*, Macerata, 2007.

Amatucci A., *Il procedimento imposizionale delle prestazioni tributarie nella Costituzione,* in *Rass. dir. pubbl.,* 1964, p. 10.

Amatucci A., voice *Legge tributaria,* in *Enc. giur. Treccani,* vol. XVIII, Roma, 1990, p. 1 ff.

Amatucci F., *L'efficacia nel tempo della norma tributaria,* Milano, 2005.

Antonini L., *Dovere tributario, interesse fiscale e diritti costituzionali,* Milano, 1996, p. 274.

Antonini L., *Sussidiarietà fiscale, la frontiera della democrazia*, Milano, 2005.

Aristotele, *Etica Nicomachea*, V, 1, 1129b, 18 ff.

Aristotele, *La Costituzione degli ateniesi*, II, 47.

Aristotele, *Politica*, III, 1, 1275b 19–20.

Arneson R.J., *Eguaglianza ed eguali opportunità di benessere*, in *L'idea dell'eguaglianza*, Milano, 2001.

Balladore Pallieri G., *Diritto costituzionale*, Milano, 1955, p. 370.

Balladore Pallieri G., *La nuova Costituzione italiana*, Milano, 1948, p. 63.

Bartolini S., *Il principio di legalità dei tributi in materia di imposte,* Padova, 1957, p. 3 ff.

Basilavecchia M., *Sulla costituzionalità dell'Irap; un'occasione non del tutto perduta*, in *Rass. trib.*, 2002, p. 292.

Batistoni Ferrara F., voice *Capacità contributiva,* in *Enc. dir., Aggiornamento,* vol. III, Milano, 1999, p. 345 ff.

Beghin M., *L'abuso e l'elusione fiscale tra regole "scritte", giustizia tributaria e certezza del diritto,* in *Corr. Trib.,* n. 17/2012, p. 1298 ff.

Berliri A., *Corso istituzionale di diritto tributario,* Milano, 1974, p. 114 ff.

Berliri L.V., *La giusta imposta*, Roma, 1945.

Bernardi L., *Imposte giuste, giuste giustizie e riforme impossibili*, in *Politica Economica*, 2002, p. 585 ff.

Bertolissi m., voice *Legge tributaria,* in *Dig. disc. priv., sez. comm.,* vol. VIII, Torino, 1992, p. 523–524.

Boria P., *L'interesse fiscale*, Torino, 2002.

Braccini R., *Osservazioni sulla rilevanza tributaria dei doveri economici familiari,* in *Dir. e prat. trib.,* 1977, I, p. 1258.

Carlassare L., voice *Legge (riserva di),* in *Enc. giur. Treccani,* vol. XVIII, Roma, 1990, p. 5–6.

Casalena P.G., voice *Riserva di legge (Dir. Cost.),* in *Il Diritto. Enciclopedia giuridica del Sole 24–Ore*, vol. 13, Milano, 2007, p. 609.

Cipollina S., *La riserva di legge in materia fiscale nell'evoluzione della giurisprudenza costituzionale,* in *Diritto tributario e Corte costituzionale. Studi per i 50 anni della Corte costituzionale,* (edited by) L. Perrone – C. Berliri, Napoli, 2006, p. 163 ff.

Cipollina S., voice *Elusione fiscale,* in *Dig. disc. priv., sez. comm.,* V, Torino, 1990, p. 220 ff.

Colli Vignarelli A., *Elusione, abuso del diritto e applicabilità delle sanzioni amministrative tributarie,* in *Boll. trib.,* 2009, p. 677 ff.

Commissione Diocesana "Giustizia E Pace", *Sulla questione fiscale. Contributo alla riflessione*, Milano, 2000, p. 6.

Concetti G., *Etica fiscale. Perché e fin dove è giusto pagare le tasse*, Casale Monferrato (AL), 1995.

Cosciani C., *Scienza delle finanze,* 8ª ed., Torino, 1977, p. 393 ff.

D'amati N. –Uricchio A., *Corso di diritto tributario,* Padova, 2008, p. 28.

D'amati N., *Istituzioni di diritto tributario,* Bari, 2006, p. 7.

D'amati N., *La progettazione giuridica del reddito,* Padova, 1973, I, p. 106 ff.

D'amati N., *Schema costituzionale dell'attività impositiva,* in *Dir. e prat. trib.,* 1964, I, p. 464 ff.

Dagnino A., *Agevolazioni fiscali e potestà normativa*, Padova, 2008, p. 23 ff.

De Mita E., *Fisco e Costituzione I. Questioni risolte e questioni aperte, 1957–1983*, Milano, 1984.

De Mita E., *L'anti–elusione trova una base costituzionale,* in *Dir. e prat. trib.,* I, 2009, p. 393 ff.

De Mita E., *L'influsso della giurisprudenza della Corte costituzionale sul diritto tributario,* in *Riv. dir. fin.,* 1981, I, p. 60.

De Mita E., *La illegittimità costituzionale del c.d. «cumulo»,* in *Dir. e prat. trib.,* 1976, II, p. 338.

De Mita E., voice *Capacità contributiva,* in *Dig. disc. priv., sez. comm.,* vol. II, Torino, 1987, p. 454 ff.

Del Giudice F. (edited by), voice *Capacità contributiva,* in *Nuovo dizionario giuridico. Enciclopedia di base del diritto,* VIII ed., Napoli, 2011, p. 127.

Del Giudice F. (edited by), voice *Riserva di legge [Principio della] (d. cost.),* in *Nuovo dizionario giuridico. Enciclopedia di base del diritto,* VIII ed., Napoli, 2011, p. 1019.

Dworkin R., *Virtù sovrana, teoria dell'eguaglianza*, Milano, 2002

Falsitta G., *Giustizia tributaria e tirannia fiscale*, Milano, 2008.

Falsitta G., *L'imposta confiscatoria*, in *Riv. dir. trib.*, 2008, I, p. 141 ff.

Falsitta G., *Manuale di diritto tributario,* Padova, 2005, p. 131 ff.

Fantozzi A., *Corso di diritto tributario,* Torino, 2005, p. 14 ff.

Fedele A., *Appunti dalle lezioni di diritto tributario,* Torino, 2005, p. 37 ff.

Fedele A., *Corrispettivi di pubblici servizi, prestazioni imposte, tributi,* in *Riv. dir. fin.,* 1971, II, p. 27.

Fedele A., *Dovere tributario e garanzie dell'iniziativa economica e della proprietà nella Costituzione italiana,* in *Riv. dir. trib.*, 1999, I, p. 971 ff.

Fedele A., *La funzione fiscale e la "capacità contributiva" nella Costituzione italiana*, in L. Perrone – C. Berliri (edited by), *Diritto tributario e Corte costituzionale*, Napoli, 2006, p. 1 ff.

Fedele a., *Rapporti civili,* in *Commentario della Costituzione,* edited by G. BRANCA, Bologna – Roma, 1978, p. 22 ff.

Fedele A., *Riserva di legge,* in *Trattato di diritto tributario,* edited by A. AMATUCCI, I, 1994.

Ferlazzo Natoli L., *Riforma etica, condoni iniqui*, in *Boll. trib.*, n. 9/2003, p. 645 ff.

Ficari V., *Clausola generale antielusiva, art. 53 della Costituzione e regole giurisprudenziali,* in *Rass. trib.,* 2009, p. 390 ff.

Ficari V., *Poche luci e tante ombre giurisprudenziali in materia di elusione e abuso del diritto nelle imposte sui redditi,* in *Boll. trib.,* n. 13/2009, p. 997 ff.

Fiorentino S., *L'Elusione tributaria,* Napoli, 1996.

Forte B., *Pagare le tasse è un dovere etico purché siano eque*, in *Il Sole 24 Ore*, May 6, 2012.

Forte F., *Il sistema tributario italiano,* in *Trattato di economia pubblica,* V, Torino, 1980, p. 28–29.

Gaffuri G., *Diritto tributario. Parte generale e parte speciale,* Padova, 2006, p. 23 ff.

Gaffuri G., *Garanzie di giustizia e diritto tributario: la capacità contributiva*, in *Iustitia*, n. 4/2008, p. 442.

Gaffuri G., *L'attitudine alla contribuzione,* Milano, 1969.

Gallo F. – MARCHETTI F., *I presupposti della tassazione ambientale*, in *Rass. trib.*, 1999, p. 115 ff.

Gallo F., *Etica e giustizia nella «nuova» riforma tributaria*, in *Dir. e prat. trib.*, n. 1/2004, I, p. 3 ff.

Gallo F., *Etica, fisco e diritti di proprietà*, in *Rass. trib.*, n. 1/2008, p. 11 ff.

Gallo F., *Il «pubblico» prevale sul «privato»*, in *Dir. e prat. trib.*, n. 2/2008, I, p. 272.

Gallo F., *La funzione del tributo ovvero l'etica delle tasse*, in *Riv. trim. dir. pubbl.*, n. 2/2009, p. 404 ff.

Gallo F., *Le ragioni del fisco. Etica e giustizia nella tassazione*, Bologna, 2007.

Galmarini U. – Giarda D.P., voice *Fisco*, in *Dizionario di dottrina sociale della Chiesa. Scienze sociali e magistero*, Milano, 2004, p. 318 ff.

Gentile F., *Ordinamento giuridico tra virtualità e realtà*, Padova, 2001, p. 67 ff.

Giannini A.D., *I concetti fondamentali del diritto tributario,* Torino, 1956, p. 22.

Giannini A.D., *I rapporti tributari,* in *Commentario sistematico alla Costituzione italiana,* direct by P. Calamandrei – A. Levi, Firenze, 1950, vol. I, p. 274.

Giannini A.D., *I rapporti tributari*, in *Commentario sistematico alla Costituzione italiana*, vol. I, Firenze, 1950, p. 273.

Giannini A.D., *Il rapporto giuridico di imposta*, Milano, 1937.

Giardina E., *Le basi teoriche del principio di capacità contributiva,* Milano, 1961.

Goldstein G. – Halpern J., *Ethical Consideration in Tax Practice*, in *First Annual Gerald L. Wallace – Charles S. Lyon National Tax Workshop*, Febraury 19–21, 2001, NYU School of Law.

Granelli A.E., *L'imposizione dei plusvalori immobiliari,* Padova, 1981, p. 30 ff.

Grassi S. – De BRaco S.C., *La trasparenza amministrativa nel procedimento di accertamento tributario: i rapporti tra fisco e contribuente*, Padova, 1999.

Grippa Salvetti M.A., *Riserva di legge e delegificazione nell'ordinamento tributario,* Milano, 1998, p. 17 ff.

Griziotti B., *Il principio di capacità contributiva e le sue applicazioni,* in *Saggi sul rinnovamento degli studi di scienza delle finanze e diritto finanziario,* Milano, 1953, p. 351 ff.

Habermas J., *Morale, Diritto, Politica*, Torino, 1992.

Herrera Molina P.M., *Moral tributaria del Estado y de los Contribuentes*, Madrid, 2002.

Higuera G. Udias S.J., *Etica fiscal*, Biblioteca de Autores Cristianos, Madrid 1982, p. 36.

Holmes S. – Sunstein C.R., *Il costo dei diritti, perché la libertà dipende dalle tasse*, Bologna, 2000, p. 37 ff.

Ingrosso G., *I tributi nella nuova Costituzione italiana*, in *Arch. fin.*, 1950, p. 158.

Kelsen H., *La dottrina pura del diritto*, Roma, 1960, p. 19.

Krugman P., *Meno tasse per tutti?*, Milano, 2001, p. 7 ff.

Kruse H.W., *Il risparmio d'imposta, l'elusione fiscale e l'evasione,* in *Trattato di diritto tributario – I tributi in Italia,* direct by A. Amatucci, III, Padova, 1994, p. 207 ff.

La Rosa S., *Costituzione, Corte Costituzionale e diritto tributario,* in *Dir. e prat. trib.,* 1981, I, p. 233 ff.

La Rosa S., *Eguaglianza tributaria ed esenzioni fiscali,* Milano, 1968, p. 51–52.

La Rosa S., *Principi di diritto tributario,* Torino, 2006, p. 7 ff.

La Rosa S., *Riflessioni sugli "interventi guida" della Corte Costituzionale in tema di uguaglianza e capacità contributiva*, in *L'evoluzione dell'ordinamento tributario italiano*, Atti del Convegno, *I settant'anni di "Diritto e pratica tributaria"*, Padova, 2000, p. 185.

Leotta F.F., *Tasse: XI comandamento? Spunti per una riflessione sui rapporti tra fisco e morale*, in *Dir. e prat. trib.*, n. 1/2009, I, p. 43 ff.

Longo M., *Saggio critico sulle finalità e sull'oggetto dell'art. 23 della Costituzione,* Torino, 1968, p. 33 ff.

Longobucco F. – Deplano S., voice *Finanza etica*, in *Dig. disc. priv., sez. comm.*, Aggiornamento, vol. 6, Torino, 2012, p. 380 ff.

Longobucco F., *La "questione ermeneutica" della sussidiarietà orizzontale: assiologia costituzionale e attività amministrativa*, in P. Perlingieri (edited by), *Temi e problemi di diritto regionale*, Napoli, 2008, p. 229 ff.

Lovisolo A., *Abuso di diritto e clausola generale antielusiva alla ricerca di principio,* in *Riv. dir. trib.,* I, 2009, p. 49 ff.

Lovisolo A., voice *Evasione ed elusione tributaria,* in *Enc. giur. Treccani,* XIII, Roma, 1989, p. 1 ff.

Lupi R. – Sepio G., voice *Elusione fiscale,* in *Il Diritto. Enciclopedia giuridica del Sole 24–Ore,* direct by S. PATTI, 6, Milano, 2007, p. 1 ff.

Lupi R. – Turchi A., *L'obiezione fiscale tra etica, politica e diritto*, in *Lo Stato civile italiano*, n. 4/2011, p. 350 ff.

Lupi R., voice *Capacità contributiva,* in *Il Diritto. Enciclopedia giuridica del Sole 24–Ore,* vol. 2, Milano, 2007, p. 688 ff.

Lupi R., voice *Riserva di legge (Dir. Trib.),* in *Il Diritto. Enciclopedia giuridica del Sole 24–Ore,* vol. 13, Milano, 2007, p. 633–634.

Luther J., voice *Ragionevolezza (delle leggi)*, in *Dig. disc. pubbl.*, vol. XII, Torino, 1997, p. 341 ff.

Maffezzoni F., *Il principio di capacità contributiva nel diritto tributario italiano,* Torino, 1970.

Maffezzoni F., voce *Capacità contributiva,* in *Noviss. Dig. It., Appendice,* vol. I, Torino, 1980, pag. 1009 ff.

Manzoni I., *Il principio di capacità contributiva nell'ordinamento costituzionale italiano,* Torino, 1967, p. 13 ff.

Marcheselli A., *Elusione e sanzioni: una incompatibilità logico giuridica,* in *Corr. trib.,* n. 25/2009, p. 1988.

Marongiu G., *I fondamenti costituzionali dell'imposizione tributaria,* Torino, 1995.

Marongiu G., *Il principio di capacità contributiva nella giurisprudenza della Corte Costituzionale,* in *Dir. e prat. trib.,* 1985, I, p. 6 ff.

Marongiu G., *La crisi del principio di capacità contributiva nella giurisprudenza della Corte costituzionale dell'ultimo decennio,* in *Dir. e prat. trib.,* 1999, I, p. 1757.

Martines T., *Diritto costituzionale,* 12ª ed, Milano, 2010, p. 386.

Martini C.M., *Solidarietà e fisco. Sulla questione fiscale, Giustizia e pace*, Milano, 2000, p. 51.

Mastroiacovo V., *Efficacia dal 1° ottobre per la nuova disciplina dell'abuso del diritto*, in *CNN Notizie*, 31 agosto 2015, p. 2 ff.

Mastroiacovo V., *I limiti alla retroattività nel diritto tributario,* Milano, 2005.

Mastroiacovo V., *La nuova disciplina dell'abuso del diritto e dell'elusione fiscale nella prospettiva dell'imposta di registro*, in *Riv. not.*, n. 1/2016, p. 31 ff.

Melillo C., *Elusione e abuso del diritto: tra ipotesi di integrazione ed esigenze di certezza normativa,* in *Dir. e prat. trib.,* n. 3/2010, p. 423 ff.

Micheli G.A., *Capacità contributiva reale e presunta,* in *Giur. cost.,* 1967, I, p. 1530.

Micheli G.A., *Corso di diritto tributario,* 3ª ed., Torino, 1976, p. 55 ff.

Micheli G.A., voice *Legge (dir. trib.),* in *Enc. dir.,* Milano, 1973, vol. XXIII, p. 1082 ff.

Miscali M., *Il diritto alla giusta imposta: contributo allo studio del diritto all'equa redistribuzione delle risorse,* Milano, 2009.

Moschetti F., *Il principio della capacità contributiva,* Padova, 1973.

Moschetti F., *Il principio di capacità contributiva, espressione di un sistema di valori che informa il rapporto tra singolo e comunità*, in L. PERRONE – C. BERLIRI (edited by), *Diritto tributario e Corte costituzionale*, Napoli, 2006, p. 39 ff.

Moschetti F., voice *Capacità contributiva,* in *Enc. giur. Treccani,* vol. V, Roma, 1988, p. 7.

Nagel T., *Equality and priority*, New York, 1991.

Padoa Schioppa A., *Storia del diritto in Europa*, Bologna, 2007, p. 653 ff.

Paladin L., *Diritto costituzionale,* Padova, 1991, p. 186 ff.

Paladin L., *Il principio di uguaglianza tributaria nella giurisprudenza costituzionale italiana,* in *Riv. dir. trib.,* 1997, I, p. 305.

Paladin L., voice *Ragionevolezza (principio di)*, in *Enc. dir.*, Aggiornamento, vol. I, Milano, 1997, p. 900 ff.

Parente F., *L'irretroattività della norma: un apoftegma della tradizione storica «resistente» al mutamento dei valori normativi,* in *Rass. dir. civ.,* n. 2/2011, p. 480, nt. 57.

Parente S.A., *L'elusione come categoria autonoma del diritto tributario,* in *Annali della Facoltà di Giurisprudenza di Taranto,* Year IV, Bari, 2011, p. 423 ff.

Parente S.A., *Lo* ius impositionis *tra potere autoritativo, solidarietà sociale e libertà personale*, in *Annali del Dipartimento Jonico in "Sistemi Giuridici ed Economici del Mediterraneo: società, ambiente, culture" – Università degli Studi di Bari "Aldo Moro,* 2013 – Year I, posted at *www.annalidipartimentojonico.org*, p. 513 ff.

Parente S.A., *Tax tools of environmental protection*, in M. Sitek, P. Terem & M. Wójcicka (edited by), *Collective human rights in the first half of the 21st century*, Jòzefòw, 2015, p. 319 ff.

Parisi M., *Principio di sussidiarietà orizzontale e finanza etica: due nuovi strumenti operativi per le formazioni sociali religiose?*, in *Dir. fam. e pers.*, n. 2/2007, II, p. 974 ff.

Parlato A., *Principi, tecnica legislativa e Corte costituzionale*, in AA.VV., *L'evoluzione dell'ordinamento tributario italiano*, Atti del convegno *I settanta anni di "Diritto e pratica tributaria"*, Genova, 2–3 luglio 1999, coordinated by V. Uckmar, Padova, 2000, p. 222.

Pedrotti F., *Il principio giurisprudenziale dell'abuso del diritto nell'imposizione indiretta,* in *Dir. e prat. trib.,* n. 4/2010, pt. 1, p. 597 ff.

Pellingra G., *L'imposizione tributaria attraverso l'evoluzione storica dei suoi presupposti etici e giuridici*, Roma, 1977.

Perlingieri G., *Profili civilistici dell'abuso tributario. L'inopponibilità delle condotte elusive,* Napoli, 2012, p. 38 ff.

Perlingieri P., *Il diritto civile nella legalità costituzionale secondo il sistema italo–comunitario delle fonti*, Napoli, 2006, p. 433 ff.

Perrone Capano R., *Imposizione ed inflazione,* Napoli, 1979, p. 83–95.

Perrone L., *Appunti sulle garanzie costituzionali in materia tributaria,* in *Riv. dir. trib.,* 1997, I, p. 577 ff.

Perrucci U., *La prospettiva di un fisco «etico»*, in *Boll. trib.*, n. 1/2004, p. 30–31.

Pontificio Consiglio Della Giustizia e Della Pace, *Compendio della dottrina sociale della Chiesa*, Città del Vaticano, 2004.

Pontificio Consiglio Della Giustizia e Della Pace, voice *Politica fiscale*, in *Dizionario di dottrina sociale della Chiesa*, Roma, 2005, p. 618 ff.

Puviani A., *Teoria dell'illusione finanziaria*, Palermo, 1903.

Rastello L., *Diritto tributario. Principi generali,* Padova, 1987, p. 205 ff.

Rawls J., *A theory of justice*, Cambridge, 1972.

Ricca Salerno G., *Le entrate ordinarie dello Stato,* in *Primo trattato completo di diritto amministrativo* direct by V.E. ORLANDO, Milano, 1897 – 1932, p. 163, nt. 3.

Rosenbaum T., *The Mith of Moral Justice. Why our legal system fails to do what's right. Perennial*, New York, 2005.

Russo P., *Manuale di diritto tributario. Parte generale,* Milano, 2007, p. 39 ff.

Sacchetto C. – Dagnino A., *Analisi etica delle norme tributarie*, in *Riv. trim. dir. trib.*, n. 3/2013, p. 618 ff.

Sacchetto C., *Etica e fiscalità*, in *Dir. e prat. trib.*, n. 3/2006, I, p. 475 ff.

Sacchetto C., *Riflessioni su etica e fisco rileggendo alcune pagine di Klaus Tipke*, in *Studi in onore di E. De Mita*, Napoli, 2012, p. 831 ff.

Sainz de Bujanda F., *Sistema de Derecho Financiero*, I, vol. 1, Madrid, 1977, p. 236.

Salvati A., *Sugli attuali orientamenti della Corte costituzionale in tema di capacità contributiva,* in *Rass. trib.,* 1998, p. 507.

Salvini G.P., *Sistema Fiscale ed Etica*, in *La Civiltà Cattolica*, 2006, I, p. 561 ff.

Santagata F., *Etica fiscale o fiscalità etica? Una questione ancora aperta*, Napoli, 2009.

Santamaria B., *Diritto tributario. Parte generale,* 7ª ed., Milano, 2011, p. 51.

Schiavolin R., *Il principio di "progressività del sistema tributario"*, in L. PERRONE – C. Berliri (edited by), *Diritto Tributario e Corte Costituzionale*, Napoli, 2006, p. 151 ff.

Selicato G., *Incentivi fiscali e governo sostenibile del territorio,* in AA.VV., *Uomo e ambiente. Atti del II Incontro ionico–polacco svoltosi a Taranto dal 17 al 20 settembre 2007*, Taranto, 2008, p. 111 ff.

Sen A.K., *Etica ed economia*, Roma–Bari, 2009.

Sen A.K., *La libertà individuale come impegno sociale*, Roma–Bari, 1997, p. 25 ff.

Sen A.K., *Lo sviluppo è libertà. Perché non c'è crescita senza democrazia*, Milano, 2000.

Sen, A.K. *L'idea di giustizia*, Milano, 2010, p. 369.

Stefani G., *Economia della finanza pubblica*, Padova, 1999, p. 43 ff.

Steichen A., *La justice fiscale entre la justice commutative et la justice distributive*, in *Archivs de philophie du droit*, tome 46, 2002, p. 243 ff.

Strauss L., *Diritto naturale e storia*, Venezia, 1953.

Tabellini P.M., *Elusione della norma tributaria,* Milano, 2007.

Tabellini P.M., *L'elusione fiscale,* Milano, 1989.

Tabellini P.M., *Libertà negoziale ed elusione di imposta,* Padova, 1995.

Tabellini P.M., voice *Elusione fiscale,* in *Enc. dir., Aggiornamento,* III, Milano, 1999, p. 545 ff.

Tesauro F., *Istituzioni di diritto tributario,* Vol. 1, Parte generale, 9ª ed., Torino, 2009, p. 18 ff.

Tipke K., *Besteuerungsmoral und Steuermoral*, Köln, 1997.

Tommaso D'aquino, *Summa theologiae*, II–II, q. 47, a. 10, ad. 2.

Tremonti G. – Vitaletti G., *Le cento tasse degli italiani*, Bologna, 1986.

Turchi A., *Giustizia fiscale e dottrina sociale della Chiesa*, in *Iustitia*, n. 4/2010, pt. II, p. 462 ff.

Uckmar V., *Etica e giustizia nella tassazione*, in *Dir. e prat. trib.*, n. 1/2011, I, p. 153 ff.

Uckmar V., *La cultura del impuesto*, in *Dir. e prat. trib. int.*, n. 3/2005.

Uricchio A.F., *Emergenze ambientali nell'area di Taranto: le risposte del mondo scientifico, gli interventi della legislazione d'urgenza, i possibili incentivi fiscali per le bonifiche*, in *Annali del Dipartimento Jonico in "Sistemi Giuridici ed Economici del Mediterraneo: societa, ambiente, culture" – Università degli Studi di Bari "Aldo Moro",* 2013 – Anno I, posted at *www.annalidipartimentojonico.org*, p. 731 ff.

Vanoni E., *Lezioni di diritto finanziario e scienza delle finanze,* Padova, 1937, p. 89–90 e 94.

Vanoni E., *Opere giuridiche,* Milano, 1962, vol. I, p. 73 ff.

Zingali G., voice *Legge tributaria,* in *Noviss. dig. it.,* vol. IX, 1968, p. 700 ff.

Zizzo G., *Abuso del diritto, scopo di risparmio d'imposta e collegamento negoziale*, in *Rass. trib.*, 2008, p. 869 ff.

Zizzo G., *Clausola antielusione e capacità contributiva,* in *Rass. trib.,* 2009, p. 487 ff.

Zizzo G., *Gli obiettivi della riforma e la clausola generale per il contrasto dell'abuso del diritto*, in *Corr. trib.*, 2012, p. 2848 ff.

Zizzo G., *La giurisprudenza in materia di abuso ed elusione nelle imposte sul reddito*, in *Corr. trib.*, 2012, p. 1019 ff.

Zonzi A.G., *Ma il cumulo dei redditi è davvero illegittimo?,* in *Giur. cost.,* 1976, p. 2218.

Endnotes

[1] The expression, derives from the Greek (*Ἀπόδοτε καὶ τὰ τοῦ Θεοῦ τῷ Καίσαρι οὖν τὰ Καίσαρος Θεῷ*) and translated into Latin (*Reddite quae sunt Caesaris Caesari et quae sunt Dei Deo*), is a famous phrase traceable to Jesus, which is listed in the synoptic Gospels (the Gospel according to Matthew 22,21; the Gospel according to Marco 12,17; the Gospel according to Luke 20,25) and also outside of the canonical writings, such as in the Gospel of Thomas (100,2–3) and in the Gospel Egerton (3,1–6).

[2] Comp. *Epistle to the Romans* 13,7.

[3] Moreover, tax avoidance is linked to the issue of abuse of rights, regulated by article 10 bis, law July 27, 2000, no. 212, concerning «transactions devoid of economic

substance which, while respecting formal tax rules, achieve essentially undue tax advantages» (Mastroiacovo, 2016, p. 31 ff.; Mastroiacovo, 2015, p. 2 ff.; Zizzo, 2012, p. 1019 ff.; Zizzo, 2012, p. 2848; Zizzo, 2008, p. 869 ff.; Perlingieri, 2012, p. 38 ff.; Beghin, 2012, p. 1298 ff.).

[4] Comp. *Catechismo della Chiesa Cattolica*, n. 2401.

[5] Comp. Corte Cost., 10 marzo 1988, n. 302, in *Giur. cost.,* 1988, p. 1022 ff.

[6] Comp. Corte Cost., 28 dicembre 2001, n. 435, in *Fin. loc.,* 2002, p. 193.

[7] In point number 12 of this document reads: «*nullum scutagium vel auxilium ponatur in regno nostro, nisi per commune consilium regni nostri, nisi ad corpus nostrum redimendum, et primogenitum filium nostrum militem faciendum, et ad filiam nostram primogenitam semel maritandam, et ad hec non fiat nisi racionabile auxilium, simili modo fiat de auxiliis de civitate London*».

[8] Comp. ARISTOTELE, *Politica*, III, 1, 1275b 19–20.

[9] Comp. ARISTOTELE, *La Costituzione degli ateniesi*, II, 47.

[10] In addition, comp. Corte Cost., 26 gennaio 1957, n. 4, cit.; Corte Cost., 22 marzo 1957, n. 57, in *Giur. cost.,* 1957, p. 598; Corte Cost., 8 luglio 1957, n. 122, in *Giur. cost.,* 1957, p. 1101; Corte Cost., 27 dicembre 1973, n. 183, in *Foro it.,* 1974, I, c. 314.

[11] In addition, comp. Corte Cost., 6 luglio 1966, n. 89, in *Boll. trib.,* 1966, p. 1832; Corte Cost., 10 luglio 1968, n. 97, in *Giur. cost.,* 1968, I, p. 1538; Corte Cost., 29 dicembre 1972, n. 200, in *Boll. trib.,* 1973, p. 433.

[12] Comp. Corte Cost., 16 giugno 1964, n. 45, cit.; Corte Cost., 31 marzo 1965, n. 16, in *http://www.giurcost.org/decisioni/index.html*; Corte Cost., 6 luglio 1966, n. 89, cit., p. 1832; Corte Cost., 10 luglio 1968, n. 97, cit., p. 1538; Corte Cost., 18 maggio 1972, n. 91, in *Dir. e prat. trib.,* 1973, II, p. 193; Corte Cost., 22 giugno 1972, n. 120, in *http://www.giurcost.org/decisioni/index.html*; Corte Cost., 28 luglio 1976, n. 200, in *Giur. cost.,* 1976, I, p. 1254; Corte Cost., 20 aprile 1977, n. 62, in *Giur. cost.,* 1977, I, p. 606; Corte Cost., 23 maggio 1985, n. 159, in *http://www.giurcost.org/decisioni/index.html*; Corte Cost., 4 maggio 1995, n. 143, in *Riv. dir. trib.*, 1995, parte II, p. 470; Corte Cost. n. 21/1996, in *http://www.giurcost.org/decisioni/index.html*; Corte Cost., 22 aprile 1997, n. 111, in *Giur. it.,* 1997, I, p. 476; Corte Cost., 21 maggio 2001, n. 155, in *Riv. dir. trib.*, 2001, II, p. 589; Corte Cost., 21 maggio 2001, n. 156, in *Giur. it.,* 2001, 10, p. 1079; Corte Cost., 28 gennaio – 6 febbraio 2002, n. 16, in *Giur. it.*, 2002, p. 1788; Corte Cost., 8 aprile – 10 aprile 2002, n. 103, in *Giur. cost.*, 2002, p. 853.

[13] Comp. Corte Cost., 10 luglio 1968, n. 97, cit., p. 1538; Corte Cost., 28 luglio 1976, n. 200, cit., p. 1254; Corte Cost., 20 aprile 1977, n. 62, cit., p. 606.

[14] Comp. Corte Cost., 21 maggio 2001, n. 156, cit., p. 1079, with note by R. SCHIAVOLIN, *Prime osservazioni sull'affermata legittimità costituzionale dell'imposta regionale sulle attività produttive.*

[15] Comp. Corte Cost., 22 aprile 1997, n. 111, cit., p. 476, with note by E. MARELLO, *Sui limiti costituzionali dell'imposizione patrimoniale*.

[16] Comp. Corte Cost., 30 settembre 1987, n. 301, in *Boll. trib.,* 1987, p. 1747.

[17] In case law, comp. Cons. St., 14 dicembre 1963, n. 1058, in *Riv. dir. fin.,* 1964, II, p. 166; Cass., 13 luglio 1971, n. 2247, in *Dir. e prat. trib.,* 1972, II, p. 176; Cass., 18 ottobre 1971, n. 2930, in *Dir. e prat. trib.,* 1972, II, p. 1099.

[18] Comp. Corte Cost., 12 luglio 1967, n. 109, in *Riv. dir. fin.,* 1967, II, p. 223; Corte Cost., 28 luglio 1976, n. 200, cit., p. 1254; Corte Cost., 26 marzo 1980, n. 42, in *http://www.giurcost.org/decisioni/1980/0042s–80.html*; Corte Cost., 22 aprile 1980, n. 54, in *Rass. Avv. Stato,* 1980, I, 1, p. 691; Corte Cost., n. 252/1992, in *http://www.giurcost.org/decisioni*; Corte Cost., 29 gennaio 1996, n. 73, in *http://www.giurcost.org/decisioni/index.html*; Corte Cost., 26 luglio 2000, n. 362, in *http://www.giurcost.org/decisioni/index.html.*

[19] Comp. Corte Cost., 26 marzo 1980, n. 42, cit.

[20] Comp. Corte Cost., 28 luglio 1976, n. 200, cit., p. 1254; Corte Cost., 26 marzo 1980, n. 42, cit.; Corte Cost., n. 252/1992, cit.; Corte Cost., 29 gennaio 1996, n. 73, cit.; Corte Cost., 26 luglio 2000, n. 362, cit.

[21] Comp. Corte Cost., 22 aprile 1980, n. 54, cit., p. 691.

[22] Comp. Corte Cost., 10 giugno 1966, n. 64, in *Giur. cost.*, 1966, p. 737; Corte Cost., 15 luglio 1994, n. 315, in *www.giurcost.org/decisioni/1994/0315s–94.html.*

[23] Comp. Corte Cost., 4 aprile 1990, n. 155, in *Foro it.,* 1990, I, c. 3072.

[24] Comp. Corte Cost., 23 maggio 1966, n. 44, in *Giur. cost.,* 1966, p. 737; Corte Cost., 11 aprile 1969, n. 75, in *Dir. e prat. trib.,* 1969, II, p. 349; Corte Cost., 27 luglio 1982, n. 143, in *Boll. trib.,* 1982, p. 1764; Corte Cost., 20 luglio 1994, n. 315, in *Fin. loc.,* 1994, p. 1199; Corte Cost., 19 gennaio 1995, n. 14, in *Foro amm.,* 1997, p. 1597; Corte Cost., 27 luglio 1995, n. 410, in *Foro it.,* 1995, I, c. 3074; Corte Cost., 4 novembre 1999, n. 416, in *Giur. it.,* 2000, p. 678.

[25] On the topic, comp. Cass., 2 aprile 2003, n. 5115, in *http://rivista.ssef.it*; Cass., 9 dicembre 2009, n. 25722, in *https://webrun.notariato.it/notiziario*

[26] Comp. Corte Cost., 6 luglio 1972, n. 120, cit., p. 1452.

The ethical foundation of human rights

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Abstract
For many years towards the end of the twentieth and the beginning of this third millennium the question of ethical foundations of law and of politics itself has been set aside in many areas of contemporary culture under the pretext that every claim to an objective and universal truth would be a source of intolerance and violence, and that only relativism could safeguard the pluralism of values and democracy. You can not safeguard human rights, the dignity of the person, regardless of the underlying reasons that they find their ultimate explanation and foundation, reason and justification. The latter can only be phylosofical, ethical and religious, because they are based on man's ontological structure.

Key words: *ethics, foundation, human rights.*

Introduction

For many years towards the end of the twentieth and the beginning of this third millennium the question of ethical foundations of law and of politics itself has been set aside in many areas of contemporary culture under the pretext that every claim to an objective and universal truth would be a source of intolerance and violence, and that only relativism could safeguard the pluralism of values and democracy. People are going on claiming the legal positivism that refuses to refer to something absolute, established to an objective, ontological criterion of what is right. In this perspective, the final horizon of law and of the moral norm is the law in force, which is considered just by definition, being the expression of the will of the legislator. Needless to say, such a position opens the way to the arbitrary of power, the dictatorship of the statistical majority and to ideological manipulation to the detriment of the common good value. Giovanni Paolo II, in his Encyclical *Fides et ratio*, hopes as «required a metaphysical philosophy, that is capable

of transcending empirical data in order to reach in the search for truth, to something absolute, ultimate and foundamental. This is a need, implicit both in sapiential and analytical knowledge; in particular it is a peculiar requirement of the knowledge of the moral good, the foundation of which is the supreme good, God himself» (Giovanni Paolo II, 1998, n. 83).

The error of modern rationalism has consisted in claiming to build the system of human rights and the general theory of law, considering the nature of man as an entity in its own right, to which there is no reference needed to a higher Being whose creative and ordering will the man depends on essence and action.

Modern rationalism puts the reason as the only criterion of truth, goodness, of right and claims to have absolute certainty without preconditions excluding the idea of God who manifested himself in history with Christ, in favor of a moral to follow "*etsi Deus daretur not*" putting God in parentheses. It is known in this context the formulation of the autonomy of the Kantian morality which excludes God in the philosophical reflection not to infringe upon human freedom and self-adhere to the moral good and morality itself. At this point one might spontaneously ask: who does not admit God and does not recognize that man is *imago Dei*, on what does he base the moral, human rights and dignity of the person himself? If it is true that nowadays an ever deeper awareness of the dignity of the human person has gained, his unique value, and so the respect and inviolability of his rights, it is also true that the vision of man as person is born and has established itself with Christianity, which has put the person in the center of the Christian vision of man, the image of God. Wherever man discovers the presence of a call to the absolute and transcendent, there «a ray of hope towards the metaphysical dimension of reality is opened: in truth, in beauty, in moral values, in other person's, in being itself in God» (Ibidem). Therefore, even Giovanni Paolo II warns, the great challenge that lies ahead is to «know how to take a step as necessary as it is urgent, from *phenomenon* to *foundation*. You can not stop short at experience alone; even if experience does reveal the human being's interiority and spirituality, speculative thinking must penetrate to the spiritual core and the grounding that sustains it» (Ibidem).

This is more necessary today as we witness the "crisis of meaning", the so deep crises that many people wonder «whether it still makes sense to ask about the

meaning and so you live in a total absence of meaning» (cfr. Ibidem, nn. 81–91), and all this comes from the fact that people «give up asking radical questions about the meaning and foundation of human personal and social life» (Ibidem, n. 5).

The crisis of meaning, as a crisis of the same question of meaning, the foundation of the crisis and the crisis of metaphysical thought as an access to the foundation skills also affect contemporary religious experience. The most serious problem with which we must compare today's Christianity in Europe is the nihilism, while yesterday was atheism. With the death of God, so much acclaimed by Nietzsche, came the man's death. What is envolved today, at the beginning of the third millennium is the question of meaning. The nihilism is the crisis of hope, the sense of things, of life, of existence itself; and this because it is not recognized the ethical foundation of human rights, of our being, of our living and living together, and because, the ultimate reasons that guide our lives are in crises and allow that, this can be seen as a project. In this regard Bobbio, which defines this problem of the foundation or theoretical justification «the illusion of the absolute foundation», states that can not be placed as such and that the real test of human rights today is not so much «to justify them, but rather to protect them», and that is not a philosophical problem but a political one and the only test of its validity is «the general consensus of mankind» (Bobbio, 1979, p. 29). He adds: «The absolute foundation is not only an illusion; sometimes it is also a pretext to defend reactionary positions» (Ibidem, p. 127)[1].

Protection and justification of human rights

Certainly human rights must be protected, but they also must be justified because it is not easy to separate implementation from justification. Without justification ceases to apply any reason, but a fundamental reason for their defence and for the protection of human rights; whose future among other things, is entrusted to a gradual realization of the reasons that justify them. If the latter values are not justified, but assumed, it is a sign that all values are equal and that there is not a criterion to prove the superiority or the preference of one over the others.

It is difficult to see how one can beat for the rights that are considered only as assumptions of which you can not account having a basis, conventional, contingent and therefore necessarily characterized in arbitrary way, both collective (political will), and individual (the subjective intention). So

to say that it is important not to base human rights, but defend them, it means to build them on sand. This position may be low, because human rights are founded, not by a vague cultural or emotional need, but because it is a requirement of reason. And the foundation of human rights is first of all and above all of an ethical nature, whose size is therefore not a superstructure, it is an integral part of the person, it is fundamental openness to otherness and to the mystery that presides over every relationship and encounter among human beings. Nor consciousness can be considered, by itself, the place of determination of the moral law: it needs a specific scientific and philosophical approach, which illuminates certain aspects of reality and the human condition.

The fundamental and decisive question of the foundation of human rights indicates the need to enlarge the area of our rationality, to reopen it to the larger questions of true, of good, of right, of ethics of life, in the respect of human life, individual dignity of person and then to combine together theology, philosophy and the sciences, in full respect of their own methods and their reciprocal autonomy, but also by the awareness of the intrinsic unity that holds them together. The consideration of humanity as a natural and essential subject and for this transcendental, founding human rights, give, to the same legal architecture, the shapes of the totality, unity and universality, not only with regard to the extension of the same rights, but also for their applicability.

The non neutrality of law

The legal formalism has, as a starting point, the neutrality of ethics within the law, but a theory of law is not only about what the law is in itself in order to distinguish it from non-right, but also covers a scope that is inscribed inside a practical philosophy, school and politics, both as a prerequisite and as a consequence (cfr. Viola-Zaccaria, 2002, p. 3).

Philosophers and jurists as Rosmini, Jacques Maritain (cfr. Maritain, 1952, pp. 12–18)[2], Mounier, Capograssi, Moro, Perlingieri, reject the concept of neutrality of the law because it is connected in everyday life to some great values and existential experience of people, in regard to that, Moro talks this way: «We reject this neutrality of the right face of the great problems of humanity and we believe that the right instead is qualified by its connection

with some great values, with some of the civilization data. Among these data, the fundamental is given freedom (...). And it is incredible that in an age like ours, in which you are moving towards large implementations of justice and human civilization, an era in which the man is called to give account of himself with his courageous decisions in the sense of justice, freedom and human dignity, right at this time, you can imagine the man entered, so to speak, natural, man entered into a set of data that are followed in social life, without his participation, without his choice, without a ruling, without his merit, without his responsibility» (Moro, 2005, p. 107)[3].

The person as a subject of rights, is a *prius* than sorting: is given the existence of the person who the law exists as a whole (cfr. Barbero, 1958) and let's say with Giustiniano that «(...) the law is very little if you ignore men because of which it was created» (Giustiniano, *Institutiones*, 1, 2, 12). The philosopher Rosmini will affirm that «the person has in his nature all the constituents of the law: it is therefore the subsisting law, the essence of the law» (Rosmini, 1967, p. 192). And no doubt that the research and the proclamation of universal moral standards implies a choice of a metaphysical nature, that is involving the implicit recognition that individual human beings as men are in relationships of superiority towards the society and the collective nature of any entity. This is, as Capograssi says, «the most famous concept, because older, and coincides with the spontaneous certainties of common consciousness. Supreme value is the human person and therefore inviolable end, not reducible to any way in the middle; and everything else, natural and collective, political and social, society and state are means and instrumental values for this purpose (...). With the Declaration (...) the United Nations have chosen the concept that coincides with the certainties of the human and common conscience. Here is the immense scope of the Declaration» (Capograssi, 1950, pp. 17–18).

The ethical-philosophical foundation of human rights

You can not safeguard human rights, the dignity of the person, regardless of the underlying reasons that they find their ultimate explanation and foundation, reason and justification. The latter can only be phylosofical, ethical and religious, because they are based on man's ontological structure. The real obstacle and bottom is the innate resistance of States to recognize that their

sovereignty is and should be limited not by this or that superpower, but by a superior natural and divine law. Human rights so lose their precise foundation with the negation of natural law, which in itself implies the recognition of the universality of human nature. The human rights being so abandoned to the historical contingency and, ultimately, to the will of the historical legislator, they remain a dead letter and everything remains on paper. One thing, in fact, are the Declarations and Conventions; and another is their practical, concrete, operational implementation, if international justice will not be able to establish themselves and to overlap with national jurisdictions. So if you avoid or remove the question of their foundation those statements eventually end to be axioms, even if they are of noble moral order, for which it was only possible to a practical agreement, while it was impossible to a theoretical agreement. Maritain in fact remembers, that the agreement can there be in the formulation of rights, provided that we do not ask why. Ultimately, Maritain says that «fundamental rights such as the right to existence and to life, the right to personal liberty and the right to lead our lives as masters of ourselves and of our actions, those responsible for these before God and before the law of the *civitas*, the right to pursue the perfection, of human life, the right to pursue the eternal good (...), the right to physical integrity, the right to private ownership of material goods, which is a safeguard of the person's freedom, the right to marry according to our own choice and to found a family, also guaranteed by the freedoms that are proper, the right of association, the right of each human dignity (...), all these rights are rooted in the vocation of the person, spiritual and free agent, the order of absolute values and with a superior destiny to time» (Maritain, 1991, pp. 12–13). If you deny the metaphysical knowledge, as the concept of person, it is not possible to give a solid foundation of human rights that would not have an objective foundation and solid and they would be reduced to statements of good will. For a stable and secure foundation for human rights we need a rational explanation and ethics that take them away from the variability and can be found in the natural law inherent in the human person, created in the image and likeness of God, precisely Rosmini says, the person has in his nature all the constituent of the right, since it is the "subsisting" right, the very essence of the right. So if we want that human rights are respected, and is re-established the moral and social order, so often violated in our time, we must hold fast

the conviction, as stated by Giovanni Paolo II, that they can not ignore the ethical foundation and natural law given by God to the men. In fact the natural law, as it regulates human social relationships is defined as "natural right" and as such requires complete respect for the dignity of individuals in the realization of the common good. An authentic conception of natural law, understood as the protection and inalienable dignity of every human being, is a guarantee of equality and real substance to those human rights that have been placed at the foundation of international Declarations. Human rights, in fact, should be related to what man is by nature and by virtue of his dignity not to the expression of the subjective choices of those who are able to participate in social life and those who get the consent of the majority.

Just in the Encyclical *Evangelium vitae*, Giovanni Paolo II denounces the serious danger that this false interpretation of human rights, such as rights of the individual and collective subjectivity, dropped by reference to ethics and truth of human nature, can lead democratic regimes to turn into a substantial totalitarianism (cfr. Giovanni Paolo II, 1995, nn. 20–21).

References

Barbero D., *Sistema istituzionale del diritto privato italiano*, I, Torino 1958.

Bobbio N., *Il problema della guerra e le vie della* pace, Bologna 1979.

Capograssi G., *Introduzione e dichiarazione universale dei Diritti dell'uomo,* Padova 1950.

Di Blasi F., *Dio e la legge naturale*. *Una rilettura di Tommaso d'Aquino*, Pisa 1999.

Giovanni Paolo II, *Evangelium vitae*, Roma 1995.

Giovanni Paolo II, *Fides et ratio*, Roma 1998.

Giustiniano, *Institutiones,* in *Corpus iuris civilis*.

Indellicato M., *Il fondamento etico-sociale del diritto nel pensiero di Aldo Moro*, in AA.VV., *Aldo Moro e l'Università di Bari. Fra storia e memoria*, Bari 2016.

Indellicato M., *La centralità della persona nel pensiero di Jacques Maritain*, Lecce 2009.

Maritain J., *I diritti dell'uomo e la legge naturale*, Milano 1991.

Perlingieri P., *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, Napoli 2006.

Rosmini A.. *Filosofia del diritto,* a cura di R. Orecchia, Padova 1967, vol. I.

Viola F.– Zaccaria G., *Diritto e interpretazioni*, Roma-Bari 2002.

Endnotes

[1] In the fifth chapter of the same work, entitled *Present and future of human rights*, Bobbio said: «The problem that is before us, in fact, is not philosophical but legal, is wider political sense» (Bobbio, 1979, p. 131), and again: «It can be said that today the problem of the foundation of human rights, adopted by the general Assembly of the United Nations on 10 December 1948. The universal declaration of human rights represents the manifestation of the test where a system of values can be recognized, and this test is the general consensus about its validity. The giusnaturalismi would talk of "consensus omnium gentium" or "humani generis" [...]. It's a foundation, the historical consensus that can be fatally tried. Well, the Declaration of Human Rights can be hailed as the greatest historical evidence that has ever been given, the "consensus omnium gentium" about a certain system of values» (Ibidem, pp. 133–134). Cfr. on this subject also Di Blasi, 1999, pp. 32–38.

[2] Cfr. also on this subject Indellicato, 2009, especially Chapters I and II.

[3] For a discussion of the ethical and social conditions of the law allows me recognize Indellicato, 2016, p. 107. The lawyer Perlingieri says that in the configuration of modern legal systems, the human person, as a priority value, is the cornerstone of the team regulated directions and ensures unity (cfr. Perlingieri, 2006, p. 717).

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Abstract
Nowadays one of the most difficult and controversial issues is the diversity of the status of women in Islamic and Western legal culture. However, the range of Muslim women's rights depends on the level of orthodoxy in particular Islamic states. Moreover many Arab women are aware of their inferiority to men in the family and in the society and try to alter this state of facts, on the other hand many of them still do not realise that they have privileges resulting from being an independent individual.
It must be stressed that at the turn of the XIX century in Muslim society the emancipation movement evolved which enhanced women's status in their culture. Muslim feminism opposes humiliating, cruelty, and sex discrimination practices which are based on tradition.
Muslim feminism is not Islamic feminism (though both belong to the group of religious feminism). The first, fights for discontinuance of constant depreciation of women, it reflects on the position of women in the Islamic society. These activities are at the level of the Koran, hadiths and law. By contrast, Islamic feminism does not question sharia, but it demands equality for women in the scope of religious practices, e.g. participation of women in public prayers.

Keywords: *Muslim feminism, Islamic feminism, feminism, emancipation movement, women's rights, fights for women's rights, Muslim society, the role of women.*

Introductory remarks

In the XXI century one of the most difficult and controversial issues is the diversity of the status of women in Islamic and Western legal culture.

The range of Muslim women's rights depends on the level of orthodoxy in particular Islamic states. However, at the turn of the XIX century in Muslim society the emancipation movement evolved which enhanced women's status in their culture.

Muslim feminism opposes humiliating, cruelty, and sex discrimination practices which are based on tradition.

Polygamy, forced marriage, female genital mutilation, punishing women for being raped, differential access for men and women to health care and education, unequal rights of ownership and assembly, and political participation, unequal vulnerability to violence. These practices and conditions are standard in some parts of the world.

Nevertheless, according to a statement by one of Muslim sociologists from Kuwait – Mohammad Al-Ruimaihi, Arab societies do not differ considerably from any other society, especially if the subject matter of a researcher regards the issue of women. He claims that many Arab women are aware of their inferiority to men in the family and in the society and try to alter this state of facts, and that many of them still do not realise that they have privileges resulting from being an independent individual. Invariably, there are no real initiatives to encourage Arab women to broaden perspectives of their own perception and to increase their social status (Brzezińska, 2011, p. 130).

The impact of Islam on the status of women

During the pre-Muslim times law of citizens of Arabia constituted a system of common law, including moral rules and rights known as sunna – drga, a way of conduct, which arose from a centuries-old position of the ancestors. It is worth stressing that in the pre-Muslim époque women were totally objectified.

They did not have the right to choose a husband, and after marriage they became part of the husband's possessions. In certain tribes which lived in the Middle East and Africa women were part of inheritance after the deceased husband. The lifestyle of the then societies, which was full of numerous fights, caused a decrease in the number of men, which was conducive to unlimited polygamy (Bielawski, 1995, p. 107). The status of women was so undervalued that new-born babies of female sex were at the mercy of their fathers, who could decide whether to bury the child alive after the birth.

The jurisdiction of Islam considerably improved the situation of women. In the tradition of the Prophet Mahomet women were not treated as

individuals who were totally subject to men's will. It is proved by the fact that when the first wife of Mahomet – Chadi-jah became a widow during her first marriage she dealt with trade and was very wealthy. She took the prophet for her husband. His last wife Aisha, after his death ran a political activity (Bury, Kasprzyk, 2007, p. 135).

Together with the death of Muhammad (8 June 632) developed caliphate which had authority – both political and religious – in the country. The activity which was started by caliphs in the later stage of their ruling (controlling everyday life of Islamists, over-interpretation of the Koran, broadly understood sexism) led to the incorporation of all forms of subordination of women to men. Islam changed into a political ideology (the so-called Islamism), whose aim was to fully control the life of an individual (N. Rani Junik, http://multiculticlub.com/kobieta-w-islamie-feminizm-islamski-a-feminizm-muzulmanski/ 1 czerwiec 2016).

The word "Islam" comes from the Arabic word *aslama* – submit, thus Islam means total and unlimited submission to the will of God. The legal culture of Islam, similarly to the whole normative culture of Islam is an integral ingredient of monotheistic religion of Islam manifested by Allah to the founder of this religion – Mahomet (Muhammad Ibn Abd Allah), who acted in Arabia. Islam as legal culture besides religious obligations also includes moral and legal standards which constitute the basis for the organisation of social, economic and political life of Muslims. As a result of which, religious matters interweaved, in a unique manner, with moral and legal matters (Tokarczyk, 2012, p. 209-210).

That is why the words of the Koran which say: "Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth. So righteous women are devoutly obedient, guarding in [the husband's] absence what Allah would have them guard." (Koran surah IV line 34, Bury, Kasprzak, 2007, p. 134) are interpreted by Muslim jurists in a way which orders women to submit to men. As a consequence, in Muslim culture there is no difference between religion and law, the role of women is marginalised in every sphere. The lack of protests by Muslim women is justified by the existence of some kind of relation between society and individuals which uses force (Ferenc-Kopeć, 2012, p.133).

For ages the situation of women in the Arabian Peninsula and in other parts of the world was similar. However, at the end of the XIX century women in Europe and North America started fighting for their equal rights in their family and social, political and economic lives. Nowadays, at least formally, within the western civilization women's and men's rights are equal.

The battle for women's rights in some cultures is very hard because the inferior position of women in a particular society is treated as welfare that should be protected against western influence. Most of non-European cultures are still strongly patriarchal and based on discrimination or often violence against women. The inferior position of women results from a belief in inferiority, impurity and weakness of women (Bobako, 2010, pp. 208–209 and 212).

The Islamic culture still preserves a huge diversity of social roles depending on sex. The basic role of women in the Muslim society is the role of a mother, a housewife and a housekeeper. The submission of women to men is related to the institution of marriage which plays an important role in Islam. Still it is the original cell of the society which is related to many roles such as:

- procreation, consisting in having and raising children
- social, consisting in providing care to ascendants and people who require such care, for example disabled, orphans, penniless
- economic, consisting in providing for the wife (wives). Marriage contract (akd az-zawad) in Islam is a typical civil contract (Witkowski, 2009, p. 89–90).

The responsibility for the family is entrusted with men. Men are also responsible for providing for the family (Bury, Kasprzak, 2007, p. 134). Hence, men play the role of the head of the family and the only participants of the public life. Women are not present on the public forum and limit their activity to the frame of private life. Men have the authority and consequently, they have political and military duties. In Muslim countries the position of women was so low that for a long time women were not even accounted for in statistics regarding the number of citizens. Islamic law until this day has held the rule that testimony of two women is equal to a testimony made by one man (Tokarczyk, 2012, p. 212).

The birth of Muslim feminism

Feminism is the movement fighting for women's interest. Muslim feminism is not Islamic feminism (though both belong to the group of religious feminism). The first, fights for discontinuance of constant depreciation of women, it reflects on the position of women in the Islamic society. These activities are at the level of the Koran, hadiths and law. By contrast, Islamic feminism does not question sharia, but it demands equality for women in the scope of religious practices, e.g. participation of women in public prayers (N. Rani Junik, 2015).

However, we should pay attention to certain difficulties in using terms which function in European and American legal culture for the Arab world. Orientalists deal with the subject matter of Arab women not hesitating to use the phrases "feminism" and "feministic" to describe organised emancipation actions in this region, as the main reason giving – apart from the argument about negative emphasis of the term by the western culture – the fact that few Arab (Muslim) female activists call themselves feminists. As it is stressed by many researchers the term "feminism" is treated as the next product of unfriendly, often hostile and rotten western culture (broadly taken), which commonly evokes pejorative associations with the period of colonisation, the phenomenon of progressing westernisation, moral corruption and consumerism, which are attributed to western societies. That is why, there exists the term *gender activism* with a less emotional note. Nevertheless, feminism understood and used in a broad context means awareness of various types of limitations imposed on women due to their sex (Brzezińska, 2011, p. 132).

"The woman question" in Muslim societies has been raised since the nineteenth century by European travellers and diplomats. The rise of anticolonial and nationalist movements put Muslims in a difficult situation. More often Europeans morally justified the attacks on Muslim societies trying to transfer western legal-human models and standards to Arab context. Muslim women who acquired feminism consciousness were under pressure to conform to anticolonial and nationalist values. They have to choose between their Muslim identity and their fight and their new gender awareness. Contemporary Western feminists could criticise the patriarchal elements of their own cultures and religions in the name of democracy, modernity and liberalism (Mir-Hosseini, 2006, p. 639).

The first signs of Muslim feminism occurred in the 1920's. However, these were only single voices of single women. Married women for fear of strong arms of their husbands preferred to remain silent; what is more, they tried to hash those women who talked too much. Feminists operating on the territory of Egypt tended to overthrow common law (*urfu*), which in its severity swerved from the basic rules of Islam. The cradle of feminism in the circle of Muslim culture is Egypt – due to the fact that this country has the longest emancipation tradition, the women's movement originated here. The first individual women organisation was created in 1923 – Egyptian Feminist Union (from 1944 Arab Feminist Union). A milestone in the process of the development of the feminist movement in the Middle East constituted the act of symbolic unveiling in a public place by two activists Huda Sha`rawi, and Saiza Nabarawi. Some of the postulates executed by Huda Sha`rawi were fight for full civil rights for women, including the right to passively and actively participate in elections, the fight for unlimited access to all forms and levels of education, the possibility to work in a selected profession and freedom to participate in collective prayers in the mosque. Here, another form of emancipation activity in Egypt is worth-mentioning, which is personified by Zajnab Al.-Ghazali. In 1936 she founded her own organization – Muslim Women's Association, whose activity included various forms of social aid, especially for poor families, organising classes in the scope of religious studies, running orphanage and support in finding jobs for the unemployed. Soon after that, not without hesitation Zajnab al-Ghazali decided to bond with a movement founded in 1928 by Hasan al-Banna – the Muslim Brothers. Within the scope of this initiative together with the Muslim Sisters she continued her charity activity, but also strengthened her propaganda and education activity which regarded political and religious issues to publicise knowledge of the Koran, traditions and Islamic law (Brzezińska, 2011, p. 136).

Only in 1980's Muslim feminism became more significant. One of the intentions, which were stated by the members of the movement, was to raise awareness among feminists from the West that the fight for the privileges of Muslim women in their presence, at the same time excluding them from any debates, creating a picture of a woman who cannot utter a word in anyway, destructs the situation of women who are subject to Islamic laws. The second

postulate was the attempt to prove to the Muslim society that Islam is a religion preaching equality of men and women (N. Rani Junik 2015).

A question arises – why the Western feminist movement does not engage in the issue of treating women in the Islamic culture. An interesting answer is given by Sabrina Deep who refers to political and religious arguments. According to her, "there is no room for power and political agendas in Islam for Western feminists. It's a religion and if you embrace Islam seriously, you embrace hijab and other amenities which are a fundamental part of the Islamic credo. The Western feminist movement is notoriously leftist and when it comes to Islam, the focus cannot be put only on how women are treated, but also on what Islam represents in relation to white supremacy, an argument which is another battle horse of the leftists. The leftists say that there are different interpretations of Islam and that the Islam who treats women bad – or what they like to call radical Islam – is the result of centuries of white supremacy. In other words, the Western feminist movement believes that radical Islam is the natural consequence of centuries of bad Western male specimen's behaviour and finding itself torn between condemning violence against women and attacking a product of naughty white males in doing so, they prefer to do like Pontius Pilate and wash their hands, remaining more silent than not" (Deep, https://www.quora.com/Why-are-western-feminists-silent-about-how-Islam-treats-women, accessed on 1 May 2016).

In the context of Islamic feminism we cannot forget about the role of Qasim Amin, who was an Egyptian born to a conservative family, under the influence of French world-view he wrote two revolutionary, for the customs at that time, works: "*Tahrir al-mara* (Emancipation of women) and *Al-Mara al-jadida* (New woman). The author defined the status of an Egyptian woman as very low, mean, and non-humanitarian. Nevertheless, his works were the subject of criticism from Muslim feminists who accused him of exalting liberated and immodest lifestyle of European women over pious Muslim women.

More contemporary activity worth-noting is the one run by Ziby Mir-Hosseini -female Koran expert living in England, who derived rights of women straight from the Koran and the theologian Rebeyha Moller, who described her conversion, as feminist, from the Catholicism into Islam and

estimates the issue in this religion that it presupposes a mature believer. She identifies herself as Islamic feminist (Busch, 2012, p. 74–75).

Ziba Mir-Hosseini pays attention to inconsistencies between what Muslim jurists claim and all Muslims believe about justice and equality in Islam principles and the sharia and rights of men and women in practice. She stresses the fact that Islamic jurisprudential texts treat women as second-class citizens and place them under men's domination. As Iranian women she strongly supported the 1978-1979 revolution and believed in the justice of Islam.

The example of contemporary Iran perfectly illustrates the variety of feminism in the circle of Muslim culture. The situation of women in this country should be presented by dividing the period of time into the reign of Pahlavi Shah and the times after the revolution of 1979, since when the Republic of Islam has existed. Reza Shah Pahlavi within his White Revolution tried to Europeanise Iran; taking as role model western democracies he made the emancipation of women one of the slogans of his governance. He banned women from wearing chador and covering hair in public places. The effect was twofold – the most religious families forbade their daughters to leave houses, and those more liberal took advantage of secularisation and followed the western fashion. In 1963 women gained the right to vote in Iran, several years later they started to work in the judicial national system. Despite the changes, among the protesting against the governance of the Shah just before the revolution there were 30% of women – the majority of whom probably were forced to do it by their fathers or husbands, other women, in turn, protested deeply believing that revolution would execute left wing assumptions about breaking the barriers and equal society. However, the Islamic revolution did not meet the women's expectations, and their situation after 1979 deteriorated. The Constitution of the Islamic Republic of Iran of 1979 assumed equality of sexes – Article 20 says:" All citizens of the country, both men and women, equally enjoy the protection of the law and enjoy all human, political, economic, social, and cultural rights, in conformity with Islamic criteria.", Article 21 says:" The government must ensure the rights of women in all respects, in conformity with Islamic criteria (…)". The Constitution theoretically assumed equality of sexes but there is a loophole in the form of words "in conformity with Islamic criteria".

And so Mullahs who took over the power in the country after the revolution ordered women to wear chador, a restrictive vice squad was created, two women who were members of the parliament during the governance of Shah were sentenced to death, and women were abrogated from judicial positions. Women in buses had to sit at the back, they could not walk the streets unattended, they could not rent a hotel room, nor buy an airline ticket. On the other hand, women have access to education, at present they constitute approx. 60% of students; there are a few women who are members of the parliament. After taking over the authority by fundamentalists who made their own interpretation of sharia, women became a second-class citizens (Bojarska, 2011).

At present, Ziba Mir-Hosseini and other activists from Iran draw attention to the rise of a popular reformist movement in Iran and the wider emergence of a new gender discourse. They stress, however, that what for the western world is the embodiment of enslavement of women and oppression, vividly represented in their all-enveloping cover, the chadri, or burqa is deeply based in tradition and family law largely accepted by women (Mir-Hosseini, 2006, pp. 629–630).

Postulates of Muslim feminism

In 1997 Muslim intellectuals primarily from Iran and South Asia published "A Declaration of the Rights of Women in Islamic Societies" (A Declaration of the Rights of Women in Islamic Societies" [in:] "Middle East Quarterly" 1997, vol. 4, no. 4, and pp. 83-84). In the preamble of this declaration it is stressed "that the oppression of women is a grave offense against all of humanity and that such an offense is an impediment to social and moral progress throughout the world". Feminists also paid attention to the source of women discrimination and the concepts of subordination of women to men referring to orthodox and fundamentalist religions. According to them these religions were devised and enforced by men who claimed divine justification for the subordination of women to men. That is why we cannot forget that the three Abrahamic religions of Judaism, Christianity, and Islam, with the Old Testament, the New Testament, and the Koran as their respective holy texts, consider women inferior to men: physically, morally, and intellectually. As a matter of

fact this declaration is not only aimed at practices discriminating women and traditions originating from Islamic culture and religion. In the preamble the problem of Islamic radicalism is taken into consideration in all Muslim countries, also in nominally secular India, which refused to recognise women as full, equal human beings who deserve the same rights and freedom as men.

The postulates of Muslim feminists refer to the postulates which at the beginning of the 20th century were proclaimed by feminists from the western civilisation. They paid attention to such issues as: expectations regarding women to marry, obey their husbands, bring up children, stay at home, and avoid participation in public life. Indicated was the lack of free choice in all walks of life and the fundamental right of autonomy, prohibition to acquire education, prevented from getting a job, and thwarted from exploring women's full potential as members of the human community in many Islamic societies. A reference was made not only to Arabic countries but also to Islamic societies living in secular countries in Europe and other parts of the globe.

Striving for improving the faith of women in the Muslim culture the creators of the Declaration created a catalogue of rights and freedoms of women. The catalogue states the following:

- equality.
- freedom of action,
- freedom to travel alone,
- permission to uncover her face,
- right to the same inheritance rights as a man,
- ban on gruesome ritual mutilations of her person,
- right to freely marry a man of her own choice without permission from a putative guardian or parents, including the right to marry non-Muslim
- right to divorce and be entitled to maintenance in the case of divorce,
- equal access to education, equal opportunities for higher education, and be free to choose her subject of study,
- freedom to choose her own job and be allowed to fully participate in public life – from politics and sports to the arts and sciences,
- attribution of human rights as those guaranteed under International Human Rights legislation.

It should be noticed that some infringements of women's rights in the Islamic culture do not result from Islam, as for example gruesome ritual mutilations, but from tribal believes, within which peoples adopted to Islam their rituals from the pre-Islamic period. In Islam the order to cover all parts of the body, which may cause the reaction of the opposite sex, regards both women and men. In force are also strict rules regarding the segregation of sexes, with the openness of the right of Islam to human corporeality exclusively in marriage (Dziekan, 2007, p. 95).

In Saudi Arabia, Nigeria, and Iran the punishment for adultery is stoning and regards, in practice, only women, despite the fact that the Koran clearly defines that the obligation to observe fidelity regards both the wife and the husband. Moreover, in the Holly Book of Islam the form of punishment is not precisely defined, hence this both primitive and old-fashioned manner of killing started to be used on the territory of the Middle East. It is worth-remembering that these practices are deeply-rooted in the tradition of the inhabitants of those regions and not in the religion. It is also proved by one of the passages of the Bible which describes an attempt to stone Marry Magdalene for adultery (Rani Junik, 2015).

The postulates of Islamic feminists are unfortunately in opposition to the views which are proclaimed by Islamic jurists. Similarly to the western culture, the law of nature is regarded as the perfect legal order, whose basis constitutes general rules of validity and fairness, in the same way Muslim law is considered by Islamic jurists as an ideal and perfect legal system. To live according to this law, in their opinion, means to live perfectly (Bielawski, 1995, p. 100). The interpretation of this law made by particular members of the Muslim community justifies many cruel practices used against women. Of course, there is a question of ethics whether Allah desired it or is it the need of men who freely interpret the Koran at their own discretion.

We should not also forget that the situation of women is especially difficult in countries where Islamic fundamentalists came to power who refer to patriarchal traditions and try to enforce in the society complete subordination of women to fathers and husbands. The fundamental stream for the sake of its ideology freely interprets the law and the tradition of Islam (Bäcker, 2004, p. 84).

In this context certain doubts are raised by the influx of new migrants to Europe who stay with their cultural identity. It is commonly known that migrants from Arab countries have difficulties with assimilation with the host societies (Trejnis, 2012, p. 214). The main source of tensions and reluctance from the local people in relation to this group of migrants is the status and rights of women and the fear that these standards may spread in Europe as a result of acceptance of cultural difference of Muslim migrants.

In contrary to assimilation the concept of integration in the EU immigration policy does not require migrants to give up their own cultural identity and indigenise. It was limited to accepting civil rights and duties. At the same time Euro-Islam, as the idea of Muslim minority functioning peacefully in European countries, requires cultural adjustment based on religious reforms. The Europeanisation of Islam and Muslim migration demands the release from jihad and sharia and accepting the values effective in admitting countries (Tibi, 2006, pp. 14-16) Unfortunately, according to specialists of Islam culture reforming Islam is going to be very difficult and distant if not impossible. Due to the lack of the main leadership in Islam, even with Muslim jurisprudence influence, numerous minorities in Europe and America are not willing to change their practices which could contradict the fundamental sharia values (Dziekan, 2006, pp. 20-21)

Moreover, R. Tokarczyk indicates that the change in broadly understood social changes is at odds with the deepest sense of Islam. This sense boils down to embedding, if it is possible for all times, the idea of Islamism and political practice based on it. Currently, we can observe changes happening under the impact of fundamentalism – coming back to the tradition breached by western influences which should be referred to as reaction changes (Tokarczyk, 2012, p. 214).

The role of Islamic feminist movement in the process of introducing changes in law and practice of Arab countries

Nowadays, feminist activity can be divided into two streams. The first, reflects Muslim women who want to express their identity through religion by having the possibility to self-interpretation of the Koran and naming their needs in accordance to their faith. The second stream of Muslim feminism is concentrated on ideas not necessarily that close to the Koran's point of view

on women's role in gaining identity rights with rights that are possessed by western women (D. Ferenc-Kopeć, 2012, p. 133).

Without a doubt the contribution of Islamic activists into women's rights is that Muslim women become aware, to a greater degree, of the need to fight for their own rights. However, the Muslim faith is so deeply-rooted in the society that a special type of feminism was created, called Islamic feminism. The credo of Islamic feminism says: "Allah treats all people equally. The underprivileged position of women in the Muslim culture results from incorrect interpretation of religious rules." Feminists from this stream are women of deep faith who desire to obey all rules imposed by their religion. They believe that it is not the Koran which specifies the inferior position of women in the society, but the incorrect interpretation of its stipulations by theologians. Among women activists for the rights of women in the Islamic culture we can identify the above-mentioned streams, which can be defined as secular feminism and Islamic feminism. The first group refers to western ideals of equality, regardless of factors such as sex; it fully rejects the interpretation of the inferior position of women which is imposed by Islam. The latter, Islamic feminists, as it was previously stated, looks for the sources of equality among men and women in the religion itself. Despite intelligible reasons for feminist fight and growing popularity of these ideas, we can risk a statement that Muslim feminism is weak. There are a few reasons for this state of fact. Firstly, secular feminists have a problem with reaching common Muslim women for whom Islam is absolutely undisputed. In turn, the weakness of Islamic feminists whose theses could be more convincing for wider masses of women results from the lack of acclaimed women theologians who could make the necessary interpretation of rules of Islam so that they could be accepted in wider circles of the society. Thirdly, we can notice significant reluctance of men to the idea of the emancipation of women, unlike in the West, where many men support the ideas of feminism. First and foremost, it results from a very long and deeply-rooted, in the collective consciousness, concept of superiority of men and their dominant role in the family (Bojarska, 2011).

That is why, there is a fear that actions undertaken by Islamic feminists for many years will remain just empty postulates without the will for their execution.

Final remarks

Without a doubt, Islam is used to justify patriarchal customs referring to women. However, we should remember that there is more than one opinion or interpretation of the Koran. The holy texts, and the laws derived from them, are matters of human interpretation. That is why so many horrors and abuses are committed in the name of Islam and use sharia as an ideology (Mir-Hosseini, 2006, p. 632).

The equality of men and women in the society is not possible without redefinition of oppressive relations in the private sphere, and thus reaching into the sphere, where cultural practices are deeply-rooted and bond with the most personal emotions of an individual, at the same time constituting the basis for their identity (Moller Okin, 1999, p. 4). In simple words, in Europe the protection of cultural distinctness of migrants from Arab countries cannot justify the inferiority of women. In this context multiculturalism is at odds with the postulates of the feminist movement.

The women's rights should be universal, even if this idea is considered in circles of Islamic fundamentalists as imposed by the Western part of Muslim society. Pointing to respect for tradition and culture of a given society creates a certain abuse used to justify psychological, economic and physical violence against women. As stressed by Osiatyński the idea of human rights is more of moral than legal nature. Thus, human rights are universal moral rights of a fundamental character which belong to everyone in their relations with the country and any other authority which can use coercion against such individuals. Human rights are innate and belong to a human as such due to his/her nature from the moment of their birth (Osiatyński, 2011, p. 23). These rights are innate, even if as a result of upbringing, fear or lack of awareness of their rights an individual agrees to breach them. The acceptance of violence does not justify violence. That is why, the western civilisation should support the activity of emancipation movements in Muslim societies by all available means, starting from financial support enabling to extend the activity of Islamic feminists, through educational activity in the Islamic society to political activity. There has not been even one social change both difficult and full of traditions and habits which would take place quickly and painlessly, but we cannot assume that this change is impossible. We should remember that not long ago in Europe the situation of women in social,

political and family walks of life was not much better than the situation of women in Muslim countries nowadays.

References

Bäcker R., Islam: między fundamentalizmem a totalitaryzmem, [in:] Islam a świat, R. Bäcker, S. Kitaba (eds.), Toruń 2004.

Bielawski J., Prawo muzułmańskie, [in:] Główne kultury prawne współczesnego świata, Warszawa 1995.

Bobako M., Demokracja wobec różnicy. Multikulturalizm i feminizm w perspektywie polityki uznania, Poznań 2010.

Bojarska M., Różnorodność feminizmu w kręgu kultury muzułmańskiej w Iranie i Holandii, http://www.psz.pl/117-polityka/roznorodnosc-feminizmu-w-kregu-kultury-muzulmanskiej-w-iranie-i-holandii (15 marzec 2011).

Brzezińska J., Islam i feminizm?-Ruch kobiet w Egipcie na rzecz równouprawnienia płci, „Acta Universitatis Lodziensis" 2011, no. 39.

Bury J., Kasprzak J., Prawo karne Islamu, Warszawa 2007.

Busch A., Islam and the Human Rights Situation of Muslim Women in the EU, [in:] Communication as a Measure of Protection and Limitation of Human Rights. Information in Relation to Human Rights, L. Dufalová, K. Lenhartová and Others (eds.), Bratislava 2012.

Deep S., https://www.quora.com/Why-are-western-feminists-silent-about-how-Islam-treats-women.

Dziekan M., Cywilizacja islamu w Azji i Afryce, Warszawa 2007.

Dziekan M., Jak żyć na obczyźnie? Z zaleceń Wielkiego Ajatollaha Alego As-Sistaniego (w kontekście islamu obywatelskiego), [in:] Islam i obywatelskość w Europie, K. Górak-Sosnowska, P. Kubicki, K. Pędziwiatr (eds.), Warszawa 2006.

Ferenc-Kopeć D., Women's Rights in Legal Culture of Islam and Buddhism, [in:] Communication as a Measure of Protection and Limitation of Human Rights. Information in Relation to Human Rights, L. Dufalová, K. Lenhartová and Others (eds.), Bratislava 2012.

Junik Rani N., http://multiculticlub.com/kobieta-w-islamie-feminizm-islamski-a-feminizm-muzulmanski/ .

Mir-Hosseini Z., Muslim Women's Quest for Equality: Between Islamic Law and Feminism, "Critical Inquiry" 2006, Vol. 32, No. 4.

Moller Okin S., Is Multiculturalism Bad for Women, [in:] J. Cohen, M. Howard, M. Nussbaum (eds.), Princeton 1999.

Osiatyński W., Prawa człowieka i ich granice, Kraków 2011.

Tibi B., Euro-islam jako europejski most między cywilizacjami. Europeizacja islamu, [in:] Islam i obywatelskość w Europie, K. Górak-Sosnowska, P. Kubicki, K. Pędziwiatr (eds.), Warszawa 2006.

Tokarczyk R., Współczesne kultury prawne, Warszawa 2012.

Trejnis Z., Migracje a bezpieczeństwo granicy państwa, [in:] Bezpieczeństwo granic Rzeczpospolitej Polskiej, A. Konopka, G. Sobolewski (red.), Białystok 2011.

Witkowski S. W., Wprowadzenie do prawa muzułmańskiego, Warszawa 2009.

Healthy towns – healthy residents
Hungarian healthy towns in 21 Century

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Abstract

In my short summary I intend to provide a survey of the topic of healthy towns with healthy residents. The term healthy town already appeared in the 1930s, naturally with different content and values in comparison to today's notions. The transformation of settlements, their becoming interactive spaces, necessarily triggered socio-spatial processes resulting in healthier urban environments, rejuvenated both spatially and as communities.

In the first part of the study those international models (WHO) are elaborated on which serve as the basis of healthy towns, focusing on goals and means. In the second part the examples of Hungarian healthy towns, the concepts and projects of retirement and liveable communities are listed. The current Hungarian initiatives in this area are rather modest; nevertheless, the already realized projects may generate further ones in the future.

Keywords: *health, Hungarian healthy, healthy towns, Hungary*

Introduction

"To define the term 'town' is a complex endeavour with every involved scientific discipline and even practical field emphasizing its unique set of criteria. A town is defined as a type of settlement, which due to some particular function *(cultural, industrial, commercial, etc.)* enjoys a special legally circumscribed status. Towns within the settlement networks usually possess larger populations and central functions in public administration. Besides their own residents, they provide various services for those living in their agglomeration" (Térport, 2012).

We can consider a town as a settlement and distinguish it from a statistical angle, based on the population figures as an incorporated settlement with

special legal privileges, and also as a functional entity, which perceives the town as a location for the availability of a number of services.

> *"Such definition, therefore considers those settlements as towns which specialize on higher, non-ordinary functions within the regional division of activities (the definition originally is attributed to Tibor Mendöl). In a different reading, towns possess an elevated level of significance by fulfilling various roles, i.e. providing medium and premier services, not only for their residents but for those living in their agglomerations."* (Térport, 2012)

In the contemporary social and spatial approaches we can find different definitions, as the Danish architect Jan Gehl did. "According to him cities are meeting points where people can exchange ideas, can do business or simply relax and enjoy themselves. The public spaces in cities, such as the streets, squares and parks, are the venues and catalysts for activities" (Gehl, 2014, p. IX).

Irrespective of which definition we use to characterize a town, the available data shows that the proportion of urban dwellers on the planet is steadily growing. The rate of urbanization varies from country to country. (Hagget, 2006, p. 241) Nevertheless, in every country surveyed it is visible that the towns and especially the larger cities are the most desirable places of residence. On the one hand, the available opportunities towns offer are richer in content, and on the other hand, from the aspect of attaining a more individualistic living space, towns can assure a more abundant and diverse environment for urban dwellers. Simultaneously, the processes of suburbanization also appear which clearly equate to a partial separation from the large cities, though not a complete partition from it.

Recently additional spatial characteristics have gained credence. "The traditional urban agglomeration, which includes a central large city and the surrounding intrinsically connected smaller towns and villages, is being increasing replaced by the metropolitan region" (Hagget, 2006, p. 241).

A number of questions may emerge at this point concerning the extent of liveability of settlements, what opportunities they can offer to their residents, and what the expectations of these residents are: an unlimited utilization

of opportunities, liveability, or even in some cases sustainability, the main purpose of the town in one's life, and whether it serves as a permanent or only temporary residence.

By answering these questions, some of the pertinent professional experts now maintain that towns can remain sustainable in the long run if we transform them into liveable spaces. Being liveable is complex, social, spatial, and political process, which denotes the degree to which any particular settlement can be considered a pleasant and enjoyable place to live in. The notion of health also enters the equation whereby we may assume that a settlement becomes liveable if healthy socio-spatial processes characterize it, with environmental, community and labour market conditions that grant the possibility of a healthy lifestyle for the people living there.

"The principles behind the creation of the living city support the planning and aiming at social sustainability. The living city attempts to prevent the withdrawal of its residents into closed communities and supports the creation of an urban space that is accessible and appealing for all social classes" (Gehl, 2014, p. 109).

Liveable towns, healthy towns

The concept of the healthy cities project can be traced back to a one–day workshop in Canada titled 'Healthy Toronto 2000' in order to create a healthy community. The WHO's regional office for Europe identified 38 separate health targets within the European continent. The same office in 1984 published its 'Targets for health for all' that propelled the academic discussion of individual health related issues continent-wide. In 1986 in Ottawa they held the First International Conference on Health Promotion which identified three main health promotion strategies to build healthy public policies, create supportive environments for health, strengthen community action for health, develop personal skills, and re–orient health services."(Füzesi – Tristyán, 2004, p. 15–17).

The WHO launched the European Healthy Cities Network in 1987 with the main goal to involve in health promotion actors such as municipal governments and community action groups that normally operate outside the healthcare sector. The primary goal of the Healthy

Cities movement is to keep at the forefront of the agenda of decision-makers the issue of health, provide support for the formulation of comprehensive local strategic programmes for health and sustainability based on the targets of the 'Health for All' and the 'Health 21' European policy frameworks."(Füzesi – Tristyán, 2004, p. 15–17).

A prime characteristic of these principles is that health promotion should not merely be the responsibility of the healthcare sector but all actors present in any given city should be involved. Additionally it is also of elevated importance that the very residents living in their city should become health conscious, thus raising their quality of life and equality in opportunities. Inequalities among the various segments of society have become especially a question of concern in the past few years. The ageing of society, the appearance and immigration of new ethnic groups pose crucial dilemmas to municipal governments and other involved actors. An additional problem is the appearance of social loafing.

The sizable changes that were registered in the social fabric of the developed world also challenged the makers of public health policies. Manual and physical work that had been representative of the previous periods was replaced by sedentary lifestyles, while transportation is being carried out increasingly by automobiles. The resulting problems are often compounded by the improper eating habits, the consumption of excessive amounts of high-fat food (Gehl, 2014, p. 111). This triggers all involved parties in the healthcare system to make cities fertile grounds in the institution of novel approaches in the raising of the general level of health among city dwellers. An important strategy is to offset the physical inactivity of the residents to support the development of pedestrian areas and bicycle paths. By doing so, besides the obvious health benefits to those living a more active lifestyle, the environmental burden on the cities also lessens in the form of better air quality and an increase in the size of the green areas.

In the European health promotion strategy the raising of general health receives an important role in the development concepts of cities (either as directly part of them or as separate documents) since it is the goal of every settlement maintain its population levels and for this end to make the local living areas liveable, sustainable, and more attractive.

Healthy cities in Hungary

Since 1986 Hungary has been involved in the WHO Healthy Cities Project. From Hungary the city of Pécs was among the founding members of the European network, and soon after that the Hungarian Speaking Association of Healthy Cities was established as well in 1992. After just four years of work the association had already boasted ten member cities. Membership today entails high levels of intersectoral cooperation and community initiatives with only modest financial commitments required"(www.hahc.hu, 2008).

All the participants of the association believe that they are part of an initiative that positively contributes to the long-term liveability and sustainability of their cities. Thus the title 'healthy city' promotes activities that aim for existing or new cooperative projects and programmes by utilizing the natural and already existing infrastructural potential of cities to trigger sustainable and long-term urban development.

Thus, Hungary has been involved in the Healthy Cities Project since 1986 with the city of Pécs becoming the first participating member. In the ensuing 30 years beyond the initial ten participants other towns have also joined the association. All the new members have also fully accepted the principles and objectives followed by the association. Currently, in 2016, the Hungarian Speaking Association of Healthy Cities has 21 participating members.

HUNGARIAN SPEAKING ASSOCIATION OF HEALTHY CITIES	
Baja	Sopron
Békéscsaba	Székesfehérvár
Erdőszentgyörgy	Szentendre
Győr	Szigetszentmiklós
Gyula	Szolnok
Hódmezővásárhely	Szombathely
Kaposvár	Tatabánya
Mosonmagyaróvár	Zalaegerszeg
Nagykanizsa	Zalakaros
Nyírbátor	Zalaszentgrót
Pécs	

Compiled by: Laki Ildikó, 2016
Source: http://www.hahc.hu/tagvarosaink.php

At the local community level the main strategy of the healthy cities is to initiate special projects that can have a direct impact on relevant legal regulation. The commitment of the political decision–makers to the ideal conditions laid down in healthy cities is a lynchpin in the strategy elaborated above. The healthy cities project emphasises that the actual process through which these conditions are attained are more important from the angle of a healthy city than any other objective health indicator (Füzesi – Tristyán, 2004, p. 16–18).

All towns function not only as places of residence but as centres for community activities. Some of these activities are formal in nature, or can be connected to some organization or body such as a school, workplace, the army, a prison, etc.; the other group of activities is based on attachment to non–formal associations, e.g. spontaneously formed groups or clubs. Examples of the latter category are a local community initiative (our street, our block etc.), or the participants at a special event or even partygoers at a club. (Füzesi – Tristyán, 2004, p. 16–18).

Community activities for a number of reasons have an impact on the health conditions prevalent in the towns/cities. They serve as platforms to generate the peculiar norms and values accepted by the local community. The resulting norms provide for the community or group the framework for deciphering and digesting outside influences and information flow. (Füzesi – Tristyán, 2004, p. 16–18).

It is legitimate to ask in what ways do healthy cities community activities connect to the current study. Health, healthy lifestyles, and the main development paths of towns and cities should be treated strictly as a singular whole. However, the experts in diverse disciplines or areas of activity have their own often dissimilar priorities. In order to achieve the state of healthy cities, architects focus on the utilization of available space, environmentalists fight for good air quality, the retail sector wants to fulfil all consumer demands to the maximum extent, and representatives of educational and training institutions want the best possible schooling for all their charges. The demands of the residents of any town transcend these goals since the general sense of wellbeing, prosperity, as well as the initiatives and activities of the local community play equally important roles in laying the foundations for healthy cities.

For this reason further analyses and evaluation are needed to develop a satisfactory definition to what constitutes a healthy city, while also remembering those expectations and needs that manifest from the perspective of the society and especially the residents of towns and cities.

The process of urbanization also generates a specifically new form of living specifically centred on the town or city. With the development of urban settlements the demands and expectations of their residents have expanded, who in return also shaped and moulded the very places they call home (see Alfred Schütz's work 'The Stranger' – an outstanding work in phenomenological sociology). With the overcrowding and complete population of urban areas, the growth of industrial and agricultural land use, and the increasing scope of available services, today's so- called intelligent cities become less and less liveable. All available space has been built up, local communities lost their character, and the whole society increasingly became the mere consumer of the artificial functions offered by urban life. The principles for the creation of healthy cities emerged in reaction to this scenario, including the relevant policy proposals as well as economic considerations and the heightened role of civil society.

The Hungarian healthy cities are such settlements that can in the long--run transform their natural, environmental, and communal values in order to attain sustainability and a more liveable condition for the benefit of their residents.

Five main points represent the membership criteria for the WHO Healthy Cities Project, which also play an important role from their inception in the national association and in the regional healthy cities networks. In becoming a healthy city it is indispensable to follow a multisectoral approach and ascertain equal opportunities – fighting against poverty and social inequalities. Additionally, involving the local community in decision-making affecting their lives and having municipal governments dedicated to the realization of healthy cities and sustainable development are also of prime relevance; the latter feature in the classification of the National Council for Sustainable Development meaning that men should pursue happy and satisfying lives while also contributing to the public good. Naturally all these goals are realized in a way that the generation attaining its desired level of welfare does not compromise and exhaust the available resources, but rather preserves and even expands them for its posterity. To achieve the material, intellectual

and psychological wellbeing of any given generation there is a need for the availability of human, social, economic, and natural resources.

From the aspect of urban planning, social and economic criteria and environmental indicators are **of equal importance**. Responding to the challenges of climate change and urban heat islands, which are to be remedied by increasing green areas in cities and by the most efficient ways for infrastructure development, are all the responsibilities of municipal governments similar to water treatment, waste disposal, and recycling, all to be properly integrated in non-obtrusive manner to the cityscape (http://epiteszforum.hu/fenntarthato-es-elheto-varos-rangsorok, 2012).

A description of Hungarian Healthy Cities through the available data

The health of the residents of all settlements, including towns and cities, is greatly influenced by the living areas, work conditions, the surrounding physical and socio-economic environment, as well as the quality and availability of the healthcare system. (Füzesi – Tristyán, 2004, p. 25).

The current members of the Hungarian Association of Healthy Cities all joined the organization on virtue of their distinct and specific merits. On the one hand, they all expressed strong commitment to abide by the five previously mentioned criteria, while on the other hand they started novel initiatives which can further contribute to their cities' positive public perception and image. One of the genuine indicators of a town's growth curve and appeal is the shift in population figures. If there is a net population gain it shows the strong retaining power of any given city and its positive appeal among people. If the population is shrinking that may denote two root causes, the strong attractiveness of the suburban settlements surrounding the city or that some major transformation has taken place in the life of the city. In the latter case it is of prime relevance what triggered the population loss, disrupting the healthy unity of the urban community. In the table below the demographic changes of healthy cities in the past 25 years can be seen in Hungary. Of the 20 Hungarian cities and one city outside Hungary proper we can register population growth in six; of these, four are situated in the westernmost regions of the country while two are in the metropolitan area of Budapest. Exceptional growth was measured in the cases of Sopron and Szentendre,

as well as Szigetszentmiklós, clearly considered to be a healthy and liveable town by the local residents. The local residents follow in the descriptions of their respective settlements the previously elaborated complex indicators, i.e. beyond development projects and the natural environment; there are high levels of community action as well as the workings of urban functions. A full range of services and institutional structures assists the residents in their attainment and maintenance of healthy living.

Changes in population figures between 1990 and 2015

Settlement	**Population 1990**	**Population 2015**
Baja	38 686	35 718
Békéscsaba	67 609	60 334
Erdőszentgyörgy (Romania)		(2011) 5166
Győr	129 338	129 372
Gyula	34 331	30 658
Hódmezővásárhely	51 180	44 795
Kaposvár	71 788	63 742
Mosonmagyaróvár	30 079	32 752
Nagykanizsa	54 052	48 241
Nyírbátor	13 849	12 259
Pécs	170 039	145 985
Sopron	55 083	61 780
Székesfehérvár	108 958	98 673
Szentendre	19 351	25 542
Szigetszentmiklós	19 372	35 656
Szolnok	78 328	72 786
Szombathely	85 617	77 866
Tatabánya	74 277	66 791
Zalaegerszeg	62 212	58 959
Zalakaros	1041	1936
Zalaszentgrót	8 258	6552

Compiled by: Laki Ildikó, 2016 (www.ksh.hu, 2015)

Additional questions may be posed by those towns/cities which face a substantial drop in their populations due to emigration or other causes. They concern what may be lacking from the lives of healthy cities, which could be responsible for the falling populations or whether it is only a natural phenomenon whereby there is a population shift among settlements with residents opting to move to the suburbs and metropolitan areas.

What comprises healthy towns and cities

In lieu of a summary

Aspects to consider are the quality of life, local communities, well–functioning urban functions, spatial dimensions, healthcare policy principles, and good practices.

The **principle of quality of life** concerns the general wellbeing in any given settlement. It primarily views the specific quality of life of residents as stemming from the type and functions of the settlement they live in. In a general sense the quality of life refers to an individual's or an entire group's, community's wellbeing from important physical and psychological aspects, while also considering the objective and subjective qualities of the term (http://fogalomtar.eski.hu/index.php/%C3%89letmin%C5%91s%C3%A9g_%28Quality_of_life%29, 2010).

The **local community** includes all the residents and those claiming residency in any given settlement. A healthy city can be built only if her residents deem their locality valuable enough to invest in and make liveable.

Healthy cities possess well-functioning **urban functions**; these are smoothly operating systems that encompass a number of sectors and diverse areas, which without being interconnected would be more vulnerable. In healthy cities NGOs and economic actors have elevated roles – similarly to public bodies/organizations, local community action groups, and churches. In healthy cities trust, values, morality, social norms, and solidarity are to be found.

The significance of spatial dimensions is of equal value to the previous factors. Towns/cities are independent entities with unique characteristics, thus giving the adjective 'healthy' and the term 'healthy life' different interpretations depending on the particular individual they concern.

Finally, **healthy cities have concepts about their futures**; these notions are also coupled with health policy principles. They have well–founded notions about how they can retain their residents, the types of investment schemes they can initiate to raise the quality of life, the specific principles whereby they can energize their urban functions, and their good practices that can even serve as examples to imitate for other towns/cities.

After all, what is a healthy town/city where people have a sense of wellbeing and are not sick either in a psychological or in a physical sense? The environment, the air, and the soil are clean. The local community protects itself and its environment, constantly developing and investing its social and economic capital.

Photo1.: The city center of Baja

Photo 2.: The City center of Pécs

Photo 3.: The city center of Tatabánya

References

Downloaded at and time of downloading: http://www.hahc.hu/az_egeszseges_varosokrol_hatodik_ciklus.php 29 March 2016

Downloaded at and time of downloading: http://www.terport.hu/telepulesek/telepulestipusok/varos/varos–fogalmak. 14 April 2016

Egészségfejlesztés a színtereken. 2004. (Healthcare development on the spot) Downloaded at and time of downloading: http://www.oefi.hu/modszertan3.pdf . 23 March 2016

Életminőség fogalom (Quality of life). Downloaded at and time of downloading: http://fogalomtar.eski.hu/index.php/%C3%89letmin%C5%91s%C3%A9g_%28Quality_of_life%29 2 May 2016

Enyedi G. Városi világ. (Urban Word) Akadémiai Kiadó, Budapest, 2012, 241 p.

Fenntartható és élhető város rangsorok. (Ranking of livable and sustainable towns) Downloaded at and time of downloading: http://epiteszforum.hu/fenntarthato-es-elheto-varos-rangsorok 2016. április 10.

Füzesi Z., László Tistyán L.: Egészségfejlesztés és közösség. Fejlesztés a színtereken. 2004. (Healthcare development and the community. Improvements on the forefronts) Downloaded at and time of downloading: http://www.oefi.hu/modszertan4.pdf. 10 March, 13 April 2016, 16–18.pp.

Gehl J., Élhető városok. (Livable cities) TERC, Budapest, 2014, IX.

Hagget P., Geográfia globális szintézis. (Geography, a global synthesis) Typotex, Budapest, 2006

Városi adatok. Helységnévtár 2015. (Gazetteer of place names – towns 2015) Downloaded at and time of downloading: www.ksh.hu/helysegnevtar. 10 April 2016

The list of photos:

Photo 1.: The city center of Baja
Photo 2.: The city center of Pécs
Photo 3.: The city center of Tatabánya

The Acquisition of Agricultural Real Estate in Poland by Foreign Nationals – selected issues

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Abstract
This paper relates to the problems of acquisition of agricultural land in Poland by foreigners.
However, given the wide scope of the problem, this discussion will cover only selected issues:

- definition of a foreigner, agricultural real estate and the acquisition of real estate;
- personal and subject-matter restrictions on the acquisition of agricultural real estate; the acquisition of agricultural real estate with and without permit;
- the compliance of the amended Act on Developing the Agricultural System with the Constitution of the Republic of Poland;
- attempt to answer the question – Is there a possibility of introducing legal restrictions on the acquisition of agricultural real estate by foreigners?

Keywords: *foreigner, agricultural real estate, acquisition of real estate, permit, restrictions on the acquisition of agricultural real estate.*

Introduction

This paper relates to the problems of acquisition of agricultural land in Poland by foreigners. One of reasons behind the analysis of the subject in question was the fact that on 1 May 2016, the transition period negotiated by Poland with the European Union ended, during which period prospective buyers were required to obtain permit for the purchase of agricultural and forestry land by foreign nationals from the European Economic Area (EEA) and the Swiss Confederation. However, given the wide scope of the problem, this discussion will cover only selected issues. The basic legal act

regulating the issue of purchase of real estate in Poland by foreigners is the Act of 24 March 1920 on the Acquisition of Real Estate by Foreigners (Consolidated text: Dz.U. [Journal of Laws] 2014, item 1380, as amended, (hereinafter U.N.N.C.)). It should, however, be noted that the acquisition of agricultural properties by foreign nationals must also take into account the provisions of the Act of 11 April 2003 on Developing the Agricultural System (Consolidated text: Dz.U. [Journal of Laws] 2012, item 803, as amended, (hereinafter U.K.U.R.)), the provisions of which were amended by the Land Act of 14 April 2016 on the Suspension of the Sale of Real Estate Held in the Agricultural Property Stock of the State Treasury and the Amendment of Certain Acts (Dz. U. [Journal of Laws] 2016, item 585 (hereinafter U.W.S.N.)).

This Act has raised high expectations of preventing massive buyouts of agricultural land by foreigners, by introducing the possibility of controlling transactions regarding this land (Lichorowicz, Przegląd Legislacyjny 2009, No. 1/2, p. 16). But this raises the question about whether this effect has been achieved. Moreover, there are doubts whether or not the provisions of this Act violate both the Polish Constitution and provisions of the EU law. In view of the above, it should be considered to what extent it is possible, if at all, to establish restrictions on the acquisition of agricultural land by foreigners. Liberalism of the law in this matter carries the risk of massive buyout of Polish real estate by foreigners (Cf. Wielgo, Gazeta Wyborcza 2000, issue No. 63, p. 25; more Skoczylas, 2005, p. 237 ff). On the other hand, any rigorism may be contrary to the principle of free movement of capital we have been required to respect since 2004. One should also keep in mind that at the moment, the Polish legislature has suspended the sale of real properties held in the Agricultural Property Stock of the State Treasury, for a period of 5 years from the date the Act of 14 April 2016 became effective. Only the sale those agricultural properties the area of which does not exceed 2 hectares (Article 2 paragraph 1 clause 4 of U.W.S.N.) is allowed. In exceptional cases, justified by social and economic reasons, after obtaining the consent of the minister responsible for rural development, the possibility of acquisition of agricultural property with a larger surface area was implemented (Article 2, paragraph 2 of U.W.S.N.).

Definition of a foreigner, agricultural real estate and the acquisition of real estate

To begin with, we should pay some attention to explain the significance of the title issues. The definition of a foreign national was set out in the wording of Article 1 paragraph 2 of U.N.N.C., according to which "a foreigner (...) is:

1) a natural person without Polish citizenship;
2) a legal person established abroad;
3) an unincorporated partnership of the persons referred to in paragraphs 1 or 2, having its registered office abroad, established in accordance with the laws of foreign countries;
4) a legal person and a commercial company without legal personality with a registered office in the Republic of Poland, controlled directly or indirectly by persons or companies/partnerships referred to in paragraphs 1,2 and 3" (More Dalecka, Przewoźny–Paciorek, 2013, Nb. 1–9; Wereśniak-Masri, 2011, p. 17–25).

The analysis of U.N.N.C. leads to the conclusion that the provisions contained therein in fact relate at the moment to foreigners coming from outside the EEA and Swiss Confederation. This is so because they primarily cover the issues relating to the granting of a permit. From 1 May 2016 onwards, the acquisition of any real property by foreign nationals coming from the EEA and the Swiss Confederation does not require a permit (Article 8, paragraph 2, item 1 U.N.N.C.). Under the Accession Treaty, (Accession Treaty signed by Poland on 16 April 2003 in Athens (Dz.U. [Journal of Laws] No. 90, item 864, as amended)) it was assumed that after the negotiated transition period, which lasted 12 years from the accession of the Republic of Poland to the EU, citizens and businesses from the EEA and the Swiss Confederation should be treated equally with Polish citizens, as regards the acquisition of real estate. Thus, it seems reasonable to propose making the definition of foreigner in U.N.N.C. more precise, and to specify that a foreigner is an entity coming from outside the two above–mentioned areas. It seems that owing to this, the Act would be more legible and far shorter.

Turning to the definition of agricultural property (More Borkowski, Rejent 2007, No. 7–8, p. 35–58) we should mention Article 2.1 of U.K.U.R., which

in conjunction with Article 46[1] of the Civil Code (Act of 23 April 1964 – Civil Code (consolidated text: Dz.U. [Journal of Laws] of 2016, item 380, as amended)) states that agricultural real estate are properties that are or may be used to conduct plant and animal production, including horticulture, orcharding and fishery, with the exception of real estate located in areas reserved in land development plans for purposes other than agricultural. However, difficulties can occur, and as practice shows, quite often do occur, when there is no local development plan. Then, agricultural use of land is determined based on the following types of documents:

- zoning approval,
- decision establishing the location of a public purpose project,
- decision to exclude the land from agricultural production,
- excerpt from the land register (Kasperek, Zasacki, 2013, section 4).

However, as has rightly been pointed out by some scholars of law, there are doubts whether the intended purpose of a property, other than agricultural purpose, in the zoning approval and in the decision on the location of a public purpose project, should be treated on a par with the purpose specified in the local development plan (Ibid. section 5). In my opinion it should, but to prevent any doubts in this respect, this matter should be made more specific in the Act itself. The identification of the status of a property was of a priority significance, especially for citizens and businesses from the EEA and the Swiss Confederation until 1 May 2016, before which date it was required, when acquiring agricultural land, to obtain permit from the competent minister.

The last term to explain is acquisition of real estate. According to Article 1.4 of U.N.N.C., we are dealing with the acquisition of real estate, as defined in the Act, in the event of acquisition of property ownership or the right of perpetual usufruct (long–term leasehold of land owned by public law entities), on the basis of any legal event. The literature of reference emphasizes the inaccuracy of the expression "on the basis of any legal event" used in this provision. It has been signalled that such a vague phrase may raise doubts and abuses in interpretation. An example of this may be the acquisition of ownership as a result of a tort, which also qualifies as a legal event, and which entails the obligation to remedy the damage/

loss (Skoczylas, Szlęzak, 2010, section 9). It has been suggested that a provision be introduced in the wording of Article 1.4 of U.N.N.C., which would indicate that the acquisition of real estate shall be related to the legal basis for the acquisition, and not to a legal event (Ibid.). This proposal met with a negative reaction. It seems to be rightly rejected, for example due the fact that real estate transactions are always controlled by a professional entity. A similar provision can be found in U.K.U.R., where in paragraph 7 of Article 2, the legislature stipulates that the acquisition of agricultural real estate should be understood as the transfer of ownership of an agricultural property or acquisition of ownership of an agricultural property as a result of a legal action or judicial or administrative decision, as well as another legal event. Comparing the definitions of real estate acquisition in the two Acts being referred to herein, it can be seen that in U.K.U.R., in the fragment where agricultural property is mentioned, the legislature narrows the concept of acquisition of a real property only to acquisition of the right of ownership, ignoring the right of perpetual usufruct. This does not mean, however, that the provisions of U.K.U.R. shall not apply to the acquisition of perpetual usufruct of an agricultural property, which is governed by Article 2c of U.K.U.R. It seems, however, that a more correct approach is the definition proposed by the legislature in the other above-mentioned Act.

Personal and subject–matter restrictions on the acquisition of agricultural real estate

The Act on the Agricultural System Development does not make the acquisition of an agricultural property conditional on nationality. But we must remember that under U.N.N.C., foreigners coming from outside the EEA and Swiss Confederation may become owners of any real property located in Poland, including agricultural, after obtaining prior permit from the Minister of Internal Affairs – this will be discussed later in this paper. According to Article 2a.1 of U.K.U.R., an agricultural property may only be acquired by a sole-trading farmer, unless the law provides for otherwise. A sole--trading farmer is a natural person who is the owner, perpetual usufructuary, independent possessor or leaseholder of agricultural estate, of which the total area of arable land does not exceed 300 hectares, educated in farming and

who has lived for at least 5 years in the municipality (gmina) where one of the agricultural properties forming part of the farm is located, and who has personally operated this farm within this period (Article 6.1 of U.K.U.R.).

In paragraph 3 of Article 2a of U.K.U.R., the legislature indicates that the property may also be acquired by a close friend or relative of the alienor, a local government unit, the State Treasury or an Agency acting on its behalf, legal persons acting under the legal provisions on the relations between the State and the Catholic Church in the Republic of Poland, on relations between the State and other churches and religious associations and the guarantees for the freedom of conscience and religion. An agricultural property may also be acquired by those who are granted an agricultural property as a result of inheritance and specific bequest, pursuant to Article 151 or Article 231 of the Civil Code, as well as during reconstruction proceedings as part of rehabilitation proceedings. The above-mentioned entities are not required to obtain permit of the President of the Agricultural Property Agency to carry out this type of transaction. In respect of other entities, the acquisition is permissible only after prior approval of the President given by an administrative decision. The decision is issued on the request of:

"1) the alienor, provided that the alienor proves that:
   a) it was not possible to acquire the agricultural property by the entities referred to in paragraphs 1 and 3,
   b) the alienee guarantees that the alienee will duly perform the agricultural activity,
   c) the acquisition will not result in excessive concentration of agricultural land;
2) a natural person wishing to establish a family farm who:
   a) is a qualified farmer, or who, with a condition of improving his/her education, has been granted the aid referred to in Article 5.1 clause 2 of the Act dated 7 March 2007 on supporting rural development with the participation of the European Agricultural Fund for Rural Development within the framework of the Rural Development Programme for 2007–2013 (Dz. U. of 2013, item 173, of 2015 item 349, and of 2016, item 337) or in Article 3.1, clause 6.a of the Act of 20 February 2015 on supporting rural development with the participation of the European Agricultural Fund Rural Development

for 2014–2020 (Dz. U., item 349 and 1888, and of 2016, item 337), and the deadline to complete the skills has not yet expired,

b) guarantees that he/she will duly perform the agricultural activity,

c) agrees to live for at least 5 years from the date of acquisition of the property in the municipality (gmina) where one of the agricultural properties to form part of the family farm being established is located" (Article 2a.4 of U.K.U.R.).

Such limitations as mentioned above, restricting some people in the possibility of acquisition of agricultural land seemingly appear to be consistent with the Community law. The strict rules relating to the acquisition of this type of real estate hinder their availability both for the majority of Polish citizens (generally favouring only sole–trading farmers) and foreign nationals. However, it may be assumed that in practice, Polish citizens will be treated more liberally than foreigners (Cf. Jeżyńska, R. Pastuszko, OE – 197, Biuro Analiz i Dokumentacji, 2012, p. 30), because of the requirement to apply, in most cases, for permit of the President of the Polish Agricultural Property Agency.

It is also worth mentioning that the Agricultural Property Agency has the power to carry out audits (More on the issue of agricultural land transactions – Lichorowicz, Studia Prawnicze PAN, 1991, vol. 3, p. 87–112). It should supervise whether the alienee of an agricultural property complies with the obligation to live for a period of 5 years from the date of acquisition of the property in the municipality (gmina), where one of the agricultural properties to form part of the farm being established is located (Article 8a.1 of U.K.U.R.). When conducting an audit, the Agency has the right to enter the area of the estate being audited and has the right to request relevant information, as well as to be provided with the documentation (Article 8a.5 of U.K.U.R.).

The Polish legislature has also introduced restrictions in terms of the subject, stating that the area of the agricultural property being acquired, plus the area of agricultural properties constituting the family farm of the alienee, shall not exceed 300 hectares of arable land. The aim of such a provision was to prevent excessive concentration of agricultural land in the hands of one owner. When determining the area of the arable land being the subject of

joint ownership, the area of agricultural property corresponding to its share in the joint ownership of such property must be taken into account and, in the case of co-ownership (of a tenancy-by-the-entirety type) – the total area of agricultural properties that are the subject of co-ownership (Article 5.2 of U.K.U.R.) must be taken into account. Similar rules shall apply when determining the area of arable land which is subject to joint independent possession and joint possession on the basis of perpetual usufruct or under a lease contract (Article 5.3 of U.K.U.R.).

Also, note the provision of Article 1a of U.K.U.R., according to which the Act does not apply to agricultural land held in the Agricultural Property Stock of the State Treasury, referred to in the Act of 19 October 1991 on Managing Agricultural Property of the State Treasury (Dz. U. of 2015, items 1014, 1433 and 1830, and Dz. U. of 2016, item 50 and 585) and to agricultural real estate with an area less than 0.3 hectares.

The acquisition of agricultural real estate with and without permit

The need to obtain permit to acquire an agricultural property located in Poland by foreigners depends on their national origin. For foreign nationals from the EEA and the Swiss Confederation, since 1 May 2016, such acquisition has not been subject to permit by the competent body. For other foreigners, obtaining permit is a necessary requirement for the granting of ownership rights. It is issued by the minister responsible for internal affairs, unless the minister responsible for rural development raises an objection (Article 1.1 of U.N.N.C.). The possibility of raising an objection is restricted by a period of 14 days counting from the date of delivery of the decision of the minister responsible for internal affairs. Where it is particularly reasonable, this period may be extended up to two months (Article 1.1a of U.N.N.C.). The permit shall be issued on the request of the foreigner, if the following conditions are met:

- the acquisition of the property by the foreigner does not pose a risk to national defence, security or public order, and will not come in conflict with the social policy and public health,
- they prove the ties linking them with the Republic of Poland, such as e.g. Polish ethnic background or Polish origin, or marriage to a citizen of the Republic of Poland (Article 1a.1 and 1a.2 of U.N.N.C.).

Before issuing the permit, the Minister of Internal Affairs may require that evidence and information necessary to decide the case be submitted, and may also demand that competent government authorities verify whether the acquisition of real estate by the foreigner will not pose a threat to national security (Article 2.1 of U.N.N.C.). In addition, the Minister is entitled to define additional conditions, the fulfilment of which will be a prerequisite for the acquisition of real estate (Article 2.2 of U.N.N.C.). It should be noted that the permit is valid for 2 years from the moment of its issue (Article 3.2 of U.N.N.C.).

The legislature also authorizes the foreign national to apply for an administrative promise to issue a permit (More on this topic Szafrański, Kwartalnik Prawa Publicznego 2001, No. 1, p. 153 ff.). The validity of the promise is one year from the date of issue. It is essential that during this period of validity of the promise, in principle it cannot be refused to issue the permit unless the facts that are essential to decide the case change (Article 3d of U.N.N.C.).

It should also be noted also that the acquisition of real estate by a foreigner contrary to the provisions of law is null and void (Article 6.1 of U.N.N.C.).

The legislature has allowed the acquisition of real estate by a foreigner without prior procurement of a permit, in the following cases, among other things:

- where the property is to be acquired by a foreign national living in the Republic of Poland for at least 5 years from being granted permanent residence or long-term EU residence permit,
- where the property is to be acquired by a foreign national who is the spouse of a Polish citizen and has resided in Poland for at least 2 years from being granted permanent residence or long-term EU residence permit, and as a result of the acquisition the real property will be part of the joint property of spouses,
- where the property is to be acquired by a foreign national who, as of the acquisition date, is entitled to statutory inheritance after the alienor of the property, and the alienor has been the owner or perpetual usufructuary for at least 5 years (Article 8.1 of U.N.N.C.).

It is important that, as previously mentioned, from 1 May 2016 onwards, a permit is not required for the acquisition of any property by foreign nationals who are citizens or businesses from the Contracting Parties to the EEA Agreement or the Swiss Confederation (Article 8.2 of U.N.N.C.).

The compliance of the amended Act on Developing the Agricultural System with the Constitution of the Republic of Poland

After reading the amended U.K.U.R., some doubts are raised as to the compliance of some of its provisions with the Polish Constitution. It is worth paying attention here to paragraph 1 of Article 2b of this Act, where the legislature imposes on the alienee of an agricultural property an obligation to run the farm containing the acquired property, for a period of at least 10 years from the acquisition of the property, and where the alienee is a natural person, the alienee shall be required to run the farm in person. An additional limitation of the ownership rights is enacted in paragraph 2 of Article 2b of U.K.U.R., preventing the alienee, in the aforementioned period, from transferring or delivering the acquired property to third parties. Only in exceptional cases resulting from force majeure reasons beyond the control of the alienee, the court, on the request of the alienee, may agree to carry out the above mentioned activities (Article 2b.3 of U.K.U.R.) Such type of regulation can be criticised as arbitrary, while Article 32 of the Constitution stipulates that everyone is equal before the law. Furthermore, it seems that forbidding the sale of agricultural property for a period of l0 years violates Article 64 of the Constitution, which provides that "the right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right" and is contrary to the very idea of ownership.

In addition, it is worth noting paragraph 4 of Article 2b of U.K.U.R., wherein the legislature releases the following entities from the aforementioned restrictions laid down in its paragraphs 1 and 2:

- a close friend or relative of the alienor,
- a local government unit,
- the State Treasury or an Agency acting on its behalf,
- legal persons acting under the legal provisions on the relations between the State and the Catholic Church in the Republic of Poland, on relations

between the State and other churches and religious associations and the guarantees for the freedom of conscience and religion,

- persons who acquired agricultural property as a result of inheritance or specific bequest,
- persons who acquired agricultural property under Article 151 or Article 231 of the Civil Code.

Each ownership should be treated the same way, as it is subject to an equal legal protection (Article 64 of the Constitution) and, therefore, different treatment of different alienees seems to be inconsistent with the Constitution.

In my opinion, the requirement that the owner agree to live for a period of 5 years from the date of property acquisition in the municipality (gmina) where the agricultural property is located is also in contradiction with Article 52 of the Constitution, which guarantees everyone the freedom to choose their place of residence.

It is true, however, that the right of ownership, despite the fact that it is an *erga omnes* property right with the widest scope, it is not an absolute right, and that in certain cases, it may be subject to statutory restrictions in terms of its content and use (Decision of the Supreme Court of 21 January 2015, IV CSK 203/14, LEX No. 1656510). It seems, however, that the above--described limitations introduced by the legislature in U.K.U.R. violate the provisions of the Polish Constitution.

Is there a possibility of introducing legal restrictions on the acquisition of agricultural real estate by foreigners?

The question of the admissibility of the introduction of legal restrictions on the acquisition of agricultural real estate by foreigners should be considered in a twofold manner (Likewise Jeżyńska, R. Pastuszko, 2012, p. 28). It seems that in the case of foreigners from outside the EU, it is acceptable to establish the restrictions to prevent excessive buyout of Polish land, especially farmland. On the other hand, for foreigners from the EEA or Swiss Confederation, it appears that overly rigorous regulations may undermine the principles of the Community law, in particular the free movement of capital and freedom of establishment. Thus, it cannot be overlooked that it was assumed during the accession negotiations that citizens of the Member States may not be treated worse than on the date of

signature of the Accession Treaty in the issues of acquisition of agricultural land and forests (Jeżyńska, Pastuszko, 2012, p. 29; Mataczyński, Rejent 2004, No. 5, p. 76).

According to Article 345 of the Treaty on the Functioning of the EU (The Treaty on the Functioning of the European Union of 30 April 2004, Dz.U. [Journal of Laws] 2004.90.864/2 as amended, hereinafter: TFEU), the Treaty shall in no way prejudice the rules governing the system of property ownership in Member States. However, these rules cannot be formed absolutely freely, which is stipulated for example in Article 18 of TFEU, whereby any discrimination on grounds of nationality shall be prohibited. It is also worth quoting here the thesis of the ruling issued by the Court of Justice of 8 November 2012 (CASE C-244/11, European Commission v. Greek Republic, text available on the website: www.eur-lex.europa .eu; see also judgment of the Court of Justice of 23September 2003, in the case C-452/01 Ospelt i Schlössle Weissenberg, Rec, text available on the website: www.eur-lex.europa.eu) where the Court held that: "although Article 295 EC does not call into question the Member States' right to establish a system for the acquisition of immovable property, such a system remains subject to the fundamental rules of EU law, including those of non-discrimination, freedom of establishment and free movement of capital".

In another of its rulings, the CJ pointed out that the national legal solutions regarding the acquisition of property must comply with the rules on free movement of capital and freedom of establishment (Judgment of 1 June 1999 in the case C-302/97, Klaus Konle v. Austrian Republic, ECR 1999/6/I-03099). According to Article 63 of TFEU, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited. The semantic scope of the notion of movement of capital includes, inter alia, direct investment in real estate, activities relating to securities and other instruments to be traded on the money market, and loans (Glossary contained in Annex I to Council Directive 88/361 EC of 24 June 1988 for the implementation of Article 67 of the Treaty, OJ EC, 1988 L 178, p. 5). It should be then assumed that the acquisition or disposal of immovable property in the territory of another Member State is undoubtedly free movement of capital (The same

view expressed in: Jeżyńska, Pastuszko, 2012, p. 28). The Court held that the measures restricting the free movement of capital may include those which are likely to discourage non-residents from making investments in another Member State (Judgment of the Court of Justice of 23 February 2006 in the case C-513/03, heirs M.E.A. van Hilten-van der Heijden v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen bu itenland te Heerlen, (text available on the website: www.eur-lex.europa.eu).

According to the Court of Justice, the exercise of the right to acquire, use and dispose of immovable property on the territory of another Member State is also one of the essential elements of the freedom of establishment (Judgment of 1 June 1999 in the case C-302/97, Klaus Konle v. Austrian Republic, ECR 1999/6/I-03099).

Both in case law and among scholars of law it has been pointed out that a violation of a Treaty-enshrined freedom may, in some cases, be justified. But to do so, the freedom-restricting measures adopted by the Member State must jointly meet the following conditions:

- the use of the measure in question is justified by the circumstances set out in Article 65 paragraphs 1–3 of the Treaty or overriding requirements of public interest (ibid.),
- the measures do not infringe on the principle of non-discrimination,
- the measures correspond to the objective to be achieved and do not go beyond what is necessary to achieve the same (Jeżyńska, Pastuszko, 2012, p. 28; Frąckowiak-Adamska, 2009, p. 126 ff.).

In my opinion, the judgement of the Court in the Festersen case is of the utmost importance for the assessment of the Polish regulations in the context of their compliance with the Community law. The Court found that the solution which makes the right to acquire an agricultural property conditional on the obligation to live on that property restricts not only the free movement of capital but also the right of the alienee to choose his place of residence freely, guaranteed by Article 2(1) of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Judgement of the Court of Justice of 25 January 2007 in the case C-370/05, criminal proceedings against Uwe Kay Festerse n, (text available on the website: www.eur-lex.europa.eu).

Therefore, we should suppose, that the Polish legal solutions in this regard may be challenged in the near future on the grounds of being in violation of EU law.

In view of the above, it must be undoubtedly held that the provisions on freedom of establishment and free movement of capital require the enabling of acquisition of immovable–estate by foreigners (This view is shared by Pawłowski, Zeszyty Prawnicze BAS 2014, No. 2, p. 135).

Summary

As a result of the analysis of the subject in question, it can be noted that the Polish legislature treats EEA/Swiss Confederation nationals and other foreign nationals differently. The lapse of the transitional period negotiated by Poland with the EU requires the Polish legislature to treat foreigners from the above-mentioned areas, who are interested in acquiring real property located in Poland, equally as Polish citizens. This is justified by the accepted principles of the Treaty of Accession – the freedom of establishment and freedom of movement of capital to be respected by Poland since our accession.

It seems that there are legitimate concerns about the fact that the solutions adopted by the Polish legislature may meet with the disapproval of the European Commission, which can challenge them as contrary to the basic principles of Community law.

In my opinion, certain provisions concerning the acquisition of real estate included in U.K.U.R. may also be declared unconstitutional. Undoubtedly, the new regulations discussed herein will make life more difficult, especially for Polish farmers, although this was not the intention of the legislature. It should also be assumed that the regulation discussed will contribute to inhibiting economic transactions, which is certainly not a desirable outcome.

References

Borkowski M., *Pojęcia „nieruchomości rolnej" oraz „nieruchomości leśnej" w rozumieniu przepisów ustawy o nabywaniu nieruchomości przez cudzoziemców*, Rejent 2007, No. 7–8,

Dalecka A., Przewoźny–Paciorek A., *Komentarz do art. 1 ustawy o nabywaniu nieruchomości przez cudzoziemców*, [in:] *Nabywanie nieruchomości przez cudzoziemców. Komentarz*, Lex/el. 2013,

Frąckowiak–Adamska A., *Zasada proporcjonalności jako gwarancja swobód rynku wewnętrznego*, Warszawa 2009,

Jeżyńska B., Pastuszko R., *Ramy prawne obrotu nieruchomościami rolnymi po 2016 r.,* OE–197, Biuro Analiz i Dokumentacji, grudzień 2012, dostęp: http://senat.gov.pl/gfx/senat /pl/senatekspertyzy/ 265/plik/opinie_197_do_internetu.pdf (access – 29.05.2016 r.),

Kasperek I., Zasacki T., *Nabycie nieruchomości rolnej* [in:] *Ryzyka prawne w transakcjach fuzji przejęć,* Ed. P. Ciećwierz, I .Zielińska–Barłożek, Lex/el. 2013,

Lichorowicz A., *Podstawowe rozwiązania w zakresie obrotu gruntami rolnymi w ustawodawstwie krajów Europy Zachodniej*, Studia Prawnicze PAN, 1991, No. 3,

Lichorowicz A., *Prawna regulacja obrotu gruntami rolnymi – ocena stanu aktualnego, postulaty de lege ferenda*, Przegląd Legislacyjny 2009, No. 1/2,

Mataczyński M., *W kwestii zgodności ustawy o kształtowaniu ustroju rolnego z prawem europejskim w świetle orzecznictwa Europejskiego Trybunału Sprawiedliwości*, Rejent 2004, No. 5,

Pawłowski B., *Opinia prawna na temat możliwości wprowadzenia ograniczeń prawnych w nabywaniu ziemi rolnej przez cudzoziemców,* Zeszyty Prawnicze BAS 2014, No. 2,

Skoczylas J. J., *Cywilnoprawny obrót nieruchomościami przez cudzoziemców (po wejściu Polski do Unii Europejskiej),* Warszawa 2005,

Skoczylas J. J., Szlęzak E., *Nabycie nieruchomości* [in:] *Cywilnoprawny obrót nieruchomościami przez cudzoziemców,* Lex/el. 2010,

Szafrański D., *Promesa zezwolenia na nabycie nieruchomości przez cudzoziemca (przyrzeczenie wydania zezwolenia),* Kwartalnik Prawa Publicznego 2001, No. 1,

Wereśniak–Masri I., *Nabywanie nieruchomości przez cudzoziemców w Polsce. Komentarz*, Warszawa 2011,

Wielgo M., *Sporna nasza ziemia cała*, Gazeta Wyborcza 2000, No. 63,

Legal acts

Act of 24 March 1920 on the Acquisition of Real Estate by Foreigners (consolidated text: Dz.U. [Journal of Laws] 2014, item 1380, as amended,

The Treaty on the Functioning of the European Union of 30 April 2004, Dz.U. [Journal of Laws] 2004.90.864/2 as amended,

Act of 23 April 1964 – Civil Code (consolidated text: Dz.U. [Journal of Laws] of 2016, item 380, as amended),

Annex I to Council Directive 88/361 EC of 24 June 1988 for the implementation of Article 67 of the Treaty, OJ EC, 1988 L 178,

Act of 19 October 1991 on Managing Agricultural Property of the State Treasury (Dz. U. of 2015, items 1014, 1433 and 1830, and Dz. U. of 2016, item 50 and 585),

Act of 2 April 1997 – The Constitution of the Republic of Polish (Dz.U. [Journal of Laws] No. 78, item 483 , as amended),

Judgment of the Court of Justice of 1 June 1999 in the case C–302/97, Klaus Konle v. Austrian Republic, ECR 1999/6/I–03099

Act of 11 April 2003 on Developing the Agricultural System, (consolidated text: Dz.U. [Journal of Laws] 2012, item 803, as amended),

Accession Treaty signed by Poland on 16 April 2003 in Athens (Dz.U. [Journal of Laws] No. 90, item 864, as amended),

Judgment of the Court of Justice of 23September 2003, in the case C–452/01 Ospelt i Schlössle Weissenberg, Rec, text available on the website: www.eur-lex.europa.eu, (access – 29.05.2016 r.),

Judgment of the Court of Justice of 23 February 2006 in the case C–513/03, heirs M.E.A. van Hilten–van der Heijden v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen bu itenland te Heerlen, text available on the website: www.eur–lex.europa.eu, (access – 29.05.2016 r.),

Judgment of the Court of Justice of 25 January 2007 in the case C–370/05, criminal proceedings against Uwe Kay Festersen, text available on the website: www.eur-lex.europa.e u, (access – 29.05.2016 r.)

Judgment of the Court of Justice of 8 November 2012, in the case C–244/11, European Commission v. Greek Republic, text available on the website: www.eur-lex.europa.eu, (access – 29.05.2016 r.),

Decision of the Supreme Court of 21 January 2015, IV CSK 203/14, LEX No. 1656510

Act of 14 April 2016 on the Suspension of the Sale of Real Estate Held in the Agricultural Property Stock of the State Treasury and the Amendment of Certain Acts. (Dz. U. [Journal of Laws] 2016, item 585),

The Basis for an Entry in a Land and Mortgage Register

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Abstract
The analysis of the issue of land and mortgage register entry is a difficult and multifaceted task. The problem is important inasmuch as currently there are no uniform legal solutions in this area at European level yet. The ever increasing migration of people is conducive to generating further difficulties, not only in private international law, but also in the matter of property law.
The freedoms guaranteed to European Union Member States regarding free movement of capital, people and property have opened the door wide to trade in foreign real estate for many entities. Every single purchase of real estate requires, of course, to be reflected in the relevant land record. It would be socially desirable to make the rules for making entries in the "European" land and mortgage registers uniform, or at least similar. Unification of bases for a land and mortgage entry may constitute the first step towards the unification of EU law in the field of recording real estate transactions in Europe.

Keywords: *land and mortgage register, land registry, entry into a land and mortgage register, basis for an entry.*

Introduction

The increasingly intensive migration processes occurring presently both in Europe and worldwide undoubtedly affect the transnational nature of legal proceedings being conducted, including land and mortgage proceedings. The desire to leverage assets and securely invest capital is conducive to investments involving the purchase of real estate, located not only in one's home country but also abroad. This affects the need to regulate the legal status of purchased real estate in an appropriate land register applicable for the location of the property.

Real estate registers have long been part of the economic life of Europe, increasing the security of legal transactions in this area. They are known not only in Europe but also globally. Despite this, however, there are no uniform legal solutions to reflect the legal status of real properties in individual legal systems. Also, there is no in-depth legal comparative analysis, which would contribute to the improvement of domestic legislation within this area, and eventually result in the unification of European land registries, or at least the rules under which they are maintained. This in turn could result in a strong revival in legal transactions regarding real estate, both in Poland and abroad.

I will focus my deliberations on an attempt to offer an insight into the title issues and initiate in-depth discussion in this regard. In order to compare and to find the best legal solutions in the field of making entries into a land and mortgage register, I will refer to foreign (non-Polish) regulations covering legal systems of both state law, and common law cultures. Due to the limited scope of the subject as it is demarcated, these contemplations cannot be deemed an exhaustive analysis of the problem. They should be seen rather as the author's voice in the discussion on contentious issues related to making entries in land and mortgage registers, and especially the basis for such entries. Detailed discussion is preceded by a few general remarks about the nature of the system, which is necessary for the purposes of the introduction to the title issues.

The nature of an entry and the basis for an entry in the land and mortgage register

According to Article 1, paragraph 1 of the Polish Act on Land and Mortgage Registers and Mortgage (Act of 6 July 1982 on land and mortgage registers, consolidated text: Dz. U. [Journal of Laws] of 2016, item 790, hereinafter: U.K.W.H.) land and mortgage registers are maintained in order to determine the legal status of a real property. Essentially, they are to be established and kept for those real properties that do not have land and mortgage registers yet established or whose land and mortgage registers have been lost or destroyed (paragraph 2 of the Article). Both the establishment and keeping a land and mortgage register is associated with the need to make various kinds of entries. None of statutory regulations does explain, however, the very term of "entry in the land and mortgage register".

The scholarly opinion presents two main views on the nature of an entry into a register. According to the first position, an entry is each annotation made in the land and mortgage register, indicating the change of the legal status of the real property, or determination of that status according to facts (Ciepła, Bałan-Gonciarz, 2011, p. 65; Ignatowicz, Stefaniuk, 2009, p. 345ff..; Ignatowicz, Wasilkowski, 1976, p. 900 f.; Barłowski, Janeczko, 1988, p. 28ff.; Henclewski, Monitor Prawniczy 2010, No. 4, p. 238ff).

Proponents of the second view argue that an entry in a land and mortgage register has a double nature in the sense that it is not only a judicial decision – to rule on the substantive essence of the case), but at the same time, it is a technical operation – reflects the substance of the judicial decision in the land and mortgage register (Rudnicki, 2009, p. 135; Jefimko, Przegląd Sądowy 2002, No. 10, p. 53ff.; Oleszko, 2003, p. 127; Hoffmann, Rejent 2002, No. 5, p. 97ff.; Stawecki, 2005, p. 65ff).

What is noteworthy is the position of jurisprudence in the described area. According to the concept assumed by the Supreme Court, "the nature of land and mortgage register, as a legal institution, requires a written form of legal actions that are relevant to achieving the purpose of the register (public determination of the legal status that is open to the unlimited circle of addressees). This is done by describing and crossing out. The literal meaning of the word "entry" refers to the expression of thoughts with a visible and permanent system of signs. In the law, this concept is given a conventional and heterogeneous nature – depending on whether the formal or material importance prevails. If an entry does not establish legal circumstances, the legal significance of the term is limited to its form and the place (relevant sections of land and mortgage register) where it was made. This applies for example to mentions on requests and remedies that are not judicial decisions. Even these steps (the procedural nature of which is unquestionable) must also be made by the physical act of making an entry. On the other hand, an entry as a form decisive ruling on the substantive essence of the case is another thing, being, according to Article 49 of the Act, a judicial decision. By virtue of an express provision of Article 30 of the Act, deletion as an operation opposite to an entry has the same nature. Thus, in this case, the logical and functional meaning of the word "entry" rests on its role as an imperious act that directly or indirectly decides about a right (e.g. entries in

section I-O)" (Grounds for the Supreme Court's resolution of 20 September 1996, III CZP 104/96, OSNC 1996, No. 12, item 163).

In land and mortgage registers maintained in a computer system, entries take the electronic form. Each such entry, however, requires the authorized signature of the judge or court clerk. This follows from the wording of Article 626^8 § 8 of the Civil Code, according to which a signed entry shall be only deemed made when it is saved in the central database for land and mortgage registers. In this case, a signature of the judge or court clerk is electronic data, which, together with other data they are attached to, are used to identify the judge or the court clerk who performs operations in the computer system (Article 626^8 § 9 of the Civil Code) (Deneka, 2010, p. 67–68).

Scholars of law make the distinction between the content of an entry to a land and mortgage register and the basis for the entry. The content of an entry covers the core of the document underlying the entry. It consists of a description of the right that is subject to entry or deletion, and an indication of the authorized or obligated entity. Where any discrepancies arise between the content of the entry and the reason to make it, the content of the entry decides in favour of a person who does not know the content of the document. This is so because, as a general rule, no one can plead ignorance of the entries in a land and mortgage register (Art. 2, sentence 2 of U.K.W.H.). This rule does not apply to files of a land and mortgage register, to which documents which form the basis for the entries are to be lodged (Ibid. p. 68; Ignatowicz, Stefaniuk, 2009, p. 346).

The term "basis for the entry" was used by the legislature in a number of various legal provisions. By way of example, one may mention Article 31, paragraphs 1 and 2 of U.K.W.H.; Article 626^2 § 3 and Article 626^9 K.P.C. (Act of 17 November 1964 – Civil Procedure Code (consolidated text: Dz. U. [Journal of Laws] of 2014, item 101, as amended), hereinafter: K.P.C.), Article 92 § 4, sentence 2 of the Notary Law (Act of 14 February 1991 – Notary Public Law (consolidated text: Dz. U. [Journal of Laws] of 2014, item 164, as amended), hereinafter: Pr. Not), § 10 para. 1 item 3 and para. 3 of the regulation of 2013). Regulation of the Minister of Justice of 21 November 2013 on establishing and keeping land and mortgage registry in an IT system (Dz. U. [Journal of Laws] of 2013, item 1411, as amended)) "Basis for the entry" is a concept essential and superior to "the basis for

the purchase" or "basis for the designation of the property" (Kuropatwiński, Rejent 2015, No. 5, p. 167.).

Scholars of law make a distinction between two meanings of the term entry. The first meaning is the factual basis of a judicial decision (basis for an entry in a substantive sense), and second – a document or set of documents forming the basis for an entry into a land and mortgage register (basis for an entry in a formal sense). To sum up, one may conclude that the basis for an entry in its formal sense as evidence generally taking the form of documents is used to demonstrate the basis for the entry in its substantive sense (Ibid., p. 168; Mysiak, Rejent 2006, No. 7–8, p. 158; Bieniek, Nowy Przegląd Notarialny 2007, no. 2, p. 13).

Basis for an entry in comparative terms

The Polish legal regulation concerning the basis for an entry in the land and mortgage register is not too extensive. The provision of Article 31 para. 1 of U.K.W.H. specifies a formal minimum for an entry in the form of a document with notarised signature. On the other hand, an entry needed to eliminate discrepancies between the contents of the land and mortgage register and the actual legal status may be made where the discrepancy is proved by a judicial decision or other relevant documents (para. 2 of the article).

According to the wording of Article 32 of U.K.W.H., to make an entry of limited property rights to a real property, it suffices to have a document containing a statement of the establishment of this right given by the owner. For an entry of a personal right or claim, it suffices to have a document containing a statement of the owner on the establishment of this right, or the owner's consent to the entry of the claim. This provision shall apply accordingly to the entry regarding the transfer of mortgage and waiver of priority; however, where the rights of another person are to be affected by the waiver of priority, a document containing the consent of that person is also needed. It should be stressed here that the consent to making an entry may not be subject to a condition or time limit.

By way of comparison, in Germany the bases for an entry are governed by § 19 of the German Law on Land Registers (Grundbuchordnung of 24 March 1897 (RGBl 1897, 139), hereinafter: GBO),according to which

an entry is made based on the consent of the person whose the right is to be affected by the entry. There are of course exceptions to this rule specified in the other sections of the provision, although the general rule is that an entry requires the consent of the person entered as a person entitled to dispose of the right. In accordance with § 29 of GBO, the basis for an entry can only be official documents or officially certified documents (Bengel, Bauer, Weidlich, 2000, p. 178ff.; P. Mysiak, 2010, p. 189).

In Switzerland, entries in the land and mortgage register can be made solely on the basis of demonstration of the right to dispose of the right concerned, and the legal basis thereof (Article 965 of the Swiss Civil Code) (Schweizerisches Zivilgesetzbuch of 10 December 1907 (SR 210), hereinafter: ZGB). The "demonstration of the right to dispose of" means the requirement of proving that the person performing the action which is to form the basis for the entry is recorded in the land and mortgage register as an authorized entity or has the authorization of such a person to perform that specific action. The "demonstration of the legal basis" involves demonstrating that the action was performed in the form set out in the law (Zohl, *Grundbuchrecht*, Zürich 1999, p. 179). Apart from legal actions, also administrative decisions, judicial decisions and statutory provisions may constitute a basis for an entry (Mysiak, 2010, p. 189).

In Austria, pursuant to § 94 paragraph 1 of the Austrian Act on Land Registers (Allgemeines Grundbuchgesetz 1955 (BGBl. 39/1995), hereinafter: GBG), there are four prerequisites to make an entry. Firstly, no obstacles for making an entry may be derived from the content of the land and mortgage register. Secondly, there will be no doubt as to the legitimacy of the applicant or their capacity to dispose of the right. Thirdly, the demand of the application shall be supported by documents attached thereto. Finally, the documents that form the basis of an entry shall be prepared in the appropriate form (Rechberger, L. Bittner, *Grundbuchsrecht*, Wien 2007, p. 137ff). The basis for an entry should therefore be the documents submitted in the form required by law. Upon acquisition or change of a property right, the content of the document must include the legal basis for the action performed. Austrian scholars of law make a distinction between a "decisive entry" and "pre-notation." The former requires the submission of an official document or a document with an officially certified signature, while a pre-notation occurs

when the document does not meet all the legal requirements established in the provisions of § 31 et seq. of GBG (Mysiak, 2010, p. 190).

It is also noteworthy to mention the solutions applied in English-speaking countries. The English Land Registration Act of 2002 makes the basis for an entry conditional upon whether *in concreto* we are dealing with the first entry, or with a subsequent one for a property that is already registered. In the first case, apart from documents, other evidence, including copies of documents, is also admissible. For entries regarding registered real properties, it is necessary to submit the original document or its officially certified copy (Harpum, Bignell, 2004, p. 31; Mysiak, 2010, pp. 190–191).

The comparison demonstrates that the issue of the basis for an entry in the land and mortgage register is variously regulated in the continental and English legal systems. It is interesting that each of these regulations is quite narrow and regulates these issues in a brief, vague manner. Meanwhile, the basis for an entry is undoubtedly one of the most important elements of the process of making a substantive decision on land and mortgage register applications. However, perhaps, the intent of the legislatures was to create a flexible structure, providing courts and other bodies keeping land registers with the discretion in decision-taking, especially for complicated factual circumstances.

Limited substantive legalism

The mortgage registry system in Poland is based on the principle of substantive legalism. Its essence is based on the assumption that, subject to exceptions specified in the Act, making an entry in the land and mortgage register is dependent on demonstrating a relevant change in the legal status of the property. The subject of the evidentiary proceedings in a land and mortgage register court must therefore include both the circumstances confirming the transfer of the right from the entity recorded in the land and mortgage register to another, and the circumstances confirming the validity and effectiveness of the actions leading to a change in such this legal status. All those factors constitutes the basis for an entry in a substantive sense (Kuropatwiński, Rejent 2015, No. 5, pp. 169-170; Wasilkowski, Part II, Państwo i Prawo 1947, vol. 5–6, p. 50; Oleszko, Rejent 2007, No. 1, p. 15ff).

Similar solutions have been adopted in Switzerland and Austria (*Legalitätsprinzip*), where the principle of substantive legalism reduces the risk of discrepancies between the content of the land and mortgage register and the actual legal situation (Zohl, 1999, p. 178; Rechberger, Bittner, 2007, p. 136). In Germany, in turn, the mortgage registry system is based on the principle of formal consensus, which, according to German scholars, is a significant simplification of the mortgage registry procedurę (Erickmann, 1994, p. 86–87).

It is worth noting that in the light of the judgement of the Polish Constitutional Court of 3 July 2007, SK 1/06, „(...) the entry may be made on the basis of a document, which proves the existence of a legal status of the property, or is evidence of a substantive action giving rise to, change in or termination of a right that is subject to entry in the land and mortgage register (...). In view of the Act on the Land and Mortgage Register and Mortgage, and the challenged Article 626^8 § 2 of the K.P.C., it is worth referring to the case law, showing that an action under substantive law, which constitutes the basis for an entry, should be examined by the mortgage registry court not only in formal terms, but also in terms of its substantive effectiveness (…). The jurisdiction of the mortgage register court is not limited only to control the literal content of the application and attached documents. Therefore there is no grounds to conclude that Article 626^8 § 2 of the K.P.C. infringes Article 45 paragraph 1 of the Polish Constitution" (OTK-A 2007, No. 7, item 73).

The Polish mortgage registry legalism is subject, however, to certain exceptions for the benefit of the principle of formal consensus and the principle of formal statement of one party (Ignatowicz, Rejent 1994, No. 2, p. 15; Wasilkowski, Part II, Państwo i Prawo 1947, vol. 5–6, p. 50. Cf. Gniewek, 2005, p. 100ff). Hence, the literature on the subject refers to the principle of limited substantive legalism. It results in the delimitation of evidence measures, by which the change of the legal status of the property can be demonstrated in the land and mortgage register proceedings. In addition to this, there is the limited jurisdiction of a land and mortgage registry court, covering only an examination of the content and form of the application, attached documents and the content of the land and mortgage register (Article 626^8 § 2 of the K.P.C.) (Cf. Kuropatwiński, Rejent 2015, No. 5, p. 171–172; Mysiak, 2010, p. 196).

Thus, the rules for giving evidence in land and mortgage proceedings differ significantly from the general rule of evidence. With a few exceptions, they do not admit other evidence than documents. The latter are generally the basis for entries in its substantive sense. In the event the change in the legal status of the real estate is due to various legal events, all of them are the substantive basis for the entry in the land and mortgage register. This does not mean that they become the basis for an entry in the formal sense *per se*. These bases may often differ from each other, and the role of the land and mortgage court is to verify them and select the basis which is appropriate to the facts and the state recorded in the land and mortgage register (Rechberger, Bittner, 2007, p. 139ff.; Kuropatwiński, Rejent 2015, No. 5, p. 171).

In practice, situations in which the basis of an entry is built based on the principle of formal consensus (Article 32 paragraph 2 of U.K.W.H.) or the principle of a statement by one party (Article 32, paragraphs 1 and 2 of U.K.W.H.) are rare. In the latter case it is *de facto* about a further restriction on the principle of substantive legalism, involving excluding from the jurisdiction of the land and mortgage court an examination of the declaration of intent of a party to a contract referred to in Article 32 paragraphs 1 and 2 of U.K.W.H. (Ignatowicz, Rejent 1994, No. 2, p. 16; Kuropatwiński, Rejent 2015, No. 5, p. 171–172).

The form of the documents constituting a basis for an entry

In the literature of reference, authors assume that the basis for an entry may be mostly documents constituting proof of ownership or other rights that are subject to entry in the land and mortgage register. Those documents include primarily:

- notarial acts – including a number of legal actions related to real estate transactions. Because of their public nature, the significance and evidence qualities of such documents is high. A notary is a person of public trust, and their role is to examine the content of legal actions, both in the context of current and previously applicable legislation;
- documents with a notarized signature – their importance in the land and mortgage register transactions is as high as these mentioned above and their role cannot be ignored. However, pursuant to the decision of the

Supreme Court of 9 March 2005, III CK 132/04, "the principle, provided for in Article 31 paragraph 1 of U.K.W.H., of a notarized certification of signature on a document, which forms the basis for an entry to the land and mortgage register, does not refer to official documents within the meaning as defined in Article 244 of the K.P.C. Such documents include court rulings. The function of an original is replaced by its official copy, since the original is taken out of the flow of documents and is held on file" (Lex No. 453048);

- administrative decisions – the content of which directly decides the change in the legal status of real estate or limited property rights, which the land and mortgage registers are kept;
- judicial decisions – both final and those determined as immediately enforceable;
- other documents – usually evidencing the acquisition of ownership or proving that such acquisition took place, e.g. a certificate from the state archives, extracts from liquidation tables, documents from the land and buildings records etc. (Borkowski, Trześniewski-Kwiecień, 2008, Nb. 2).

As a rule, an entry in the land and mortgage register may be made only on the basis of an original document or documents. The exception is the entry of ownership upon establishing a land and mortgage register. The requirement to submit the original document was highlighted in the resolution of the Supreme Court dated 8 December 2005, III CZP 101/2005, where it was decided that the basis for an entry of compulsory mortgage in the register can only be an original enforcement order (OSNC 2006, No. 11, item 180. Likewise; the Supreme Court's in its decision of 12 June 1996, III CZP 61/96, OSNC 1996, No. 10, item 132). Despite this, due to the requirements of the substantive law as to the form of documents, in real estate transactions the basis for entering is often not an original document *sensu stricto* (Siciński, 2013, Nb 2.4).

Also requiring consideration is the situation of public, which are usually issued in the form of duplicates or extracts. These are documents, in respect of which the function of the original is played by their official copy, because the original is held on file. In such a situation, notarial authentication is virtually excluded, because deeming such a document excluded from legal

transactions, the notary will not be able to make a duplicate or copy of it. In addition, in the decision of the Supreme Court dated 24 June 1997, II CKN 216/97, it was assumed that the basis for an entry to the land and mortgage register may not be a duplicate made of a duplicate of an official document certified by the authority in possession of a duplicate of this document (OSNC 1998, No. 1, item 7). This decision also decided the question of inadmissibility of a copy as the basis for an entry in all cases, where the copy would not be based on an entry in a specific public register. This is so, since only documents issued from these records are admissible duplicates made from the original (Wrzecionek, Przegląd Prawa Handlowego 2007, No. 2, Nb 2.4).

Moreover, according to Article 109 of the Pr. Not., only an excerpt of a notarial act has the legal effect of the original. Thus, copies, duplicates and extracts drawn up by a notary , although they have the effect of an official document, do not have legal effect of the original. Therefore, they shall not constitute the basis for an entry in the land and mortgage register, if their capacity as a notarial document within the meaning of Article 31 U.K.W.H. does not suffice to make the entry. It will be so in the case of a judicial or administrative decision. In assessing such documents constituting the basis for an entry, one should not ignore limited jurisdiction of the land and mortgage court, comprising, according to Article 626^8 § 2 of the K.P.C., the examination of only the documents attached to the application. It should be kept in mind that Article art. 626^2 § 3 of the K.P.C. clearly requires that only documents that form the basis for an entry are to be attached to the land and mortgage register application (P. Rylski, Polski Proces Cywilny 2012, No. 1, p. 129; Bieniek, Nowy Przegląd Notarialny 2007, No. 2, p. 48; Siciński, 2013, Nb 2.4).

The grammatical (textual) interpretation of Article 31 paragraph. 1 of U.K.W.H. seems to speak in favour of the assumption that only those documents that are directly assessed by the court in the land and mortgage register proceedings are required to be in the form specified in this legislation. The documents in question are those which are the basis for an entry in the formal sense. On the other hand, however, the principle of substantive legalism entails the fact that legal events that determine the effectiveness of a particular action also form the basis for an entry in the land

and mortgage register. So, one cannot say that they are less important than the legal documents supporting the land and mortgage register application. The role of Article 31 paragraph 1 of U.K.W.H. is undoubtedly to increase the security of legal transactions in the field of private documents, which determine the change of the legal status of real estate (Czech, 2014, p. 463; Kuropatwiński, Rejent 2015, No. 5, p. 176–177; Mysiak, 2010, p. 196).

Jurisdiction of the land and mortgage court

One of the matters that are closely related to the subject of the basis for an entry in the land and mortgage register is the issue of the scope of court's jurisdiction in the in the land and mortgage register proceedings. The crucial role is played by Article 626^8 § 1 and 2 of the K.P.C. The content of the first states that the court is bound within the scope of the request, which means that the court may not adjudicate on what has not been requested, or more than the request submitted in the application. In contrast, the provision of Article 626^8 § 2 of the K.P.C. results in the obligation of examination by the court of only the content and form of the application, documents attached to the application, and the content of the land and mortgage register. Where the land and mortgage register is kept in a computer system, the court, when examining the application, additionally examines *ex officio* the compliance of the data included in the application with the data resulting from the systems keeping records of universal identification numbers (Article 626^8 § 3 of the K.P.C.). Additionally, in the case of a request to amend the designation of the property in the land and mortgage register kept in a computer system, the court shall, also *ex officio*, verify the data indicated in the application and the property designation recorded in the land and mortgage register with the data of the real estate cadastre, unless there are obstacles to actually prevent making such a check – article 6268 § 4 of the K.P.C. (Deneka, 2010, p. 111).

When a document covering legal action is attached to the application for an entry, the mortgage registry court must examine this step not only in terms of formal and legal requirements, but also in terms of its substantive effectiveness (See the decision of the Supreme Court of 25 February 1963, III CR 177/62, OSNC 1964, No. 2, item 36 and of 16 January 2009, III CSK 239/08, Lex No. 523685). The court should first assess whether the

legal action is not affected by the sanction of absolute nullity. On the other hand, it is emphasized in case-law that "the nature of jurisdiction, limited under art. 626^8 § 2 of the K.P.C., of a district court deciding the case upon an application for an entry, does not allow it to conduct the examination in the direction of finding the facts. The phrase "examines only" is to emphasize the limited nature of the jurisdiction of the court in the proceedings in which the court has no power or possibility of taking evidence, so it cannot verify the data provided by the parties" (Supreme Court's resolution of 17 January 2003, III CZP 79/02, OSNC 2003, No. 11, item 142).

It should be agreed with the view expressed in the literature on the subject, that the court's serious doubts as to the content of the agreement to form the basis for an entry in the land and mortgage register may be left unsolved. In such a case, the court should conduct a full investigation of evidence and admit e.g. witness evidence or hearing of participants to the proceedings, which is not possible as part of land and mortgage registry proceedings (Deneka, 2010, p. 114; H. Ciepła, Przegląd Sądowy 1999, No. 9, p. 30).

Without a doubt, however, in the light of article 626^8 § 2 of the K.P.C., the deliberation on the application for an entry in the land and mortgage register includes the examination of the documents attached to the application. This regulation does not define the limits of such "examination". Only the content of § 10 para. 1 item 3 of the Regulation of 2001 (Regulation of the Minister of Justice of 17 September 2001 on the manner of keeping land and mortgage registers and collections of documents (Dz. U. [Journal of Laws] 2001., No. 102, item. 1122, as amended.)) stipulates that "document" should be understood as "data on the basis for an entry," therefore the type, date and number or reference sign of the document. In practice, a document intended to be the basis for an entry should also specify the subject matter and the name and address of the authority that issued it, or the name of the notary and the notary office.

The legislation mentioned above do not specify the scope within which the land and mortgage court examines the basis for an entry – a document attached to the application. Although secondary legislation defines the formal requirements for such a document, it is beyond dispute that the competence of the court in the proceedings for an entry also includes the obligation to examine the content of the document as the basis for an entry. The content

of the document is determined by the type of the document to form the basis of an entry in a particular section of the land and mortgage register. Thus, the scope of jurisdiction of the court will also be different depending on whether the basis for the entry will refer to Section I, II, III or IV of the land and mortgage register (Oleszko, 2016, Nb. 6).

According to Article 626^2 § 3 of the K.P.C. the application for an entry must be accompanied by the documents constituting the basis for an entry in the register. The *ratio legis* of the regulation is to provide the court with all the documents necessary for the initiation and conduct of the land and mortgage registry proceedings.

Particularly important, especially for notarial practice, are the provisions of § 3 and 4 of Article 626^8 of the K.P.C. on how to compose e-applications, in which the basis for an entry is a notarial deed. Their content must always be consistent with the formal requirements of the ICT system. The integrity of the notarial deed with regard to the e-application requires a separate assessment. In the light of the applicable land and mortgage registry regulations, the court examines not only the formal requirements of the e-application, but also *ex officio* verifies the consistency of the data indicated in the application with the data resulting from systems keeping the records. Moreover, it checks the data included in the application and the designation of the property recorded in the land and mortgage register with the data from the record of land and buildings. These circumstances have a direct impact on the responsibilities of a notary who, before drawing up a notarial deed and submitting the e-application, should read the entries in the land and mortgage reg ister, and compare them with the current data in the record of land and buildings (Oleszko, Pastuszko, 2016, Nb. 4.4).

The above does not change the fact that the jurisdiction of the land and mortgage court includes the examination of not only the form but also the content of the notarial deed constituting the substantive basis for the entry. The validity and effectiveness of a legal action identified in the notarial deed constituting the basis for an entry may be assessed only by the court. The court's role is to correctly demarcate between the actual intention of the parties of a legal action and the influence of the notary on the editorial content of the deed (Ibid.).

Conclusions

The above observations show that bases for an entry in the land and mortgage register are a complex, multifaceted issue, both in theory and in practice. Certainly, it is impossible to define a single pattern of proceeding, consistent for all land and mortgage registry cases. Although in practice the basis for an entry is usually different kinds of documents, one must remember about other types of basis for an entry, e.g. in the form of specific legal provisions, notorious facts, etc. The analysis of all these bases would certainly exceed the scope of this study.

The author has tried to provide an insight into the issue and to define certain issues related to the title issue. On the basis of selected foreign legislation, an attempt was also made to show the main rules of foreign jurisdictions in terms of making entries in land registers. However, the assessment of foreign regulation was intentionally abandoned, bearing in mind that regardless of the chosen system of the land and mortgage register, and whether it is based on the principle of substantive legalism (Poland) or formal consensus (Germany), the most important factor is always the security of legal transactions of real estate and other rights recorded in land and mortgage registers. When examining a particular land and mortgage register application and assessing the documents in terms of the basis for an entry, one should always have in mind the purpose of land registry, which is the need to reflect the actual legal status of the property in the land and mortgage register.

As regards proposals for the law as it should be (*de lege ferenda*), it is worth considering the idea of establishing, at least across the European Union, a central system for the registration of real estate. The EU's land records built based on this system would unquestionably make the life of potential real estate buyers easier – this also applies to creditors seeking measures to secure their claims in the form of a mortgage. Such a European land registry (European Mortgage Register) would, in fact, play a crucial role in terms of information, as well as contribute to security of real estate legal transactions transnationally.

References

Allgemeines Grundbuchgesetz 1955 (BGBl. 39/1995)

Barłowski B., Janeczko E., *Księgi wieczyste – rejestr nieruchomości*, Warszawa 1988

Bengel M., Bauer R., Weidlich D., *Grundbuch Grundstück Grenze*, Kriftel 2000

Bieniek G., *Podstawa wpisu do księgi wieczystej a kognicja sądu wieczystoksięgowego,* Nowy Przegląd Notarialny 2007, No. 2

Borkowski P., Trześniewski-Kwiecień J., *Dokumenty stanowiące podstawę wpisów do księgi wieczystej*, [in:] Borkowski P., Trześniewski-Kwiecień J., *Wpisy do ksiąg wieczystych*, Lex/el. 2008

Ciepła H., *Kognicja sądu wieczystoksięgowego*, Przegląd Sądowy 1999, No. 9

Ciepła H., Bałan-Gonciarz E., *Ustawa o księgach wieczystych i hipotece. Komentarz po nowelizacji prawa hipotecznego. Wzory wniosków o wpis. Wzory wpisów do księgi wieczystej*, Warszawa 2011

Czech T., *Księgi wieczyste i hipoteka*, Warszawa 2014

Deneka M., *Księgi wieczyste. Zasady materialnoprawne*, Warszawa 2010

Erickmann D., *Grundbuch – Verfahrensrecht: ein Lehrbuch*, Bielefeld 1994

Gniewek E., [in:] *System prawa prywatnego*, vol. IV, *Prawo rzeczowe*, Ed. Gniewek E., Warszawa 2005

Harpum C., Bignell J., *Registered Land. Law and Practice under the Land Registration Act 2002*, Bristol 2004

Henclewski T., *Podstawy ujawnienia wzmianki w księdze wieczystej,* Monitor Prawniczy 2010, No. 4

Hoffmann P., *Dane i informacje z ewidencji gruntów i budynków a księgi wieczyste*, Rejent 2002, No. 5

Ignatowicz J., *Podstawy wpisów do ksiąg wieczystych*, Rejent 1994, No. 2

Ignatowicz J., Stefaniuk K., *Prawo rzeczowe*, Warszawa 2009

Ignatowicz J., Wasilkowski J., [in:] *System prawa cywilnego*, vol. II, *Prawo własności i inne prawa rzeczowe*, Ossolineum 1976

Jefimko E., *Postępowanie wieczystoksięgowe jako szczególny rodzaj postępowania nieprocesowego (zagadnienia wybrane)*, Przegląd Sądowy 2002, No. 10

Kuropatwiński J., *Jurydyczna konstrukcja podstawy wpisu do księgi wieczystej*, Rejent 2015, No. 5

Mysiak P., *Podstawa wpisu do księgi wieczystej*, Rejent 2006, No. 7-8

Mysiak P., *Postępowanie wieczystoksięgowe*, Warszawa 2010

Oleszko A., *Badanie podstawy wpisu (treści dokumentu)*, [in:] *Wpis w księdze wieczystej na podstawie aktu notarialnego*, Lex/el. 2016

Oleszko A., *Obrót cywilnoprawny w praktyce notarialnej i wieczystoksięgowej*, Kraków 2003

Oleszko A., *Uzgodnienie stanu prawnego nieruchomości w zakresie podstawy dokonanego wpisu prawa własności w księdze wieczystej*, Rejent 2007, No. 1

Oleszko A., Pastuszko R., *Kognicja sądu rozpoznającego wniosek*, [in:] Oleszko A., Pastuszko R., *Prawo o notariacie. Kodeks Etyki Zawodowej Notariusza. Księgi wieczyste. Postępowanie wieczystoksięgowe*, Lex/el. 2016

Rechberger W.H., Bittner L., *Grundbuchsrecht*, Wien 2007

Rudnicki S., *Ustawa o księgach wieczystych i hipotece. Przepisy o postępowaniu w sprawach wieczystoksięgowych. Komentarz*, Warszawa 2009

Rylski P., *Odpis dokumentu poświadczony przez pełnomocnika występującego w sprawie jako podstawa dokonania wpisu w postępowaniu wieczystoksięgowym*, Polski Proces Cywilny 2012, No. 1

Siciński P., *Podstawy dokonywania wpisów – uwagi o formie dokumentu*, [in:] *Komentarz do wpisów w księgach wieczystych*, Ed. Ignaczewski J., Lex/el. 2013

Stawecki T., *Rejestry publiczne: funkcje instytucji*, Warszawa 2005

Wasilkowski J., *Znaczenie wpisu do księgi wieczystej według prawa rzeczowego*, Part II, Państwo i Prawo 1947, vol. 5-6

Wrzecionek R., *Kontrola sądu rejestrowego nad czynnościami notarialnymi w spółkach kapitałowych*, Przegląd Prawa Handlowego 2007, No. 2

Zohl D., *Grundbuchrecht*, Zürich 1999

Grundbuchordnung of 24 March 1897 (RGBl 1897, 139)

Schweizerisches Zivilgesetzbuch of 10 December 1907 (SR 210)

Act of 17 November 1964 – Civil Procedure Code (consolidated text: Dz. U. [Journal of Laws] of 2014, item 101, as amended)

Act of 14 February 1991 – Notary Public Law (consolidated text: Dz. U. [Journal of Laws] of 2014, item 164, as amended)

Regulation of the Minister of Justice of 21 November 2013 on establishing and keeping land and mortgage registry in an IT system (Dz. U. [Journal of Laws] of 2013, item 1411, as amended)

Proper management of access to public information, as a realization of the needs and rights of citizens

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Abstract
The right man to the right of access to public information on the activities of the public administration has become a fundamental right which, in accordance with applicable regulations, is assigned to every citizen. Such an approach clearly indicates that the right of access to public information has also become a sign of increasingly pursued social control over the functioning of the public administration. With the possibilities for realization of the right to information, public use for many years both institutions of civil society and individual citizens. There is a growing awareness associated with the use of citizen control over all activities that take public sector institutions.

Keywords: *management, public management, public information, public administration, civil rights.*

Introduction

The right of access to public information on the activities of the public administration is a fundamental right enjoyed by every citizen. With such an approach, the right of access to public information is a manifestation of social control over the functioning of the public finance sector. The right to public information for many years to appreciate and actively use it both organized civil society institutions, and individual citizens.

The study analyzed area is to identify the essence of the management of public information in public institutions from scratch the legal changes in this topic in the context of the tasks executed by them. The right of access to public information is subject to ongoing development, the development of this action affects more and more all the values of social life, in particular, it includes the construction of an effective democratic system once the civil society.

The article indicates the methods and ways to manage system access to public information, which is also the realization of the rights of citizens. Modern methods of access to public information enjoy, the more it grows more and more awareness of citizens in the range of new possibilities for use of the provisions of the law on access to public information.

The essence of public information in international law and polish

Access to public information is one of the fundamental principles of modern democracy and a thriving civil society. Hence, one can notice that the right to public information, it has become one of the fundamental human rights, which was adopted by the international community. You have pointed out that the obligation to provide all citizens with public information stems from a number of regulations for global coverage.

It is worth mentioning at this point of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, which is also called the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms). Extremely important article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides that "everyone has the right to freedom of expression. This right includes freedom (...) receive information and ideas without interference by public authority and regardless of frontiers. "It is a basic principle related to the right to express their own opinion and the opinion which found its reflection in the Polish Constitution of 2 April 1997, which in its article 54, paragraph 1 indicates that guarantees everyone the freedom to express opinions and to acquire and disseminate information (article 54, paragraph 1 of the Polish Constitution). You should also mention Article 19 of the International Covenant on Civil and Political Rights, signed on 19 December 1966, which gives every person the right to "(...) the freedom to seek, receive and disseminate any information and ideas, regardless of frontiers, orally, in writing or in print, in the form of art, or through any other media of his choice "(International Covenant on Civil and Political Rights).

In the new united Europe, issues related to the wider access to public information is governed by two major pieces of legislation in this area. The first normative act is the Green Paper of the Commission of the

European Communities of 20 January 1999. This document indicates the possibility of access to information, which is held by the public sector visible in the information society called *the Green Paper on Public Sector Information in the Information Society*. It also sets out guidelines for the legislative bodies of the Member States of the European Union regarding access to data held by public administration bodies. The second document is a Recommendation No. R / 81/19 of the Committee of Ministers to Member States on access to information held by public authorities (Jasudowicz, 1997, p. 99). The recommendation is non-binding tightly. It contains only recommendations which must adapt Member States of the Council of Europe. The recommendation defines the basic principles relating to the provision of information, which were held by public authorities. Extremely important was the application of the principle, visible also in Polish law regulating access to public information, where the entity requesting public information may not be claimed to justify their interest. Furthermore, each request associated with granting the information can be submitted directly to all public authorities. The exception here is the legislative and judicial power. Any award of public information, in accordance with the recommendation – should take place within a reasonable period of time. However, the refusal to provide public information must be fully justified certain factors, which can include among other issues of national security, public safety and order, protection of private life or other legitimate private interests.

Currently in the European Union the right to public information is identified as an individual right of every human being, a citizen of both the European Union and natural or legal person that resides or is domiciled in one of the 28 countries concerned (Przyborowska-Klimczak, Tefelska-wing, 2004, p. 295–296). This law also include wide access to information that is in the possession of the Union and to the information that is in the possession of the whole public sector European Union. In this sense, the meaning of "public sector" are all public entities that carry out broad public tasks. It was also very detailed guidance on access to public information. The aim of these procedures is to ensure the transparency of decision-making process, which is undertaken in all countries of the European Community. Hence, it guarantees an extremely large access to documents held by the

European Union and national, regional and local governments. Access to such information is entirely free of charge and based on the principle of equality and non-discrimination.

The essence of public information in polish law

Referring to the access to public information in Polish law, indicate the already cited provision of article 54, paragraph 1 of the Polish Constitution, which granted because everyone has the freedom to express their views, obtain and disseminate information. The instruction contained in article 61, paragraph 1 of the Polish Constitution guaranteed citizens the right to obtain information on the activities of public authorities, as well as persons performing managerial public functions.

The case involving regulation of mutual respect article 61 of the Polish Constitution and article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms – was the subject of a Supreme Court judgment of 1 June 2000 (Judgments of the Supreme Court dated 1 June 2000). In the present judgment, the Supreme Court categorically stated that the Polish Constitution establishes a relatively higher standards of protection of freedom of expression than those provided for in the said Convention. The law also allows you to obtain information on the activities of self-governing economic and professional. It allows you to get information about the activities of organizational units in the field in which they perform the duties of public authorities and manage communal assets or property belonging to the Treasury. The right to obtain information covers a very important opportunity, which allows access to documents and entry to sittings of collective organs of public authority formed by universal elections, with sound and visual recordings (article 61, paragraph 2 of the Polish Constitution).

However, the right of access to public information is defined in the Polish Constitution too broadly. Therefore, there was a need to address these issues in the act normal. This took place under the adoption of the Act of 6 September 2001 on access to public information, which for the most part entered into force on 1 January 2002 (act on access to public information). The Law on Access to Public Information was to be in its original assumption of an Act of the political system. She had to focus on a clear indication of

the constitutional right of a citizen to free access to public information. But it did not happen. The Act is the largest but not the only legal act that expresses and expression to the principle of transparency of activity of public authorities. Unequivocal declaration of transparency – in relation to the scope of normalization – you can find, among other things:

- act of 27 August 2009 on public finance, where he implemented the principle of transparency of public finances;
- act of 27 March 2003 on spatial planning and development, in this case, implies a right of access to the local zoning plan and paid for obtaining extracts;
- act of 3 October 2008 on provision of information about the environment and its protection, public participation in environmental protection and environmental impact assessments, which allows for active participation of the people in control of civic environmental protection.

Cited examples of the act clearly shows that assigned the right to public information is realized on many levels of law. And it can be the start of a discussion on the wider freedom of giving it easy access to public information.

Implementation of the principle of openness in terms of access to public information

The principle of openness is an extremely important principle of a democratic state of law, which is to ensure transparency and transparency of public administration. In the European Union, this rule has many years of experience and is a very serious consideration and respected (Górzyńska, 2005, p. 102). Noteworthy is also the view quoting B. Kudrycka, which even before the adoption of the current functioning of the Polish Constitution considered that: ,,Publicity activities, open dialogue, free and efficient flow of information between citizens and public officials are a sine qua non of public administration in many democratic countries. This method also reduces the biased and unethical conduct within the administrative bodies "(Kudrycka, 1995, p. 93). The principle of openness should be visible and implemented at all levels of the administration, that citizens have the right and ability to make their own assessment related to

the functioning of public sector institutions. In particular, the principle of clarity is particularly noticeable at the level of functioning of local administration bodies. Proximity linking public institutions with citizens, results in much greater opportunity to influence inhabitants in decision-making processes, which are taken every day. The direct influence residents on public affairs makes it quite an important and increasingly used tool to diagnose the correctness of decisions in local government is the use of a local referendum and civic control. Openness is therefore a constant attempt to limit arbitrariness and discretion of public administration (Koniuszewska, 2009, p. 124–126).

The principle of openness has therefore become an important area of the activities of all public authorities. However, it must be strongly emphasized that transparency in the functioning of government institutions as entities closest to the citizens, still remains extremely sensitive. Hence, the principle of transparency in the context of the functioning of local governments – should be regulated so wide, and extremely precisely, to the applicability of this principle in practice was very real and satisfied the basic needs of the residents in the area of free access to public information.

Discussed and repeatedly stressed the principle of openness, and in particular the right to public information in Poland is a constitutional principle. In accordance with the provisions of article 61 paragraph 1 of the Constitution of the Republic of Polish, where "A citizen has the right to obtain information about the activities of public authorities and persons holding public office" (the Polish Constitution). The location of the law giving the opportunity to obtain public information, a group of freedom and political rights shows clearly that this right is closely linked to the participation of citizens in the intermediate model of the exercise of power. Invoked permission would not have been possible to use it were not ensured a real possibility of obtaining public information. The reference to it in article 61, paragraph 4 of the Constitution of the Republic of Polish laws to characterize the mode of access to information, can really take advantage of the right to information, which, like the principle of openness – is also a constitutional law. The Polish Constitution indicates, however, limit the right of access to public information. This can be done only in exceptional circumstances so warrant. In its article 61, paragraph

3, clearly indicates that the limitation of the right of access to public information, may be only due to set out in the laws protecting the rights and freedoms of other persons and economic subjects, public order, security or important economic interests of the state (article 61, paragraph 3 of the Polish Constitution).

It should be noted that despite the frequent use by the legislator notion of transparency – there is no official definition of the term. Transparency can be understood as a certain idea or a certain state of affairs, which tend to public institutions but not always fully understand it and thus realizing. In this sense the notion of transparency is the opposite of secrecy (Piskorz-Ryń, 2003, p. 487-489). It is reasonable to say that the principle of openness is linked to the right to access to information, which is used to its full implementation. However, it is possible to realize the principles of transparency, without the realization of the right of access to information. Such action is linked to the obligation to provide public information (Koniuszewska, 2009, p. 125-126). You will notice that transparency is the aim, which easily can be achieved by well-defined right to information. These activities can be put in another way, where citizens enjoyed the right to public information is a kind of tool for the implementation of the principle of transparency. In the studied literature often it specifies that the transparency in public administration makes it necessary to share information, both from the office and at the request of the person concerned (Lang, 1996, p. 159). As defined transparency of public administration, which coincides with the scope of the scope of the concept of access to information that can be found in the Law on Access to Public Information. From here you can define that access to information is somehow part of the principle of transparency, which is a manifestation of the functioning of the institutions of the public sector on the basis of transparency and clarity.

Method of managing rights to public information

The right to public information is a right of every individual to apply for any available information. This right is linked to the obligation to provide information by entities that are required to provision of article 61, paragraph 1 of the Polish Constitution to information concerning:

- activities of public authorities;

- activities of self and professional, as well as other persons and organizational units in the field in which they perform tasks in the field of public administration and manage communal assets or property of the State Treasury;
- activities of public officials (the Polish Constitution).

You also need to refer to the definition of public information, which was formulated in the provision of Article 1, paragraph 1 of the law on access to public information. This definition came into force on 16 June 2016. In accordance with this disposition – any information about public affairs is public information within the meaning of the Act and available subject to the terms and procedures set forth in the law on access to public information. It should also be noted that this is how the legislator pointed to the concept of public information – in literature quite often criticized, where some see it as a concept that is flawed *ignotum per ignotum* (Bąkiewicz, 2008, p. 92) . They are also in the literature position significantly. According to some legislator defining the concept of public information it received that transparency of access to public information is of a general nature. This increases the definition of information, including the sphere of information and facts (Sitniewski, 2006, p. 544–546).

According to M. Jaśkowski, "the concept of public information but can not be considered only on the background of article 1 paragraph 1 law on access to public information without considering the content of article 61, paragraph 1 of the Polish Constitution. Applied a literal interpretation could because then lead to a too narrow understanding of the term. This would result in that as a public information would be treated any message relating to the things the public, that is the case concerning a certain community. Not so subscribed to this concept of information relating to individual cases resolved, for example, an administrative decision, unless it would occur in the public elements of the circle of parties. It would define too narrow, contrary to article 5, paragraph 2 of the law on access to public information, which allows access to data contained in the records of proceedings of individuals, if they contain information on persons performing public functions associated with performing these functions" (Jaśkowska, 2002, p. 25–28).

The right to public information has therefore been defined in the act on access to public information very widely. On the one hand, it often creates doubts as to interpretation in terms of what can be made available as public information, on the other hand, it allows for the fullest realization of the principle of openness. Interesting decision pointed to the Constitutional Court in its judgment of 20 March 2006. The Court pointed out that the right to public information is primarily a subjective constitutional right referred to in article 61 of the Polish Constitution, where the part of the citizen has the right to obtain information about the functioning of public institutions and all institutions of public authority (judgment of the Constitutional Court).

Everyone has the right of access to public information, hereinafter referred to as "the right to public information". It should also be borne in mind that the person exercising the right to public information must not be required to reveal the legal or factual. However, the right to public information is restricted to the extent and on the terms specified in the regulations on the protection of classified information and the protection of other secrets protected by law. The right to public information is subject to limitation due to the privacy of an individual or a trade secret. This restriction does not apply to information on persons performing public functions associated with the performance of these functions, including the conditions of entrusting and performing these functions, and if the natural person or entrepreneur give up their right (article 5, paragraph 2 of the law on access to public information).

It seems that the term ,,everyone "should be understood as individuals who have legal capacity, legal persons or organizational units without legal personality. These are the entities that can obtain information about the activities of bodies working in the public sector. This was confirmed by the Regional Administrative Court in Warsaw in its judgment of 11 February 2004. He stated that ,,in accordance with article 61 paragraph 1 of the Constitution of the Republic of Polish – citizen has the right to obtain information about the activities of public authorities and persons holding public office. On the basis of the law on access to public information, the right information is available to any. This means, therefore widening the circle of entities authorized in relation to article 61 of the Constitution. Accordingly,

the concept ,,everyone" means both natural persons, legal persons and organizational units without legal personality, and social organizations".

In accordance with article 6, paragraph 2 of the law on access to public information, an official document within the meaning of the Act it is the content of a declaration of intent or knowledge, preserved and signed in any form by a public official. While the local government act, or the act on local government, district and province indicate only generally on access to documents, but not all, and the only resulting from the exercise of public tasks. It seems that the official documents is a broader concept than documents resulting from the exercise of public duties. However, this has meaning to the extent that disclosure of any document on the basis of the law on access to public information, rather than government laws, which means that the significance will have an access to official documents specified in this act.

In a democratic country such as Poland, all major policy decisions are taken by elected bodies. But you have to remember public institutions can't have a monopoly on decision-making. In this regard a large role begin to play the inhabitants of a given local community, who are permanently associated with a given unit of local government (Zaremba, 2009, p. 74–77). When given a public authority operates explicitly and openly – publishes documentation of meetings, conducts open meetings of its bodies, organizes a public consultation and invites the participation of all who may be interested in the problem. Only in such situations, in which citizens can participate in the implementation of social control, we can talk about a true and effectively functioning democratic system.

Based on article 8, paragraph 1 of the law on access to public information, created Public Information Bulletin. This is a newsletter that was created to universal access to public information, in the form of a unified system in the telecommunication net. Public entities are obliged to make available in the Public Information Bulletin information about how to access public information, which are in their possession and are not made available in the Public Information Bulletin. Any public information that was not available in the Public Information Bulletin, or the central repository is available at the request of the entity concerned. With this privilege is using more and more people are trying to get as

much information about the activities of public administration bodies. Also, public information, which can be made available immediately, is available in oral or written form without written application. It should also be noted that public information can be made available in two respects:
1) by lining or out in public places accessible;
2) installed by a device that can read the public information.

Public sector entities must remember that the information provided must be marked the data that define the entity providing the information, which should indicate the particulars of the person who produced the information or is responsible for the content of the information, the particulars of the person who provided the information, and the date of release of such information. It is incumbent on sharing public information is to provide:
- copy the public information or its printout;
- send public information or transfer it to the appropriate, commonly used information carrier (article 10–12 of the law on access to public information).

Unit (citizen), due to membership in a self-governing community, has, as evidenced E. Olejniczak-Szałowska, numerous privileges, which could include:
- the right to participate (participation) in the management of the affairs of a public institution, which is a fundamental right and a general, which includes the right to participate in decision-making;
- the right to information on matters of community self-government;
- the right to social control activities undertaken by the public sector;
- the right to direct and exclusive settlement of matters of a local government (election of representatives to the executive bodies and accounting), dismissing them prior to expiration of the term and to decide on the most important issues for the community through a referendum);
- the right to articulate and promote their interests both in the way of individual action and group activities;
- the right to judicial protection of those interests against violations by government bodies;
- the right to social benefits (Olejniczak-Szałowska 1996, p. 9–10).

And what is extremely valuable discourse on freedom of access to public information, as rightly pointed Z. Niewiadomski, the guardian of the public interest is not only the administration, "but the initiative to protect that interest may occur individual or specific community. Public administration loses as the only initiator defend the public interest. Sometimes it becomes contractor initiatives in this regard" (Niewiadomski, 2010).

Summary

The right of every human right of access to information on the activities of the public administration, became the primary power which in accordance with applicable regulations, has become a pillar of democratic rule of law. In most of the solutions adopted normative principle of access to information is respected, allowing you to provide a guarantee of individual rights of the individual. The biggest concern still can raise some provisions of the Law on Access to Public Information. This applies particularly to the legal definition of the term „public information", the question of access to information processed, the security model of access to information. Let us hope that the legislature will decide in the near future, however, to take into consideration raised by theorists and practitioners of concerns for fuller access to public information, which is the guarantee of individual rights of the individual.

Due to the undoubtedly important importance for every human being has access to information at the level of local government, we should also note that increasing public awareness of their rights. The right to public information has been the subject of much debate purely developmental. You have to have hope that the ongoing work on the amendment of the provisions on access to public information will be the nucleus for the development of civil society, where the involvement of people in the functioning of public sector institutions, will be a good step in the development of mutual cooperation.

References

Bąkiewicz M. (2008), *Prawo do informacji w jednostkach samorządu terytorialnego* [w:] *Obywatelskie prawo do informacji,* T. Gardocka (red.), Warszawa

Górzyńska T. (2005), *Dostęp do informacji publicznej w Europie – rozwój czy stagnacja?*, [w]: *Dostęp obywateli do europejskiego wymiaru sprawiedliwości*, H. Izdebski H., Machińska H. (red), Warszawa: Biuro Informacji Rady Europy

Jaśkowska M. (2002), *Dostęp do informacji publicznych w świetle orzecznictwa Naczelnego Sądu Administracyjnego*, Toruń

Jasudowicz T. (1997, *Administracja wobec praw człowieka*, Toruń, Wydawnictwo „Dom Organizatora" TNOiK

Koniuszewska E. (2009), *Środki ograniczające nadużycia władzy w jednostkach samorządu terytorialnego w ustrojowym prawie administracyjnym,* Warszawa: Wolters Kluwer

Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997r. (Dz. U. z 1997 r. Nr 78, poz. 483 ze zmianami)

Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności sporządzona w Rzymie dnia 4 listopada 1950 roku, zmieniona następnie Protokołami nr 3, 5 i 8 oraz uzupełniona Protokołem nr 2 (Dziennik Ustaw z 1993 r. Nr 61, poz. 284 z późniejszymi zmianami)

Kudrycka B. (1995), *Dylematy urzędników administracji publicznej,* Białystok: Wydawnictwo Temida 2

Lang J. (1996), *Zasada jawności w prawie administracyjnym*, St. lur. nr 32

Międzynarodowy Pakt Praw Obywatelskich i Politycznych z 19 grudnia 1966r. (Dz. U. z 1977 r. Nr 38, poz. 167)

Niewiadomski Z. (2010), *Pojęcie administracji publicznej*, [w:] *System Prawa Administracyjnego*, T. 1, Warszawa

Olejniczak-Szałowska E (1996), *Członkostwo wspólnoty samorządowej*, Samorząd Terytorialny, nr 5

Orzeczenia Sądu Najwyższego z dnia 1 czerwca 2000 roku (sygnatura akt: III RN, 64/00, OSNAP 2001, nr 6, poz. 183)

Piskorz-Ryń A. (2003), *Jawność działania administracji publicznej*, [w:] *Prawo do dobrej administracji*, H. Machińska (red.), Warszawa

Przyborowska-Klimczak A., Tefelska-Skrzydło E. (red.), *Dokumenty europejskie*, Tom V, Oficyna Wydawnicza VERBA, Lublin 2004-2006

Sitniewski P. (2006), *Bezpłatność, czyli bez kosztowność udostępniania informacji publicznej,* [w:] *Sprawność działania administracji samorządowej,* E. Ura (red.), Rzeszów

Ustawa z 6 września 2001 roku *o dostępie do informacji publicznej* (Dz. U. t.j. Dz. U. z 2015 r. poz. 2058 ze zmianami).

Ustawa z dnia 27 marca 2003 r. *o planowaniu i zagospodarowaniu przestrzennym* (Dz. U. z 2015r., poz. 199 ze zmianami)

Ustawa z dnia 27 sierpnia 2009 r. *o finansach publicznych* (Dz. U. z 2013 roku, poz. 885 ze zmianami).

Ustawa z dnia 3 października 2008 r. *o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko* (t.j. Dz. U. z 2013 r., poz. 1235 ze zmianami)

Wyrok Trybunału Konstytucyjnego z dnia 20 marca 2006 roku w sprawie prawa do informacji publicznej (K 17/05, OTK-A 2006, numer 3, pozycja 30)

Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 11 lutego 2004 roku (II SAB 391/03, Wspólnota 2004, numer 19, strona 55)

Zaremba M. (2009), *Prawo dostępu do informacji. Zagadnienia praktyczne*, Warszawa

The legal and social aspect of freedom of the incapacitated[1]

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Abstract

Subject of research: Freedom is one of the most important – if not the most important one – element of existence (freedom in choosing a profession, freedom in deciding about selfimprovement, etc.). Elimination of every single part of it, that, moreover, has external source, may not only cause inquiries about validity of such an action, but it may also cause negation. Incapacity is very often treated as someting equal to disrcimination, though discrimination is being socially and legaly negated. The aim of this article is to point out how developes freedom of those, whose competency was limited.

Purpose of research: The aim of this article is to underline the role that incapacity plays in selfcreation of a humanbeing.

Methods: Rewiev of literature

Keywords*: freedom, incapacity, equality.*

Introduction

Incapacitation brings consequences that affect every aspect of life of the individual, his family and the people around. Once incapacitation has been ruled, it has a significant influence on the human being's life; it restricts a number of his rights[2] (Zima-Parjaszewska; www.ptpa.org), excluding him from the possibility of full co-existence. It makes taking important decisions more difficult, depriving of the possibility of executing rights and duties that are for the people with full legal capacity obvious, absolutely natural, and especially important. The Constitutional Tribunal noticed that and ruled the following:

> "an indirect consequence of the incapacitated person's inability to apply for a change or a dismissal of the incapacitation judgement is the restriction of his freedom in other dimensions too. As the Polish Ombudsman accurately points out, the consequences of incapacitation ruling are much greater than just the inability to apply for the change or dismissal of the incapacitation judgement. (...) To incapacitate is "to totally or partially deprive somebody of legal rights to decide about themselves" (Słownik języka polskiego, PWN; http://sjp.pwn.pl). Apart from the important social and psychological consequences, often verging on the exclusion from the category of "normal people" and branding with the label of the "psycho". The very legal consequences of this decision are far reaching. They primarily result from the fact that in the Polish legal system the definition of incapacitation automatically and necessarily involves the restriction (partial incapacitation – article 15 of the Civil Code) or the deprivation (full incapacitation – article 12 of the Civil Code) of legal capacity of the incapacitated person. It is not possible to establish, for instance, a court-appointed guardian that would help the mentally handicapped, mentally ill or addicted person in the management of the person's affairs without the restriction in the scope of the person's legal capacity" (Judgment of the Constitutional Tribunal of 7th March 2007).

It should be noted that incapacitation in reality deprives the person of the possibility to fulfil their own ambitions and aims. It is of a particular importance from the social and legal point of view, as for the period of its duration the person is eliminated from the civil society (Łuniewski, 1950, p. 56), especially that in normal circumstances it is usually the possession of the applicable rights that determines the status of the individual in the state (Banaszak, 2015, p. 362).

Therefore, should not incapacitation be treated as a sign of discrimination? If we look at discrimination as a different treatment of people in objectively the same (or basically similar) situation, and the different treatment of them cannot be objectively justified (Gronowska et al., 2013, p. 160), then the situation in which a justification for the different treatment exists may be called discrimination; what is more, such a treatment is "addressing the requirements that result from the principle of equality (the so-called positive discrimination)" (Constitution of the Republic of Poland of 2.04.1997).

The role of freedom

Article 31 of the Constitution of the Republic of Poland guarantees the legal protection of freedom with the reservation that the restrictions of the constitutional rights and freedoms may be legislated exclusively as an act of law and only when they are indispensable in a democratic state for the sake of its security or keeping public order, for the protection of the environment, public morality, the freedoms and rights of other people. These restrictions must not undermine the principle of freedom and rights (Constitution of the Republic of Poland of 2.04.1997). It naturally implies the question about the definition of freedom. In the legal sense, liberty was defined for the first time in the act of constitutional law in France, in the Declaration of the Rights of Man and of the Citizen of 1789 (Wiśniewski, 2006, p. 21). The idea that the freedom of man consists inman's capacity to do anything that does not harm the others, with the reservation that what is harmful and forbidden may only be defined by the applicable laws, makes the article No. IV and article No.V of the French Declaration (Wiśniewski, 2006, p. 21). In Leszek Wiśniewski's view, the liberty of man must be understood as the capacity to make decisions and implement them, which is subject to restrictions aimed at guaranteeing the same possibility to exercise freedom to the others. Therefore, the legal definition of liberty should enumerate the orders and prohibitions and guarantee the possibility of exercising freedom in the part that is not subject to restrictions (Wiśniewski, 2006, p. 22).

The Constitutional Tribunal examined the principle of freedom in two aspects: positive (the possibility of free behaviour formation in a given sphere through the choice of such forms of action which are best suited to the given person, or abstaining from action) and negative (the legal obligation to abstain from "the interference with the individual's protected sphere", which directly concerns the state and other legal subjects) (Judgement of the Constitutional Tribunal of 18th February 2004).

The Constitution of the Republic of Poland maintains that everyone is equal before and under law and everyone has the right to equal treatment by public authorities (Constitution of the Republic of Poland). The personal scope of this standard is embodied in the word *everyone* (Łabno, 2006, p. 37). Considering the issues of freedom and the rights of the individual from a point of view other than *stricte* constitutional, it may be concluded

that the current wording of article 32 section 1 of the Constitution is founded on article 30 of the Basic Law[3]. Personal dignity is the indicator of the protection of human rights, is at the foundation of them and is the source of the exercise of them, and the dignity is the starting point for any discussion of man's and citizen's rights and freedoms, not only in the context of constitutional guarantees of these rights and freedoms, but also the protection of rights and freedoms beyond the constitutional scope.

The Constitution is structured in a way that not only defines specific human rights[4], but first of all guarantees the protection thereof[5] by the inclusion of a given right in the Constitution (Hołda, Hołda, Ostrowska, Rybczyńska, 2014, p. 28).

As Wiesław Skrzydło puts it: "While looking for the origin of the individual's rights and liberties, not by chance one reaches for 17th-century political and legal documents, created in the times of the bourgeois revolution. The origin of this institution is related to the revolution, as only at that time could the category of liberty and the rights of the individual be created" (Chmaj, Leszczyński, Skrzydło, Sobczak, Wróbel, 2002, p. 38). The significance of liberty is proven by its historical presence on the banners. The nations of the world are capable of suffering bloodshed for years in the name of their sovereignty and autonomy. Still, it is worth noting the fact that incapacitation is often a necessary consequence of the incapacitated person's life situation and, as a legal measure, it is aimed at the very protection of the interests of the person to be incapacitated (Łuniewski, 1950, p. 56).

> "In sociology, to measure the quality of life, two kinds of criteria are generally taken into consideration: objective and subjective. The former refers to the material conditions of life, the status, the social roles fulfilled, the relationships with other people (..). The latter criterion is a subjective assessment of life satisfaction in the many of its aspects. This dimension is of a great importance due to the role the perception of one's own situation has, which may differ from the objective criteria. In its broadest sense, the quality of life is a collective category that is made of mental and physical well-being, material existence (the physical conditions of life), work and recreation conditions, the opportunities for personal development, the quality of relationships with the immediate surroundings, selfless and the ability to pursue plans and desires. Different configurations of the abovementioned dimensions make up the continuum, from low quality, characterised by the lack of

> satisfaction of most basic needs, to high quality, which is synonymous with full, creative life, marked by a desirable level of affluence. Additional criteria for the assessment of the quality of life are introduced by the consideration of the context of illness and disability. It involves the clinical evaluation, the nature and the extent of burden the ailment causes, functional efficiency, access to medical treatment, limitations and regimes of life resulting from the illness (medicines, regular treatments, medical examinations), as well as the mental condition. In the documents of the World Health Organization the general terms referring to the positive mental and physical condition are further detailed with specific categories, such as: "life free of pain and suffering," "maximum independence within the limitations of the body," "hope for recovery," but also "the acceptance of one's limitations." They show the directions for actions and the values focused on the raising of the quality of life with an illness" (Ostrowska, 2007).

Some disorder types are defined by their influence on the environment and the harmony of the cultural system (Sowa, 1984, p. 77). The patterns of behaviour created in a given society form certain criteria on which the assessment of mental health is based. They reflect some social relativism that assumes that this situation is right and true, and other types of behaviour are considered as unhealthy (Fromm, 1959, p. 171).

It is very interesting to consider the accurate analysis of, among others, the ideological character of cultural approaches to the definition of mental health provided by Julia Sowa (Sowa, 1984, p. 89). She is right to point out that a sociologist knows that in all kinds of societies, apart from those that have a homogeneous social structure, societies have not only heterogeneous cultural heritage, but also social expectations that are likely to cause conflicts, opposite interests, or even alternative behaviour patterns. Therefore, the definitions of health or illness may yield a situation in which one person may be both healthy and ill (Sowa, 1984). An additional significance is found in the fact that the following phrases are rather abundant: "culture assimilation," "meeting social expectations," "the compatibility of behaviour with cultural patterns," "fulfilling one's social role" and "conformity" (Sowa, 1984, p. 90).

In today's fast developing, consumer world, health is the supreme value[6]. It is the most important factor that guarantees, among others, man's coherent development (Mrowicka, 2009, p. 11). In a broader sense, health also means

"the ability to fulfil social roles, adaptation to the changes of the environment and a means to achieve a better quality of life" (Mrowicka, 2009, p. 12). By nature, people are rather intolerant to psychiatric and psychological deficiencies. Racial, cultural and religious differences may be more and more acceptable, yet mental disorders are considered to be a sign of weakness, a pejorative otherness and the inability to assimilate. In this way, social ostracism easily appears while dealing with individuals with mental disorders. The models of people who are ambitious, creative and self-confident are fashionable, widely desirable and socially acceptable. Since we feel good in the company of "successful people," we often want to be perceived as resourceful, strong and enterprising, so we reject the other, weak individuals loaded with trouble[7]. "Every personality well-assimilated to a culture is characterised by the fact that the fulfilment of social requirements is, at the same time, the fulfilment of the person's own requirements"(Sowa, 1984, p. 103). The social positioning of the incapacitated people is founded on the social rejection of them. Within the scope of our awareness of our individualism[8] we need to remember, first of all, that we make a mere constituent part of the whole society. Assimilation to the currently dominant culture is often treated as a criterion that determines either an illness or the absence of it, which may cause some to consider only the data referring to "the typically sociological approaches to the definition of mental illness or, at least, some types of mental illness" (Sztompka, 2009, p. 579).

The next of kin, from whom it seems to be natural to expect help and support, files a motion for incapacitation[9]. From this perspective, one can perceive this tool of incapacitation as a weapon often drawn on the incapacitated. The insufficiently educated society becomes an incompetent owner of strong legal instruments. Meanwhile, the knowledge of the rule of law is a fundamental condition for obeying the law and achieving intended effects (Pieniążek, Stefaniuk, 2005, p. 163). Therefore, either the addressee of the rule of law or its author or the means of transmission are not without significance (Pieniążek, Stefaniuk, 2005, p. 163).

A supportive function oriented towards the individual's interest lies at the basis of incapacitation (Tomaszewska, 2008, p. 17). The most elementary aspect of human activity is behaviour which has an implied meaning. In sociology such activity is called action (Tomaszewska, 2008, pp. 47–48).

> "We constantly send and receive information. Without such interaction we would not be able to make contact with other people; we would not be able to create cultures; we would not be able to build or maintain social structures so important for human life. Thus, interaction is the most basic social process which keeps society, culture and our own well-being in existence" (Turner, 1998, p. 68).

From the sociological point of view, we must have society-wide awareness of the purpose and functionality of incapacitation[10]. It is important that we, as a conscious and educated society, understand the idea of legal tools, which we may use. The common rule is the equality of us all under and before the law, however, the desirable one is social equality. Any form of inequality involves our emotions, as an manifestation of widely understood injustice (Sztompka, 2009, p. 356).

J. H. Turner compared life to a tug-of-war between the desire to be free and the need to participate in the social structure (1998, p. 54). Undoubtedly, the situation of the partially incapacitated deserves distinguishing from the situation of the fully incapacitated. Moreover, the distinction between incapacitation due to the criterion of age and incapacitation resulting from disorders of a psychological and mental nature should be made.

Such a division seems to be justified, considering the fact that partial incapacitation brings a totally different reaction than full incapacitation. We differently treat the incapacitated due to the criterion of age and differently the incapacitated with reference to their disorders. The partially incapacitated are able to function in the society in a way that does not create their alienation. They only need some help in dealing with everyday life situations. However, if man was fully independent and self-sufficient, he would not create freely strong emotional bonds with his loved ones, he would not start a family and he would not enter into any, or at least intimate, human relations. Whereas, we care about strong and lasting family bonds because they give us security in the form of awareness that we can always count on our beloved ones to help us. We differ from the partially incapacitated in a way that we are fully aware of this weakness and dependence on others to a certain extent. By asking for help, we give testimony of our own maturity that we are imperfect in the human aspect, as self-determined legal bodies and subjects of social duties. By virtue of life experience (being a result of life span, kinds and number of

different experiences, etc.) we are aware that there are situations in which we are not able to be one hundred percent independent and willingly, or even with a feeling of relief, we count on others to help us. While comparing it to the situation of the partially incapacitated, it must be remembered that such persons are not able to function fully independently, which does not really depend only on them. As a matter of principle, they have the ability to move autonomously, but because of many reasons, they need support. This need for help may be the result of young age (therefore an insufficient preparation for life) or at least of the unawareness of such unpreparedness. Here it is worth following Maria Jankowska and reflecting upon the *de facto* world of affairs in which a young human lives, and thinking whether the full incapacitation is really a constraint[11].

A fundamental principle of human rights is the concept of the free man. Consequently, human rights should guarantee space for the development of personality and active participation in the changes occurring in the world. They should protect man from other people's excessive interference, and sometimes from himself. There are also essential restrictions in the scope of granting and using social rights, as well as political and personal rights (Redelbach, 2001, p. 361). However, if a person does not fulfil the external functions assigned to them, the role of the environment may be entirely decisive, which, for instance, takes place when the environment's requirements do not take the individual's abilities into account (Sowa, 1984). While examining the complex issue of incapacitation and its influence on human life, the personal characteristics of people to whom the motion for incapacitation refers should be especially taken into account. "Information about the mental life of the ill person is essential to understand healthy people's spiritual life because (…) there is no clear boundary between sanity and sickness" (Witwicki, 1948, p. 1). Therefore, in this matter, the criterion of age, or (dis)ability, should be referred to. Monika Tomaszewska states that while classifying the incapacitated due to the physical development, a few age groups of the incapacitated ought to be distinguished.

"The largest group of the incapacitated (regardless of the type) consists of people aged 50-70; fewer people are in the 30-50 age group; the lowest percentage of the incapacitated are young people, under 20 (2008).

According to the author, the disabled constitute a significant group of the incapacitated. This physical disability is often inborn and appears in conjunction with mental impairment. However, it is more often disability acquired through mental illness, stroke or senile dementia" (Tomaszewska, 2008, p. 205)[12].

Still, the recognition of the economic background to the issue of incapacitation is very interesting.

> "The largest group of the incapacitated consists of the ones whose main source of livelihood is the social pension. It is because mental illness often manifests itself in youth and mental deficiency happens to be inborn, which effectively prevents the ill from taking up a job. (...) A little smaller group of the incapacitated consists of those for whom the state pension is the main source of livelihood. It especially relates to those who have been incapacitated because of mental disorders in the form of drinking and drug addiction or senile dementia acquired in the advanced years. Such people had been professionally active for many years until the long-term dementia process prevented them from practicing a profession. The smallest group of the incapacitated consists of the people living off their own work" (Tomaszewska, 2008, pp. 207–208.).

The legal system is structured in such a way as to allow the whole society to act freely according to people's own will. Man's *modus operandi* cannot restrict the same acts of free will in other people's lives. A more precise description of the criteria of freedom is then necessary to ensure that every person enjoys equal rights. If the obstacles are of a different nature than a legal standard, we need to have the possibility to use instruments that will protect us from the abuse of our lack of knowledge, weakness and inability to defend ourselves. The welfare state creates solutions that meet the requirements of modern society. Family ties may not always be sufficient protection against the abuse of a person whose management of life affairs is less effective. The core of the problem is how we make use of these instruments. The regulators gave us the ability to act within the scope of our right to privacy and other people's freedom, assuming that by equipping us with the right to control the actions and operations of other people, we would use the right in a way that would not make the equipment a kind of weapon that could do harm to both parties.

Summary

Following Bogusław Banaszak's description, it is worth noting that the rights of the individual and the freedom of the individual are not necessarily equal. The rights refer to the claims of the individual against other people, and the freedom refers to the legal subject's own deeds (Banaszak, 2015, p. 16)[13]. In the social environment we have a varied influence on the various aspect of our existence. Therefore, man as an individual will never reach complete freedom. It happens that these restrictions are very clear and burdensome, but they may also have just a symbolic significance (Pieniążek, Stefaniuk, 2005, p. 8).

An outstanding Polish psychologist Władysław Witwicki wrote:

> "People have their eccentricities, obsessive thoughts, suspicions and delusions, they happen to be conceited, affected and habitually mischievous, in spite of the fact they do not gain anything thanks to that; they happen to be regularly depressed and full of misgivings, but nobody diagnoses them as mentally ill, as long as these symptoms do not prevent them from earning a living or do not pose a threat to the environment" (1948, pp. 1 – 2).

References:

Banaszak B., (2015), *Prawo konstytucyjne*, Warszawa.

Banaszak B., Jabłoński M., (2005), *Wewnątrzkrajowe systemy ochrony wolności i praw jednostki* [w:] Banaszak B., Bisztyga A., Complak K., Jabłoński M., Wieruszewski R., Wojtowicz K., *System ochrony praw człowieka*, Kraków.

Bańka A., (2005), *Psychologia jakości życia*, Poznań.

Chmaj M., Leszczyński L., Skrzydło W., Sobczak J.Z., Wróbel A., (2002), *Konstytucyjne wolności i prawa w Polsce. Tom I. Zasady ogólne*, Kraków.

Eckhardt K., (2004) *Status prawny jednostki w świetle ustaw o stanach nadzwyczajnych* [w:] red. Granat M., Sobczak J., *Problemy stosowania Konstytucji Polski i Ukrainy w praktyce*, Lublin.

Eckhardt K., (2004), *Dopuszczalność derogacji prawa do równego traktowania i zakazu dyskryminacji w czasie stanów nadzwyczajnych* [w:] red. Zięba-Załucka H., Kijowski M., *Zasada równości w prawie*, Rzeszów.

Fromm E., (1959), *Psychoanaliza i religia*, New Haven.

Góraj A., (1982), *Wpływ ubezwłasnowolnienia na losy osób ubezwłasnowolnionych*, Psychiatria Polska, year 16; 1–2:39–44.

Gronowska B., (2013), *Wolność, prawa i obowiązki człowieka i obywatela* [in]: Witkowski Z. (red.), *Prawo Konstytucyjne,* Toruń.

Gudowski J. (2003), *Sprawy z zakresu prawa osobowego* [w:] Ereciński T., Ciszewski J., *Komentarz do kodeksu postępowania cywilnego – część pierwsza tom drugi*; *postępowanie rozpoznawcze; część trzecia – Przepisy z zakresu międzynarodowego postępowania cywilnego*, Warszawa.

Hajdukiewicz D. (2008), *Opiniowanie sądowo-psychiatryczne w sprawach cywilnych,* Warszawa.

Hołda J., Hołda Z. (2014), *Prawa człowieka w wewnętrznym porządku prawnym* [in:] Hołda J., Hołda Z., Ostrowska D., Rybczyńska J.A., *Prawa człowieka. Zarys wykładu*, Warszawa.

Jankowska M. (on the initiative of the Information and Legal Centre of the SYNAPSIS Foundation), *Reprezentacja prawna osoby z autyzmem lub upośledzeniem umysłowym. Ubezwłasnowolnienie całkowite i częściowe w świetle polskiego prawa cywilnego, p. 9.*

Kaczmarek M., (2009), *Koncepcja i pomiar jakości życia związanej ze zdrowiem człowieka* [in:] Kaczmarek M. (red.), Szwed A., *Między antropologią a medycyną. Koncepcje teoretyczne i implikacje praktyczne*, Poznań.

Łabno A. (2006), *Zasada równości i zakaz dyskryminacji* [in:] *Wolności i prawa człowieka oraz ich gwarancje w praktyce,* L. Wiśniewski (red.), Warszawa.

Łuniewski W. (1950), *Zarys psychiatrii sądowej. Część ogólna*, Warszawa.

Mrowicka B. (2009), *Zdrowie – konteksty biologiczne i społeczne* [in:] Kaczmarek M. (red.), Szwed A., *Między antropologią a medycyną. Koncepcje teoretyczne i implikacje praktyczne*, Poznań.

Osiatyński W. (1994), *Filozofia i historia praw człowieka* [in:] Rzepliński A. (red.), *Prawa człowieka, a policja. Problemy teorii i praktyki*, Legionowo.

Pieniążek A., Stefaniuk M. (2005), *Socjologia prawa,* Kraków.

Redelbach A. (2001), *Natura praw człowieka. Strasburskie standardy ich ochrony*, Toruń.

Skrzydło W. (2011), *Konstytucyjny katalog wolności i praw jednostki* [in:] Chmaj M., Leszczyński L., Skrzydło W., Sobczak J. Z., Wróbel A., *Konstytucyjne wolności i prawa w Polsce. Tom I. Zasady ogólne*, Kraków.

Sowa J.(1984), *Kulturowe założenia pojęcia normalności w psychiatrii*, Warszawa.

Sztompka P. (2009), *Socjologia. Analiza społeczeństwa*, Kraków.

Tomaszewska M. (2008), *Charakter prawny decyzji o ubezwłasnowolnienie w sądowym stosowaniu prawa*, Toruń.

Turner J.H. (1998), *Socjologia. Koncepcje i ich zastosowanie*, Poznań.

Wiśniewski L. (2006), *Zakres ochrony prawnej wolności człowieka i warunki jej dopuszczalnych ograniczeń w praktyce*, s. 21 [in:] red. Wiśniewski L., *Wolności i prawa jednostki oraz ich gwarancje w praktyce*, Warszawa.

Witwicki A. (1948), *Dusze chore*, Warszawa.

Zima-Parjaszewska M., *Ubezwłasnowolnienie w świetle Konstytucji RP oraz Konwencji o Prawach osób z niepełnosprawnościami, wersja internetowa:* www.ptpa.org.pl*;* accessed: 05.03.2016 r.

Acts:

Act of 2nd April 1997 – Konstytucja Rzeczypospolitej Polskiej; Dz. U. 1997, nr 78, poz. 483 ze zm.

Act of 17th November 1964 – Kodeks postępowania cywilnego; Dz. U. nr 43, poz. 296 ze zm.

Judgments:

Judgment of the Constitutional Tribunal of 7th March 2007 , K 28/05, OTK ZU 2007, nr 3A, poz. 24.

Judgment of the Constitutional Tribunal of 18th February 2004, P 21/02.

Internet sources:

Ostrowska A., press conference material „Jakość Życia w Chorobie – uwarunkowania psychologiczne, społeczne i medyczne", która odbyła się 18.10.2007 r. w Warszawie [in:] www.medigo.pl; accessed: 21.03.2016 r.

Słownik języka polskiego, PWN; http://sjp.pwn.pl; accessed: 5.03.2016 r.

Endnotes

[1] The text is an excerpt of the doctoral dissertation presented by M. Babula titled Wpływ ubezwłasnowolnienia na sferę konstytucyjnych wolności i praw jednostki, written under the supervision of prof. dr. hab. Wiesław Skrzydło, Rzeszów 2015. The dissertation is available at the ZWPiA library of Wyższa Szkoła Prawa i Administracji (University of Law and Public Administration).

[2] In M. Zima-Parjaszewska's view, it also causes "a gradual loss of legal awareness". See also to compare: K. Eckhardt, *Dopuszczalność derogacji prawa do równego traktowania i zakazu dyskryminacji w czasie stanów nadzwyczajnych* [in:] ed. by H. Zięba-Załucka, M. Kijowski, *Zasada równości w prawie*, Rzeszów 2004, pp. 58–63 and K. Eckhardt, *Status prawny jednostki w świetle ustaw o stanach nadzwyczajnych* [in:] ed. by M. Granat, J. Sobczak, *Problemy stosowania Konstytucji Polski i Ukrainy w praktyce*, Lublin 2004, pp. 166–178.

[3] "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of personsand citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities."

[4] On the role of national constitutions for the protection of human rights see: B. Banaszak, M. Jabłoński, *Wewnątrzkrajowe systemy ochrony wolności i praw jednostki* [in:] B. Banaszak, A. Bisztyga, K. Complak, M. Jabłoński, R. Wieruszewski, K. Wojtowicz, *System ochrony praw człowieka*, Kraków 2005, pp. 333–367.

[5] More on the constitutional models of regulations of the individual's legal situation in W. Skrzydło, *Konstytucyjny katalog wolności i praw jednostki* [in:] M. Chmaj, L. Leszczyński, W. Skrzydło, J. Z. Sobczak, A. Wróbel, *Konstytucyjne wolności i prawa w Polsce. Vol. I. Zasady ogólne*, Kraków 2011, pp. 42–45 and 45–49.

[6] In this aspect, health may be understood as a specific exemplification of normal processes that take place in the human body; both in the sphere of the body and of the mind.

[7] "In sociology, the quality of life is measured through the perspective of social well-being that refers to the satisfaction of existential-type needs, related to safety and social contact. Social well-being is described by the indicators of social standards, the code of values and the rules of social life. (...) In psychology, the quality of life is understood as the emotional well-being related to the feeling of satisfaction and happiness of individuals and social groups. The quality of life related to health is understood as the ability of the individuals or groups to recognise, describe and pursue one's own aspirations and to satisfy one's needs and to choose the life environment, in accordance with one's preferences, which should result in the achievement of full physical, mental and socialwell-being."; See: M. Kaczmarek, *Koncepcja i pomiar*

jakości życia związanej ze zdrowiem człowieka [in:] red. M. Kaczmarek, A. Szwed, *Między antropologią a medycyną. Koncepcje teoretyczne i implikacje praktyczne*, Poznań 2009. pp. 29–30; *See also*: A. Bańka, *Psychologia jakości życia*, Poznań 2005.

[8] P. Sztompka defines individualism as: "the emphasis on the significance of the individual who is free from the imposed group relationships and dependencies, endowed with dignity and unalienable rights, not only as a citizen, member of the society, but, as a human being who independently decides about the shape of their own biography, having a choice of many models of life and career at their disposal, and also bearing exclusive responsibility for their success" [in:] P. Sztompka, *Socjologia. Analiza społeczeństwa*, Kraków 2009, p. 579.

[9] A motion for incapacitation may be filed by the following people: the spouse of the person to be incapacitated, the person's direct relatives, i.e. parents, grandparents, children,grandchildren and siblings and also the statutory representative. Relatives may not file a motion to institute legal proceedings if the personhas a statutory representative; Article 545 § 1 and 2 of the Code of Civil Procedure. It is worth mentioning here the person to be incapacitated; see: J. Gudowski (2003), *Sprawy z zakresu prawa osobowego* [in:] T. Ereciński, J. Ciszewski, *Komentarz do kodeksu postępowania cywilnego – część pierwsza tom drugi*; *postępowanie rozpoznawcze; część trzecia – Przepisy z zakresu międzynarodowego postępowania cywilnego*,Warszawa, p. 164; and the prosecutor, *cf*: article 7 of the Civil Code. Article 545 § 1 of the Civil Code. By virtue of law, the participants are the following people – apart from the movant – the person to be incapacitated, the person's statutory representative and the spouse of the person to be incapacitated. It is of great importance for the questions above that "the spouse is authorised to demand incapacitation and to support the demand if the spouse remains married at the time the motion is filed, and then, at the time of the proceedings, until the case is closed." Furthermore, for the sake of the trial, there is no distinction between adopted and biological children, which has an influence on the rights of the siblings; there are no restrictions of the degree of relatedness for direct relatives.

[10] A reference may be made here to the results of the research conducted by Andrzej Góraj; see more: A. Góraj, *Wpływ ubezwłasnowolnienia na losy osób ubezwłasnowolnionych*, Psychiatria Polska 1982, vol. 16; 1–2:39–44. He sampled a group of the incapacitated, both partially and fully, and divided them into three subgroups. The first consisted of the people whose incapacitation was necessary indeed – after incapacitation their life and material situation improved. Another group was made of the people who partially met their objectives as a result of incapacitation, but it did not really affect their life and material situation. The last group consisted of the people whose incapacitation did not produce any measurable results. Their objectives were not met and their life

situations did not improve.On the abovementionedresearch and otherresearchsee: D. Hajdukiewicz, *Opiniowanie sądowo – psychiatryczne w sprawach cywilnych,* Warszawa 2008, pp. 82–90. The author, making references to the previously cited research by Andrzej Góraj, writes the following, among others: "(...) thefamilies of the ill people, filing motions for incapacitation, do it mostly in order to achieve a legal right to receive the disability pension the ill personhas the right to, a then they abandon the person. The authors do not find it necessary to incapacitate the long-time patients of psychiatric hospitals or nursing homes, as the goal of treatment is reached without the institution of incapacitation, which, as experience shows, may deprive them of the disability pension at most.The authors also point out that incapacitation isan inadequate measure in relation to the goal indicated in the motion.(...)."

[11] See more: (on the initiative of the Information and Legal Centre of the SYNAPSIS Foundation), *Reprezentacja prawna osoby z autyzmem lub upośledzeniem umysłowym. Ubezwłasnowolnienie całkowite i częściowe świetle polskiego prawa cywilnego*, p. 9.

[12] Tomaszewska refers to the following data: "(...) a majority of cases concerns women, men are much rarely involved in the proceedings, and the most infrequently young people of both sexes. The most infrequent category of people in the gender aspect is unmarried men – they make up10% of the total number of the incapacitated people. An equally infrequent category of the incapacitated is unmarried women – only 8% of the total number of the incapacitated people. A slightly larger group is married people – 13% in the total population. Among the married people subject to incapacitation, a vast majority is people who have been married for a long time (20–30 years), much more infrequently the people who have been married for less than 5 years. The most numerous group is that of widows and widowers and single people".

[13] See also to compare: W. Osiatyński, *Filozofia i historia praw człowieka* [in:] ed. by A. Rzepliński, *Prawa człowieka, a policja. Problemy teorii i praktyki*, Legionowo 1994.

The effect of crisis in Eastern Mediterranean region on international tourist arrivals

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Abstract
The fragility of tourism sector could be observed in many parts of the world. Instability of natural environment can be determining factor in turning away potential tourists from tourism destinations – earthquakes, volcano eruptions or tsunamis, as well as visible climate changes certainly decrease tourist arrivals to the regions where they have been reported. However, economic and political instability seems to have larger effects on the sector. Eastern Mediterranean region's political instability after 2005 affected negatively its countries in numerous ways, including tourism. Purpose of this paper is to measure the effect of crisis in Eastern Mediterranean region on international tourist arrivals to all Mediterranean countries. Research period 2005–2013 covers outbreaks of several huge crises in the region. The leading hypothesis is that international tourist flow has generally switched from Eastern to Western Mediterranean countries within the research period, meaning that the largest "benefiters" of the political crisis in the Eastern Mediterranean countries are Western European Mediterranean countries, including the ones which were not involved into Arab spring happenings. In order to test hypothesis the desk research is done by analyzing various reports on tourism in Mediterranean region prepared by United Nations World Tourism Organization (UNWTO).

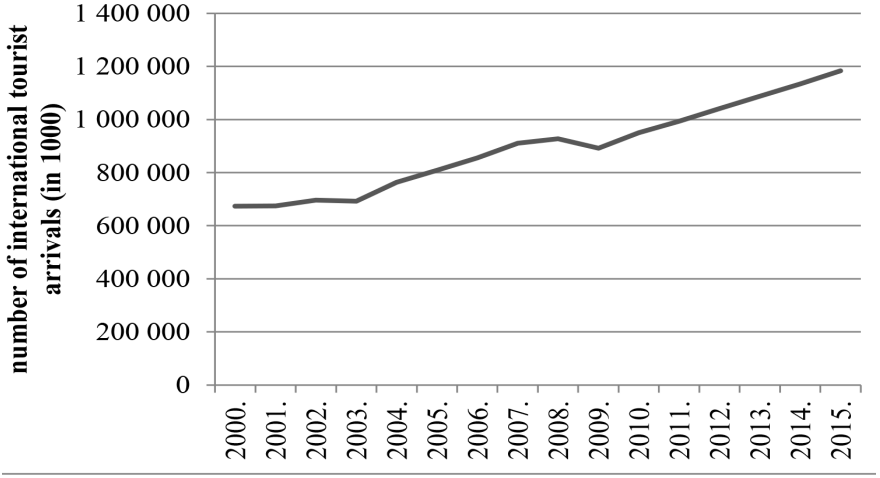
Keywords: *Arab spring, switch of tourist flows, Western Mediterranean.*

Introduction

Despite occasional shocks, international tourism has shown virtually uninterrupted growth worldwide since the middle of the 20th century. The UNWTO reported 25 million of international tourist in 1950, while the year 2013 finishes with 1.087 million of people travelling internationally for tourism

purposes (UNWTO, 2015). Moreover, the analysis of various UNWTO reports show that even more rapid increase of international tourist arrivals could be observed in the 21st century, when between 2000 and 2015 – in only 15 years, number of international tourist arrivals has almost doubled itself (Fig. 1). During mentioned period international world tourism sector experienced stagnation at the very beginning of the century and a slight decrease in 2009 with immediate recover in 2010. The first was a consequence of the 7/11 terrorist attack and the second of Global Financial Crisis 2007–2008.

Fig. 1: Increase of worldwide international tourist arrivals (2000-2015)



Source: own elaboration based on UNWTO (2005, 2007, 2009, 2011, 2013, 2015 and 2016)

The importance of tourism for many world economies is undoubtable. Tourism in many countries represents a key driver of socio-economic progress through export revenues, the creation of jobs and enterprises, and infrastructure development (UNWTO, 2013). Over the past six decades, tourism has experienced continued expansion and diversification becoming one of the largest and fastest growing economic sectors in the world. The UNWTO report (UNWTO, 2015) suggests that in export earnings by category, the tourism with its US$ 1.522 trillion is on the third place, after fuels and chemicals and before food and automotive products. Moreover,

UNWTO experts argue that in 2014 tourism has covered 9% of the World's GDP by direct, indirect and induced impact, 1 in 11 jobs in the World and 6% of the World's exports (UNWTO, 2015).

Delimitations in the research

Despite scholars' continuous criticism on UNWTO definition of (international) tourist, where tourist is only the person with an overnight stay in the destination, or criticism on methods of measuring tourist arrivals where the data are not standardized among the countries, in this paper the UNWTO definitions of tourists and the measuring methods are followed since there has been no better comparable data between the countries existing yet. However, the UNWTO world regionalization is not followed here, since its regionalization split Mediterranean region into three regions: Europe, Middle East and Africa. Despite Mediterranean region is known as the area with largest number of tourist arrivals, UNWTO is not issuing annual reports focused only on this region.

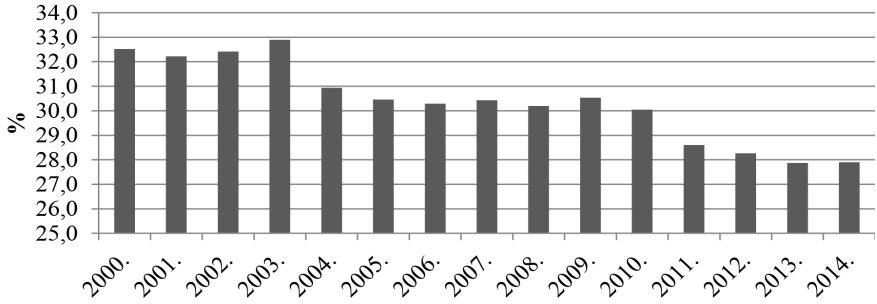
This research is covering all countries with access to Mediterranean Sea, except countries which have access only to the Black Sea. Therefore, 11 European (Albania, Bosnia and Herzegovina, Croatia, France, Greece,Italy, Malta, Monaco, Montenegro, Slovenia, Spain), 6 Asian (Cyprus, Israel, Lebanon, Palestine, Syria, Turkey), and 5 African countries (Algeria, Egypt, Libya, Morocco, Tunisia) are included in the research. Another delimitation is that research focuses only on international tourists and it is excluding the domestic ones. Third delimitation considers area taken in research. Because of incomparable data, international arrivals taken in the research cover arrivals to entire observed countries, not only their Mediterranean range. Therefore in the research are incorporated tourist arrivals to Paris and Cairo for example, which are definitely not Mediterranean destinations. Fully aware of this problem, author finds that results could be suitable to accept or reject the set hypothesis.

Tourism in Mediterranean Region

Mediterranean belongs to developed World's tourism regions, which are characterized by slow increase in number of tourists, in comparison with countries which tourism is still developing. However, first 15 years of 21st

century showed increase in number of tourists for Mediterranean region for over almost 100 million – from 219 199 arrivals in 2000 to 316 054 in 2014. From the other side, between 2000–2014 Mediterranean Region experienced decline in shares of world international tourist arrivals from 32,5% to 27,9%, presenting a decline trend from almost one third toward one fourthof World's international tourist arrivals (Fig. 2). No matter of decline, Mediterranean Region still presents the highest concentration of international tourist arrivals among all of the World's regions.

Fig. 2: Mediterranean Region's international tourist arrivals' shares in worldwide international arrivals



Source: own elaboration based on UNWTO (2005, 2007, 2009, 2011, 2013 and 2015)

Economic and political crisis are not alone within Mediterranean tourism vulnerabilities. Natural conditions are changing a lot recently and various prognosis shows that temperatures will continue to increase in the region with a consequence of droughts which will become more frequent, water stress will grow, fire risks will increase and heatwaves will become more frequent. Also, biodiversity will be affected by the changes, more vector-borne diseases will appear and jellyfish outbreaks or algae blooms will become more frequent in entire basin. Human activity as well as a tourist pressure on the area is obviously helping the change of the natural conditions in the Mediterranean, but the largest recent vulnerability of Mediterranean Region's tourism sector presents human activity which influences economy and political systems of the countries in the region. In their research, Sonmez et al. (1999) found that terrorism has higher impact on tourism than natural disaster. Huge majority of tourists seek secure areas, but perception of

secure or dangerous area is very subjective. Definitely, areas with not stabile government(s), frequent demonstrations, violence, conflicts, visible military troop or war areas are treated as "dangerous" and will be avoided by ordinary international tourists. Mediterranean Region in the 21st century, especially its eastern part, became this dangerous zone. In order to find out what was the reaction of potential international tourists on outbreak of various crises, the analysis in this article has been done. Research covers the period between 2005 and 2014, since this period covers outbreaks of several huge crises in the Mediterranean Basin (Fig. 3). The year 2014 is taken as a final one, since it is the year for which official data are available.

Fig. 3: Outbreak of crises in the Mediterranean Region since 2005

Global financial crisis (2007–2008)
Greek government-debt crisis („Greek depression") (since 2009)
Arab Spring (since 2010): – government overthrown multiple times (Egypt 2011–) – government overthrown (Tunisia 2010–2014) – civil war (Lybia 2011-, Syria 2011–) – protests and governmental changes (Morocco 2011–2012) – major protests (Algeria 2010–2012, Lebanon 2011)
Cypriot financial crisis (2012–2013)
Islamic State of Iraq and Syria (ISIS) terrorist attacks (since 2013) **Migrant Crisis** (since 2014)
continuation of Israel – Palestina conflict – Israel – Gaza conflict (2006) – Fatah – Hamas conflict (2007) – Israeli Operation Pillar of Defense (2012)

Source: own elaboration

Analysis of international tourist flow in the Mediterranean between 2005 and 2014

Between 2005 and 2014 the Mediterranean region experienced growth of 28.3%, nearly 70 million of "new" international tourists visited Mediterranean destinations. During the same period, the number of worldwide international tourist arrivals increased for 40%, representing 324 million of "new" tourists.

Tab. 1: International Tourist Arrivals by Mediterranean countries between 2005 and 2014 (in thousands), and their yearly change (in%)

continent	country	2005.	2006.	2005-2006 change (in%)	2007.	2006-2007 change (in%)	2008.	2007-2008 change (in%)	2009.	2008-2009 change (in%)	2010.	2009-2010 chnage (in%)	2011.	2010-2011 change (in%)	2012.	2011-2012 change (in%)	2013.	2012-2013 change (in%)	2014.	2013-2014 change (in%)	2005-2014 change (in%)
Africa	Algeria	1 443	1 638	13,5	1 743	6,4	1 772	1,7	1 912	7,9	2 070	8,3	2 395	15,7	2 634	10,0	2 733	3,8	2 301	-15,8	59,5
	Egypt	8 244	8 646	4,9	10 610	22,7	12 296	15,9	11 914	-3,1	14 051	17,9	9 497	-32,4	11 196	17,9	9 174	-18,1	9 628	4,9	16,8
	Lybia	81	42	-48,1	38	-9,5	34	-10,5	.	.	.	.	.	.	.	.	.	.	.	.	.
	Morocco	5 843	6 558	12,2	7 408	13,0	7 879	6,4	8 341	5,9	9 288	11,4	9 342	0,6	9 375	0,4	10 046	7,2	10 282	2,3	76,0
	Tunisia	6 378	6 550	2,7	6 762	3,2	7 049	4,2	6 901	-2,1	6 903	0,0	4 782	-30,7	5 950	24,4	6 269	5,4	6 069	-3,2	-4,8
Asia	Cyprus	2 657	2 629	-1,1	2 416	-8,1	2 404	-0,5	2 141	-10,9	2 173	1,5	2 392	10,1	2 465	3,1	2 405	-2,4	2 441	1,5	-8,1
	Israel	1 903	1 825	-4,1	2 068	13,3	2 572	24,4	2 321	-9,8	2 803	20,8	2 820	0,6	2 886	2,3	2 962	2,6	2 927	-1,2	53,8
	Lebanon	1 140	1 063	-6,8	1 017	-4,3	1 333	31,1	1 844	38,3	2 168	17,6	1 655	-23,7	1 366	-17,5	1 274	-6,7	1 355	6,4	18,9
	Palestine	.	.	.	264	.	387	46,6	396	2,3	522	31,8	446	-14,6	490	9,9	545	11,2	556	2,0	.
	Syria	3 368	4 231	25,6	4 158	-1,7	5 430	30,6	6 092	12,2	8 546	40,3	5 070	-40,7	.	.	.	.	.	.	.
	Turkey	20 273	18 916	-6,7	22 248	17,6	24 994	12,3	25 506	2,0	31 364	23,0	29 343	-6,4	35 698	21,7	37 795	5,9	39 811	5,3	96,4
Europe	Albania	.	.	.	1 062	.	1 247	17,4	1 792	43,7	2 191	22,3	2 865	30,8	3 156	10,2	2 857	-9,5	3 341	16,9	.
	Bosnia and Herzegovina	217	256	18,0	306	19,5	322	5,2	311	-3,4	365	17,4	392	7,4	439	12,0	529	20,5	536	1,3	147,0
	Croatia	8 467	8 659	2,3	9 307	7,5	9 415	1,2	8 694	-7,7	9 111	4,8	9 927	9,0	10 369	4,5	10 948	5,6	11 623	6,2	37,3
	France	75 908	78 853	3,9	81 940	3,9	79 300	-3,2	76 764	-3,2	77 648	1,2	79 500	2,4	81 980	3,1	83 633	2,0	83 700	0,1	10,3
	Greece	14 765	16 039	8,6	16 165	0,8	15 939	-1,4	14 915	-6,4	15 007	0,6	16 427	9,5	15 518	-5,5	17 920	15,5	22 033	23,0	49,2
	Italy	36 513	41 058	12,4	43 654	6,3	42 734	-2,1	43 239	1,2	43 626	0,9	46 119	5,7	46 360	0,5	47 704	2,9	48 676	2,0	33,3
	Malta	1 151	1 124	-2,3	1 244	10,7	1 291	3,8	1 182	-8,4	1 339	13,3	1 412	5,5	1 443	2,2	1 582	9,6	1 690	6,8	46,8
	Monaco	286	313	9,4	328	4,8	324	-1,2	265	-18,2	279	5,3	295	5,7	292	-1,0	328	12,3	329	0,3	15,0
	Montenegro	272	378	39,0	984	160,3	1 031	4,8	1 044	1,3	1 088	4,2	1 201	10,4	1 264	5,2	1 324	4,7	1 350	2,0	396,3
	Slovenia	1 555	1 617	4,0	1 751	8,3	1 958	11,8	1 824	-6,8	1 869	2,5	2 037	9,0	2 156	5,8	2 259	4,8	2 411	6,7	55,0
	Spain	55 914	58 004	3,7	58 666	1,1	57 192	-2,5	52 178	-8,8	52 677	1,0	56 694	7,6	57 464	1,4	60 676	5,6	64 995	7,1	16,2
Mediterranean Region total		246 378	258 399	4,9	274 139	6,1	276 903	1,0	269 576	-2,6	285 088	5,8	284 611	-0,2	292 501	2,8	302 963	3,6	316 054	4,3	28,3
World total		809 000	853 000	5,4	901 000	5,6	917 000	1,8	883 000	-3,7	949 000	7,5	995 000	4,8	1 035 000	4,0	1 087 000	5,0	1 133 000	4,2	40,0
share of Med Region in total World		30,5	30,3	-0,5	30,4	0,4	30,2	-0,8	30,5	1,1	30,0	-1,6	28,6	-4,8	28,3	-1,2	28	-1,4	27,9	0,1	-8,4

Source: own elaboration based on Gosar (2007), TourMIS (2016), UNWTO (2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015) and World Bank (2016)

Mediterranean growth differs among the Mediterranean countries, including that some of them recordedless international tourists in 2014 than in 2005 – Cyprus –8.1%, Tunisia – 4.8%. Since there is no data for last years because of war situation, Libya and Syria have also recorded lower number of international tourist arrivals than in 2005. Absolute winners of the research area and period are two countries with access to Adriatic Sea: Montenegro and Bosnia and Herzegovina, with international tourist arrivals' increase of 396.3 and 147.0%. However, both belong to the group of countries with the smallest absolute number of tourists in the Mediterranean region – 0.5 and 1.3 million of arrivals in 2014. Within the countries which were receiving over 5 million tourists yearly in 2005, the highest increases over the decade were recorded for Turkey 96.4%, Morocco 76.0% and Greece 49.2%. Despite the good overall results, the happenings in the region and especially in its eastern part influenced a lot in dynamics of growth during last decade. Before achieving good positive results, most of the countries experienced negative changes during the certain period within the decade (Tab. 1).

During the observed period, there were only two years when Mediterranean region underperformed in matter of international tourist numbers, in 2009 and in 2011. Overall decrease of international tourists in the Mediterranean region for 2.6% in 2009 is the effect of Global financial crisis (2007–2008), while decrease of 0.2% in 2011 is the effect of Arab spring which started in 2010. While Global financial crisis affected mostly European Mediterranean countries – Monaco –18.2%, Spain –8.8%, Malta –8.4%, Croatia –7.7%, Slovenia –6.8% and Greece –6.4%, Arab spring affected mostly African and Asian Mediterranean countries such as are Syria –40.7%, Egypt –32.4%, Tunisia –30,7% and Lebanon –23.7%. Libya should be added on the latter list, but there is a lack of data present for it due to ongoing conflicts.

The first effects of Global financial crisis on international tourist arrivals in the Mediterranean region can be noticed in 2008, since after two subsequent years of higher increases on yearly basis, 4.9% for 2006 in comparison with 2005, and 6.1% for 2007 in comparison with 2006, the increase for 2008 in comparison with 2007 was only 1%. Within those three subsequent years, in Afro-Mediterranean Morocco has recorded constant high increases: 12.2% for period between 2005-2006, 13.0% for 2006–2007, and 6.4% for 2007–2008.

Morocco's stellar performanceamong other factors isattributable to dedicated investment in tourism infrastructure and to the liberalization of air transport and the subsequent entry of low-cost airlines in 2006 (UNWTO, 2007), as well as to strong government support coupled with easy access and attractive prices compared to "euro" destinationson the northern shores of the Mediterranean in 2008 (UNWTO, 2009). Other Afro-Mediterranean countries except Libya – Algeria, Egypt and Tunisia posted good results as well, while Tunisian slightly lower than average results from the previous yearsare due to market volatility and problems with air transport (UNWTO, 2007). Libya is the only Afro-Mediterranean destination during the pre-Global financial crisis research period which recorded continuous decrease, despite the conflicts in Libya which continued as a civil war started in 2011. Because of the Israel-Lebanon crisis, Israel-Gaza conflict (2006) and Fatah--Hamas conflict (2007), the performance of Asian Mediterranean countries or Middle East between 2005 and 2007 is turbulent. However, 2008 brought to these countries high growth rates in comparison with arrivals in 2007: Palestine 46.6%, Lebanon 31.1%, Syria 30.6%, and Israel 24.4%. Syria has recorded also high growth rates in 2006 – 25.6%, in large part due to the high increased in arrivals from Lebanon (UNWTO, 2007). The international tourist arrivals to Euro-Mediterranean countries in 2006 and 2007 were more stable than to Afro-Mediterranean or Asian Mediterranean countries. High growths are observed in Balkan states, especially in Montenegro where the growth rate for 2005-2006 was 39.0%, and for 2006-2007 even 160.3%. Montenegro is followed by its neighbor Bosnia and Herzegovina – 18.0% for 2005-2006, and 19.5% for 2006-2007. Such a high growths are attributed as a result to increased promotion in key markets (UNWTO, 2008). The effect of the Global financial crisis that emerged in mid-2008 could be observed also in Euro-Mediterranean countries already in 2008, when the rates of national growths decreased and the most important destinations, such as are France, Spain and Italy has recorded the decrease in international tourist arrivals in comparison to 2007: 3.2%, 2.5 and 2.1%, respectively.

As mentioned above, the largest overall decrease in international tourist arrivals to Mediterranean region during the researched period happened in 2009 due to Global financial crisis. Despite the crisis, some countries recorded very high growth rates for 2009 in comparison to arrivals in 2008:

Albania 43.7%, Lebanon 38.3%, Syria 12.2%, Algeria 7.9%, and Morocco 5.9%. Out of all the UNWTO regions in the world, Europe's tourism sector in general, the world's largest and most mature, has been the hardest hit by the recession (UNWTO, 2010). The infamous recorder of decrease 2008–2009 in Euro-Mediterranean countries is Monaco with –18.2%. The tourist "giant" Spain recorded decreased international tourist arrivals between 2008 and 2009 for 8.8%. In the largest underperformance in Euro-Mediterranean countries, Spain is followed by Malta –8.4, Croatia –7.7%, Slovenia –6.8%, Greece –6.4%.

Due to huge decreases in 2009, 2010 shows only growths for all of 22 observed Mediterranean countries. In 2010 the largest growth rates are observed in Asian Mediterranean countries, where except Cyprus with increase of only 1.5%, all other countries recorded two digits growth rates: Syria 40.3%, Palestine 31.8%, Turkey 23.0%, Israel 20.8% and Lebanon 17.6%. In Afro-Mediterranean countries Tunisia recorded stagnation, while other countries recorded high growth rates as well: Egypt 17.9%, Morocco 11.4% and Algeria 8.3%. Well established Euro-Mediterranean destinations such as Spain, France, Italy and Greece reported weak growth in 2010 with comparison to 2009 – all around 1%.

While Euro-Mediterranean recovers in the following year, 2011th brought to entire Mediterranean region the second overall decrease in the researched period. In Afro-Mediterranean countries the growth rate for Egypt was –32.4%, and for Tunisia –30.7%, due to governments overthrown in Tunisia in 2010 and Egypt in 2011. The beginning of Arab spring in 2010 affected international tourist arrivals to majority of Afro-Mediterranean and Asian Mediterranean countries already in 2011. The Middle East and North Africa were the only World's UNWTO sub-regions to record a decline in arrivals in this year (UNWTO, 2012). The UNWTO's predictions for Middle East region, as the fastest growing one in the world over the past decade, is a lost an estimated 5 million international tourist arrivals in 2011 (UNWTO, 2012). Besides Egypt and Tunisia, significant drops in tourist arrivals are recorded in Syria –40.7%, Lebanon –23.7, Palestine –14.6%, and Turkey –6.4%. From the other side, the robust growth of international tourist arrivals in Euro-Mediterranean countries was mostly driven by the larger destinations: Greece 9.5%,Croatia 9%, Spain 7.6%, and Italy 5.7%.

Due to continued tensions in some of Middle East destinations and civil war in Syria, majority of countries in this part of Mediterranean experienced additional drops or significant lower growth in arrivals as well in 2012. Because of huge protests in Lebanon in 2011 and a war in neighboring Syria, Lebanon suffered decrease of 17.5%. The only destination which experienced huge growth within Asian Mediterranean countries was Turkey with 21.7%. A better political situation in Afro-Mediterranean countries resulted in a strong rebound from the decline in 2011, as Tunisia with growth rate of 24.4% started to recover from the negative demand trends following the Arab spring transition. As well Egypt has experienced a sustained rebound of 17.9% growth in international tourist arrivals after the decline of 2011. Due to protests and governmental changes in Morocco in 2011 and 2012, the growth of Morocco in 2012 is the smallest performance of this country in the researched period. Destinations in Euro-Mediterranean consolidated their excellent performance of 2011 and returned in 2012 to their normal modest growth rates (UNWTO, 2013). However, because of the peak of Greek government-debt crisis in 2012, Greece is the only Euro-Mediterranean destination with significant decrease – even –5.5%.

Lebanon with decrease of international tourist arrivals of 6.7% continued to suffer from the conflict in neighboring Syria as well is 2013. The effect of new local financial crisis – Cypriot financial crisis which had place in Cyprus 2012-2013, the number of international tourists in Cyprus drop for –2.4% in 2013. The Cypriot crisis remained local and therefore neighboring Turkey recorded growth of 5.9% in 2013, which is important because Turkey with almost 38 million international tourist arrivals was the largest Asian Mediterranean destination in 2013 – with 5 times larger number of arrivals than all other Asian Mediterranean countries togeher. Huge growth rate in Morocco of 7.2% made it the first African destination to have surpassed the mark of 10 million international arrivals (UNWTO, 2014). Tunisia recovered further with annual growth rate of 5.4%, while Egypt finished the year with significant drop of international tourist arrivals. It is interesting that firstly posted to UNWTO headquarters double-digit growth in the first half of the year, but saw a significant drop in arrivals in the second half due to renewed political tension in the country which led to an overall decrease of 18.1%

(UNWTO, 2014). Except the Albania, all Euro-Mediterranean countries registered growth for 2013. Its largest tourist destination Spain recorded a sound 5.6% increase in arrivals to receive nearly 61 million tourists in total. Other major destinations such as Greece with 15.5% and Croatia with 5.6% also saw robust growth in 2013.

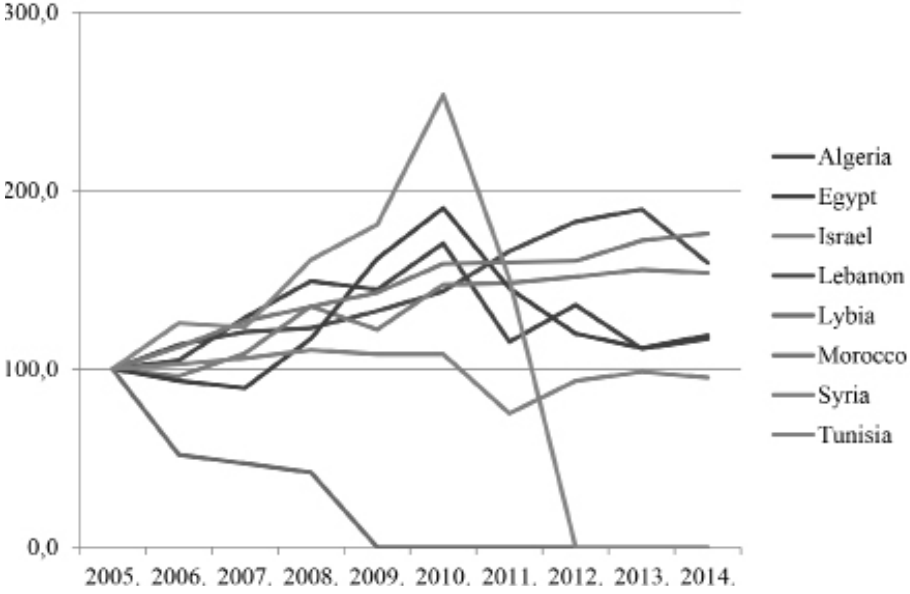
Since 2013, despite of some signs of recovery in Asian Mediterranean and Afro Mediterranean countries, the terrorist attacks with responsibility took by Islamic State of Iraq and Syria (ISIS) members become another problem for growth of tourism in this part of Mediterranean. In 2014, Lebanon started recovering with growth rate of 6.4%, but again the subregion's overall growth is due to 5.3% growth of international tourist arrivals to Turkey. Among Afro-Mediterranean countries, Algeria with –15.8% and Tunisia with –3.2% recorded decreases. Morocco remained to have more than 10 million of international tourist arrivals with modest growth of 2.3%, whlile Egypt, after previous year's decrease of –18.1%, finished with 4.9% increase in 2014. However, again first part of the year for Egypt was totally different than the other one: first was decrease, while the other was increase (UNWTO, 2015). Just like in 2007, 2010 and 2011, the 2014 for Euro-Mediterranean represented a year withou a country with decreases. Arrivals to Greece grew by an exceptional 23.0% while Spain, the subregion's second top destination posted 7.1% growth. Other established Mediterranean destinations such as Malta and Croatia also reported solid growth. Europe's third most visited destination Italy posted 2.0%, while emerging Euro-Mediterranean destination Albania reported double-digit increase of 16.9% in 2014.

Mediterranean tourism *winners* and *losers* in the last decade

As presented analysis by countries showed that majority of the Mediterranean countries experienced both increases and decreases during the last decade, it is very hard to clearly point *the winners* and *the losers* of the Mediterranean tourism over the last decade. However, it is obvious that country such is Syria where civil war started in 2011 and immidiately affected international tourist arrivals, can be pinpointed as a *loser* of the researched period. In this category Syria is followed by Lybia, where the conflicts which started in 2011 were still on duty in 2014. The data on

international tourist arrivals for mentioned two countries are missing for the last year of the research, but it is logical to pinpoint those countries as a *losers* of the decade in Mediterranean region when international tourism matters. Those two countries are followed by Cyprus and Tunisia, which are the only Mediterranean countries with recorded decrease over the period 2005-2014, –8.1% and –4.8%, respectively. From the other side, proclaimed as a Mediterranean regional tourism winners over the last decade could be Montenegro, Bosnia and Herzegovina and Turkey with increase of 393.3%, 147.0% and 96.4% over the period, respectively. Among larger destinations which recorded more than 5 million of international tourist arrivals in 2005, Tunisia again act as a *loser* and the only larger destination which recorded decrease over the decade. The pinponted larger destinations' *winners* are Turkey with 96.4%, Morocco with 76.0% and Greece with 49.2% increase in the research period.

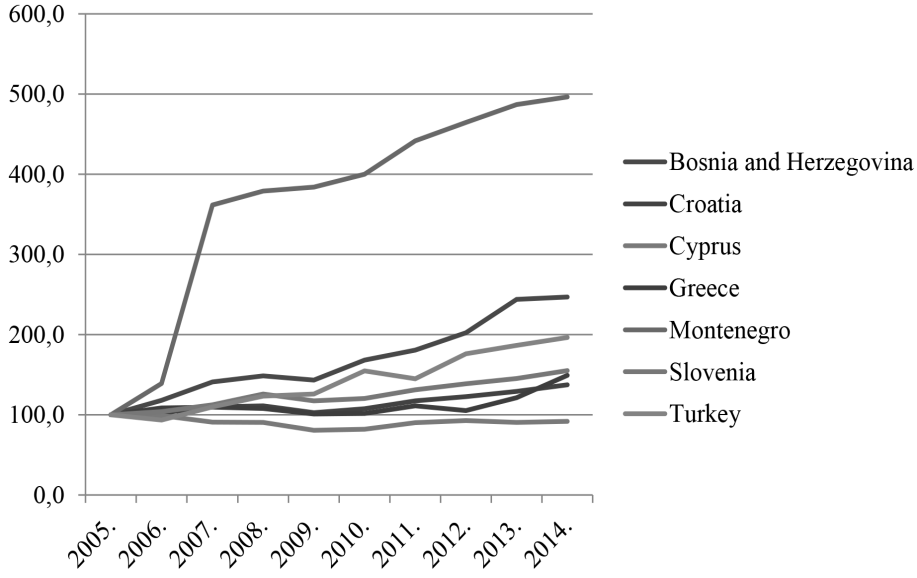
Fig. 4: International tourist arrivals to the countries involved in Arab spring and Israel between 2005 and 2014 (indexes; 100 = number of international tourists in 2005)



Source: own elaboration based on UNWTO (2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014 and 2015)

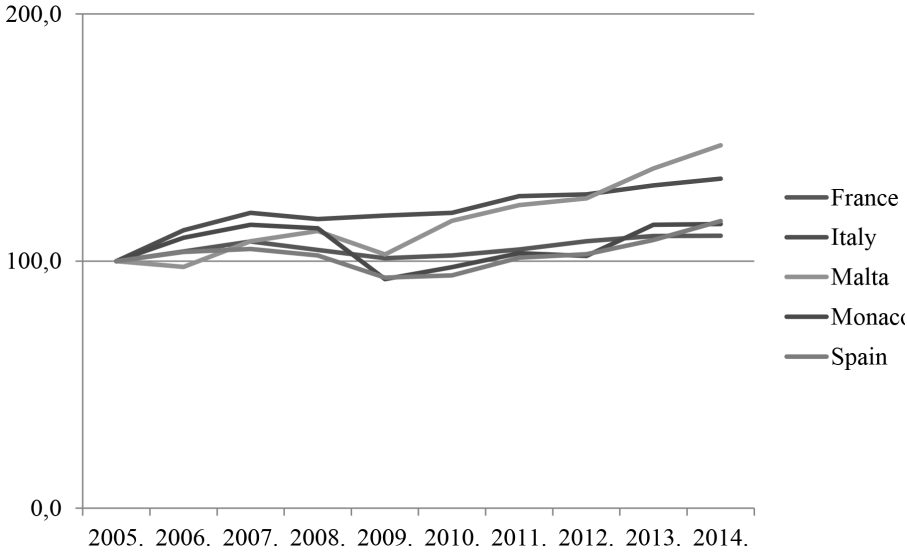
In order to track subregional changes, the Mediterranean region is divided into three: (1) countries involved in Arab spring and Israel, (2) other Eastern Mediterranean countries, and (3) other Western Mediterranean countries. This division shows huge differences. While countries involved in Arab spring and Israel shows huge turbulences over the whole period (Fig. 4), other two regions show dynamics as well, their overall result is more constant increase (Fig. 5 and Fig. 6). However, Eastern Mediterranean countries not involved in Arab spring show higher increases than Western Mediterranean countries. From this analysis appears that the *winner* of the Mediterranean tourism is the region consists of countries in the Eastern Mediterranean which were not involved in Arab spring.

Fig. 5: International tourist arrivals to the Eastern Mediterranean countries not involved in Arab spring between 2005 and 2014 (indexes; 100 = number of international tourists in 2005)



Source: own elaboration based on UNWTO (2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014 and 2015)

Fig. 6: International tourist arrivals to the Western Mediterranean countries between 2005 and 2014 (indexes; 100 = number of international tourists in 2005)



Source: own elaboration based on UNWTO (2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014 and 2015)

Summary

Purpose of this paper was to measure the effect of crisis in Eastern Mediterranean region on international tourist arrivals to all Mediterranean countries between 2005 and 2014. Several huge crises hit the region during the research period and the leading hypothesis was that international tourist flow has generally switched from Eastern to Western Mediterranean countries, including Eastern Mediterranean countries which were not included in Arab spring. The desk research based on official UNWTO reports accept this hypothesis and pinpointed Eastern Mediterranean countries not involved in Arab spring as the subregion with largest benefits in tourism flow during the last decade. It also pinpointed among larger destinations Tunisia as a country which lost the most, while Turkey, Morocco and Greece gain the most over the researched period.

References

Gosar, A. (2007). Razvojne karakteristike i izazovi turizma u jugoistočnoj Europi, s posebnim naglaskoeem na Sloveniju. Actaturistica nova, 1.(2.), p. 127–154.

Sonmez, S., Apostolopoulos, Y., Tarlow, P. (1999). *Tourism in Crises: managing the effect of terrorism*. Journal of Travel Research.38 (1). p. 13–18. doi: 10.1177/004728759903800104

TourMIS (2016).Marketing-Information-System for tourism managers. Obtained [11.05.2016] from: http://www.tourmis.info/

UNWTO (2005). Tourism Highlights – 2005 Edition. Obtained [06.05.2016] from: http://www.e-unwto.org/doi/book/10.18111/9789284411900

UNWTO (2006). Tourism Highlights – 2006 Edition. Obtained [06.05.2016] from: http://www.e-unwto.org/doi/book/10.18111/9789284413492

UNWTO (2007). Tourism Highlights – 2007 Edition. Obtained [06.05.2016] from: http://www.e-unwto.org/doi/book/10.18111/9789284413539

UNWTO (2008). Tourism Highlights – 2008 Edition. Obtained [06.05.2016] from: http://www.unwto.org/facts/eng/pdf/highlights/UNWTO_Highlights08_en_HR.pdf

UNWTO (2009). Tourism Highlights – 2009 Edition. Obtained [06.05.2016] from: http://www.e-unwto.org/doi/book/10.18111/9789284413591

UNWTO (2010). Tourism Highlights – 2010 Edition. Obtained [06.05.2016] from: http://www.e-unwto.org/doi/pdf/10.18111/9789284413720

UNWTO (2011). Tourism Highlights – 2011 Edition. Obtained [06.05.2016] from: http://mkt.unwto.org/sites/all/files/docpdf/unwtohighlights11enhr.pdf

UNWTO (2012). Tourism Highlights – 2012 Edition. Obtained [06.05.2016] from: http://www.e-unwto.org/doi/book/10.18111/9789284414666

UNWTO (2013). Tourism Highlights – 2013 Edition. Obtained [06.05.2016] from: http://www.e-unwto.org/doi/pdf/10.18111/9789284415427

UNWTO (2014). Tourism Highlights – 2014 Edition. Obtained [06.05.2016] from: http://www.e-unwto.org/doi/pdf/10.18111/9789284416226

UNWTO (2015). Tourism Highlights – 2015 Edition. Obtained [06.05.2016] from: http://www.e-unwto.org/doi/pdf/10.18111/9789284416899

UNWTO (2016). World Tourism Barometer – Volume 14, January 2016. Obtained [06.05.2016] from: http://cf.cdn.unwto.org/sites/all/files/pdf/unwto_barom16_01_january_excerpt.pdf

World Bank (2016).World Bank Database.Obtained [11.05.2016] from: http://data.worldbank.org/indicator/ST.INT.ARVL?page=2

The idea of social equality in a meritocratic society – a cultural approach

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Abstract
Subject of research: This work philosophical analysis is concerned with the relation between the ideas of quality and meritocracy. The axiom of liberalism, the equality of opportunities, states that thanks to their endeavour, individuals have a chance to improve their life quality. Thus, people with similar abilities have a similar chance to achieve their goals. Meritocracy was to guarantee the implementation of the tenet. The attempt to build a meritocratic society is not a novelty in the history of the humankind. The history of western civilisation is the arena of a dispute between the supporters of meritocracy over democracy, like the doctrine of Plato, and the advocates of democracy at the expense of meritocracy, which is represented by the philosophy of J. J. Rousseau. A system of education based on the principles of the philosophy of Confucius, is worth consideration. The philosopher claimed that putting well educated officials on top of the social hierarchy was the measure to eliminate egoism, nepotism and ethnocentrism and accomplish the ideal of a full social harmony. At present meritocracy is widely criticised. It is reproached for creating a new oligarchy, since it encourages the process of segregation of individuals on the base of their natural abilities. There also the advocates of a compromise between the extremities of meritocracy and egalitarian populism.
Purpose of research: The subject of the work was to pay attention to the relations between the ideas of equality and meritocracy in the chosen legal paradigms.
Methods: a theoretical and historical discourse.

Keywords: *equality, meritocracy, legal cultures.*

Introductory notes

In the Polish Scientific Publishers' dictionary, the entry "meritocracy" is defined as a futurological concept, under which the 21st century was

supposed to be the century of the reign of the highly educated, talented and competent(in their fields) people. The second entry defines meritocracy as the system of the government of the above (2005, p. 811). A Latin etymology of the concept is connected with the system of governance based on accomplishments, competence (*meritas)* and the expression meaning referring to the very essence of the matter (*meritum)*.

The concept was coined by a British sociologist, Michael Young, who, in his work *The Rise of Meritocracy*, described a dystopia of a society based on meritocratic differences. He wrote: 'The loser faces the choice of acknowledging himself a failure or living in the negation of the system" (Young, 1994).

Meritocratic societies must be blamed for the condition of modern democracies. From the perspective of the several past decades they can be also classified as anti-democratic conceptions. According to Young, meritocracy is a class of people, who have reached the top of the social hierarchy thanks to a true equality of the opportunity. The consequence is a permanent feeling of inferiority of those with a lower status, which derives from the fact that they are really worse, and not from the fact that they have been deprived of equal possibilities, like the lower-class people from the past (Young 1971, cited in White, 2008, p. 100).

A profound analysis of meritocracy was performed by M. Walzer (Walzer, 2008, pp. 203–230) and P. Rosanvallon. The second author, having analysed the origin of the French crisis, notices that since the 1980s, a society's wealthiest members have claimed an ever-expanding share of income and property. It has brought he end to the age of growing equality launched by the American and French revolutions (Rosanvallon, 2013, p. 28). A passive social policy adopted by the state governments started to reward inactive people, depriving them of a motivation to act, and therefore enabling them to stay passive (Rosanvallon,1995, pp. 28–41, pp. 107–118). Therefore, the crisis of the 1980s was not the return of the problems of the times before the rise of the French welfare state. R. Pyka claims that at the basic level, it was driven by financial problems and social benefits inadequately reflecting social needs, at the social- philosophic level, it interfered with the fundaments of social solidarity and, widely questioned at present, social rights (Pyka, 2008, p. 51). And just as significant as the social and economic factors

driving this contemporary inequality, has been a loss of faith in the ideal of equality itself. In the eighteenth-century, equality meant understanding human beings as fundamentally alike and then creating universal political and economic rights.

At the beginning of the 20th century, after some revolutionary movements, a welfare state emerged. The crisis of the 1970s brought a collapse of the precept and the slide towards social inequality in the years that followed. As Rosanvallon reasons, there is no returning to the days of the redistributive welfare state. Yet, it is essential to revitalize the idea of equality according to principles of singularity, reciprocity, to reflect modern realities.

Social stratification has existed in the majority of societies throughout the history. The equality before the law is a huge achievement of the philosophy and practice of liberalism of the last 300 years. As L. Balcerowicz writes, a radical and consequently pro-liberal view is expressed by a postulate of a maximal liberty for the maximal number of people, a fusion of the sphere of the state coercion reduced to a minimum and the equality before the law (Balcerowicz, 2012, p. 30).

In liberalism the idea of social equality is not affiliated, because people are not equally provided with a talent, health or diligence. The axioms of individualism and autonomy are substantial. The other fundament of liberalism is the idea of the equality of opportunity. Thanks to their endeavours, individuals can improve their life quality. The principle states that people with similar abilities have a similar chance to achieve their goals, and it is based on the views of Bentham and Mill. They claim a moral legitimacy of everything that is beneficial for a society. As Heywood remarks, it is the total of the efforts taken by the individuals in their pursuit of happiness (Heywood, 2007, pp. 63–65). However, the idea of equality before the law alone in not sufficient to prevent inequality of possibility.

The history of the fight for human rights is connected with their community character originating from cultural tradition. As J. Raz reasons, the protection of many rights was connected with a fight for the autonomy of an individual, however its driving force was the concern to secure collective goods, without which individual rights would not be able to serve their purpose (Raz, 1986, p. 251). This approach resulted in the rise of democratic solutions and pluralism. Meritocracy, in the opinion of H. Arendt, may

deepen the social inequality that has been existing for recent years and, in the extreme, threaten the foundation of democracy (Arendt, 1994, p. 216).

Equality and individualism in an ancient *polis*

The first concepts concerning social inequality were formed in the ancient times. The history of western civilisation is the arena of a dispute between the supporters of meritocracy over democracy, like the doctrine of Plato, and the advocates of democracy at the expense of meritocracy, which is represented by the philosophy of J.J Rousseau.

In his work *The Republic*, the author creates the vision of an utopian *polis*, governed by the wisest class of citizens. The system proposed was and ideal of a state. The philosopher developed the theory of education that reflected the internal order of a soul- psyche of an individual (Środa, 2012, p. 59) The vision of *kallipolis* is the weird fusion of an idealistic political system of Sparta and ethical and philosophic views of Plato. As Barwicka- Tylek and J. Malczewski claim, the objective of an well-managed *polis* is not merely to secure a material welfare of citizens, but first and foremost, to embody moral and ethical values, good and justice, to educate a young person and shape a young soul properly (Barwicka-Tylek, Malczewski, 2014, 43–44). Plato claims that a soul of every individual has a three- part structure, and the logic (thinking part) should control the appetitive, (desires and wishes) in order to keep the healthy, constructive balance. Analogically, an ideal state comprises members of three distinct classes: rulers- philosophers, soldiers, and craftsmen. The first must have the virtue of wisdom, the second need the virtue of courage, and the last must exhibit the virtue of moderation. Plato held that the *polis* functions properly thanks to the separation of functions and the specialization of labour.

He wrote: 'I said: 'Until philosophers are kings, or the kings and princes of this world have the spirit and power of philosophy, and political greatness and wisdom meet in one, […] cities will never have rest from their evils' (Plato, 1994, p. 207). The separation of labour was supposed to realise the rule of justice. Social differences built the ladder of a meritocratic hierarchy. The idea of consumer communism accessible exclusively to the two upper classes seems especially unethical. As L.Dubel states, such a system in Plato's theory prevents extensive privileges and nepotism in the class of

philosophers (Dubel, 2012, p. 63). The conception of the control on human reproduction, which was compared to a dog or horse selective breeding, is especially controversial. Mating was only allowed at a certain age, and the partners were chosen by means of a fixed lottery, which aim was to match the best men and women to get the best offspring. The process of education and multi- level selection was supposed to guarantee the best, most talented people to keep public positions.

Plato's theory of forms has a lot in common with the conception of natural law. The doctrine implies that a soul possesses the memories of the true knowledge from the time before its birth, some virtues, which can be recollected at the highest level. Therefore, those whose abilities to reason are most developed, can identify and recognize the stratified memories. This implies, though, that the *arte* is fully available to very few, while the majority must, as Ch. Rowe expressed it, be deprived of self-reliance (Rowe, 2000, p. 164). At the time of an ancient *polis*, the differences between people were considered natural and innate, and belonging to a certain social class was lifelong. Plato held: "But when the (…) man whom nature designed to be a trader, having his heart lifted up by wealth or strength or the number of his followers, or any like advantage, attempts to force his way into the class of warriors, or a warrior into that of legislators and guardians, for which he is unfitted, and either to take the implements or the duties of the other; or when one man is trader, legislator, and warrior all in one, then I think you will agree with me in saying that this interchange and this meddling of one with another is the ruin of the State" (Plato 1990, IV, 434 a-c).

In many ways, it was the meritocracy that Plato advocated in his most famous work. He saw the dangers evident when people of power rise to positions of authority without the needs of the whole governing their motives. As a result, selfishly intelligent people make decisions that are contrary to the good of the whole, though usually personally beneficial. He believed that this is one of the greatest problems facing civilization and democracy.

Also a disciple of Plato, Aristotle, did not consider social inequality a big problem. The only danger was a potentially risky and status quo threatening, social unrest (Woźniak, 2011, p. 15).

Both Plato and Aristotle criticized democracy as an unjust system that requires the devotion of human masses, offering them the right to keep

certain functions, thus being involved in the process of governance, regardless of their inability to proceed the task properly due to their lack of skills and education (White, 2008, p. 45). The ideal of a platonian state embodies the idea of meritocracy in its political aspect. The disciple of the philosopher held a similar belief, and justified the existence of "natural slaves" with their limited intellectual abilities. The authority was reserved to those wise and virtuous. However, he is not as rigorist in admitting the access the class of rulers to a limited group as Plato. Aristotle approves the right of wealthy citizens, regardless which social class they originate from, to rule the state.

Both conceptions represent the idea of a power naturally prescribed to a group of people because of their better abilities, which alone validates their right to rule the others. Such a "natural aristocracy" comes out of the authority of wise and virtuous people. These axioms did not, however, exist in dependently, they were connected with the idea of collective goods.

Meritocracy in a Chinese model

The system of state organization where the authority is held by intellectualists was also typical of a Chinese philosophy. Its key elements appear in the teachings of Confucius. In 130 BC, the texts by Confucius became the foundation of the education provided to state officials, until the collapse of the Chinese Empire in 1905.

What were the institutional and organizational principles of a Confucian model of meritocracy that influenced a quarter of the world's population? The reason for Confucius's political activity was a pragmatic need to commence a positive social change. The starting point was an ideal man, a virtuous ruler, who was surrounded by equally virtuous nobles who were able to govern the state on his behalf. The philosopher postulated the replacement of a hereditary aristocracy with the aristocracy of intellect, that comprised of those who had managed to achieve the intellectual perfection, regardless their social origin (Künstler, 1983, p. 131). Education and art (*wen*) strengthened the whole society, and people's hearts. *Wen* is the arts of peace, as opposed to arts of war, such as music, painting, and all aesthetic and spiritual manifestations of culture (Smith, 1995, p. 111). In a political dimension, the country which represents the highest culture, and deserves the respect of whole societies, is victorious.

One of the duties of a *wen* individual was the critics of an improper government, demonstrating good practices, revealing menaces and an active participation in a social life (Kola, 2011, p. 128). In a Chinese social hierarchy well educated bureaucrats were positioned on top, whereas soldiers were located at the bottom. Thus, the platonian ideal of a king-philosopher was reflected. Confucius expected that the effort of overcoming selfishness and nepotism, acting exclusively for the sake of the welfare of a local community, and ethnocentrism would award an individual with a nobility and a gust of humanity at its fullest.

The Confucian system comprises an element of a specific democracy which guarantees all citizens the opportunity to hold an office, and at the same time, respecting the virtues and nobilities cumulated by the preceding generations, approves hereditary privileges.

As X. Yao writes, the foundation of the Confucian anthropology is the confidence in a human ability to transform the world, and the possibility to educate and develop an individual (Yao, 2009, p. 284).

Education (*hüe*) is necessary to prepare an individual to perform the role of a state official. However, it does not mean acquiring new sciences. *Hüe* is achieving the perfection which is laid in the past. This is the only way a candidate for a state office can accomplish a transcendent morality and possess the necessary virtues. This method was acknowledged the only adequate for a man attained to a high office, whose aim was to serve the society. Men, apart from their social duties, were obliged to take care of their families properly.

It is a servitude to a wise ruler, as Künstler remarks, that differs a man of dignity from an ignorant person. A noble man does not need to achieve many skills, contrary to an ignorant man, who performs menial functions in the society (Künstler, 1983, p. 132). A noble man is guided by rectitude and fairness. He should be ordered by the morals and it is to shape his ethic.

Following Confucius teachings, cultural achievements were rewarded in a political sphere. They gave the Chinese civilisation the momentum to assimilate to an extend which, as H. Smith claims, at its climactic manifestation, had never been surpassed (Smith, 1995, p. 120). Confucianism is widely considered to contribute to the transformation of an autocratic Chinese empire into a bureaucratic feudal state. An extensive system of

education and assessment, as Kola notes, formed the hierarchic ladder in a state administration system up to the highest, central level. In result a kind of a community, with a strong ethos, a sense of social mission of a service for citizens and the state constituted itself (Kola, 2011, p. 131). Thus, Chinese meritocracy was driven by the ideas of justice and equality. The emperor aimed at weakening the position of the hereditary aristocracy and gaining the best people to hold the positions of state officials. To serve the idea, a system of scholarship was introduced to provide with equal opportunities for the emperor's subjects. M. Walzer notices that the conception of meritocracy was not implemented fanatically. Having passed their exams, the candidates had to undergo a stage of a practical selection process (Walzer, 2008, p. 217, cited in T. Kalbarczyk, 2014, p. 35).

Chinese meritocracy has been a central element of the Chinese political culture. A. F. Kola expresses a view that stimuli originating from the eastern civilisation should elicit and enforce certain ideas in the extremely different western culture. Yet it should not accredit to a search of some cultural universals but a constitution of a trans-cultural model of philosophy and academic discourse (Kola, 2011, p. 122). The author claims that in an era of multicultural animosities, the education of social elites based on the ethos of social commitment, with transcendental religious categories excluded, since their epiphanic nature accounts for numerous conflicts in multicultural societies, would allow to prevent social friction (Kola, 2011, p. 135).

As a matter of fact, a model of Chinese meritocracy has been plagued with a pathology of nepotism, corruption and excessive privileges of the well-born. The communist China under the reign of Mao Zedong rejected the political meritocracy that had been introduced two thousand years earlier by Confucius. Revolutionary energy and military protection of the country was a driving force of a new state. A political entity of a modern, powerful China is by no means unthreatened, thus efficient and competent state officials are its main concern.

Fast changes launched by the economic growth of the last decade and a deepening social stratification have devastated a fundamental for a Chinese culture balance. Therefore, the government propose to restore the national heritage of the Confucian China with the state control based on the doctrine of meritocracy.

Equality of opportunities and meritocracy – a modern face of meritocracy

The conception of equality of opportunities is connected with the idea of social justice. In a moral democracy – as S. White writes – citizens expect the rights and institutions to act with a just respect of the interests of all people. So, a kind of social and economic inequality that influences a right treatment of all citizens must be identified (White, 2008, p. 75). Meritocracy seems to match with the rule of fairness. However, a separation of meritocracy and the idea of quality forecasts the regression to a class society where the most talented (and frequently the wealthiest) individuals belong to elites. As M. Taylor suggests in a document *Meritocracy without equality is wrong and cruel*, neglecting the inequality in favour of the mobility results in the negation of the universal dignity of an individual and the affirmation of differences between people deriving from individual talents or abilities. The ideology of meritocracy favours the richest and legitimises the contempt for the poor. The cooperation of the mobility and the demand to decrease inequality and to guarantee respect for each individual, regardless his talent and natural endowment, is the requisite (Taylor, 2016).

What is the equality of opportunity within the meritocracy? In a weak meritocracy, a discrimination exists in either public or a private sector. Here, the postulate of equal opportunity incarnates itself in a demand to abolish discrimination in the sectors of education of employment. Otherwise, employers could selectless competent candidates[1]. Taking non- relevant criteria into consideration during the recruitment process, *de facto* challenges meritocracy, insomuch as the access to certain social functions is limited by the criteria which are of less or no importance for the proper performance of those functions. In the majority of democratic societies there is a consensus regarding anti-discrimination legislation with reference to state institutions. However, advocates of a conception of the free market question such an interference in the freedom of an employer to define competences of his potential employees.

A strong meritocracy, as W. Woźniak claims, is the bedrock of a standpoint which, apart from a disapproval of discriminative practices, concurrently promotes a real equality of opportunity (Woźniak, 2012, p. 109). A strong meritocracy approves the objective of a weak meritocracy, but additionally

pursues an individual's background and initial potential. S. White claims that the rationale of the replacement of a weak meritocracy by a strong one, is both its effectiveness and justice (White, 2008, p. 83).

The fundaments of liberalism lay within the belief that a moral pluralism of a society is a natural state, because it expresses an individual's autonomy. The state is not allowed to take any action which, as H.L.A. Hart points, favours or promotes a particular religion, philosophy or weltanschauung, or supports the followers thereof (Hart, 1984, p. 77). The principle of freedom of all individuals guarantees an autonomy of each individual to act according to their own beliefs. Such an approach is reflected in an assumption that rulers should equally respect all citizens. As R. Dworkin asserts, the principle of equality manifests itself in the freedom of choice of a conception of a good life that it gives to people. What follows, is the prescript to perceive and treat each human as equally valuable (Dworkin, 2006, p. 166). In this context, the meritocracy appears adverse, because while exalting individualism and competition, it changes market mechanisms and educational systems to promote the most talented. Those, whose access to elites is denied, are deceived by the ideal of egalitarian and universal education (Borelli, 2010).

S. White enlists the following arguments against meritocracy: a threat to freedom, an inequality status, inconsistency and unfairness towards less gifted citizens (2008, p. 95-106). Successively, the advocates of meritocracy criticize democracy, under which incompetent people are allowed to gain high state offices. This view is shared by D. Bell (Bell, 1973), Z. Brzezinski, D.K. Price. Also, as W. J. Cynarski states, the government of experts ("aristocrats of soul"), the best and the wisest, will assure a steady and balanced advancement of the human civilisation, albeit numerous social conflicts (Cynarski, 2001, p. 176). A proficient government will contribute to the development of the system towards the harmony, in accordance with Confucianism.

Walzer suggests that the attempt to find an equilibrium between the extremities of meritocracy and egalitarian populism would be a solution. Accordingly, the equality of opportunity should be a decisive factor while filling certain public offices, whereas the desire to establish a 'common public service' based on the endeavour to the absolute equality of possibilities must be regarded as irrational and dangerous, as it contradicts democracy and pluralism (2008, p. 271). In capitalism, meritocracy may negate human

solidarity. The notion of constant perfection to keep a leadership position, a nonstop rivalry and a perpetual evaluation generate stress and destroy a sense of brotherhood and belongingness, which hinders social stability.

Final remarks

A historic perspective provides with the material on the subject matter such as a controversial Plato's conceptions or the ideas by the "head teacher for 10000 years", Confucius, a pioneer of a public education. Confucian doctrine of meritocracy crystallised numerous aspects of the Chinese ancient civilisation and has symbolised the moral standards in Chinese politics and philosophy. In western civilisations, public offices are held in accordance with the rule of the sovereignty of the society rather than the acknowledgement of merits. In China, the Confucian heritage ordains that government elites recruit from a well- educated people who are obliged to develop their competences continually. They start in the lowest level of bureaucratic hierarchy. However, meritocracy is plagued with a huge corruption[2] and causes a sense of injustice of a part of the society.

As Aristotle said, man is a social creature by his nature *(zoon politicon).* At a global scale, societies face a challenge to form a modern system of education anchored in science and emotions. Confucian meritocracy included the idea of a citizen being concerned with himself and others. A modern system of education neglects the importance of inner development, and a western variant of meritocracy fosters the omnipresent rivalry. The West focuses on scientific study of external phenomena, whereas the East shows the insight into the sphere of spirit. The fusion of the two may bring a new quality of the perception of humanity.

In his considerations over the nature of live S. Nachmanovitch wrote: "We have the whole nightmare-history of political revolutions against bloody regimes, replacing them by still more bloody regimes, to teach us that that is not the way out. The only way out is a spiritual, intellectual, and emotional revolution in which we learn to experience as biological facts, first-hand, the interlooping connections between person and person, organism and environment, action and consequence" (Nachmanovitch, 2001).

Finding a balance in the economic and social spheres and protecting the equality of opportunities should become the main concerns of a present

discourse on meritocracy. The exertion to achieve an intellectual perfection must not be the excuse for social inequality or a pretext under which undeserved privileges are granted.

References

Arendt H., *Między czasem minionym a przyszłym*, Warszawa 1994.

Balcerowicz L., *Odkrywając wolność przeciw zniewoleniu umysłów*, Poznań 2012.

Barwicka-Tylek I., Malczewski J., *Historia myśli ustrojowej i społecznej*, wyd. 2, Warszawa 2014.

Bell D, *The Coming of Post-Indystrial Siciety*, New York 1973.

Boarelli M., *L'inganno della meritocrazia*, "Lo Straniero", 2010, N. 118.

Cynarski W. J., *Ewolucja nauk na przykładzie socjologii*, „Rocznik Naukowy IDŌ – Ruch dla kultury", Rzeszów 2001.

Dubel, L., *Historia doktryn politycznych i prawnych do schyłku XX wieku*, Warszawa 2012.

Dworkin R., *Imperium prawa*, Kraków 2006.

Hart H. L. A., *Are There Any Natural Rights?*, [w:] *Theories of Rights*, red. J. Waldron, Oxford 1984.

Heywood A., *Ideologie polityczne*, Warszawa 2007.

Kalbarczyk T., *Merytokracja: oligarchia utalentowanych czy sprawiedliwość szans?*, „Studia i Prace Pedagogiczne", 2014 (1).

Kola F. A., *Rorty – Konfucjusz: merytokracja w poszukiwaniu humanizmu i uniwersalnej ramy odniesienia*, „Przegląd Filozoficzny – Nowa Seria", 2011, Nr 3 (79).

Künstler M. J., *Sprawa Konfucjusza*, Warszawa 1983.

Nachmanovitch S., *Gregory Bateson: old men ought to be explorers*, Free Play Productions, Ivy (Wirginia) 2001.

Platon, *Państwo*, t. I, Warszawa 1994.

Platon, *Państwo,* Warszawa 1990.

Pyka R., *Globalizacja – sprawiedliwość społeczna – efektywność ekonomiczna. Francuskie dylematy*, Katowice 2008.

Raz J., *The Morality of Freedom*, Oxford 1986.

Rosanvallon P., *La nouvelle question sociale. Repenser l'Etat-providence*, Paris 1995.

Rosenvallon P., *The Society of Equals*, Harvard University Press, 2013.

Rowe Ch., *Etyka w starożytnej Grecji*, [w:] *Przewodnik po etyce*, red. P. Singer, Warszawa 2000.

Smith H., *Religie świata. Śladami mądrości pokoleń*, Warszawa 1995.

Środa M., *Etyka dla myślących*, Warszawa 2011.

Taylor M., *La meritocrazia senza ugualianza e sbagliata e crudele*, 2016. http://www.internazionale.it/video/2016/02/17/meritocrazia-uguaglianza-video [10.06.2016].

Walzer M., *Sfery sprawiedliwości. Obrona pluralizmu i równości*, Warszawa 2008.

White S., *Równość*, Warszawa 2008.

Wieki słownik wyrazów obcych, red. M. Bańko, PWN, Warszawa 2005.

Woźniak W., *Użycie i nadużycie nauk społecznych. Przypadek merytokracji*, [w:] *Wiedza, ideologia, władza. O społecznej funkcji uniwersytetu w społeczeństwie rynkowym*, red. P. Żuk, Warszawa 2012.

Yao X., *Konfucjanizm. Wprowadzenie*, Kraków 2009.

Young M., *The Rise of the Meritocracy*, London 1994.

Endnotes

[1] Especially when a job selection is based on the factors such as: nationality, sex, religion or sexual preferences. In such cases, anti-discrimination legislation is legitimised.

[2] ccording to the information issued by The Central Commission for Discipline Inspection of the Communist Party of China in 2015 almost 300 thousand high officials were punished for corruption. Among them, 80 thousand were given severe penalty, including a degradation. 'GazetaPrawna', 07. 03. 2015

The influence of the antiterrorist act onto the Poland's security and citizens' rights

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Abstract
The increasing threat of terrorist attacks in Poland forces the government to undertake proper preventive activities in advance. The authorities have decided, within their competences, upon the implementation a new act into the Polish legal system aiming at strengthening the competence of the Internal Security Agency (ABW) and assuring proper coordinating mechanisms between the ABW and remaining services, including those special ones in order to undertake common actions connected with recognizing, preventing and eliminating potential perpetrators of terrorist attacks. There are also elements concerning assuring proper mechanisms of reaction and undertaking activities in case of occurring such events. In order to complete at least a partial analysis of the undertaken matter, the notions concerning terrorism, the competences of the ABW, the special services and other services cooperating with the ABW should be defined.

Keywords: *Security, terrorism, the Internal Security Agency (ABW), special services, cooperation, coordination.*

The threat of terrorism is the most important justification of the antiterrorist act. Terrorism makes one of the biggest challenges in the context of assuring security both for the global, local or national perspectives. Being an international threat it goes beyond the frames of traditionally comprehended conflicts and critical situations. The growth of a terrorist threat level recently observed particularly in the countries from Western Europe, e.g. the attacks in France and Belgium, results in undertaking attempts aiming at amending regulations by particular countries and international organizations of other groups whose member is Poland, in

order to strengthen recognizing opportunities, preventing and fighting potential threats of terrorist character. The further part of the justification includes the lack of terrorist attacks in Poland until now however it does not mean that such attack may not occur in future. Additionally, it should be mentioned here about the involvement of the Polish Army in the combat against Islamic which significantly increases the level of occurring terrorist attacks. The changeability of the methods used by terrorists makes Poland to possess proper instruments serving to appropriate recognizing and revealing threats and effective preventing potential events.

In case of a terrorist attack, Poland must be prepared to undertake immediate and adequate measures of coordinated reaction of proper services, including neutralization of event effects. Reaching those aims demands providing cooperative mechanisms of all services, bodies and institutions engaged in widely comprehended antiterrorist actions as well as local authorities, private sector and the whole society.

The justification to the act indicated the most important aim – the increase of security of all Polish citizens that may be reached by:

- Strengthening mechanisms of activities coordination;
- Précising tasks of particular services and bodies as well as regulations of their cooperation;
- Providing opportunity to effective actions in case of suspecting crime of a terrorist type including those within preparatory proceedings;
- Providing reaction mechanisms adequate to the kind of occurring threats;
- Adjusting penal regulations to the new types of threats of a terrorist kind.

Nowadays, binding regulations in that matter is not cohesive and thus they do not guarantee an effective activity or preventing from terrorist cases.

The legislator indicates that the act is of integrating character for the entities of the Polish antiterrorist system with clear indication of responsibility in particular areas.

The use of a system attitude in the act to the matter of threats of a terrorist kind shall allow using the potential of all services, bodies and institutions possessing legislative competences to perform antiterrorist actions.

Regardless the undoubted benefits from the act on antiterrorist actions and the amendment of other acts there are opposite voices particularly within the limit of citizens' freedoms. That issue shall be touched in the further part of the article.

Terrorism

It derives from the Greek *τρέω/treo* (to thrill, be scared, escape, be coward) and the Latin *terror, – oris* (fear, scare or a horrible news) and the Latin verb *terreo* (to cause terror, scare).

Whereas the Oxford English dictionary explains the term as extreme fear, the use of such fear to intimidate people, especially for political reason. The Terror also explains and means the period of the Jacobins ruling in the times of the Great French Revolution; whereas terrorism means the use of violence and intimidation in the pursuit of political aim. In all European languages, the word terrorism sounds phonetically almost the same: French *terrorisme*, English *terrorism*, Russian *terrorizm*, Spanish *terrorismo*, thus it is understood for everybody. Language specialists also found the relation to the Latin and sanscrit. There are over 200 definitions of terrorism in the subject literature. The lack of one universal and commonly accepted definition of terrorism is a serious difficulty of a legal character of international institutional cooperation within combating terrorism and imprisoning a transferring captured organizers and perpetrators of terrorist attacks. Terrorism is similar to a national freedom fight recognized as a legal form of performing the law of nations to sovereignty by the national law. Without a binding definition of terrorism, it is impossible to unanimously determine actions to be regarded illegal and combat them and which of them are an acceptable form of a political fight.

The reasons of not accepting a common definition of terrorism in the international law are:

- Free interpretation of the term terrorism dependent on their interests by the states;
- Discrepancies of attitudes of developing and developed countries towards the evaluation of activities of groups using terrorist methods in the national freedom fight;
- Discrepancies of states in the evaluation of the level of threat against the phenomenon for own security;

- Performing a policy to undertake more determined actions by a state towards terrorism only after spectacular acts of terror (the last outrage policy).

The problems with determining what is and what not terrorism is result mostly from strong relations of the phenomenon with politics. They are still present and unsolved questions as follow: Is an armed attacking politics, army or the police called terrorism? Can terrorism be justified in any situations? Can terrorism be used by a state? The opinions expressed in that matters always depend on moral beliefs and political attitudes of citizens usually created by media.

The analysis of scientific heritage within the phenomena of terrorism allows claiming that terrorism is:

- Politically inseparable as regards aims and motivations;
- Planned in order to follow long-term psychological repercussions extending a direct victim or target;
- Used by organizations of a clear leader hierarchy to be identified or of a conspiracy structure of units whose members do not wear uniforms or identification bands.
- Performed by a sub-national group of non-state creature;
- Uses violence or threats its use which is equally important.

The first use of the word terrorism occurred during the third Conference of the International Peal Law Association in Brussels in 1930 when a text referring to the terrorism issues consisting of five articles was adopted. In order to present the multiplicity and variety of used notions in defining the phenomenon of terrorism it is obvious to refer to several definitions used in selected countries and international organizations.

In Great Britain the definition is mainly used for legislative purposes. It differs terrorist attacks and criminal crimes. According to it "terrorism is a use of various forms of violence to reach political aims and to threaten a society".

According to the Federal Bureau of Investigation, "terrorism may be defined as illegal use of force and violence aiming at threatening persons or making pressure on government, civilians as well as other segments of a state system in order to support political and social purposes".

The US Department of Defense terrorism is considered as "illegal use or threat to use force or violence towards a person or property in order to force or threat governments or societies often to reach political, religious or ideological purposes". Another definition is in the NATO structures where terrorism is considered to be illegal use of violence or power against a unit or property aiming at forcing or threatening a society or government and reaching intended political purposes.

There are also numerous definitions of terrorism in the Polish science. According to the Academy of the National Defense, terrorism means: "a form of violence, i.e. purposed action of forcing or threatening governments or particular social groups for political, economic or other purposes".

Whereas, the PWN Encyclopedia defines terrorism as "small extremist groups' activity which attempt to draw public opinion to their slogans or force state governments where certain services are performed for their benefits (e.g. releasing imprisoned terrorists, ransom) by murders, threat of murders, assassinations, capturing hostages, hijacking and other measures condemned by an international society".

Marian Fleming determined terrorism as "purposed actions infringing penal law and aiming at threatening public bodies or significant social groups and to force to certain proceedings by acts of violence or threatening to such acts".

The research of numerous scientific centers indicate that the development of the phenomenon of terrorism forces all states to create modern and complex legal regulations allowing effective combat against terrorists' activity. One of the key elements is to adopt a professional definition of terrorism.

Taking into account the above definitions concerning terrorism it should be unanimously claimed that it is a very wide issue from a scientific and social side but as regards security it makes the biggest threat for a state functioning and the life and health of citizens.

The tasks connected with combating terrorism have been implemented to the Internal Security Agency and the Agency of Intelligence.

The Internal Security Agency (ABW)

Was established by the act from May 24th, 2002 on the Internal Security Agency and the Agency of Intelligence. On that basis two intelligence and counterespionage functions of the Government Protection Bureau were

separated. The ABW has taken over the duties of the former Government Protection Office concerning providing stable internal situation of Poland. Combating corruption of those performing public functions have been included into their tasks. Moreover, since 2004, i.e. the time of joining the EU, the ABW has been dealing with combating irregularities in the EU's funds absorption. The ABW is a special service appointed to the protection of the Polish Constitution order. The range of tasks focuses on the internal security of the state and citizens. A principal task of the ABW is protection of the state from planed and organized actions that may create threat for independence or constitutional order of Poland, disturb functioning public structures or expose to injury basic interests of the state. The ABW duties include: recognition, prevention and combating threats aimed at the state internal security and its constitutional order, particularly sovereignty and international position, independence and untouchability of its territory as well as a state defense, recognition, prevention and revealing crimes: spying, terrorism, illegal revealing or using secret information and other crimes aiming at the state security, economic basis of the state, corruption of those performing public functions if it may aim at the state security, the range of production and turnover of goods, technologies and services of a strategic significance for the state security, illegal manufacturing, possessing and turnover of weapon, ammunition and explosives, weapons of mass destruction, drugs and psychotropic substances in the international turnover and chasing its perpetrators, performing, within own properties, tasks connected with secret information protection and performing the national function of government security within secret information protection in the international relations, obtaining, analyzing, transforming and transferring information to proper bodies that may have a significant meaning for the internal security protection of the state and its constitutional order, undertaking other actions determined in separate acts and international agreements.

The ABW activity beyond the Polish borders may be performed due to its activity in the Polish territory only within the realization of tasks determined in par. 1 p. 2. The Head of the Internal Security Agency performs the tasks of a meeting point to exchange data mentioned in art. 16 par. 3 of the decision of the Council 2008/615/WSiSW concerning intensifying trans-border cooperation, particularly in combating terrorism and trans border

crime (Journal of Laws UE L 210 from 06.08.2008, p. 1). The ABW performs its duties by obtaining, analyzing and transforming information concerning dangers. Ready analyses are transferred to proper constitutional bodies. While performing the tasks, the Agency uses the operational and process entitlements. The ABW conducts preventive aiming at providing security particularly to fragile spheres of the state and economy functioning. Widely comprehended prevention consists of the systems of opinions and certifications as well as training programs. The ABW conducts controlling proceedings towards the persons and entities that wish to acquire access to the secret information due to the area they refer to. The ABW task is to provide access to such information only to those persons who guarantee keeping it secret. The Agency trains to protection proxies as well as it performs a system of trainings within so called counterespionage prevention directed to those working in significant institutions form the Polish interest point of view. The Agency is entitled to monitor the import of goods and technologies of double use. The Head of the ABW participates in the system of opinions of trade transactions of the goods of a strategic significance that are concluded by the Polish companies or those occurring in the Polish territory. The ABW also controls foreigners who apply for the Polish citizenship, the status of a refugee, granting political asylum or domiciliation permission. Moreover, it performs projects devoted to the protection of critical infrastructure particularly concerning the Polish cyberspace.

The act on antiterrorist actions and the change of some other acts

The antiterrorist act defines numerous significant notions and actions entitling coordination of actions in case of obtaining information on those suspected for preparing terrorist attacks. Additionally, the act precisely determines the duties of services and entities involved in the whole process of revealing, preventing and neutralization of the terrorist attacks effects. There are the most important notes presented as below.

The antiterrorist actions are those actions of the public administration bodies aiming at preventing the events of a terrorist kind, preparation to taking control over them by the planned endeavors, reacting in case of occurring such events and removing their effects including recreation of resources devoted to reacting to them;

The counterespionage actions are those actions towards perpetrators, those preparing or assisting in committing crime.

The public administration infrastructure is the systems and objects necessary to provide safe and continued functioning of public administration bodies.

The critical infrastructure are the systems and included objects functionally connected with each other including constructor objects, devices, installations, key services for the state security and its citizens and serving to providing proper functioning of public administration bodies as well as institutions and entrepreneurs. The critical infrastructure overwhelms the following systems:

a) delivery of Energy, Energy raw materials and gas,
b) communication,
c) IT network,
d) finances,
e) delivery of food,
f) delivery of water,
g) health care,
h) transport,
i) rescue,
j) providing continuity of public adinistration actions,
k) production, storage, and using chemical and radioactive substances including gas pipes of dangerous substances.

The Minister Special Services Coordination is a Minister – a Member of the Council of Ministers whose range of actions overwhelms tasks connected with the activity of special services pursuant to the act from May 24th, 2002 concerning the Internal Security Agency and the Agency of Intelligence.

The place of occurrence of a terrorist kind is an open or closed space where an action of a terrorist kind occurred or where its result occurred or was supposed to occur and a space where threats connected with an action of a terrorist kind take place.

An action of a terrorist kind is a situation which is suspected to have aroused due to a crime of a terrorist kind i.e. a forbidden action penalized by imprisonment up to 5 years committed in order to:

1) serious threatening many people,
2) forcing a public authority body of Poland or other country or an international organization body to undertake or stop certain actions,
3) arouse serious disturbances in the system or economy of Poland or other country or an international organization as well as a threat or committing such an act or threat or occurring such an act.

Responsibility for preventing actions of a terrorist kind has been granted to the Head of the Internal Security Agency.

Responsibility for preparation of undertaking the control over actions of a terrorist kind due to planned endeavors, reacting in case of occurring such actions and recreation of resources devoted to reactions on those actions has been granted to the appropriate Minister of home affairs.

The Head of the ABW coordinates the analysis and information actions undertaken by the Internal Security Agency, the Agency of Intelligence, The Military Counterespionage Service, the Military Espionage Service and the Central Anticorruption Bureau as well as the exchange of information transferred by the Police, Border Guard, the Government Protection Bureau, the State Fire Brigade, the Customs service, the General Inspector of Financial Information, the General Inspector of Tax Control, the Military Police and the Governmental Security Centre concerning threats of a terrorist kind and data concerning persons mentioned in art. 6 par. 1 by their collection, transformation and analysis.

The Head of the ABW keeps a register preserving the requirements concerning the protection of secret information including the information on:

1) persons undertaking an activity for the benefit of terrorist organizations or organizations connected with terrorist activity or members of those organizations;
2) wanted persons conducting a terrorist activity or persons suspected for committing crimes of a terrorist kind toward whom there was an order to be arrested, searched in Poland or there has been a wanted curricular submitted as well as those wanted on the basis of the European order of arrest;
3) persons towards whom there is a justified suspicion that they may perform actions aiming at committing a crime of a terrorist kind including those being dangerous for the security of civil aviation;

1) persons participating in terrorist trainings or those travelling in order to commit a crime of a terrorist kind.

The Head of the ABW coordinates:
1) operational and recognizing action undertaken by the Internal Security Agency, the Agency of Intelligence, the Military Counterespionage Service, the Military Espionage Service, the Central Anticorruption Bureau, the Police, the Border Guard, the General Inspector of Tax Control and the military Police as well as
2) actions of observing and registering, via technology measures, an image of events in public places and sound accompanying to those events undertaken by customs officers.

In order to recognize, prevent or combat crimes of a terrorist kind, the Head of the ABW may order secret conducting proceedings towards a non-Polish citizen being a concern to be performing a terrorist activity for the period up to 3 moths, namely:
1) acquiring and maintaining the content of conducted conversations via technology measures including IT network;
2) acquiring and maintaining image or sound of persons in interiors, means of transport or other place than public ones;
3) acquiring and maintaining the content of mailing including e-mailing;
4) acquiring and maintaining data included IT data players, final telecommunication devices, IT and tele-information systems;
5) acquiring the access and control over dispatch content.

The officers of the ABW, Police and Border Guard are entitled to collect fingerprints or record a face image of a non-citizen of Poland in case when:
1) there is a doubt concerning the person's identity or
2) there is a suspicion concerning illegal Polish border crossing or doubt as for the declared purpose of the stay in the Polish territory or
3) there is suspicion as for the intention of illegal stay in the Polish territory or
4) there is suspicion as for the relation of a person with an event of a terrorist kind or
5) a person might have participated in a terrorist training.

In order to accomplish the task mentioned in art. 3 par. 1, the Head of the ABW may acquire an access for free to:

1) data and information collected in public registers conducted particularly by:
   a) the Internal Security Agency, the Intelligence Agency, the Military Counterespionage Service, the Military Espionage Service, the Central Bureau of Anticorruption, the Government Protection Office the Police, the Border Guard, the State Fire Brigade, the Customs Service, the General Inspectorate of Tax Control, the Military Police and the Governmental Security Centre,
   b) ministers managing the governmental departments,
   c) the Head of the Office of Foreigners' Affairs,
   d) the Head of Electronic Communication Office,
   e) the Head of Civil Aviation Office,
   f) the Head of the State Atomic Agency,
   g) Social Insurance Office (ZUS),
   h) the Head of Agricultural Social Insurance Fund (KRUS),
   i) the Commission of Financial Supervision,
   j) the General State Surveyor,
   k) self-governmental units
   – as well as organizational units and subject of supervised by them,
2) an image of events registered by picture recording devices placed in objects of public use, by public roads and other public places as well as receives for free a copy of the registered recording of the image.

Emergency levels

In case of occurring a threat of event of a terrorist kind or in case of occurring such an event there may be one of the four emergency levels implemented:

1) the first emergency level CRP (ALFA–CRP);
2) the second emergency level CRP (BRAVO–CRP);
3) the third emergency level CRP (CHARLIE–CRP);
4) the fourth emergency level CRP (DELTA–CRP).

Summary

The information presented above concerning the phenomenon of terrorism undoubtedly is one of the biggest threats for the security and sovereignty of Poland. Terrorist actions unanimously indicate the basis of the analysis of the contemporary acts that they directly focus on the society and critical infrastructure of the state. Thus, undertaking necessary preventive actions and ordering the competences of particular services and entities are government's obligation.

Undertaking effective actions requires using any available methods, measures and forms of action of all services in Poland. Those actions far involve a person's privacy but there is no other possibility in order to build a complete personality of a potential terrorist.

Information appearing in media on a society's permanent invigilation due to introducing the antiterrorist act is presented in a one-sided way and present fake image of the activity of the services due to the antiterrorist act. Coming the antiterrorist act into force shall bring more benefits for Poland and it will allow to:

1. Effective coordination of actions within recognition and collecting information concerning persons suspected of terrorism.
2. Proper functioning of actions connected with neutralization of terrorist attacks effects and providing effective coordination of services participating in undertaken actions.
3. Control of the actions conducted by services within the area of personal privacy protection.
4. Defining lacking notions connected with functioning of services, administration bodies and remaining entities.
5. Determining particular tasks and obligations of services and entities.
6. Determining responsibility for undertaken actions.
7. Increasing effectiveness within recognition, revealing and preventing from terrorist actions.
8. Collecting information on persons suspected of terrorism.
9. Establishing detailed principles of cooperation while exchanging and accessing information for the Head of Security Agency.
10. More effective using personal, devices and logistic resources within the conducted actions.

References

Hoffman B., Oblicza terroryzmu, Wydawnictwo Bertelsmann Media, Warszawa 1999.

Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz. U. z 1997 r. nr 78, poz. 483).

Pawłowski J. (red), Terroryzm we współczesnym świecie, Wydawnictwo Bellona, Warszawa 2001.

Rozporządzenie Prezesa Rady Ministrów z dnia 18 listopada 2015 r. w sprawie szczegółowego zakresu działania Ministra - Członka Rady Ministrów Mariusza Kamińskiego - Koordynatora Służb Specjalnych (Dz.U. 2015 poz. 1921).

Słownik terminów z zakresu bezpieczeństwa narodowego, Wydawnictwo AON, Warszawa 2002.

Ustawa o działaniach antyterrorystycznych oraz o zmianie niektórych innych ustaw.

Ustawa z dnia 12 października 1990 r. o straży granicznej (Dz. U. z 2011 r., nr 116, poz. 675).

Ustawa z dnia 16 marca 2001 r. o Biurze Ochrony Rządu (Dz. U. z 2014 r. poz. 170).

Ustawa z dnia 21 czerwca 2002 r. o stanie wyjątkowy, (Dz. U. z 2014 r. poz. 1191).

Ustawa z dnia 24 maja 2002 r. o Agencji Bezpieczeństwa Wewnętrznego oraz Agencji Wywiadu (Dz. U. z 2010 r. nr 29, poz. 154).

Ustawa z dnia 24 sierpnia 2001 r. o Żandarmerii Wojskowej i wojskowych organach porządkowych (Dz. U. z 2013 r., poz. 568).

Ustawa z dnia 26 kwietnia 2007 r. o zarządzaniu kryzysowym (Dz.U. 2013 poz. 1166).

Ustawa z dnia 27 sierpnia 2009 r. o Służbie Celnej (Dz. U. z 1999 r. nr 72, poz. 802).

Ustawa z dnia 6 czerwca 1997 r. - Kodeks karny (Dz.U. 1997 nr 88 poz. 553).

Ustawa z dnia 6 kwietnia 1990 r. o Policji (Dz. U. z 2011 r., nr 287, poz. 1987).

Ustawa z dnia 9 czerwca 2006 r. o Centralnym Biurze Antykorupcyjnym (Dz. U. z 2012 r., poz. 621).

Ustawa z dnia 9 czerwca 2006 r. o Służbie Kontrwywiadu Wojskowego oraz Służbie Wywiadu Wojskowego (Dz. U. z 2006 r. nr 104, poz. 709).

The right of an entrepreneur running sole proprietorship as a natural person to the protection of personal data

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Abstract
The protection of entrepreneurs' personal data belongs to the problems of contemporary challenges associated with the guarantee of the right to privacy compounded by the development of information and communication technologies. It should be noted that the entrepreneur's data are collected and made available to the public through information and communication systems. The position of the Polish legislator towards the scope of protection of personal data of entities engaged in economic activity has changed over the last few years. Some doubts in this regard were dispelled by the Act of September 25th 2015[1] amending the Act on Freedom of Business Activity. The aim of the article is to define the scope of personal data protection granted to an entrepreneur who is a natural person *de lege lata,* and to comment on the validity of adopted legal solutions. Beyond the scope of the article is the data protection of employees as well as contractors. The paper will use a legal-dogmatic method, involving the analysis and inference from legal acts and the jurisprudence as well as an analytical-synthetic method in respect to representative literature in the field of study.

Keywords: *data protection, entrepreneur, a sole proprietorship.*

Introduction

In accordance with the provisions of the data protection directive 95/46/EC and according to the article 47 of the Constitution of the Republic of Poland everyone has the right to the protection of private and family life, honour and good name and to decide on one's own private life. Personal data are considered as a part of private life and the right to the autonomy of information is one of the manifestations of the right to the privacy (Piechowiak, 2009, p. 39). Autonomy of information,

according to the judicial decisions of the Constitutional Tribunal, is the right to make independent decisions on the disclosure of information regarding one's person to others, as well as the right to exercise control over such information held by other parties (Judgment of Constitutional Tribunal from February 19th 2002). Detailing of the principles contained in the Constitution, on the individual's right to information autonomy is included in the Act of August 29th 1997 on the personal data protection (Journal of Laws 1997 No. 133 item 883). Whereas, the Act setting out the principles and procedures for collection and sharing of information on the nature of personal data in relation to the entrepreneurs who are natural persons is the Act of July 4th 2004 on freedom of economic activity (Journal of Laws 2004 No. 173 item 1807).

Privacy in the doctrine is identified with the right to appoint the realm free from external interference, including unjustified interference by public authority. The law can thereby effectively protect the privacy – including the privacy of an entrepreneur – from violation, only in case of clear definition which data belong to private sphere and which to the public sphere, which in practice turns out to be a difficult task. Contemporary challenges related to the guarantee of the right to privacy are enhanced by the development of information and communication technologies exceeding the barriers of time and space (Chyrowicz, 2009, p. 7). With respect to the privacy protection of entrepreneurs it should be noted, that the information and communications system, which the data of economic operators (entity conducting economic activity) as natural persons are collected and disclosed in, is Central Register and Information on Economic Activity (further CEIDG) operating in Poland since July 1st 2011.

The basic conceptual categories

For the purposes of this discussion, one should take the most common definition of an entrepreneur included in the provisions of the Act of July 2nd 2004 on freedom of economic activity[2]. Under article 4 paragraph 1 of Freedom of Economic Activity Act an entrepreneur is a natural person, a legal person and an organizational unit other than a legal person, which is granted a legal capacity by a separate act – performing an economic activity in its own name. Partners of a civil partnership are also considered as entrepreneurs in

the scope of their economic activity (article 4 paragraph 2 of the Freedom of Economic Activity Act)[3]. According to article 2 of Freedom of Economic Activity Act business activity is a gainful manufacturing, building, trade and service activity, as well as exploration and exploitation of minerals from deposits, and professional activity carried out in an organized and continuous way. Therefore, it should be noted that the status of an entrepreneur may be eligible to both natural persons and legal persons as well as to organizational units other than a legal person, but which have a legal capacity (i.e. private commercial companies). Further considerations will focus mainly on the entrepreneur as a natural person.

In accordance with article 43^2 of Civil Code with reference to article 43^1, an entrepreneur operates under a brand. The brand of a natural person is her/his name and surname (article 43^4 of Civil Code). It is possible to include in the brand designations indicating the object of activity of the entrepreneur and other freely chosen terms. Due to this fact, a brand under which a natural person operates must contain his/her name and surname, whereas this data in certain situations may be strictly personal data, when the same name is enough to identify a natural person (Zajączkowska-Waremczuk and Białek, 2007, p. 25.).

Personal data, on the other hand, within the meaning of the Act of August 29th 1997 (Journal of Laws 1997 no. 133 item 883) on personal data protection in accordance to article 6 paragraph 1 is understood as all information regarding identified or possible to identify natural person. Such definition of data indicates that personal data includes, inter alia, name and surname, PESEL number, eye colour, the appearance, fingerprints, clothing habits provided that on the basis of these data it will be possible to establish unequivocally someone's identity. In practice, direct and indirect identification of personal data may be distinguished. Indirect identification refers to the use of several sets of data, which, when connected correctly, enables the identification of a given natural person, whereas the direct identification uses only one set of data. General Data Protection Supervisor in the decision of June 11th 2012 clearly emphasized, that the definition of personal data refers only to living natural persons.[4] According to the judgment of NSA (Supreme Administrative Court) of May 19th 2011, information is not considered as possible to define the identity, if its use in

this purpose should require incurring excessive costs, spending too much time or taking too much action.

On the other hand, the concept of data processing is understood, according to article 7 paragraph 2 of Personal Data Protection Act, as any operation performed upon personal data, such as collection, recording, storage, organization, alteration, disclosure and erasure of data, especially those which are performed in computer systems. Therefore, in fact, each action, which personal data were subjected to, will mean processing. It should be noted, that the Act imposes a number of information and rectification obligations on the administrator[5], as well as defines the rules of data processing. These include, in particular, the principle of purpose, factual correctness and relevance of data processing as well as data retention time.

Entrepreneur's privacy and the principle of reliability of business transactions

The possibility of unambiguous identification of the contractor's identity in business transactions is the basic warrant of reliability of business transactions. *Fajgielski* stressed in this context that economic activity that may entail restrictions on the right to privacy and data protection. Any restrictions on the right to privacy and protection of personal data must however have a statutory basis and be consistent with the principle of proportionality (Fajgielski, 2016, p. 82-83). As pointed out by *Markowski* (2013, p. 42) in the realities of business, privacy cannot, mean anonymity. The latter brings forth feelings of responsibility for one's own actions (Piechowiak, 2009, p. 56). It was emphasized in the doctrine, that it is important for understanding of privacy whether in a given activity one focuses on own purposes, or whether a reference to the aims of other entities appears in the activity (Nussbaum, 2004, p. 300-301). According to *Chyrowicz*, potentially unfair nature of the actions towards others would be limitation of privacy (Chyrowicz, p. 11).

It should, therefore, be assumed, that information autonomy, in the context of business activity, is being modified and it gains a certain specific extent. This position was stressed by WSA (Provincial Administrative Court) in Warsaw which stated in the judgment of September 21st 2005 that the right to personal data protection is not an absolute right like most of other

constitutional rights and, in practice, it is reduced due to the public interest or justified interest of others. According to the court, the provisions of the Act on personal data protection cannot be understood in a way that disclosure of personal data of the debtor to recover the debt violates the welfare of the person, because it would be an unjustified privilege. Protection of goods of some cannot take place at the expense of infringing goods of others. It should be reminded that also in the light of the European Convention on Human Rights (article 8 paragraph 2) limitation of the right to privacy cannot be arbitrary and should serve one of the legitimate aims. The catalogue of these purposes is closed. Among mentioned reasons are such values, which are of social nature – public and national safety, economic wellbeing of the country, protection of order and crime prevention, morality and health protection, or of individual nature – rights and freedoms of other people. According to the third condition – a limitation must be necessary. If the set target, i.e. certainty of business transactions may be achieved in other way than by privacy compromise it should be chosen. The necessity is also the proportionality of the measures to the objective, which means that the limitation realizing a given objective should be possibly the smallest.

The disclosure of personal data of a natural person as an entrepreneur in the CEIDG

The disclosure of data of entrepreneurs, including personal data of natural persons running a business, was established in the regulations governing the rules of functioning of public registers of entrepreneurs. The principle of formal openness of CEIDG (Central Register and Information on Economic Activity) means that, according to the content of article 38 paragraph 1 of the Act on the Freedom of Economic Activity, everyone has the right to access to data and information disclosed by CEIDG. The functioning of CEIDG, which is a register proper for natural persons running a business, is regulated by the provisions of chapter III of the Act on Freedom of Economic Activity.

The essence of the informative function of CEIDG is the disclosure of entrepreneurs' data as natural persons defined in article 25 paragraph 1 of the Act on Freedom of Economic Activity, which means recordable data. Recorded in CEIDG are, inter alia, entrepreneur's company and his PESEL

(General Electronic System for Registration of the Population) number, as long as he has one; date of birth of the entrepreneur; REGON (Register of National Economy) identification number of the entrepreneur, if he has one; tax identification number (NIP); information of Polish nationality of the entrepreneur, if he has it, and other nationalities of the entrepreneur; address of residence of the entrepreneur, address for service of the entrepreneur and addresses, under which economic activity is carried out, including the main address of the business and its branch, if it was created; these data are in accordance with code markings adopted in the national official register of territorial division of the country, as far as it is possible in a given case, contact details of the entrepreneur, especially e-mail address, website, telephone number, if the data were submitted in the application for entry to CEIDG. What is more, CEIDG discloses information on obtaining, withdrawal, loss and expiry of the rights under concession, permit or license, about entry in the register of regulated activity, prohibition of exercise of activities defined in the entry and the removal from the register.

With regard to personal data protection of an entrepreneur it should be noted that according to the new wording of article 37 paragraph 1 sentence 1 of the Act on the Freedom of Economic Activity, CEIDG discloses data on entrepreneurs, except for PESEL number, date of birth, address of residence, as long as it is not the same as the address for service of the entrepreneur and addresses under which economic activity is carried out, including the main address of the business and its branch, if it was created, and contact details of the entrepreneur, such as e-mail address, website, telephone number, when giving them, the holder opposed to making them available in CEIDG. In that way, apart from general explicit exclusion of the application of the Act on Personal Data Protection to data contained in CEIDG the scope of data available in the registry was clarified. The attention is drawn to the fact that the entrepreneur gained an explicit right of objection to the disclosure of data, the general availability of which might cause a significant breach of the right to privacy, including telephone number and e-mail address.

It was emphasized in the literature and case-law in this context that exceeding the limit of privacy can be scarcely perceptible, while the limitation itself runs between what defines the area of our public duties, and the sphere of private life. The consequence of the recognition of disclosure

of personal data of an entrepreneur as a natural person is the necessity of establishment of a moment (instance), the occurrence of which ceases the specified by provisions protection of personal data of natural person, and causes the disclosure of entrepreneur's personal data. In the literature it is usually assumed (Fleszar, 2008, p. 118) that gaining entry to the CEIDG is this moment.

It should be borne in mind that the subject to legal protection will also be the personal data of natural persons who are members of bodies of companies – collected and made available in the National Court Register (KRS). Under Article 35 of the Law on the National Court Register, whenever the Register is a part of a natural person, it should contain the surname and the names and an identifier given in the population register system, hereinafter referred to as "PESEL" number. In this case, under the Act on KRS, the data disclosed in the registry are limited to the name, surname and "PESEL" number. They are, therefore, limited data considered to be closely related to the sphere of economic activity. Apart from the aforementioned, KRS does not provide other, more detailed data about individuals, such as address, which will be treated as protecting the privacy of those individuals. As noted in the judgment of the Administrative Court in Warsaw of April 28th 2014 (II SA/ / Wa 125/14) openness and universal availability of data from the register of the National Court and the goal that the legislature realizes in this way determine the type and scope of personal data of individuals processing.

The scope of application of national law on personal data protection to the entrepreneurs as natural persons

Statutory obligations related to the need to ensure data protection are applied under article 3 paragraph 2 Personal Data Protection Act to natural and legal persons and organizational unit other than a legal person, which are established on or reside on the territory of the Republic of Poland if they process personal data in connection with gainful or professional activities. From the above provision it is clear that every Polish entrepreneur is obliged to apply the provisions of the Act if he processes personal data in connection with the business. In some situations, this may be personal data of other entrepreneurs as natural persons, cooperating with a particular administrator of the data. It must, therefore, be borne in mind, that as a rule each

entrepreneur processing personal data of other natural persons, including those being entrepreneurs, should fulfil, inter alia, their information duties in relation to the data subjects. The data subjects may be, in this context, the employees or contractors of an entrepreneur.

The provisions of the Act on personal data protection at the same time do not contain any clear guidance to the scope of personal data protection of natural persons independently performing an economic activity. A provision of article 1 paragraph 2, according to which personal data processing may take place because of public good, good of a person, whom the data concern or the welfare of third parties, in the extent and manner specified by the Act in this context is too general and imprecise (Zajączkowska-Waremczuk and Białek, 2007, p. 22). Also the analysis of the content of the data protection directive 95/46/EC leads to the conclusion that the issues of data protection of sole traders is not at all addressed in the legal act. Another problem is the issue how data collected in the public register associated with the legalization of business – CEiDG (Central Register and Information on Economic Activity) are personal data in the understanding of Personal Data Protection Act. On the basis of article 7a paragraph 2 of Act of November 19th 1999 – Economic Activity Law, applicable until December 31st 2011 it was assumed that "Registration of a business is open and the personal data contained therein are not subject to the provisions of the Act of August 29th 1997 on Personal Data Protection". Adjustment of article 7a paragraph 2 was repealed on December 31st 2011, which resulted in the fact that since January 1st 2012 the provisions of the Act on personal data protection have been also concerned with information disclosed in CEIDG (Central Register and Information on Economic Activity). This caused many practical difficulties. Among other things, providers of business information without the proper consent of the entrepreneur collected personal data of entrepreneurs registered in CEIDG into their own database, where they were processed and then disclosed to other entities in the form of reports on a particular entrepreneur. Providers did not inform entrepreneurs neither about the rules of processing of their data, nor about their rights. [6]

Taking into account the realities of business transactions, proposals taken to article 39b of the Act on the amendment of the Act on the Freedom of Economic Activity of September 25th 2015 should be recognized as more

adequate in this scope[7]. They assume that the provisions of the Act of August 29th 1997 on Personal Data Protection, apart from provisions of article 14-19a and article 21-22a and chapter 5 of this Act, are not applied to non-confidential data and to information disclosed by CEIDG. Therefore, the amendment of the Act in the wording enabled less rigorous treatment of data disclosed in CEIDG, which means without the necessity to apply to them all the provisions of the Act on Personal Data Protection, but only those referring to control operations and protection of personal data.

New developments in the realm of data protection on the European level

When discussing the issues of personal data protection of a natural person as an entrepreneur the attention should be paid to the fact that on May 24th the new general data protection regulation 2016/679 entered into force. It shall apply from May 25th 2018 and will replace the provisions of the directive 95/46/EC. In point 4 of the preamble of the regulation it has been stated that "the processing of personal data should be designed to serve mankind. The right to the protection of personal data is not to be regarded as an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality." The Regulation does not contain any provisions directly related to the processing or protection of entrepreneurs' data. The possibility of conducting public registers for the purposes of the fairness of business transactions can be derived from subparagraph 73 of the preamble. In this respect, limits to the application of the general rules of data processing, such as the right to object, are acceptable.

General data protection regulation 2016/679 is vague in subparagraph 14 of the preamble about the fact that protection guaranteed in this act should be applied to natural persons – regardless of their nationality or place of residence – in connection to the processing of their personal data. The regulation also does not apply to the processing of personal data relating to legal persons, especially in companies that are legal persons, including data about the company and legal form and contact details of the legal person. According to the European legislator, the processing of personal data for archiving purposes in the public interest or statistical purposes should also

be a subject to appropriate safeguards for the rights and freedoms of the data subject (subparagraph 156 of the preamble). It has also been clarified that Member States should be authorised to provide specifications and derogations with regard to the information requirements and the rights to rectification, to erasure, to be forgotten, to the restriction of processing, data portability and to object when processing personal data for archiving purposes in the public interest. The conditions and safeguards in question may, according to subparagraph 156 of the regulation, "entail specific procedures for data subjects to exercise those rights if this is appropriate in the light of the purposes sought by the specific processing along with technical and organisational measures aimed at minimising the processing of personal data in accordance to the proportionality and necessity principles". From the general nature of subparagraphs 73 and 156 of the preamble one may, therefore, conclude that the detailed manner, in which the entrepreneurs' data protection shall be granted and exercised, will largely stay within the discretion of national legislator.

Summary

In Poland, subject to the legal protection are personal data relating to individuals, including the self-employed. Data protection in general does not apply to legal persons. In some cases, it is sometimes however difficult to differentiate between the data of the individual and data of a small enterprise. The right to privacy and personal data protection is not an absolute right – this is due to the Data Protection Act as well as the judgment of the Supreme Administrative Court – the participants of business transactions in order to ensure its reliability must agree to limit their sphere of privacy. The certainty of business transactions requires the openness of some of entrepreneur's data in relations between traders as well as traders and consumers. Therefore, the solution when personal data of natural persons conducting an economic activity are not subject to the rigour of the Personal Data Protection Act should be considered as correct. As it was noticed in the doctrine (Fajgielski, p. 82) and in case-law, otherwise legal certainty and transparency of business transactions would be impossible to achieve.

On the basis of the provisions of the Act on Freedom of Economic Activity, by March 19th 2016 there was no regulation which would plainly exclude the

application of the Act on Personal Data Protection towards the data collected in CEIDG (Central Register and Information on Economic Activity). From the point of view of the clarity of legal system, the adopted range of limits connected with the protection of personal data of the entrepreneurs as natural persons disclosed by CEIDG should be positively assessed. It should be mentioned that the application of general rules of data processing in relation data disclosed by CEIDG would guarantee their protection only in an illusive way. Certain doubts are however raised by the upheld obligation of the Ministry of Commerce as to safeguard entrepreneurs personal data, collected in the CEIDG. This obligation requires, among others, to keep records of the buildings in which entrepreneurs' data are processed. Due to the size of the register it is basically impracticable. However, as adopted by Polish legislator – in case when a given natural person conducting a recorded economic activity does not act on behalf of this activity, but in his own name, the general rules of personal data protection will be applied admittedly. It should also be borne in mind, that the protection of entrepreneur's data, except for the provisions of the Act on Personal Data Protection, is applied additionally on the principles typical to personal goods defined in article 23 and 24 of the Civil Code and as an indication of the company is the subject to the protection set by the provisions of the Act of April 16th 1993 on The Suppression of Unfair Competition.

It remains however unclear why the Polish legislator distinguishes between the type and scope of data disclosed in CEIDG and these provided in KRS. As analysed the last provides e.g. the entrepreneur's PESEL number, which is not the case of CEIDG. New European data protection regulation does not provide much clearance in this context as the details concerning the functioning of public registers stay beyond the scope of the regulation.

References

Chyrowicz B., *Jawność i prywatność,* [in:] Chyrowicz B. (red.) , Prywatności w dobie globalizacji, Lublin 2009.

Fajgielski P., *Jawność obrotu gospodarczego a prywatność przedsiębiorcy będącego osobą fizyczną – aspekty prawne,* [in:] A. Mednis (ed.), Prywatność a jawność. Bilans 25-lecia i perspektywy na przyszłość, Wyd. C. H. Beck, Warszawa 2016.

Fleszar D., *Zakres przetwarzania danych osobowych w działalności gospodarczej*, Wyd. Wolters Kluwer SA 2008.

Hoc S., *Prawo administracyjne gospodarcze. Wybrane zagadnienia*, Wyd. Uczelnia Łazarskiego, Warszawa 2013.

Markowski K., *Prywatność czy rzetelność obrotu gospodarczego*, [in:] Mednis A. (Ed.), Prywatność a ekonomia. Ochrona danych osobowych w obrocie gospodarczym, Warszawa 2013.

Nussbaum M.C., *Hiding from Humanity*. Disgust, Shame and Law, Princeton-Oxford 2004. [cited by Chyrowicz]

Piechowiak M., *Co osobie po prywatności?*, [in:] Chyrowicz B. (ed.) , Prywatności w dobie globalizacji, Lublin 2009.

Zajączkowska-Waremczuk K./Białek T., *Ochrona danych osobowych przedsiębiorcy będącego osobą fizyczną*, PUG 3/2007.

Jurisprudence

General Data Protection Supervisor'a Decision of June 11th 2012 (signature DOLiS/DEC-520/12/35884

Judgment of Supreme Administrative Court of May 19th 2011, (Signature I OSK 1086/10 – the central database of Administrative Course Judgments http://orzeczenia.nsa.gov.pl/doc/ A95CABDB32).

Judgment of Constitutional Tribunal from February 19th 2002 (U 3/01, OTK – A 2002, no. 1 item 3).

Judgment of Provincial Administrative Court in Warsaw of September 21st 2005, (II SA/Wa 1443/05, Lex no 204649).

Legal sources

Act of August 29th 1997 on the personal data protection (Journal of Laws 1997 No. 133 item 883, as amended).

Act of August 20th 1997 on the National Court Register, (Journal of Laws 1997 No. 121, Item 769 as amended).

Act of July 4th 2004 on Freedom of Business Activity (Journal of Laws 2004, No. 173, Item 1807, as amended).

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). Official Journal of the EU 119/1 of May 4th 2016.

Endnotes

[1] The Act of September 25th 2015 amending the Act on Freedom of Business Activity entered into force on March 19th 2016.

[2] Around the uneven concepts of Polish law a number of concerns has accumulated. More on this subject S. Hoc, *Prawo administracyjne gospodarcze. Wybrane zagadnienia*, Wyd. Uczelnia Łazarskiego, Warszawa 2013, p. 114.

[3] In relation to the currently applicable definition of an entrepreneur contained in the Civil Code it should be borne in mind that this term is close to the term from the Freedom of Economic Activity Act. In the light of article 43^1 of the Civil Code, an entrepreneur is a natural person, a legal person and an organizational unit, other than a legal person which is granted a legal capacity by an act, performing an economic activity in its own name. It is also worth mentioning that next to the Civil Code and Freedom of Economic Activity Act, the term of entrepreneur is also defined in at least three other legal acts, whereas the definition in the Freedom of Economic Activity Act and the definition contained in the Civil Code are of fundamental importance.

[4] http://www.giodo.gov.pl/301/id_art/5809/j/pl/, [01.06.2016]

[5] This means that in case when the data administrator collects personal data not directly from a person they concern, he is obliged to inform that person, directly after recording collected data on:

1) the address of the head office and the full name, and in case when the data administrator is a natural person – the place of his residence and name and surname

2) the purpose and the range of data collection, especially the data recipients or the categories of the data recipients; 3) the source of the data; 4) the right of access to their personal data and the right to correct them; 5) right to object to the processing

of data for marketing purposes or to forwarding them to other parties; 6) the right to request to stop the data processing because of the particular situation of the person whose data are processed.

[6] Exhaustively on the former regulation of the entrepreneurs'data protection and existing legal problems Fajgielski in: *Jawność obrotu gospodarczego a prywantość przedsiębiorcy będącego osobą fizyczną – aspekty prawne*, (in:) A. Mednis (ed.), Prywatność a jawność. Bilans 25-lecia i perspektywy na przyszłość, p. 83-89.

[7] http://orka.sejm.gov.pl/opinie7.nsf/nazwa/3761_u/$file/3761_u.pdf, [30.05.2016].

Poverty reduction as human rights immanent struggle *Case India*

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Abstract
According to contemporary definitions we can distinguish two kinds of human rights: first – civil and political rights, second – economic social and cultural rights. When focusing on economic rights it is easy to observe specific group of human population deprived, basically all economic human rights; namely a group living under poverty line. Poverty issue and poverty reduction is one of the crucial consideration of United Nations, countries governments and many NGOs and it is based on notion of economic and social equality or rather raising inequality.
Asia is the continent with majority of population living in poverty and India is the state with enormous – biggest in the world – amount of people living in humiliation of poverty. Both Indian government and international community makes an effort to reduce it and improve the situation. The paper attempts to put some light on the problem.

Keywords: *Human rights, social inequality, poverty line, global poverty line, starvation line, poverty reduction.*

Introduction

"Wherever we lift one soul from a life of poverty, we are defending human rights. And whenever we fail in this mission, we are failing human rights."
Kofi Annan United Nations Secretary-General

The idea of human rights is as old as humanity, The world's first bill of human rights was discovered on a clay tablet dating back from the reign of Cyrus the Great (555–529 BC).

The documents which form the historical foundation of modern human rights are: the English Bill of Rights (1688), the American Declaration of Independence (1776) and the French Declaration of Rights of Man (1789).

Human rights are the ones that has been conferred to individuals by the states in the modern International Law. The declaration of the United Nations signed on January 1,1942 at Washington was the first document which used the term human rights. The modern perspective to human rights is reflected in the Vienna Declaration adopted by the World conference on Human rights in June 1993. The declaration categorically states that all human rights are universal, indivisible and interdependent and inter-related

The legal process in the universality of human rights effectively commenced with the **Universal Declaration of Human Rights 1948 (UDHR).**

According to UN The Universal Declaration of Human Rights, that was proclaimed in Paris the December 10th 1948, article number one says:´ All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Among 22 articles of the Declaration some refer to civil rights and freedom some to dignity and materially decent life.

Thus human rights may be analyzed and considered in two groups.

Civil and political rights: Civil rights and liberties are referred to those rights which are related to the protection of the right to life and personal liberty. They are essential for a person so that he may live a dignified life. such rights include right to life, liberty, right to privacy, freedom from torture and right to own property. The nature of both civil and political rights may be different but they are inter-related and therefore it does not appear logical to differentiate them**.**

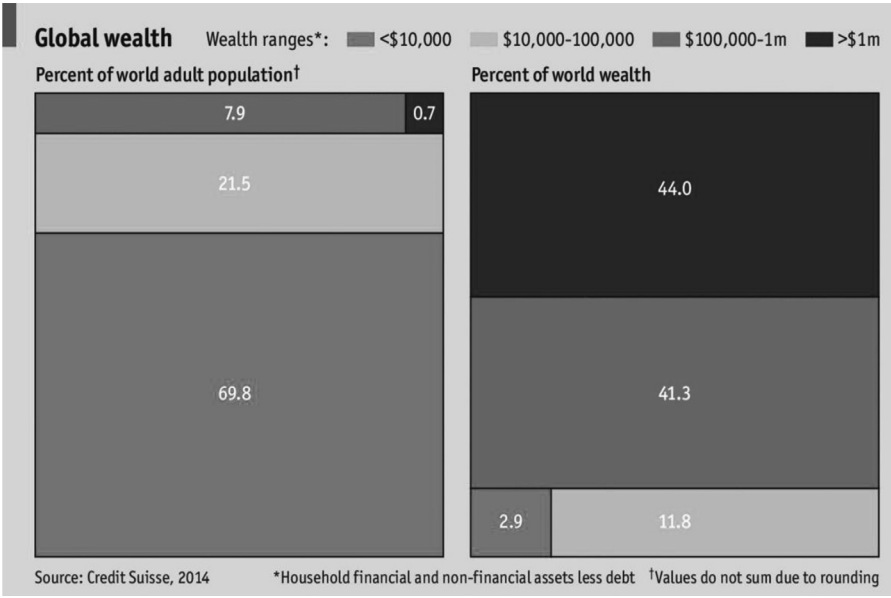
Economic, social and cultural rights: Economic, social and cultural rights are based fundamentally on the concept of social equality (also called 'freedom to') are related to the guarantee of minimum necessities of the life to human beings. In the absence of these rights the existence of human beings is like to be endangered.

Right to adequate food, clothing, housing and adequate standard of living, right to work, right to social security, right to physical and mental health and right to education are included in this category of rights.

When considering economic rights there is an argument: should it take priority over civil and political rights. Economic, social and cultural rights (ESC) are socio-economic human rights, distinct from civil and political rights but to enjoy your civil and political rights one has to be freed from cruel struggle for basic survival. As statistics prove, there is enough wealth in the world – the distribution of this wealth is crucial.

As impressive graph published by prestigious The Economist magazine shows below 8,6% of world reaches households (possessing wealth from 100 000 US$ till more than 1 000 000 US$) possess over 85% of world wealth. The 69,8% of world households (owing less than 10 000 US$ in average each) possess merely 2,9% of world wealth. A majority of them are extremely poor, many of them leave on the edge or below poverty line.

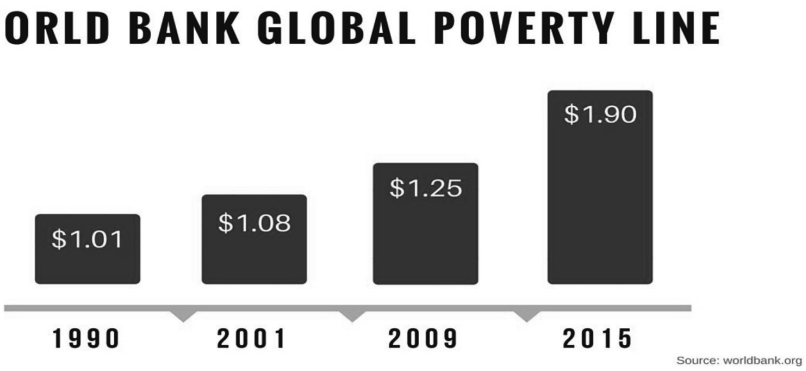
The World Bank uses different criteria to measure poverty. The lowest the digit the less people live "under poverty line" .Thus when Chine has recently lifted the line till 1,75 US$ per day they have to count around 200 million people more living in poverty.



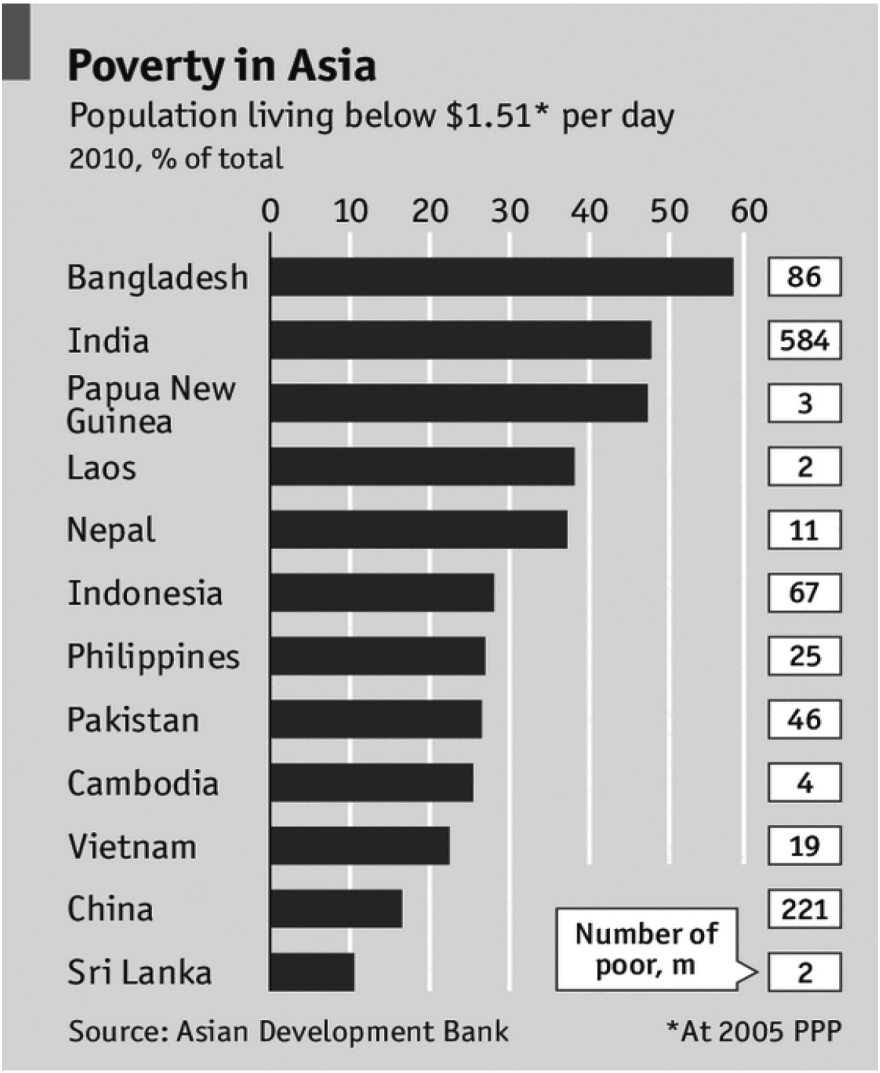
The economist; October 18th; 2014

Poverty in ASIA

Asia's rapid economic growth has put it on track to eradicate "extreme" poverty, defined by the World Bank as daily consumption of less than $1.25 per person, by 2030. However, the Asian Development Bank reckons this is too low given that nowadays, things like mobile phones are seen as necessities; so it has calculated a more suitable daily minimum of $1.51. This lifts Asia's 2010 poverty rate to nearly one-third of the population, adding 343 million people to the ranks of the poor. The ADB believes food insecurity, and the risks of natural disasters, global economic shocks and the like, should also be taken into account when measuring poverty. This would further raise Asia's 2010 poverty rate, to nearly 50%.



Different measurements… meaning "global poverty line" are used by different institutions and different governments. Thus there are significant differences in different statistics, however we can assume that more than over two billion people in the world (roughly 20% of human population) live in extreme poverty. Around 50% of them live in Asia. India and China are struggling with the issue, with India being apparently in front of all countries facing poverty problem.



Human rights in India

When considering human rights and poverty we have to underline the social protection role of state Social protection consists of policies and programs designed to defend human rights and reduce poverty by obeying law, promoting efficient labor markets, diminishing people's exposure to risks, and enhancing their capacity to manage economic and social risks.

It is the duty of every nation to create such laws and conditions that protect the basic Human rights of its citizens. India as world's largest democratic country also provides such rights to its citizens and allows them certain rights including the freedom of expression. These rights, which are called 'Fundamental Rights' form an important part of the Constitution of India. In India under "the Protection of Human Rights of 1993", the Human Rights have been defined in the following way:

> "*Human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the constitution or embodied in the International Covenants and enforceable by courts in India".*

India has also enacted the protection of **Human Rights Act in 1993** and also constituted the National Human Rights Commission, the State Human Rights Commission in different States and Human Right Courts.

The analysis of the human rights should be made from three perspectives:

- The Socio-Economic dimension of Human Rights in India,
- The legal dimension of Human Rights in India and
- The role of international organizations and NGOs in promotion of human rights.

Considering specific culture and tradition, the steps were taken to protect human rights in India

Particular initiatives have been undertaken for the greater protection of the women, children and certain other groups of the society to address cast system among others;

- Sati Practice has been prohibited in India (Sati was a cruel custom condemning widowed woman).
- The Protection of Human Rights Act, was enacted in 1993.
- Right to Information act was passed in 2005.
- Right to education has been accepted as a fundamental right in India.
- Dowry System has been prohibited by law. The Dowry Prohibition Act was passed in 1961.

Poverty in India

Despite the country's GDP growth rate (about 9%), poverty in India is still pervasive; especially in rural areas where 70% of India's 1.2 billion population live.

It is one of the fastest growing economies in the world and yet its riches are hardly evenly redistributed across the population. It spends only 1% of its GDP on health, which is half that of China, who is already planning on increasing that by a substantial amount of, 3 to 4%.

- Poverty in India Statistics: (Before 2014)
  1) 50% of Indians don't have proper shelter
  2) 70% don't have access to decent toilets
  3) 35% of households don't have a nearby water source
  4) 85% of villages don't have a secondary school
  5) Over 40% of these same villages don't have proper roads connecting them.

If the decline in poverty went from 60% to 35% between the 70s and the early 90s, globalization and liberalization policies have made this trend go backwards in the 90s.

The poverty in India is measured by a poverty line that is probably one of the most disputed and incessantly attacked measure in the world. It is simply what some call a "starvation line", a line that accounts for the feeling of satiety: measured in calories.

There are different issues when challenging urban and rural poverty.

Urban Poverty characteristics : Just like most of the growing and developing countries, there has been continuous increase in Urban population in India.

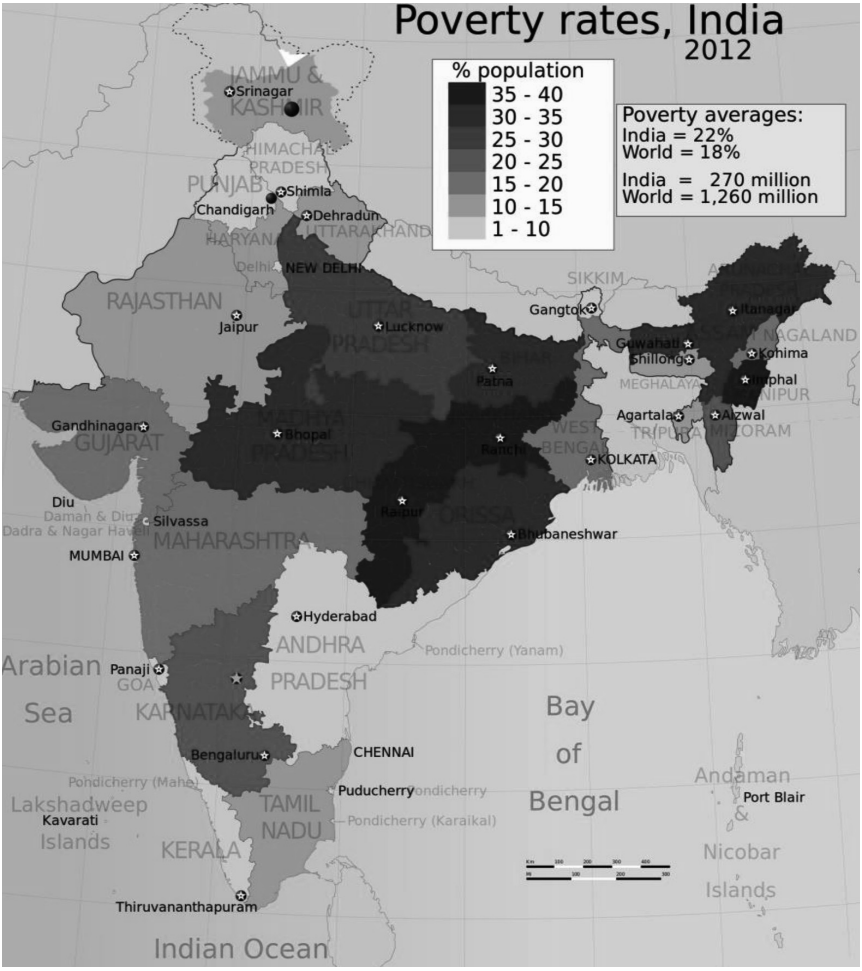
- Poor people migrate from rural areas to cities and towns in search of employment/financial activity.
- The income of more than 8 million urban people is estimated to fall **below poverty line (BPL)**.
- In addition to this, there are around 4.5 million urban people whose income level is on borderline of poverty level.
- A income of urban poor's is highly unstable. A large number of them are either casual workers or self-employed.

- Banks and financial institutions are reluctant to provide them loan because of the unstable income.
- Five states that constitutes around 40% of all urban poor people of India are Uttar Pradesh, Bihar, Rajasthan, Odisha, and Madhya Pradesh.
- Around 35% of the total population of the four metropolitan cities (Delhi, Kolkata, Chennai and Mumbai) consists of slum population.
- A large portion of people living in slums are illiterate.

Rural Poverty characteristics : It is said that rural India is the heart of India. In reality, the life of people living in rural areas is marked with severe poverty:

- **SCST:** (SCHEDULED CASTS AND SCHEDULED TRIBES SYSTEM) Of all the rural households, around 18.46 percent belongs to scheduled castes, and around 10.97 belongs to scheduled Tribes.
- **Major source of income:** Manual causal labour jobs and cultivation are the major sources of income for rural people. Nearly 51 percent of all households are economically engaged in manual casual labour and nearly 30 percent of them is engaged in cultivation.
- **Assets:** Only 11.04 percent of families own a refrigerator while there is a vehicle (including two-wheeler, boat, etc.) in around 29.69 percent of the rural houses.
- **Income Tax:** Only 4.58 percent of rural households pay income tax.
- **Land ownership:** Around 56 percent of village households doesn't own a land.
- **Size of rural houses:** The houses of around 54 percent rural families consists of either one or two-rooms. Out of them, around 13 percent lives in a one-room house.

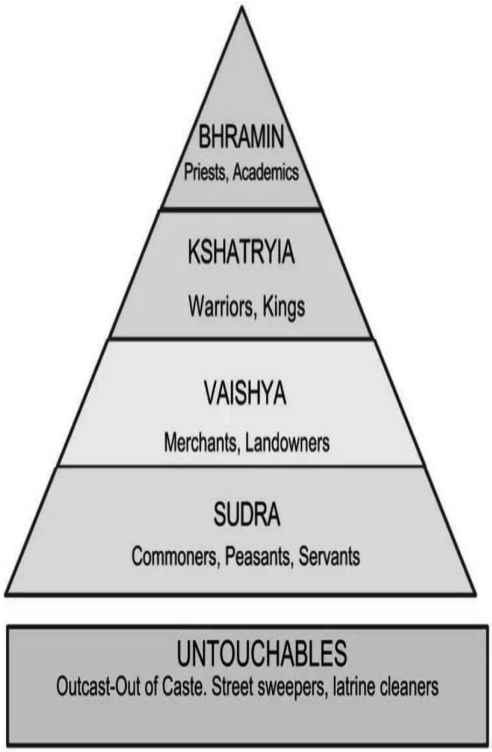
Significant issue for Indian government is the different distribution of wealth and development among different states. The uneven distribution of poverty in India is presented on a map below.



India's government is well aware that poverty is a giant barrier to overcome. The complexity of it puts enormous tasks that are necessary to deal with in order to fully develop the nation. A wide range of anti-poverty policies have been introduced since the 1950s, which took effect after 20 years of implementation. However cultural and traditional environment still restricts government efforts.

Effects of caste system in countries economy: One of the Indian biggest issues is the caste system, the root cause of poverty in India and seemingly the issue fragile to tackle and often avoided by commentators.

The most obvious problem with this caste system was that under its rigidity, the lower castes were prevented from aspiring to climb higher, and, therefore, economic progress was restricted. Lower-caste communities are often plagued by low literacy levels and a lack of access to health care and education. A lack of formal education or training, as well as discrimination that effectively bars them from many forms of employment, and the no enforcement of protective legislation, perpetuates caste-based employment and keeps its hereditary nature alive.



The picture above shows the importance and complexity of social system in India. It also proves how hard an issue it is to cope. The most important is the education system and poverty reduction for rising lower cast population to better life standards. The authoritarian regulation are partly efficient so far,in particular in rural areas. The governments of different political orientations made the attempts to solve the problem however.

On Monday, 30 May, 2016, Prime Minister of India – Narendra Modi has given the speech about the series of measures and reforms, which will help the Indian economy achieve its potential of high growth. Out of ten major points on the agenda **POVERTY ELIMINATION** WAS NUMBER ONE ON THE LIST.

Government Schemes that are contributing in reduction of poverty in India:

- **Atal Pension Yojana**: is a government-backed pension scheme in India targeted at the unorganised sector
- **Beti Bachao, Beti Padhao Yojana**: (*Save girl child, educate girl child)* is a scheme that aims to generate awareness and improving the efficiency of welfare services meant for women.
- **Housing for All**: is a vision of Prime Minister Narendra Modi of India where all facilities will provide in a place. The government has identified 305 cities and towns in 9 states for beginning construction of houses for urban poor.
- **Rashtriya Krishi Vikas Yojana:** (National Agriculture Development Scheme) is a State Plan Scheme of Additional Central Assistance launched in August 2007 as a part of the 11th Five Year Plan by the Government of India.
- **Midday Meal Scheme**: is a school meal programe of the government of India designed to improve the nutritional status of school-age children nationwide.
- **Pradhan Mantri Jeevan Jyoti Bima Yojana**: is a government-backed Life insurance scheme in India. It was formally launched by Prime Minister Narendra Modi.
- **Pradhan Mantri Ujjwala Yojana**: is a welfare scheme of Government of India launched by Prime Minister Narendra Modi in 2016.

Major goals to reduce the Poverty in India:

1. Accelerating Economic Growth
2. Agricultural Growth and Rural Societies Alleviation
3. Speedy Development of Infrastructure
4. Accelerating Human Resource Development
5. Growth of Non-Farm Employment

6. Access to Assets
7. Access to Credit
8. Public Distribution System (PDS)
9. Direct Attack on Poverty: Special Employment Schemes for the Poor.

To fight poverty requires significant steps in many areas in parallel. The task is challenging and India, as many other countries has to cope. There are improvements but still a lots lies before. Education system plays one of the most important roles.

Conclusion

Asia is the continent with majority of population living in poverty and India is the state with enormous – biggest in the world – amount of people living in humiliation of poverty. Both Indian government and international community makes an effort to reduce it and improve the situation. Inefficient distribution system and general inequality gives a sad and hopeless picture since it limits the equal opportunities. India has a very specific place in the global fight of poverty. It is huge, densely populated, still basing on agriculture and having, until now, still important and influential tradition and culture that hinders reforms. The new government has a heavy task in ahead.

References

http://www.un.org/en/universal-declaration-human-rights/

Effects of Poverty in India: Between Injustice and Exclusion, July 2013 http://www.poverties.org/poverty-in-india.html

Measures to reduce Poverty in India- Explained Published by : Supriya Guru http://www.yourarticlelibrary.com/poverty/top-9-measures-to-reduce-poverty-in-india-explained/38388/

Economic Reforms and Human development indicators in India, Asian economic policy review 2008 Published by: Raghbendra Jha

Reducing Poverty and Inequality in India, 2004 Published by: Raghbendra Jha

Aspects of Urban Poverty in Bombay(Mumbai), 1995 Published by Madhura Swaminathan

Human rights and corporate social responsibility in developing countries' industrial clusters

E Giuliani – Journal of Business Ethics, 2016 – Springer

Gender, Nutrition, and the Human Right to Adequate Food: Toward an Inclusive Framework; AC Bellows, FLS Valente, S Lemke, MDNB de Lara – 2016

Thomas Piketty,,Capital in the 21st Century

Health and Human Rights Publications Series, December 2008 Published by: Navanethem Pillay (united nations high commissioner for Human Rights) http://www.ohchr.org

Indian Elephant in the Room, February 2009. Published by: Meena Verma http://www.theguardian.com/commentisfree/2009/feb/10/india-slumdog-millionaire-caste

Narendra Modi Government's 10 Economic Agendas, June 2014, Business Insider India http://www.businessinsider.in/Narendra-Modi-Governments-10-Economic-Agendas-That-Stood-Out-In-Presidents-Speech/articleshow/36297454.cms?curpg=2

The Economist; October 18th; 2014