HUMAN RIGHTS AS A GUARANTEE OF SMART, SUSTAINABLE AND INCLUSIVE GROWTH

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INTRODUCTION

The subject of the publication focuses on human rights assigned to different generations, but all revolve around the topics of technological development, sustainability, digitization and the place of man in this changing world. The authors present issues related to first generation rights, such as: the right to a court, the right to integrity, freedom of conscience or religion; second generation rights: guaranteeing the rights of vulnerable groups, e.g. the elderly, the disabled, or even women on the labor market, social rights; third generation rights, in particular the right to live in a clean environment, which is supported by the principle of sustainable development, which should be implemented in various areas of life (public procurement, energy market).

The monograph emphasizes in particular that civilization changes related to the progressive digitization of processes and services (such as telemedicine) cannot be implemented forgetting about disadvantaged groups, i.e. relevant authorities must ensure social inclusion mechanisms. The authors draw attention to social responsibility, which no longer results only from legal regulations, but from our duty to another human being resulting from humanity. The society must become inclusive, so that exclusion of disadvantaged groups and individuals are removed.

Editors

SECTION I

Law as a tool to ensure smart development

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Property Rights, Human Genome and Social Development [1]

Abstract:
The article deals with the upmost actuall legal and ethical topic, caused by rapid development of biotechnology. It deals with problem of human genome editing as the central topic by creating of hereditary immunity against new viral threats. The article also analyses the impact of enhancement and CRISPR/Cas9 method on human rights, equality and human dignity. The text also mentions the basic legal regulation and ethical arguments on genome editig. The final part deals with the rise of inequalities through genome editing and the risk of new social divisions. It emphasizes on those threat in the sphere of sports competition and deals with the future of Olympic Games.

Keywords: CRISPR/Cas9 – human genome – human dignity – legal regulation – sports competition – germ line intervnetion

Let me start with a joke about germ line intervention.

„Two dog owners meet in the park, a young muscular man with a pitbull and an old lady with a green dog.

The young man laughts: - Ha-ha-ha, a green dog!

The lady answers him: - Let‘s bet that my dog kills yours in a few seconds.

A fight begins and the green dog really chokes the pit bull.

The young man is surprized and asks: - Madam, how much did your dog cost?

Lady: - 10 euros for the pooddle embryo and 10 thousand for enhancement with crocodile DNA.“

Human genome editing

The problem of genome intervention is however not limited to animals. In long term, the issue of the human genome is the most current topic in ethical and legal discussions. It is a broad issue, so only few questions can be discussed in this text. However, as it is primarily a topic of biology and medicine, it is necessary to describe the basic developments in those disciplines. The development of **human genome research is rapid** and has changed the world in many ways. As known, it started with the first in vitro fertilisation in 1978 and two years later the PGD (prenatal genetic diagnostic) became reality. Let‘s remember, in 1990 the Human

[1] This contribution is the result of the research project “New challenges in the area of rights in rem in Slovakia”, which is funded by the Agency for Research and Development (project number: APVV-18-0199).

Genome Project started and in 2003 Human Genom Atlas was produced. [2] Also human stem cells were first grown in vitro in 1998. Since then, laboratory methods have greatly improved. Stem cells are divided into embryonic stem cells and stem cells found in specialized tissues, adult stem cells. They have two unique characteristics: the ability to reproduce and the ability to differentiate. Growth factors that direct cell growth and differentiation are needed to maintain them in tissue cultures. A certain combination of growth factors will cause the cells to differentiate only in a certain direction.

Prenatal examination of human fetuses in the mother‘s body for genetically and non-genetically determined diseases is now also a common procedure in gynecology and obstetrics. The disadvantage is that the diagnosis (collection of material from amniotic fluid) is made relatively late in the developmental stage of pregnancy (weeks 9-15). [3]

It is a procedure that allows the early detection of a diseased gene or damage of the fetus during pregnancy. If pathology is ruled out, it means psychological relief for the mother; if the presence of a pathological gene is confirmed, it will allow early treatment in the newborn or give parents the opportunity to prepare for the birth of a sick or injured child. From a medical point of view, abortion will be considered. Prenatal diagnosis must be performed only on a voluntary basis. It must provide factual information on the risks and be of benefit to the medical procedure. If the examination should be a risk to the unborn child, the examination should be waived. In any case, the rights of the unborn child must be respected.

Prenatal diagnosis from an ethical point of view will be often rejected if it is not indicated for medical reasons (eg determination of the child‘s sex). As in the case of genetic testing of an adult, the danger of prenatal diagnosis is to generalize the diagnosed positive marker and to include the patient in the list of genetically ill persons. Each case is individual. In today‘s not yet quite clear genetic context, the gene under investigation may not be transplanted at all or may be transplanted to varying degrees. Generalization leads to eugenics. The basic ethical issue in the case of a positively diagnosed marker will be the relationship - the well-being of the unborn child and the wishes of the parents.

In this situation, several questions arise. Do parents have the right only to a genetically intact child, only to a healthy child? Do they have the right to request an abortion? Can medicine do something like that? Do sick and injured children have the right to life? On the part of the doctor - should the doctor guarantee only a healthy child?

Those questions remain open for the future, but scientific development changed the ethical discussions even more. The last decade was influenced by the new method of humane genome editing. [4] The new method is called **CRISPR /Cas9** and much more effective and cheaper than older methods, using lenteviruses. The method caused a lot of public interest, especially after some new experiments in China took place.

In 2018, an event took place in the field of genetics, which was concerned to be a major breakthrough in the field of evolution. Man took his own evolution into his own hands and began to „play God.“ The whole case stirred up the world and led to passionate debates not only among doctors, but especially among theologists and lawyers. This is not only a medical

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[2] Human Genome Project Timeline, See: https://www.genome.gov/human-genome-project/timeline (August, 1st, 2022)

[3] See : KAPPELER, K., POSPÍŠILOVÁ, V. Embryológia človeka. Martin: Osveta, 2001.

[4] PAK, E. CRISPR: a game changing genetic engineering technique. In: Sciene in the news. Blog. Harvard University, 31th July 2014. See: https://sitn.hms.harvard.edu/flash/2014/crispr-a-game-changing-genetic-engineering-technique/ [2021-06-06]

problem, but also an ethical one, which can lead to far-reaching negative consequences if the method is abused.

The reason of this development was the application of the CRISP / Cas9 method. It is a molecular tool that is relatively precise and that, in millions of base pairs of human DNA, can be directed to one particular base (using a computer comparison to one particular letter) and change it in some way. [5] This process means that at one particular place in the genome, the DNA is broken, modified or deleted by the method, and the cell can then join the DNA strand. However, it is often connected incorrectly, creating the risk that information that is encoded at that location will be compromised.

CRISP / Cas9 is a **genetic tool that evolved in some bacteria** as a defense against viruses. Some bacteria have in their genetic material gene sequences derived from viruses that they have incorporated into their DNA. Based on this information, the bacteria are able to synthesize a portion of the original viral nucleic acid. In the event that a bacterium is re-infected with the virus, a portion of the original synthesized nucleic acid is ligated to a bacterial enzyme, a nuclease, which cleaves the DNA of the invaded virus. Today, this method is used for various genetic techniques.

The problem is that this mechanism does not work 100 percent. In our evolution, it has been fortunate that not all spontaneous DNA mutations have been corrected, so various genetic variants have emerged that have allowed humanity to survive under a variety of changing conditions. There has always been a part of humanity whose genetic makeup has adapted to the changing environmental conditions and survived. Examples are blood diseases such as sickle cell anemia or thalassemia, which have arisen from mutations in hemoglobin genes. However, in the malarial regions of Africa and Asia, they have enabled the affected individuals to survive. [6]

In 2018, twins were born in China, in whom man purposefully and meaningfully changed the human genome. **Chinese scientist He Jiankui** used the CRISP / Cas9 method. [7] As part of assisted reproduction, he used an egg and sperm, created a zygote, and at this stage of development he „cut out" the part of the DNA that encoded the formation of the protein responsible for the attachment of the HIV virus to the cell surface. Two girls were born, one of whom cannot develop AIDS. In other words, Dr. He created a kind of „genetic vaccine." The main thing that provoked a wave of disagreement was that these changes will be inherited in future generations. The genetic manipulations that have been carried out in the world so far have always ended with the death of the individual and have not been passed on to offspring.

The experiment however has several shortcomings. The scientist defended his approach mainly because the father of the twins was HIV positive and there was a risk that the children could become ill with AIDS. However, this danger was unlikely, and in addition, AIDS treatment is now relatively successful with other methods. There is a risk that people without the presence of the excised portion of DNA are more susceptible to other viral infections. Finally, the CRISP / Cas9 method does not work completely precisely and may affect other sites in the genome. It is questionable whether this did not happen in this particular case.

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[5] See: DEUTSCHER ETHIKRAT: Eingriffe in die menschliche Keimbahn. Stellungnahme. Berlin: Deutscher Ethikrat, 2019. In: https://www.ethikrat.org/fileadmin/Publikationen/Stellungnahmen/deutsch/stellungnahme-eingriffe-in-die-menschliche-keimbahn.pdf (August, 1st, 2022)

[6] FÁBRYOVÁ, V., BOŽEK, P., DRAKULOVÁ, M. et al. Care for haemoglobinopathy patients in Slovakia. In: Central European Journal of Public Health 2017, 25 (1), p. 67.

[7] CYRANOSKI, D. The CRSPR-baby scandal: what next for human gene-editing? In: Nature, 26.2.2019. See: https://www.nature.com/articles/d41586-019-00673-1 (August, 1st, 2022)

Most of the world has condemned the move. They consider it is a dangerous path to eugenics. Implantation of genetically modified human embryos is a red line that must not be crossed.

Arguments for and against human genome editing

There are some arguments *against* human genome editing:

1. The embryo can not give informed consent to scientists. However, even if the parents vaccinate the child, this does not give them informed consent. Parents rely on the advice of a doctor and scientific knowledge. When it comes to genome editing, no doctor today is able to guarantee relevant information.
2. Today we do not yet have such a perfect method to know how to influence the physiology and mental properties of an individual. We should also mention the case of African and Asian malarial regions, where the diseases like thalassemia or sickle cell anemia in their light forms have enabled the affected individuals to survive. Under specific conditons, the disease may be a comaprative advantage to survive, and we are not able to exclude that such a situation will take placce in the future, especially after experience with the corona pandemics.
3. Once the method is improved, the „improvement" of the genome begins according to the wishes of the parents. But what do we want to improve? Will the individual be satisfied with the „improvements" that his parents have prepared for him? Didn't they rob him of part of his freedom? The child should have an open future. He has more freedom if he owns a genetic mix than a predetermined genetic set. He does not want to be born as an attempt by his parents.

The counter-argument is that editing human DNA should not be rejected a priori. This applies in particular to state institutions to be cautious about this issue. A distinction must also be made between the therapeutic use of genome transcription and its enhancement. In some families, the mentioned monogenic diseases occur, where only one gene is pathological. Repairing this gene in the embryo would prevent the child's devastating disease. Genetic techniques already exist that allow reversibility of genome editing. In the distant future, conditions incompatible with present life may occur on Earth. Thus, it is possible that genome editing will be the only active way for humanity to survive. [8] Today, however, it is premature to put power in man's hands to take control of one's evolution. These technologies have not yet grown.

Restrictive approach in the global world?

Most states have condemned dr. He's act as unethical. The method was used prematurely, since it is associated with a high risk of new and harmful mutations (the possibility of activating oncogenes in the human genome that may trigger the cancer process is reported). In Europe, similar „attempts" are banned, with strong Christian influence in the background. There is perhaps a **more benevolent attitude in China**, although even under Chinese law, a scientist has acted illegaly. The scientist was later sentenced for three years in jail for his action, [9] however, the experiment has caused more outcry abroad than in China.

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[8] SÝKORA, P. Bioetik Sýkora o editovaní ľudskej DNA: Čelíme aj vzniku novej genetickej ariistokracie. In: Denník N, 2nd December, 2018. See: https://dennikn.sk/1308913/bioetik-sykora-dedicne-editovanie-ludskej-dna-je-milnik-ako-ked-clovek-vystupil-na-mesiac/ (August, 1st, 2022)

[9] NORMILE, D.: *Chinese scientist who produced genetically altered babies sentneced to 3 years in jail.* ScienceInsider, December, 30th, 2019. See: https://www.science.org/content/article/chinese-scientist-who-produced-genetically-altered-babies-sentenced-3-years-jail (August, 1st, 2022)

The experiments with the editing of humane genome would reach a criminal level in most states. Many countries in Europe, are alarmed by such experiments, as it opens **reminiscences of the past**, when eugenic ideas were wide-spread, with the worst experiences from World War II. That is one of the reasons for technoscepticism and legal regulations of biotechnologies in countries like Germany or Slovakia are quite restrictive.

Let's mention the restrictive § 161 of the Slovak Criminal Code („Unauthorized experiment on human being and cloning of human cells"): [10]

„Who, under the pretext of acquiring new medical knowledge, methods or to confirm hypotheses or for clinical trials of medicinal products, performs verification of new medical knowledge without permission

(a) despite the fact that the life or health of a person is immediately endangered, unless the necessary operations are capable of saving his life immediately threatened, or

(b) without a medical indication and without the consent of the person concerned, or carries it out on persons on whom verification without a medical indication is prohibited, or carries it out on a human fetus or embryo, or carries it out in contravention of other legal conditions for verification without medical indications, shall be punishable by a term of imprisonment of one to five years."

Those provisions are not only restrictive, they are problematic from many points of view and too suspicious against biomedical research. The well known problem of the law is lack of differenciation between therapeutic and reproductive cloning, but it is also quite inappropriate to talk about the „pretext" of acquiring new scientific knowledge, because a large part of scientific research is carried out without direct social benefits. Much scientific knowledge however has been gained through such „pretexts."

How futile the restrictiveness may be, confirm other experiences from Slovakia. As the Czech Republic has permissive legslation, many Slovak scientists travell to Czech Republic for their stem cell research. In the Czech Republic, research on human embryonic stem cells is permitted by the explicit law. [11] Imports and exports of embryonic stem cell lines are also permitted. These research opportunities also had an impact on the supply of scientific capacities and resources to the Czech Republic. For an interested Slovak scientist, it takes only 90 minutes by train from capital Bratislava to Czech city of Brno for doing stem cell research, that would be criminal in Slovakia...

Human genome research is not free of different risks and its consequences should not be underestimated at all. At European level, there is **a Convention on Human Rights and Biomedicine** and its Additional Protocols. [12] The other key document is the Charter of Fundamental Rights of the EU. [13] It states what must be respected in the field of medicine and biology in articular: the problem of eugenic practices (in particular those aiming at the selection of persons), the prohibition of the reproductive cloning of human beings, the prohibition of financial gain from human body and the consent. However, all that binding legislation has its limits as well.

The most risky result of human genome editing may be the creation of an „upper caste"

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[10] Act No. 300/2005 Coll. Criminal Code, § 161 para. 1

[11] Act No. 227/2006 Coll., on research on human embryonic stem cells and related activities and on the amendment of some related laws

[12] Convention on Human Rights and Biomedicine (Oviedo Convention), Additional Protocol on the Prohibition of Cloning Human Beings, Additional Protocol concerning Transplantation of Organs and Tissues of Human Origin, Additional Protocol concerning Biomedical Research, Additional Protocol concerning Genetic Testing for Health Purposes, See: https://www.coe.int/en/web/bioethics/oviedo-convention (August, 1st, 2022)

[13] Charter of Fundamental Rights of the EU, Article 3 para. 2

and, conversely, a „lower caste“. The enhanced individuals, immune against many infectious diseases, may create a new „**genetic upper caste**“, not willing to interbreed with „lower castes“, because of thread to their offsprings who could loose the hereditary immunitiy oor other benefits. Even without legal segregation, the social pressure from family and relatives not to interbreed with „lower castes“ may create atmosphere enemical to equalitiy and dignity of human beings. Similar serious problems may occur with other qualities, like intelligence. From a democratic point of view, there is a danger that such enhanced individuals can form a group that could feel superior to others and demand priorty in the ruling the public affairs as a new form of „meritocracy“.

One important question is at **what stage of development** the embryo will receive protection due to human dignity. It is practically impossible to find the exact wording and determine the time or developmental stage when the protection of human dignity is to take place and with what type of consequences. To date, there has been no ethical consensus to determine the human dignity in a cloned embryo. When an embryo „reaches“ the stage of protection of human dignity, its status changes, however, the courts cannot wait for the scientific community to unite on a common view.

The day-to-day medical process and scientific development are constantly calling for legal solutions, as has been the case in the past for abortion. In the field of biotechnology, there are often conflicts over the claim to the absolute validity of certain values. The big issue concerning the limits of biomedical law limits is the **global aspect of biotechnology**, which makes it necessary to tackle the subject globally. Scientific progress can not be limited by national boundaries and even strict regulation through the law would not be enough. It is well known that human genome editing via CRISPR / Ca9 interventions can be performed in relativelly simple laboratories and at low cost. Checking these laboratories would require an extremely sophisticated system of control to prevent abuse.

Sports competition as example

The example of some genetic risks on the path of 21st could be seen in the field of sports. The genetic method that allows embryonic stem cells to be enhanced could create „trans-human“ or „extra-human“ qualities in some athletes. Then they could win the competitions thanks to qualities that are not yet available for the others. This inequality in future sports may be even worse problem than growing politicization or high costs of competitions. Sports bring the need for **continuous improvement of results**, often beyond human capabilities. Some performances of men - Olympic winners from the 20th century - would not be enough even among women athletes today. Mike Troy, the famous Olympic winner in swimming from 1960s (also acting as Tarzan in the movie), would have it difficult to compete with contemporary female swimmers. [14] At present, therefore, much is said about new methods or doping in sport, but the approach of International Olympic Comittee and World Anti-Doping Agency (WADA) changed rapidly in the 21st century and will change even more in the next decades. This also represents the composition of the WADA expert working groups – perhaps the most important group is the Gene and cell doping expert advisory group. [15]

[14] Mike Troy won 200 m butterfly at Olympics 1960 with olympic record (2:12.8); compare it with the female winner at Olympics 2020 (2:03.86) or the last participant in that finals (2:09.48)

[15] See: https://www.wada-ama.org/en/gene-and-cell-doping-expert-advisory-group (August, 1st, 2022)

Rapid development of biotechnology may even deepen other problems in sports, like politisation. Gene doping is becoming more and more topical, and it is not without interest that the same countries that dominate contemporary **Olympics medal tables** are the world leaders in the field of human genome research (USA, China, UK and Japan). [16] In long term, the Olympics are won by the countries that are the most technologically advanced and invest the most in sports - just look at the top ten of the Olympic rankings of the last Olympics (London 2012, Rio 2016, Tokyo 2021). On the contrary, large African countries with populations having excellent athletic dispositions are not at the forefront of the Olympic medal tables despite their rapidly growing populations. [17]

In generally, the decisive threat to the future of the sport will be the genome editing, which has the potential to create a hereditary advantage for a certain group of people in sports competitions. Thanks to laboratory intervention into the genome in the zygote stage, we can already create various benefits for future athletes - not only in terms of immunity, but e.g. also in terms of hematopoiesis or muscle growth. As the method used (CRISPR / CaS9) is less expensive and more effective compared to older methods, it can be performed without much rumors. For the future it is not possible to check all potential genome editations and „enhanced" people in the world. It can not be excluded that in the future a generation of young individuals will be created who will inherit more immunity to diseases, their muscles will grow faster and will have fewer oxygen debt problems due to better hematopoiesis - although side effects have not been studied. Either way, in the competition they will have a great advantage over other athletes and they will **achieve victory even with less effort**.

In the future, the question of whether **competition between genetically „enhanced" and „unenhanced" individuals** makes sense. The enhancement of the embryo should not be seen an intentional violation of the rules by the athlete, because his parents and doctors in the laboratory have taken care of his benefit before his birth. Thus, he or she himself or herself should not be responsible for having genetically improved predispositions to the sport. Therefore, it will not be possible to apply sanctions against such an „offender". But will it be fair for such an „improved" person to win thanks to the decision of his or her parents? Or will it be fair to exclude him or her from competition because of unequal opportunities for other athletes? Or why is necessary to prohibit gene and cell doping, if ordinary athletes are competing against enhanced individuals? As mentioned above, from human rights point of view, it will be even more dangerous that such enhanced athletes could form a group that will not interbreed with unenhanced iindividals, as their offspring could loose their hereditary benefits for sports. However, if the sports becomes a place of „enhanced people" competitions, the Olympic ideas will lose its universal character and become a discriminatory event for „chosen" athletes from rich countries of the world.

9Law or education?

As the previous text states, human genome editing raises new questions for our legal system, that reacts on it in a very restrictive way. Many of the risks of biotechnology are serious, but we have to adapt to the fact that recent developments in the world of genetics have shaken basic postulates in topics like human freedom, equality or dignity. Man begins to shape his

[16] See: https://olympics.com/en/olympic-games/tokyo-2020/medals (August, 1st, 2022)

[17] No African country was among 10 medal winners at any Olympic Games.

own biological life. We have to ask: what will this mean for our freedom, equality and dignity? Can we make ourselfs morally better beings?

Genetic manipulation may modify especially our concept of human dignity. According to traditional opinions, the **human dignity** must be taken into account when exercising one's own wishes and preferences for modifications on human cells. Man is constantly changing and so the the final stage of man's development, so it cannot be finaly answered. However, human dignity remains inviolable in the legal rules, despite all fundamental changes in biomedicine.

On the other hand, the **rapid development** of new scientific research in feld of biotechnology can not be stopped by new and more restrictive legal rules. New biotechnologies have often appeared to the legislator unexpectedly, and the legislator has rarely been prepared to react promptly to such developments. We should not underestimate legal challenges caused by biotechnology, and in such controversial issues like human genome research the reality would often differ from our normative ideals. Since the legislator has always lagged behind the development of scientific research, so we should not be surprized if the „enhanced athletes" or „ehanced individuals" in other fields of human activity became reality. There will be probably lot of other unexpected „surprizes", as the development of biotechnologies remains rapid and the regulation by new legislation impacts it slowly. [18]

Of course, some legislation has to be enacted. Support will be needed for those individuals who will be excluded from genetic enhancement in the form of editing the human genome. **Ensuring the diversity** of the human species can even become a reason for stronger protection of minorities, which will be considered by a part of society as minorities with genetic handicaps. The issue of the crime of genocide will also have to be dealt with new ideas, particularly in relation to the removal of certain characteristics of the human species. Under the influence of the economization of relations, as well as the influence of the media, a certain physical ideal of the individual may appear, which will lead to the removal of qualities that contradict this ideal. Equality and non-discrimination should become a central issue of human rights protection, and we will also have to take into account new guarantees against privileges and discrimination in the field of genetics.

The topic of „enhanced individuals „ will need to be addressed not only by changes in different branches of law, but also in the **field of education** or health care. There are regulations that exclude genetic discrimination at present, however, given the relative simplicity of interventions in the human genome, the efficacy of that regulation may have some limits in the long run. In generally, the law will be not enough to „domesticate" biotechnologies. Legal regulation in the field of biotechnology has its limits and it is uneffective, not only because of the transnational aspect of the human genome research.

For more effective protection of human rights, it will be necessary to change the **approach to biomedicine in the society**. It would be a really effective tool in times of new biotechnological developments. Society is very unprepared for new phenomena in the field of human genome, which already leads to a negative attitude and there is mostly general rejection. Of course, problems in relation to biomedicine have been associated with a lack of scientific communication with society, but the idea that more information from scientists brings more public trust is also wrong. It concerns especially the most controversial areas as biotechnology and human genome editing. Development in the field of biomedical science have been causing concern and fear for a long time and not only among laicist public. Of course, in the past there have

[18] See: FÁBRY, B. Biotechnologické výzvy a nedostatky právnej reguláce. In: PLAŠIENKOVÁ, Z. (ed.): Bioetické výzvy a súčasnosť. Bratislava: Stimul, 2015, 107-118, p. 108

been periods, when society has received the new progress of science with enthusiasm. But gradually doubts began to arise, and society ceased to perceive the biomedical research as beneficial, which was reflected in the alienation of society and biomedicine. In many countries of Europe, mistrust was also multiplied by the fact that totalitarian ideologies of the past were based on science and nacist ideology directly on biology. However, biotechnology will provide an increasing role in everyday life, so it is necessary that everyone understands it to a certain extent. In some countries, there have also been activities to spread scientific information in the population, but it has been found that more scientific information is not enough for people to increase their trust towards science. [19] The idea of passive public reception of scientific information was not very successful. It is necessary to establish a dialogue between the science and public, to invite the public to communicate and to take part in ethical discussions.

According to Bauer, there were three phases in the **development of public perception** of science. [20] The first phase was the period of scientific optimism and he ranks it the 1960s to 1980s. At that time, science developed in isolation from the general public, but it was highly valued and enjoyed confidence. The next phase was the period of the deficit model, which lead to a decrease in confidence in science. The third paradigm, called „Science in society", seeks to correct the previous deficit: the key sciences and its actors have lost the trust of society, so the science must move towards greater social participation. Bauer however emphasizes that there is not a strict chronological separation of those three periods, but rather a multiplication of discourses that overlap.

A key role in this approach are attitudes and values in the society, but also openess of the science towards society. Scientific knowledge should be interpreted as one of the multifaceted social activities. The public must be invited to help clarify moral and social questions related to science and biomedical research in particular and to take part in the decision making. In the 21st century there were various activities in Slovakia and some other countries to popularize science among the population, but these activities often represented a one-way popularization of science and the way to „**Science in Society**" was not succesful. However, despite lower public interest, the human genome research is one of the biggest current challenges in medicine, biology, law and ethics and it will influence our lifes more than expected by public (not only) in Slovakia. Of course, this issue has been somewhat overshadowed by the coronavirus pandemics, but **its relevance will only increase, especially in the field of human rights**.

BIBLIOGRAPHY

Act No. 300/2005 Coll., Criminal Code (Slovak)

Act No. 227/2006 Coll., on research on human embryonic stem cells and related activities and on the amendment of some related laws (Czech)

BAUER, M. W.: The Evolution of Public Understanding of Science – Discourse and Comparative Evidence. In: Science, Technology and Society 14 (2009), 221-240, p. 257

Charter of Fundamental Rights of the EU

Convention on Human Rights and Biomedicine (Oviedo Convention)

[19] SZAPUOVÁ, M., NUHLÍČEK, M.: Veda a verejnosť: premena spôsobov tvorby poznania a ich vzťahovania k verjenosti. In: PLAŠIENKOVÁ, Z. (ed.): Bioetické výzvy a súčasnosť. Bratislava: Stimul, 2015, 249-260, p. 253.

[20] BAUER, M. W.: *The Evolution of Public Understanding of Science – Discourse and Comparative Evidence. In:* Science, Technology and Society 14 (2009), 221-240, p. 257

CYRANOSKI, D. The CRSPR-baby scandal: what next for human gene-editing? In: Nature, 26.2.2019. See: https://www.nature.com/articles/d41586-019-00673-1 (August, 1st, 2022)
DEUTSCHER ETHIKRAT: Eingriffe in die menschliche Keimbahn. Stellungnahme. Berlin: Deutscher Ethikrat, 2019. In: https://www.ethikrat.org/fileadmin/Publikationen/Stellungnahmen/deutsch/stellungnahme-eingriffe-in-die-menschliche-keimbahn.pdf (August, 1st, 2022)
FÁBRY, B. Biotechnologické výzvy a nedostatky právnej reguláce. In: PLAŠIENKOVÁ, Z. (ed.): Bioetické výzvy a súčasnosť. Bratislava: Stimul, 2015, p. 107-118
FÁBRYOVÁ, V., BOŽEK, P., DRAKULOVÁ, M. et al. Care for haemoglobinopathy patients in Slovakia. In: Central European Journal of Public Health 2017, 25 (1), p. 67.
Human Genome Project Timeline, See: https://www.genome.gov/human-genome-project/timeline (August, 1st, 2022)
KAPPELER, K., POSPÍŠILOVÁ, V. Embryológia človeka. Martin: Osveta, 2001
NORMILE, D.: Chinese scientist who produced genetically altered babies sentneced to 3 years in jail. ScienceInsider, December, 30th, 2019. See: https://www.science.org/content/article/chinese-scientist-who-produced-genetically-altered-babies-sentenced-3-years-jail (August, 1st, 2022)
PAK, E. CRISPR: a game changing genetic engineering technique. In: Sciene in the news. Blog. Harvard University, 31th July 2014. See: https://sitn.hms.harvard.edu/flash/2014/crispr-a-game-changing-genetic-engineering-technique/ (August, 1st, 2022)
SÝKORA, P. Bioetik Sýkora o editovaní ľudskej DNA: Čelíme aj vzniku novej genetickej ariistokracie. In: https://dennikn.sk/1308913/bioetik-sykora-dedicne-editovanie-ludskej-dna-je-milnik-ako-ked-clovek-vystupil-na-mesiac/ (August, 1st, 2022)
SZAPUOVÁ, M., NUHLÍČEK, M.: Veda a verejnosť: premena spôsobov tvorby poznania a ich vzťahovania k verjenosti. In: PLAŠIENKOVÁ, Z. (ed.): Bioetické výzvy a súčasnosť. Bratislava: Stimul, 2015
https://olympics.com/en/olympic-games/tokyo-2020/medals (August, 1st, 2022)
https://www.wada-ama.org/en/gene-and-cell-doping-expert-advisory-group (August, 1st, 2022)
https://www.coe.int/en/web/bioethics/oviedo-convention (August, 1st, 2022)

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The Supreme Audit Institutions as guardian of the public interest in a parliamentary democracy

Abstract
The supreme audit institutions have nowadays become an indispensable element of any democracy. These bodies are usually treated in the EU Member States as the '*longa manus*' of parliamentary committees, which is a means of enabling the chambers to exercise control over the government and public administration of the state. By carrying out independent audits of the management of public funds and related activities of the government, government administration and other administrators of these funds, they provide Parliament with information, formulate opinions on issues related to financial statements and the implementation of government programmes, projects, and other activities. As a result, the state's supreme audit institutions are characterised, not only as bodies supporting the Parliament, but also the government, and they remain in a relationship of subsidiarity with these institutions, which does not exclude neutrality and objectivity in action. The subject of the article is an analysis of the role of the supreme audit institution as a guardian of public interest, promoting the principles of accountability, transparency, and good governance.

Keywords: supreme audit institution, public interest, accountability, transparency, good governance

Introductory remarks

The development of modern state control is most often combined with the birth of the constitutional state. The idea of constitutionalism, based on the rule of law and the division and mutual balancing of particular authorities, strengthened the idea of control, making it a central element in the construction of a democratic state order. Apart from the traditional area of control activities, i.e. public finances, the mechanisms of state control began to include, inter alia, the activities of public administration and the sphere of civil rights and freedoms. For this reason, the highest state control bodies have now become an indispensable element of any democracy[21]. By conducting independent audits of public funds management and the related activities of the government, government administration and other administrators of those funds, they guard the public interest.

The Supreme Audit Office in the structure of state authorities

In democratic countries, a particularly strong institutional bond connects the supreme audit institutions with the legislature. The mandate of the supreme audit body is usually based on the decision of the legislative body, which is also one of the main recipients of "services"

[21] J. Jagielski, *Kontrola administracji publicznej* [Eng. *Control of Public Administration*], Warszawa 2006, p. 106.

provided by audit institutions. The importance of the Supreme Audit Institution for Parliament lies primarily in the acquisition of information on the government's use of budgeted public funds and the preparation of reports on their use. Without the support of the supreme audit institution, no parliament would be able to fully exercise its right of supreme audit over the government, which is clearly in the public interest. In practice, this cooperation usually takes the form of expert support for the work of the parliamentary committees tasked with examining the draft budget and the observations contained in the reports of the Supreme Audit Institution[22]. Information on disputes and discrepancies between the supreme audit institution and the audited state administration should also be communicated to the legislative authority in the form of reports or special communications. The Supreme Audit Institution should not be subject to the legislative authority with regard to programming and carrying out audits. Instead, it must have full freedom to set its priorities and plan its work in accordance with its mandate, and to apply methods appropriate to the controls it undertakes. On the other hand, where scrutiny of the executive financial management is the prerogative of a parliament or an elected assembly, the SAI is requested to take into account the wishes of those bodies to carry out specific studies when defining its control objectives. However, the supreme audit body must remain free to determine the way in which it carries out any work, including tasks delegated by Parliament[23]. The consensual standing of the Parliament and the Supreme Audit Institution before the executive on the one hand contributes to the implementation of the recommendations of the audit body and on the other hand significantly strengthens political authority over the government. Thus, the supreme audit institutions can provide important support to parliamentary democracy.

Institutional state control should also be independent of political factors determined by the executive[24]. However, the continuous pursuit of supreme audit institutions to maintain an independent position vis-à-vis the executive does not preclude them from working together to promote the principle of public accountability.

In its role as external auditors of executive bodies, the Supreme Audit Institution examines and evaluates the way in which the executive implements the state's economic policy. In doing so, it draws attention to the weaknesses of the administration and recommends remedial measures to promote cost-effectiveness in managing public funds[25]. Efforts should therefore be made to avoid the participation of executive authorities in such activities as would be incompatible with the independence and objectivity of the Supreme Audit Institution in the exercise of its mandate. The independence of supreme audit institutions is also affected by pressure from the executive authorities on the conditions under which the head of the supreme audit institution holds office[26]. It is therefore desirable that the provisions on the expiry of a term of office or removal from office be implemented only through a special process similar to that applicable to persons holding judicial positions. In the case of these supreme audit institutions, which have an adjudicating function, a number of constitutional

[22] B. Brétéché, A. Swarbrick, Developing Effective Working Relationships Between Supreme Audit Institutions and Parliaments, SIGMA Papers 2017/54, pp. 21–27, http://sigmaweb.org/publications/Supreme_audit-institutions-and-parliaments-SIGMA-Paper-No.%2054.pdf, last accessed on: 09.07.2022.

[23] Relations Between Supreme Audit Institutions and Parliamentary Committees, „SIGMA Papers" 2002/33, pp. 11–13, http://dx.doi.org/10.1787/5kml60vd5x8r-en, last accessed on: 17.07.2022.

[24] Z. Dobrowolski, Ekonomiczna analiza działalności naczelnych organów kontroli państwowej [Eng. Economic analysis of the activity of principal organs of the state supervision], „Studia Lubuskie" 2009/5, p. 273.

[25] Z. Dobrowolski, Ekonomiczna …, p. 273.

[26] L. Blume, S. Voigt, Does organizational design of supreme audit institutions matter? A cross-country assessment, „European Journal of Political Economy" 2011/27, pp. 222-224.

or statutory institutions of a systemic, procedural, and economic nature (the principle of non-removability, the privilege of jurisdiction, the stabilization of professional standing, or the requirement to ensure working conditions and remuneration equivalent to the dignity of the office) should serve to implement the principle of independence of their members. However, autonomy in the functioning of the Supreme Audit Institution does not necessarily preclude agreements with the executive authorities on the management of staff and/or resources, or on the joint purchase of equipment and materials. However, the institutions of the executive branch should not be able to take decisions which would compromise the independence of the Supreme Audit Institution in the exercise of its mandate[27].

It is also important that the executive does not have the power to oversee matters relating to the exercise by the supreme audit institution of its mandate. The SAI must not be obliged to carry out, modify, or refrain from carrying out checks, or to conceal or modify the results of checks, conclusions, and recommendations.

In some areas, a certain degree of cooperation between the SAI and the executive is desirable. The SAI should be willing to advise the executive on issues such as accounting standards and rules and the form of financial statements. Therefore, while maintaining its independence, the Supreme Audit Institution can be bound by the reforms planned by the administration in areas such as public accounting or financial legislation, and participate in consultations accompanying the preparation of draft laws or regulations concerning its competences and powers[28]. However, when providing such expert support, it may not engage openly or covertly in a manner which would compromise the independence of the implementation of its audit mandate. Nor does this sphere of activity consist in interference by the Supreme Audit Institution in administrative management, but in cooperating with certain administrative services by providing them with professional assistance or sharing its experience within financial management[29].

Likewise, it cannot be excluded that an executive body may submit its own proposals for the subjects of control. However, if the supreme audit institution enjoys sufficient independence, it must be able to refuse any such proposal. However, the final decisions on the control tasks, including the programme, should be left to the discretion of the latter. A sensitive area in the relationship between the SAI and the executive is the question of financing the SAI. In fact, to varying degrees, depending on constitutional and statutory provisions, the solutions for financing the Supreme Audit Institution may be linked to the financial situation and overall financial policy of the executive. However, effective promotion of the principle of public accountability requires that the Supreme Audit Institution be provided with sufficient resources to enable it to carry out its duties properly. The principle of independence of the SAIs does not therefore preclude cooperation with the executive, provided that it is based on equivalent principles[30].

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[27] J. Mazur, Stosowanie międzynarodowych standardów dotyczących statusu prawnego najwyższego organu kontroli w krajach Unii Europejskiej i w Polsce (próba porównania) [Eng. The application of international standards regarding the legal status of the supreme audit institutions in the EU Member States and Poland (attempt to compare)], „Kontrola Państwowa" 2002/2 (special issue), pp. 61–71.

[28] M. Sieklucka, Status najwyższych organów kontroli krajów Unii Europejskiej w świetle postanowień Deklaracji z Limy w sprawie zasad kontroli finansów publicznych [Eng. The Status of the Supreme Audit Institutions in the EU Member States in the Light of the Provisions of the Lima Declaration of Guidelines on Auditing Precepts], „Kontrola Państwowa" 2008/2, pp. 28–38.

[29] Supreme Audit Institutions and Good Governance: Oversight, Insight and Foresight, OECD Public Governance Reviews,Paris 2016, pp. 22-28.

[30] Z. Dobrowolski, Kontrola wydatków publicznych w systemie demokracji amerykańskiej [Eng. Public Expenditure Controls in American democracy], Warszawa 2005, pp. 301-303.

The role of the supreme audit institution in the democratization of public life

The existence of independent state control bodies is also conducive to the democratization of the public sector. Publishing information about the condition of state finances, the activity of the administration, and the methods of providing public services increases the level of citizens' knowledge about the functioning of various spheres of public life. The supreme control bodies have become a kind of participatory link between the state authorities, through which the state administration can be involved in the development of programmes, providing its comments on the existing solutions[31]. The state control authorities also analyse whether the state administration bases its activities on generally applicable legal norms, which on the one hand is to guarantee the citizens that the behaviour of officials will be predictable, and on the other hand to ensure their equality before the law and impartiality in decision-making. The purpose of state control is not only to determine the legality and reliability of the implementation of public finances, but also to determine whether and to what extent public institutions carry out their tasks for the benefit of society in a cost-effective and efficient manner. For this reason, the legal mandate should enable the supreme audit body to have full and free access to all places and files of the audited entity as well as those related to its activities. However, the relationship between the Supreme Audit Institution and the audited entity should be based on the principle of mutual trust, which is extremely useful for obtaining reliable information and conducting discussions in an atmosphere of respect and understanding. State control bodies should therefore seek to define procedures to ensure the effective enforcement of their obligations with regard to audit reports, with which staff and external experts must fully comply[32]. However, it should be stressed that the broader and more discretionary the mandate of the Supreme Audit Institution is, the more complex the task of ensuring the quality of operations throughout the mandate. It is therefore in the public interest to take educational measures among the audited entities and the public concerning the legal status of Supreme Audit Institutions[33].

The important role of audit institutions in the process of building civil society and the democratic state the International Organisation of Supreme Audit Institutions has also been referred to in the ISSAI 12 Standard: The value of Supreme Audit Institutions and the benefits of their activities – the improvement of citizens' lives[34]. According to the provisions of the document under analysis, controlling the public sector, which is the main task of the supreme audit institutions, is an important factor in improving the lives of citizens. The control of the government and public sector entities by the supreme audit institutions has a positive impact on the level of trust in society as, thanks to the audits, the public resources trustees focus on the proper use of those resources. Such an approach contributes to the adherence to the desired values and underpins accountability mechanisms, leading in turn to the making of better

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[31] Z. Dobrowolski, Ekonomiczna …, p. 275.

[32] M. Serowaniec, Instytucjonalne gwarancje niezależności najwyższych organów kontroli państwowej [Eng. Institutional guarantees of independence of the Supreme Audit Institutions] , in: M. Serowaniec, A. Bień-Kacała, A. Kustra-Rogatka (eds.), Potentia non est nisi da bonum: księga jubileuszowa dedykowana Profesorowi Zbigniewowi Witkowskiemu, Toruń 2018, pp. 663–665.

[33] Z. Dobrowolski, Ekonomiczna …, p. 275.

[34] ISSAI 12 Standard: The value of Supreme Audit Institutions and the benefits of their activities – improving citizens' lives was adopted at the 21st Congress of the International Organization of Supreme Audit Institutions in Beijing in 2013.

decisions[35]. Once the results of the audit have been made public by the supreme audit institutions, citizens can hold the trustee of public resources to account. In this way, the supreme audit institutions promote efficiency, effectiveness, and transparency in public administration. Independent, effective, and reliable Supreme Audit Institutions therefore play an essential role in a system where accountability, transparency, and integrity are essential elements of a stable democracy[36]. However, the implementation of these tasks requires constitutional guarantees of the independence of the supreme audit institution. It was also reiterated that the independence of the body is inextricably linked to the independence of its members and of the head of the supreme audit institution. The legislation should therefore specify the procedure for the appointment (selection) of the head of the Supreme Audit Institution and the possibility of his/her early dismissal. The prerequisite for the principles of transparency and government accountability for the proper and effective use of public funds to become a reality is also that the supreme audit institutions enjoy the autonomy necessary to fulfil their tasks, including the right to decide on the subject matter, timeframe, and methods of control. This underlines the need to guarantee the financial independence of the SAIs. Effective state control also requires that the SAIs have full access to documents and information of interest to them. INTOSAI further recommends that the inspection bodies should be required to respond to the findings of the inspection and report on the follow-up measures.

State control as a matter of public interest

In the public interest, all elements of public finance management should be subject to state control, regardless of whether and how they are included in the general state budget. The supreme state audit institutions carry out their control functions both in the framework of an a priori and an a posteriori inspection.

Preliminary control (*a priori, ex ante*) involves the prior authorisation of public expenditure. As a rule, the audit authority receives the payment order and supporting documentation, verifies that the transaction has been approved, is legal, and that the budget provides the funds for this purpose. As a result of the audit, it either authorises payment or, if the transaction does not comply with these criteria, returns the documents to the auditee for correction. Preliminary inspection by the Supreme Audit Institution has the advantage of preventing damage before it occurs, but it also has the disadvantage of increasing the workload and lack of clarification of responsibilities under public law. The classic ex-ante control is currently carried out primarily by the supreme state audit institutions acting as judicial authorities (courts of auditors). The Belgian Court of Auditors carries out a preliminary financial audit. Payments, except for staff expenditure, are therefore made only after all documents have been examined by the Court. In the absence of approval by the supreme state audit body, payment is made only after this expenditure has been authorised directly by Parliament. If irregularities are discovered, the Court of Auditors submits the documentation to the competent minister and withholds consent to payment[37]. It is important to stress that even within the activities of the individual courts of auditors, the role of this form of state

[35] Cf. L. Bringselius, Efficiency, economy and effectiveness—but what about ethics? Supreme audit institutions at a critical juncture, „Public Money & Management" 2018/38, pp. 105-110.

[36] ISSAI 12 – The Value and Benefits of Supreme Audit Institutions – making a difference to the lives of citizens, http://www.intosai.org/issai-executive-summaries/detail/detail/News/issai-12-the-value-and-benefits-of-supreme-audit-institutions-making-a-difference-to-the-lives-o.html, last accessed on: 05.06.2022.

[37] Cf. L. Giampaolino, La Corte dei conti nell'ordinamento della Repubblica, „Il Foro Italiano" 2010/11, pp. 324-326.

control is steadily diminishing. Preliminary control also takes place in the case of the activity of the Comptroller and Auditor General of Great Britain, who authorises the spending of State funds. By controlling the commissions prepared by the Treasury for the Bank of England, the Bank of England agrees to the opening of budget loans.

Posteriori audit (*a posteriori, ex post*) involves the examination of already completed projects, orders, expenses or financial statements. Ex post control by the supreme audit institution reveals the responsibility of the guilty parties, may also lead to compensation for losses, and is designed to prevent the recurrence of infringements. Posteriori control is divided into the control of correctness (financial) and control of the performance of tasks.

The control of correctness consists in the assessment of how public funds are collected and spent. Within its framework, the controlling institution verifies the financial statements of the entities subject to control, including the examination and evaluation of financial registers, and expresses an opinion on the financial statements and on the financial statements of the government administration as a whole; it controls financial systems and transactions, including the evaluation of compliance with relevant acts of common law, of internal control systems and of the functioning of internal audit; and of the correctness and reliability of administrative decisions taken within the audited entity. As part of the regularity check, the Supreme Audit Institution should also be able to report on any other issues arising from or related to the audit which in its opinion should be disclosed[38].

Task performance control covers not only financial operations, but the full range of public administration activities, including the organisation and management system. The control criteria used (legality, correctness, cost-effectiveness, efficiency, and effectiveness of financial management) are equally important and it is the supreme audit institution that determines the importance it attaches to each of them. Control of the performance of tasks is based on an assessment of the cost-effectiveness of the administrative activities, in accordance with sound administrative principles and practice as well as management policy; the efficiency of the use of human, financial and other resources, including an examination of the IT systems, performance indicators and monitoring systems, and the procedures applied by the audited entities to remedy detected shortcomings; the effectiveness in achieving the objectives of the auditee, as well as an examination of the actual impact as compared to the intended impact39.

In practice, most Supreme State Audit Institutions carry out comprehensive audits, which include both correctness and performance control elements. However, the mandate of the Supreme Audit Institution should always clearly define its powers and responsibilities with regard to performance audits in all areas of government activity, inter alia to facilitate the application of appropriate control standards. Only in the case of Denmark, Finland, the Netherlands, Sweden, and the United Kingdom has it been decided to clearly separate the correctness and task performance checks in the activities of audit institutions. Separate execution of particular types of controls has led, on the one hand, to organizational division and perhaps even differentiation of professional qualifications of particular controllers, while on the other hand, such a solution enables the specialization of control procedures and methodology. The Greek Court of Auditors, which carries out only correctness checks, is also an exception in this context. The Supreme

[38] The Basic Principles of State Control (ISSAI 100), which were developed on the basis of the Lima and Tokyo Declarations, https://www.nik.gov.pl/plik/id,2048.pdf, last accessed on: 6.12.2019.

[39] M. Serowaniec, Konstytucyjne gwarancje niezależności najwyższych organów kontroli państw członkowskich UE [Eng. Constitutional guarantees of independence of the Supreme Audit Institutions of EU Member States], Toruń 2018, pp. 248-249.

Audit Institution carries out a posteriori financial audits of state and local government units, the central bank, and other legal entities governed by public law40.

All state control bodies apply the criteria of legality and reliability when examining and evaluating the activity being audited. In the context of financial control, the objective of the supreme state audit institution is to assess the legality of the executive's actions, in particular the correct accounting and reliable reporting of the implementation of state revenue and expenditure. Thereby, the legislature is assured that it has at its disposal reliable data on state expenditure. In some countries the criterion of legality is interpreted, not only as the legality of the action, but also as compliance with the will and objectives of Parliament (United Kingdom) or established practice (Denmark).

On the other hand, in the United Kingdom and in the countries that remain in the circle of British legal culture, we are dealing with a special kind of control of the performance of tasks - the so-called „Value for Money" study. The aim of this type of control is to effectively manage the resources available. The subject of the research is the quality and value for money of the public services offered to citizens directly by the state and ordered by them from private suppliers and contractors. The task that the Supreme Audit Institution seeks to implement through these audits is the promotion of the highest standards of management and financial reporting, the improvement of public administration, and the enhancement of the quality of public services offered41.

Conclusion

Audit has become a sine qua non element of any management, including state governance. The priorities set in the process of such management in terms of objectives and targets can only be implemented if adequate control of their enforcement is ensured. From this point of view, control is one of the fundamental elements of exercising political power in the state. In addition to the mutual control of the authorities, which remain in the classic Montesque scheme, there is a constant need in theory and practice for specialised state bodies whose primary task is to control the government and administration, oriented towards the proper management of public funds.

BIBLIOGRAPHY

Blume, L., Voigt, S. (2011). Does organizational design of supreme audit institutions matter? A cross-country assessment, *European Journal of Political Economy 27*, 222-224.

Bowerman, M., Humphrey, Ch., Owen, D. (2003). Struggling for supremacy: the case of UK public audit institutions, *Critical Perspectives on Accounting 14*, 4–5.

Brétéché, B., Swarbrick, A. (2017). Developing Effective Working Relationships Between Supreme Audit Institutions and Parliaments. *SIGMA Papers 54*, 21–27.

Bringselius, L. (2018). Efficiency, economy and effectiveness—but what about ethics? Supreme audit institutions at a critical juncture, *Public Money & Management 38*, 105-110.

Dobrowolski, Z. (2005). Kontrola wydatków publicznych w systemie demokracji amerykańskiej, Warszawa: Wydawnictwo Sejmowe.

[40] Ch. Pollitt, H. Summa, Reflexive Watchdogs? How Supreme Audit Institutions Account for themselves, „Public Administration" 1997/2, p. 313–336.

[41] M. Bowerman, Ch. Humphrey, D. Owen, Struggling for supremacy: the case of UK public audit institutions, „Critical Perspectives on Accounting" 2003/14, pp. 4–5.

Dobrowolski, Z. (2009). Ekonomiczna analiza działalności naczelnych organów kontroli państwowej, *Studia Lubuskie 5*, 273-275.

Giampaolino, L. (2010). La Corte dei conti nell'ordinamento della Repubblica, *Il Foro Italiano 11*, 324-326.

Jagielski, J. (2006). *Kontrola administracji publicznej*. Warszawa: Wolters Kluwer.

Mazur, J. (2002). Stosowanie międzynarodowych standardów dotyczących statusu prawnego najwyższego organu kontroli w krajach Unii Europejskiej i w Polsce (próba porównania). Kontrola Państwowa 2 (numer specjalny), 61–71.

Mazur, J. (2004). Kontrola wykonania zadań w najwyższych organach kontroli krajów europejskich, Kontrola Państwowa 4, 50.

Pollitt, Ch., Summa, H. (1997). Reflexive Watchdogs? How Supreme Audit Institutions Account for themselves, *Public Administration 2*, 313–336.

Serowaniec, M. (2018). Konstytucyjne gwarancje niezależności najwyższych organów kontroli państw członkowskich UE, Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa. Stowarzyszenie Wyższej Użyteczności „Dom Organizatora".

Serowaniec, M. (2018). Instytucjonalne gwarancje niezależności najwyższych organów kontroli państwowej. In M. Serowaniec, A. Bień-Kacała, A. Kustra-Rogatka (eds.), Potentia non est nisi da bonum: księga jubileuszowa dedykowana Profesorowi Zbigniewowi Witkowskiemu, Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa. Stowarzyszenie Wyższej Użyteczności „Dom Organizatora".

Sieklucka, M. (2008). Status najwyższych organów kontroli krajów Unii Europejskiej w świetle postanowień Deklaracji z Limy w sprawie zasad kontroli finansów publicznych. Kontrola Państwowa 2, 28–38.

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Jurisdiction of the administrative court in accessibility matters regulated by the Act of 19 July 2019 on ensuring accessibility to persons with special needs.[42]

Abstract
Adapting public space for people with special needs is becoming an important social problem. Accessibility certification relates to entities strictly defined in the Accessibility Act. Entities applying for an availability certificate. These considerations were intended to demonstrate that the legislator, in order to protect the legal interest of the applicant, introduced a judicial control of the notification of refusal to grant an accessibility certificate or of its withdrawal. Thus, the notification was classified as an act subject to judicial review pursuant to Art. 3 § 2 point 4 of the Law on proceedings before administrative courts.

Keywords : Certificate of availability, complaint to the administrative court, availability.

Introduction

In modern society, an extremely important problem is the elimination of barriers that prevent or hinder people with special needs from functioning properly in many dimensions of life. The process of adapting the surrounding reality to the needs of people with special needs is multidimensional. Negative decisions on refusal to issue or withdrawal of the availability certificate may be appealed against to the administrative court. Accessibility certification is carried out by an entity included in the list kept by the minister responsible for regional development (Article 17 (1) of the Accessibility Act) and comes down to checking whether the applicant meets the minimum accessibility conditions specified in Art. 6 of the Accessibility Act.

The presented considerations are intended to demonstrate that the entity applying for the granting of the accessibility certificate has a legal interest in bringing a complaint to the administrative court against the notification that meets the conditions for qualifying it to the acts referred to in Art. 3 § 2 point 4 of the Law on proceedings before administrative courts.[43]

The subject of the appeal to the administrative court.

The control of the administrative court covers the admissibility of submitting a complaint against the notification of refusal to issue or withdrawal of the certificate, issued on the basis of Art. 27 sec. 1 of the Accessibility Act.

The substantive jurisdiction of administrative courts is defined in Art. 3 § 2 of the Law

[42] Journal Of Laws of 2019, item 1696, hereinafter referred to as the Accessibility Act.
[43] The Act of 30 August 2002 - Law on proceedings before administrative courts, Journal Of Laws of 2022, item 329

on proceedings before administrative courts. Particularly noteworthy is the solution adopted in Art. 3 § 2 point 4 of the Law on proceedings before administrative courts, allowing for the lodging of a complaint against acts other than those specified in points 1-3[44] or activities in the field of public administration regarding the rights or obligations resulting from legal provisions, with the exception of acts or actions taken as part of the administrative procedure specified in the Act of 14 June 1960 - Code of Administrative Procedure[45], proceedings specified in sections IV, V and VI of the Act of August 29, 1997 - Tax Ordinance[46], proceedings referred to in section V in chapter 1 of the Act of 16 November 2016 on the National Revenue Administration[47] and proceedings to which the provisions of the Acts referred to apply.

Admissibility to appeal to the administrative court of the notification issued pursuant to Art. 26 of the Act on Accessibility should be considered in connection with the content of Art. 3 § 2 point 4 of the Law on proceedings before administrative courts. The acts and activities specified in Art. 3 § 2 point 4 of the Law on proceedings before administrative courts is characterized by the possibility of influencing the legal situation of an entity, which leads to a legal effect, such as that provided for by a generally applicable law, closely related to a specific activity or act. As a result of taking the action or act referred to in Art. 3 § 2 point 4 of the Law on proceedings before administrative courts, a legally binding element of normative novelty arises in the legal situation of a specific entity, determined by its powers or obligations.[48]

Analysis of the essence of the act or action under Art. 3 § 2 point 4 of the Law on proceedings before administrative courts imposes an obligation to consider the arrangements made by T. Woś regarding the acts or activities indicated in Art. 3 § 2 point 4 of the Law on proceedings before administrative courts. In his opinion, the effective lodging of a complaint against the acts or activities referred to in Art. 3 § 2 point 4 of the Law on proceedings before administrative courts is admissible when the analyzed acts or actions are not decisions or orders issued in the course of jurisdictional, enforcement or security proceedings, which have the possibility of an appeal provided for in Art. 3 § 2 points 1-3 of the Law on proceedings before administrative courts; are of an external nature, which means that they are directed to an entity not subordinated organisationally or officially to the authority issuing the act or taking the action; are addressed to an individual entity, have a public law nature and relate to the rights and obligations resulting from legal provisions.[49] The acts and activities referred

[44] Pursuant to Art. 3 § 2 of the Law on proceedings before administrative courts, the control of the activities of public administration includes adjudicating on complaints against 1) administrative decisions; 2) decisions issued in administrative proceedings, against which there is a complaint or closing proceedings, as well as decisions resolving the matter as to the substance; 3) decisions issued in enforcement and security proceedings against which a complaint may be lodged.

[45] Journal Of Laws of 2021, item 735 with amendments.

[46] Journal Of Laws of 2021, item 1540 with amendments.

[47] Journal Of Laws of 2021, item 422 with amendments.

[48] Cf. M. Bogusz, Pojęcie aktów lub czynności z zakresu administracji publicznej dotyczących stwierdzenia albo uznania uprawnienia lub obowiązku wynikających z przepisów prawa w rozumieniu art. 126 ust. 1 pkt 4 ustawy o NSA, Samorząd Terytorialny 2000/1–2, p. 183; A. Ostapski, Prawna forma działania administracji publicznej właściwa do załatwienia wniosku o przyznanie środków z Państwowego Funduszu Osób Niepełnoprawnych likwidacji barier w komunikowaniu się. Glosa do wyroku NSA z dnia 26 kwietnia 2018 r., I GSK 303/18, Samorząd Terytorialny 2019/7-8, p. 190.

[49] T. Woś, Postępowanie sądowoadministracyjne, Warszawa 2015, p. 69. A similar position was taken by the Provincial Administrative Court in Kraków in the decision of 26 May 2022, file ref. act III SA / Kr 406/22; The Provincial Administrative Court in Gdańsk, in the decision of 28 April 2022, file ref. no. III SA / Gd 13/22, CBOSA.

to in Art. 3 § 2 point 4 of the Law on proceedings before administrative courts do not have a creative function, do not create new legal states, their role and function may be to ascertain the existence of rights or obligations arising ex lege or resulting directly from the provisions of substantive law. However, one of the conditions that must be met by an act or activity within the meaning of Art. 3 § 2 point 4 of the Law on proceedings before administrative courts is that this act or action concerns the obligations or rights of the entity to which it is directed.[50]

On the other hand, K. Klonowski stated that the acts or activities specified in Art. 3 § 2 point 4 of the Law on proceedings before administrative courts is a unilateral legal act of a public administration body performed within the scope of its powers with the use of administrative authority, aimed at producing a legal effect directly or indirectly, which is expressed in the establishment, amendment or cancellation of an administrative-legal relationship. Actual acts do not have to produce such a result, although they may, if it is related to the use of direct physical coercion and is intended to enforce obligations (but not those under administrative enforcement proceedings) or to withdraw or limit the rights of an individual, or preventing the exercise of their rights.[51]

In the resolution of 4 February 2008, file ref. no. I OPS 3/07, the Supreme Administrative Court assumed that it is possible to speak about the act or action within the meaning of Art. 3 § 2 point 4 of the Law on proceedings before administrative courts, against which a complaint may be lodged with an administrative court, when this act (action) is taken in an individual case, it is addressed to a designated administered entity, it concerns the right or obligation of this entity, while the right or obligation to which the act (action) relates is specified in a provision of generally applicable law.[52]

B. Adamiak indicated three conditions, the cumulative fulfillment of which determines the effective lodging of a complaint against acts or actions specified in Art. 3 § 2 point 4 of the Law on proceedings before administrative courts. She pointed out that the acts or activities specified in Art. 3 § 2 point 4 of the Law on proceedings before administrative courts are not decisions or rulings, they are acts or activities in the field of public administration and relate to rights or obligations resulting from legal provisions. The premise referring to the definition of rights or obligations in the content of an act or action, which have their source in a legal

[50] Decision of the Supreme Administrative Court on 18 January 2022, file ref. no.II GSK 2566/21, CBOSA.

[51] K. Klonowski, Kontrola sądowoadministracyjna „innych aktów lub czynności z zakresu administracji publicznej dotyczących uprawnień lub obowiązków wynikających z przepisów prawa" z art. 3 § 2 pkt 4 p.s.a., Przegląd Prawa Publicznego 2012/ 5, sp. 46.

[52] ONSAiWSA 2008/2/21. In the justification of the resolution in question, it was assumed that, first of all, this provision refers to acts or activities in the field of public administration other than decisions and orders issued in administrative jurisdictional proceedings. This seems to clearly indicate that these are individual cases, as in the case of matters settled by way of an administrative decision, only that these cases are not adjudicated by an administrative decision, but acts or actions may be taken concerning specific addressees. As a decision or an administrative order is addressed to specific entities, the act or action referred to in Art. 3 § 2 point 4, is directed by the public administration body also to specific entities. It can be concluded from the discussed provision that the legislator's will was to control by the administrative court those legal forms of public administration activities that may be and are taken by public administration bodies in relation to administered entities, in cases for which the settlement is not provided in the form of a decision or an administrative order. An act or action is taken in an individual case in the sense that its subject is a specific and individualized administrative relationship (right or obligation), the source of which is a provision of universally binding law. Secondly, from the provision of Art. 3 § 2 point 4 it follows that the act or action must relate to a right or obligation under the law. This means that it is necessary to relate such an act or action to a provision of generally applicable law, which specifies the right or obligation of a specific addressee. In other words, there must be a relationship between a legal provision that defines a right or obligation and an act or action that relates to a right or obligation defined in such a way. The right or obligation results from a legal provision, if their creation does not require specification by way of an administrative decision.

provision, concerns the forms of action of an organ in which there is a double specificity, which is realized by an indication of an individual right or obligation and its individually specified addressee.[53]

The above presented findings of the doctrine and case law relating to the acts or activities referred to in Art. 3 § 2 point 4 of the Law on proceedings before administrative courts clearly show the convergence of positions in terms of determining their nature.

A notification issued pursuant to Art. 27 sec. 1 of the Act on Accessibility shows all the features of the act or action of the authority referred to in Art. 3 § 2 point 4 of the Law on proceedings before administrative courts, appealable to the administrative court. The act concluding the procedure for the certification of accessibility was defined by the legislator as a notification, thus excluding the termination of the certification of accessibility in the form of an administrative decision or an order.[54] The notification is issued in an individual case, the subject of which is the refusal to issue an accessibility certificate or the withdrawal of the accessibility certificate, it is addressed to the entity applying for an accessibility certificate or to the entity that was previously issued with an accessibility certificate, but there were premises resulting in the withdrawal of the certificate. Finally, in the content of the notification, the entity performing the certification of accessibility decides authoritatively on the refusal to grant the applicant the right or on the withdrawal of the previously issued accessibility certificate.

In connection with the above, the notification about the refusal to issue an accessibility certificate or about the withdrawal of the accessibility certificate meets the conditions that allow it to qualify for the catalog of acts or activities appealable to the administrative court referred to in Art. 3 § 2 point 4 of the Law on proceedings before administrative courts.

Certification procedure.

The issuance of the notification referred to in Art. 27 sec. 1 of the Accessibility Act was preceded by an accessibility certification procedure. Certification of accessibility is an optional instrument, addressed only to private entities and non-governmental organizations (public entities do not need a certificate - because they are fully obliged by this Act), and its purpose is to confirm, based on an accessibility audit, whether a given entity meets the minimum requirements, specified in Art. 6 of the Accessibility Act[55].

The certification procedure is addressed to entrepreneurs and non-governmental organizations referred to in Art. 3 sec. 2 of the Act of 24 April 2003 on Public Benefit and Volunteer Work[56] (Art. 15 (1) in conjunction with Art. 5 (1) of the Accessibility Act). The procedure is aimed at confirming whether the entities applying for an accessibility certificate strive in their business to ensure accessibility to people with special needs (Article 15 (1) of the Accessibility Act). Introducing in Art. 15 sec. 1 of the Act on Accessibility, a specific catalog of entities authorized to apply for an accessibility certificate, the legislator did not include

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[53] B. Adamiak, Z problematyki właściwości sądów administracyjnych (art. 3 § 2 pkt 4 p.p.s.a.), Zeszyty Naukowe Sądownictwa Administracyjnego 2006/ 2, p. 9 and next.

[54] See R. Mędrzycki, Komentarz do art. 27, in:) Ustawa o zapewnieniu dostępności osobom ze szczególnymi potrzebami. Komentarz, Ed. K. Roszewska, LEX/el 2021.

[55] Justification to the draft act of 19 July 2019 on ensuring accessibility to people with special needs, Sejm Document No. 3579, hereinafter referred to as Sejm Document No. 3579.

[56] Journal Of Laws of 2019, item 688 with amendments.

public entities in the above-mentioned catalog due to the fact that they are obliged to ensure accessibility to people with special needs. According to Art. 1 of the Act on Accessibility, the Act specifies the obligations of public entities in terms of ensuring accessibility to people with special needs. The certification procedure is to confirm, on the basis of an availability audit, whether a given entity meets the minimum requirements referred to in Art. 6 of this Act[57].[58]

Entities authorized to perform certification are only entities with organizational and human resources and tools allowing for the proper conduct of certification, selected by the minister responsible for regional development after an open recruitment (Article 15 (3) of the Accessibility Act). Detailed requirements for entities authorized to perform certification are specified in the Regulation of the Minister of Finance, Funds and Regional Policy of 4 March 2021 on the detailed requirements to be met by entities certifying accessibility, the template of the application for an availability certificate and the template of the availability certificate.[59] In the justification to the draft act on accessibility it was noted that the provisions on certification planned in the act ensure, on the one hand, ensure a transparent system of selecting certifying entities, and, on the other hand, limit the audit and certification service only to entities with potential in this respect, which will be verified by appropriate a group of experts. The above will serve to professionalize this type of services, which will still be provided on a commercial basis (taking into account the maximum cost specified in the Act), but in a standardized manner and in line with the requirements set out by the legislator.[60]

The concept of human resources enabling the entity to conduct certification should be understood as the possibility for the certifying entity to appoint a team consisting of at least: one person with knowledge in the field of architectural accessibility, one person with competences and knowledge in the field of digital accessibility, one person with competences and knowledge in in terms of communication and information accessibility, one person with a disability of the locomotor system, moving in a wheelchair, classified as severe or moderate, holding a certificate with the symbol 05-R or another certificate referred to in Art. 1 of the Act of 27 August 1997 on Vocational and Social Rehabilitation and Employment of Disabled Persons[61], confirming impairment of the musculoskeletal system, one person with eye disease, classified as severe or moderate, holding a certificate with the symbol 04-O or another certificate referred to in Art. 1 of the Act of 27 August 1997 on Vocational and Social Rehabilitation and Employment of Disabled Persons, confirming a visual impairment, one person with a hearing impairment, severely or moderately disabled, holding a certificate with the symbol 03-L or another certificate, referred to in Art. 1 of the Act of 27 August 1997 on Vocational and Social Rehabilitation and Employment of Disabled People, confirming hearing impairment, using Polish sign language (§ 2 of the Regulation of 4 March 2021). At the same time, § 2 of the regulation of 4 March 2021 indicates that the qualifications of team members with competences and knowledge in the field of architectural accessibility, digital accessibility and information and communication accessibility must be properly confirmed.

The broadly defined composition of the entity performing the certification is a guarantee

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[57] Art. 6 of the Accessibility Act specifies the minimum requirements to ensure accessibility to people with special needs in terms of: 1) architectural accessibility, 2) digital accessibility, 3) information and communication accessibility..

[58] Sejm Document No. 3579.

[59] Journal Of Laws of 2021, item 412, hereinafter referred to as the regulation of 4 March 2021.

[60] Sejm Document No. 3579.

[61] Journal Of Laws of 2020, item 426 with amendments.

of reliable examination of the application for granting the accessibility certificate, taking into account the expectations of people with special needs, as well as determining whether the entity has ceased to provide the minimum availability, which leads to the withdrawal of the accessibility certificate.

The certification procedure has been divided into three stages including 1) verification of compliance with the minimum requirements referred to in Art. 6, by conducting an accessibility audit, 2) formulating detailed recommendations for improving the accessibility of people with special needs by a given entity, 3) issuing an accessibility certificate (Article 15 (2) of the Accessibility Act). However, if the entity performing the certification negatively verifies the applicant's compliance with the minimum requirements in terms of accessibility specified in Art. 6 of the Accessibility Act, will notify the applicant of the refusal to grant an accessibility certificate.

The certification procedure consists in checking by the certifying entity whether the applicant meets the minimum accessibility requirements specified in Art. 6 of the Accessibility Act.[62] At the same time, the certifying entity uses the accessibility audit methodology to verify that the applicant meets the minimum accessibility requirements specified in Art. 6 of the Accessibility Act and checklists posted on the website of the office supporting the minister responsible for regional development (§ 3 point 2 of the ordinance of 4 March 2021). However, in the case of revocation proceedings, the certifying entity uses the methodology of conducting accessibility checks in entities that have been issued with an accessibility certificate (§ 3 point 3 of the Regulation of 4 March 2021).

Therefore, the correctness of the determination by the certifying entity whether the applicant meets the minimum accessibility conditions specified in Art. 6 of the Accessibility Act is subject to judicial control.

Legal interest as a condition for the admissibility of a complaint to an administrative court. The legal interest of the complainant is the prerequisite for the admissibility of an effective lodging of a complaint to the administrative court. There is no doubt that an entity that has been refused an accessibility certificate (Article 23 (2) of the Accessibility Act) or the certificate of accessibility has been revoked (Article 26 (1) of the Accessibility Act) is entitled to file

[62] Art. 6. The minimum requirements to ensure accessibility to people with special needs include: 1) in terms of architectural accessibility: a) providing barrier-free horizontal and vertical communication spaces of buildings, b) installation of devices or the use of technical measures and architectural solutions in the building, which allow access to all rooms, with the exception of technical rooms, c) provide information on the layout of rooms in the building, at least visually and in a tactile or voice manner, d) provide access to the building to a person using an assistance dog referred to in Art. 2 point 11 of the Act of 27 August 1997 on vocational and social rehabilitation and employment of disabled people (Journal of Laws of 2020, items 426, 568 and 875), e) providing people with special needs with the possibility of evacuating or saving them in a different way; 2) in the field of digital accessibility - the requirements set out in the Act of 4 April 2019 on digital accessibility of websites and mobile applications of public entities; 3) in terms of information and communication availability: a) service with the use of communication support measures referred to in Art. 3 point 5 of the Act of 19 August 2011 on sign language and other means of communication (Journal of Laws of 2017, item 1824), or by using online remote access to the interpreter service through websites and applications, b) installation of devices or other technical means to support the hearing impaired, in particular induction loops, FM systems or devices based on other technologies aimed at supporting hearing, c) providing information on the entity's website about the scope of its activities - in the form of an electronic file containing machine-readable text, recordings of content in Polish sign language and information in easy-to-read text, d) ensuring, at the request of a person with special needs, communication with a public entity in the form specified in that request.

a complaint against the notification. In connection with the above, the existence of a legal interest is determined in relation to the entity that has been refused an accessibility certificate (Article 23 (2) of the Accessibility Act) or the certificate of accessibility has been withdrawn (Article 26 (1) of the Accessibility Act).

The concept of a legal interest as a condition for an effective lodging of a complaint to an administrative court has been applied in Art. 50 § 1 of the Law on proceedings before administrative courts, because anyone with a legal interest in it is entitled to file a complaint.

The concept of legal interest, used in Art. 50 § 1 of the Law on proceedings before administrative courts, objective in nature, has its source in the provisions of substantive, sometimes procedural and systemic law. The essence of a legal interest should be determined on the basis of its relationship with a specific legal norm. Thus, the existence of a legal interest justifies the existence of a legal provision and a legal norm reconstructed from it, which is the basis for the rights and obligations of a specific entity.[63] Thus, it differs from the concept of a legal interest used in Art. 28 of the Code of Administrative Procedure, relating mainly to the rights resulting from the norm of substantive law.[64] Having a legal interest and thus the right to bring a complaint to a court should be understood only as an objective, current, actually existing need for legal protection.[65]

The legal interest in bringing a complaint to an administrative court may be treated as an interest in bringing about the verification of an administrative decision or other act or action in the field of public administration, which is the subject of the complaint, by that court.[66] The legal interest belongs to the category of substantive law, and therefore an obligation to establish it arises in the course of court proceedings.[67] In the course of administrative court proceedings, it is necessary to establish the existence of a norm of substantive law, on the basis of which a specific person may request the specification of rights or obligations or request the inspection of a specific act or action in order to protect its sphere of rights and obligations against violations and bring it to a state consistent with the law. The criterion of legal interest means that an act, action or inaction of an administrative authority must relate to the legal interest of the complainant, which must be own, individual and based on a specific provision of generally applicable law. To have a legal interest is to indicate a legal provision authorizing a given entity to make a specific request against a public administration body.[68]

During the certification procedure, the applicant entity exercises its right to obtain confirmation in the form of an availability certificate of meeting the minimum conditions ensuring accessibility to people with special needs. Being assessed in order to obtain an accessibility certificate should not be treated as an obligation of the entity which, pursuant to the provisions of the Act on Accessibility, is not obliged to ensure accessibility to people with special needs. Applying for an accessibility certificate should be considered in the category of entity's rights, resulting from generally applicable provisions of law.[69] Therefore, in the event of failure to

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[63] Judgments of the Supreme Administrative Court of 31 March 2022, II GSK 41/22, of April 22, 2021, II OSK 2044/18, CBOSA.

[64] SAC judgment of 20 April 2021, III OSK 332/21, CBOSA.

[65] SAC judgment of 25 January 2022, II OSK 1236/19, CBOSA.

[66] Judgment of the Provincial Administrative Court in Gdańsk of 17 June 2020, II SA / Gd 241/20, CBOSA.

[67] See judgment of the Provincial Administrative Court in Szczecin of 15 April 2021, II SA / Sz 1048/20, CBOSA.

[68] Judgment of the Supreme Administrative Court of 21 January 2021, I OSK 1042/20, CBOSA.

[69] These considerations do not focus on the motives of the entity applying for the certificate of accessibility.

meet the criteria justifying the granting of an accessibility certificate, the applicant entity has a legal interest justifying the submission of a complaint to the administrative court pursuant to Art. 27 sec. 1 point 1 of the Act on Accessibility. The procedural situation of the entity against which the notification of withdrawal of the availability certificate was issued pursuant to Art. 23 of the Accessibility Act is similar. An entity whose availability certificate has been withdrawn may, in the course of administrative court proceedings, request that the legality of the proceedings is examined, which ended with a notification of withdrawal of the availability certificate. In this case, the court and administrative proceedings will concern the right of the entity whose accessibility certificate has been withdrawn to use the document confirming compliance with the minimum accessibility requirements.

The consequence of lodging a complaint to the administrative court against the notification issued pursuant to Art. 27 sec. 1 of the Accessibility Act, there is a judicial control of the legality of the proceedings, as a result of which a party is deprived of the possibility of using the accessibility certificate.

Conclusion

The legislator, striving to exercise the right to a fair trial, explicitly provided for the notification specified in Art. 27 sec. 1 of the Act on the Accessibility of Control of an Administrative Court.

The above considerations have shown that the notification of the refusal to grant the availability certificate or the withdrawal of the availability certificate is an act subject to control by the administrative court pursuant to Art. 3 § 2 point 4 of the Law on proceedings before administrative courts. It meets the criteria set out in jurisprudence and doctrine, allowing for an act or action to be subject to judicial review.

Judicial control of the notification referred to in Art. 27 sec. 1 of the Accessibility Act comes down to examining the legality of the certifying entity's operations in determining whether the applicant meets the minimum criteria for ensuring accessibility to people with special needs.

BIBLIOGRAPHY

Legal acts:

The Act of 30 August 2002 - Law on proceedings before administrative courts, Journal Of Laws of 2022, item 329

Act of 14 June 1960 - Code of Administrative Procedure (Journal Of Laws of 2021, item 735 with amendments).

Act of August 29, 1997 - Tax Ordinance (Journal Of Laws of 2021, item 1540 with amendments).

Act of 16 November 2016 on the National Revenue Administration (Journal Of Laws of 2021, item 422 with amendments)

Regulation of the Minister of Finance, Funds and Regional Policy of March 4, 2021 on the detailed requirements to be met by entities that certify accessibility, the template of the application for an accessibility certificate and the template of the certificate (Journal Of Laws of 2021, item 412, hereinafter referred to as the regulation of 4 March 2021)

Announcement of the Marshal of the Sejm of the Republic of Poland of 15 March 2019 on the publication of the consolidated text of the Act on Public Benefit and Volunteer Work (Journal Of Laws of 2019, item 688 with amendments)

Announcement of the Marshal of the Sejm of the Republic of Poland of February 13, 2020 on the announcement of the uniform text of the Act on Vocational and Social Rehabilitation and Employment of Disabled Persons (Journal Of Laws of 2020, item 426 with amendments).
Act of 19 July 2019 on ensuring accessibility to persons with special needs (Journal Of Laws of 2019, item 1696)
Act of 27 August 1997 on vocational and social rehabilitation and employment of disabled people (Journal of Laws of 2020, items 426, 568 and 875)
Act of 4 April 2019 on digital accessibility of websites and mobile applications of public entities
Act of 19 August 2011 on sign language and other means of communication (Journal of Laws of 2017, item 1824)

Judgements:
Provincial Administrative Court in Kraków in the decision of 26 May 2022, file ref. act III SA / Kr 406/22;
The Provincial Administrative Court in Gdańsk, in the decision of 28 April 2022, file ref. no. III SA / Gd 13/22, CBOSA.
Decision of the Supreme Administrative Court on 18 January 2022, file ref. no.II GSK 2566/21, CBOSA.
ONSAiWSA 2008/2/21
Justification to the draft act of 19 July 2019 on ensuring accessibility to people with special needs, Sejm
Judgments of the Supreme Administrative Court of 31 March 2022, II GSK 41/22, of April 22, 2021, II OSK 2044/18, CBOSA.
SAC judgment of 20 April 2021, III OSK 332/21, CBOSA.
SAC judgment of 25 January 2022, II OSK 1236/19, CBOSA.
Judgment of the Provincial Administrative Court in Gdańsk of 17 June 2020, II SA / Gd 241/20, CBOSA.
judgment of the Provincial Administrative Court in Szczecin of 15 April 2021, II SA / Sz 1048/20, CBOSA.
Judgment of the Supreme Administrative Court of 21 January 2021, I OSK 1042/20, CBOSA.

Literature:
Adamiak B., Z problematyki właściwości sądów administracyjnych (art. 3 § 2 pkt 4 p.p.s.a.), Zeszyty Naukowe Sądownictwa Administracyjnego 2006/ 2, p. 9 and next.
Bogusz M., Pojęcie aktów lub czynności z zakresu administracji publicznej dotyczących stwierdzenia albo uznania uprawnienia lub obowiązku wynikających z przepisów prawa w rozumieniu art. 126 ust. 1 pkt 4 ustawy o NSA, Samorząd Terytorialny 2000/1–2, p. 183;
Klonowski K., Kontrola sądowoadministracyjna „innych aktów lub czynności z zakresu administracji publicznej dotyczących uprawnień lub obowiązków wynikających z przepisów prawa" z art. 3 § 2 pkt 4 p.s.a., Przegląd Prawa Publicznego 2012/ 5, sp. 46.
Mędrzycki R., Komentarz do art. 27, in:) Ustawa o zapewnieniu dostępności osobom ze szczególnymi potrzebami. Komentarz, Ed. K. Roszewska, LEX/el 2021.
Ostapski A., Prawna forma działania administracji publicznej właściwa do załatwienia wniosku o przyznanie środków z Państwowego Funduszu Osób Niepełnoprawnych likwidacji barier w komunikowaniu się. Glosa do wyroku NSA z dnia 26 kwietnia 2018 r., I GSK 303/18, Samorząd Terytorialny 2019/7-8, p. 190.
Woś T., Postępowanie sądowoadministracyjne, Warszawa 2015, p. 69.

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Appointment of a temporary guardian by the Polish court for a minor citizen of Ukraine

Abstract

In connection with the Russian invasion of Ukraine in February 2022, the Polish legislator, by the Act on Assistance to Ukrainian Citizens in Connection with the Armed Conflict in the Territory of that State, introduced a new institution, previously unknown to Polish law, as a temporary guardian for a minor Ukrainian citizen. The article presents the institution of a temporary guardian and its first application in judicial practice. First, the concept of „citizen of Ukraine" within the meaning of the Act is explained. The next considerations concern the procedure of appointing a temporary guardian. Then, the actions taken by the court when establishing care are discussed. The next issues concern the requirements for candidates for the guardianship, as well as the tasks imposed on them by the Polish legislator. The final part of the article includes the results of studies of the analysis of court cases in the Warmian-Masurian Voivodeship (Poland), in which the courts have appointed a temporary guardian. The considerations were completed with a summary and conclusions.

Keywords: minors, guardianship, temporary guardian, appointment of a guardian, citizen of Ukraine

Introduction

The invasion of the territory of Ukraine by the Russian Federation in February 2022 resulted in the arrival of war refugees on the territory of Poland. Among the refugees, women and children were the most numerous group. Some families ran away in a hurry, often taking not only their own children, but also the children of friends or neighbors. Some Ukrainian children fled to Poland with their aunts, grandmothers or older siblings. There were also cases where some parents brought children to the Ukrainian-Polish border and asked other Ukrainians (often strangers) to take their children to the Polish side and take care of them. Parents of such children were coming back to fight for the independence of Ukraine. After crossing the border with Poland, unaccompanied children had to be cared for in Poland. Due to this situation, the Polish legislator created the possibility of regulating the legal situation of persons under 18 years of age. He introduced the institution of a temporary guardian by the Act of 12 March 2022 on helping Ukrainian citizens in connection with an armed conflict in the territory of that state.

Definition of the term „citizen of Ukraine"

In accordance with the act, we can distinguish 3 cases:

Ukrainian citizens who came to the territory of the Republic of Poland from the territory

of Ukraine in connection with hostilities conducted on the territory of that state;

Ukrainian citizens who have a Pole's Card, who, together with their closest family, came to the territory of the Republic of Poland due to these hostilities;

a spouse of a Ukrainian citizen who does not have Ukrainian citizenship, provided that he or she came to the territory of the Republic of Poland from the territory of Ukraine in connection with hostilities conducted on the territory of that state and is not a Polish citizen or a citizen of a Member State of the European Union other than the Republic of Poland.

Proceedings for the appointment of a temporary guardian

Ukrainian minors are admitted to Poland on the basis of a passport, birth certificate, and even without documents. In the register kept by him, the Border Guard Headquarters records the personal data of the actual guardian of the child with whom the child crossed the border. Immediately, if an unaccompanied minor appears in Poland, the procedure of appointing a temporary guardian will be initiated immediately.

Proceedings for the appointment of a temporary guardian may be initiated upon request or ex officio. The application to initiate the procedure includes:

1) designation of the court to which it is addressed;
2) name and surname or name of the applicant, his address of residence or stay or seat, telephone number or e-mail address;
3) name and surname of the minor, his address of residence or stay;
4) names and surnames of the parents and the maiden name of the minor's mother or information that they are unknown;
5) gender of the minor;
6) date and place of birth of the minor;
7) the type, series and number of the document constituting the basis for the minor crossing the border, if any;
8) name and surname of the candidate for a temporary guardian, his date of birth, address of residence or stay as well as the series and number of the identity document or information about the candidate's absence;
9) name and surname as well as the address of residence or stay of the person exercising actual custody of the minor, if the minor is not under the custody of a candidate for a temporary guardian;
10) the basis of the application.

The persons entitled to submit the application are:

1) Border Guard;
2) commune head, mayor, city president, staroste, marshal of a voivodeship;
3) a public prosecutor;
4) Police;
5) heads of social assistance organizational units referred to in art. 6 point 5 of the Act of 12 March 2004 on social assistance (Journal of Laws of 2021, items 2268 and 2270 and of 2022, items 1 and 66);
6) representatives of international or non-governmental organizations providing assistance to foreigners;
7) the person exercising actual custody of the minor;
8) the person who took the actual custody of the minor after the minor enters the territory of the Republic of Poland and exercises it on the day of submitting the application;
9) other persons or entities as part of their tasks.

Actions taken by the court

A temporary guardian is established by the guardianship court having jurisdiction over the minor's place of residence. In a case for the appointment of a temporary guardian, the court decides in non-contentious proceedings after the hearing.

During the hearing, the court hears 3 entities:

a) candidate for temporary guardianship
b) the person exercising actual custody of the minor
c) listen to the minor, if his mental development, state of health and degree of maturity allow it, taking into account his reasonable wishes as far as possible.

In exceptional situations, what the legislator calls „particularly justified cases", the court may limit the taking of evidence to documentary evidence only and hear the case in closed session. cases do not raise doubts as to the proper performance of this care and the minor's welfare does not oppose it. The court examines the case immediately, not later than within 3 days from the date of receipt of the application by the court or obtaining information about the need to appoint a temporary guardian. The court appoints a temporary guardian in the form of an order. The order to establish a temporary guardian is effective and enforceable upon its announcement, and if there was no announcement, upon its release. The court serves a copy of the decision:

a) participants in the proceedings,
b) organizational unit indicated by the commune head, mayor, city president competent for the minor's place of stay.
c) the head of the poviat family support center competent for the minor's place of residence.

In the proceedings for the appointment of a temporary guardian, no fees are collected and the expenses are borne by the State Treasury.

Who can become a temporary guardian?

When the court appoints a temporary guardian, it is solely guided by the best interests of the child. The legislator recommends that it should be established primarily from among relatives, relatives or other persons who guarantee the proper performance of the duties of a guardian. In addition, in this case, the family and guardianship code applies, according to which there are negative subjective premises.

Firstly, a guardian may not be a person who does not have full legal capacity or who was deprived of public rights.

Secondly, moreover, a guardian of a minor may not be a person deprived of parental authority or convicted of an offence against sexual freedom or morality, or of a wilful offence with violence against a person or offence committed to the detriment of or in collaboration with a minor, or a person who has been prohibited from engaging in activities associated with upbringing, medical treatment, education or care of minors, or who has been obliged to avoid specific places or environments, prohibited from contacting specific persons or prohibited from leaving a specific place of residence without court consent.

Thirdly, a guardian may not be a person of whom it is reasonable to expect will not duly perform the duties of a guardian.

If there are no the above-mentioned persons, then the candidate for a guardian is indicated within 48 hours, at the request of the court, by the organizational unit indicated by the commune head, mayor, city president competent for the minor's place of stay. In addition, this unit is required to send a written consent of the candidate for a guardian to appoint him a temporary guardian. If the application indicates a candidate for a temporary guardian, the

degree of relationship or affinity of the candidate for a temporary guardian with a minor or information about the lack of relationship or affinity, and in the case of a person actually custody of a minor - the date from which custody is exercised. Additionally, a candidate for a temporary guardian makes a declaration that there are no negative subjective premises to him.

Moreover, the Polish legislator sets out 3 important rules for appointing a temporary guardian:

The same person may be appointed a temporary guardian for more than one minor, if there is no conflict between the interests of minors;

The same person is appointed as temporary guardian for siblings, if possible;

If the minors, prior to their arrival on the territory of the Republic of Poland, were placed in foster custody on the territory of Ukraine and came together with the person exercising this custody, the court appoints that person as a temporary guardian for all these minors.

Temporary guardian tasks

A temporary guardian towards a minor Ukrainian citizen has three basic opinions:

a) represents him
b) takes care of him
c) takes care of his property

In addition, the temporary guardian is authorized to represent the minor and take care of his person and property. However, he should obtain the consent of the guardianship court in all important cases concerning the minor's person or property. The temporary guardian is supervised in the exercise of the rights and obligations of the person performing the function by:

a) a social welfare center
b) or a social services center
c) or other organizational unit indicated by the commune head, mayor, city president competent for the minor's place of stay.

The Polish legislator also took care of the proper functioning of the temporary guardian if he needed specialist support. Pursuant to the Act, the guardian has the right to:

a) to free legal assistance
b) for free civic counseling
c) for psychological help
d) to organizational assistance consisting, in particular, in providing assistance from volunteers, translators or assistance in dealing with official matters.

If the temporary guardian looks after more than 15 children, the head of the poviat family support center employs, on the basis of an employment contract or contract of mandate, for at least 40 hours a week for each group of 15 minors, counted from 16. a minor who is being cared for by a temporary guardian, a person to help in caring for it. The head of the poviat family support center, taking into account the age of minors or their health condition, may employ an additional person to help in providing care. The poviat may commission the employment of a person to help non-governmental organizations operating in the field of family support, foster care or social assistance, or legal persons and organizational units operating on the basis of the provisions on the relationship of the State to the Catholic Church in the Republic of Poland, the relationship of the State to other churches and religious associations, and on the guarantee of freedom of conscience and religion, if their statutory goals include activities in the field of supporting the family and the system of foster care or social assistance.

Establishing a temporary guardian in court practice in the Warmian-Masurian Voivodeship

For the purposes of the article, an examination was carried out in district courts, in family and juvenile divisions in the Warmian-Masurian Voivodeship. The study covered 10 district

courts from the Warmian-Masurian Voivodeship (Bartoszyce, Biskupiec, Giżycko, Kętrzyn, Lidzbark Warmiński, Mrągowo, Nidzica, Szczytno, Pisz and Olsztyn). As a result of the research, it was established:

As of July 4, 2022, the district court in Nidzica received 12 cases for the appointment of a temporary guardian. Each case was initiated upon request.

As of June 29, 2022, the district court in Szczytno received 38 cases for the appointment of a temporary guardian. As stated, 3 cases were discontinued, 3 cases were dismissed, 32 cases were substantively settled, including 29 cases a guardian was appointed, and 3 cases a guardian was changed. All cases were brought in from the candidate's guardian application.

As of June 29, 2022, the district court in Biskupiec received 5 applications for the appointment of a temporary guardian. All requests were initiated upon request. The anonymised documentation attached by the court shows that some Ukrainian minors had a passport at the time of crossing the border, others only had a copy of their birth certificate. In most cases, the temporary guardian was a citizen of Ukraine, in one case a citizen of the Republic of Poland. In one case, the court dismissed the application.

As of June 24, 2022, the district court in Giżycko received 42 applications for the appointment of a temporary guardian. All cases were initiated upon request.

As of June 28, 2022, 6 applications for the appointment of a temporary guardian were submitted to the district court in Lidzbark Warmiński. All requests were initiated upon request. Based on the information obtained, it was established that in all cases the court issued a decision in closed session. In one case, the court appointed the minor's grandmother as a temporary guardian.

As of June 28, 2022, the district court in Bartoszyce received 14 applications for the appointment of a temporary guardian. The attached material shows that 10 cases were instituted at the request (two of which were initiated by the Director of the Municipal Social Assistance Center), while 4 cases were ex officio.

As of June 28, 2022, the district court in Mrągowo received 35 applications for the appointment of a temporary guardian. The attached material shows that 34 cases were initiated at the request, while 1 case was ex officio (at the request of the Registry Office). Moreover, it was established that 5 cases were held during a hearing and the remaining 30 were held in camera. The court indicated as temporary custodians: aunt (4), a stranger (2), grandmother (3), maternal grandmother (5), paternal grandmother (6), mother's sister (1), minor's sister (9), stepbrother (1), cousin of the minor (1), cousin (2). In 6 cases, the application was submitted by the Director of the Municipal Assistance Center. A phenomenon worth noting, which cannot be said about other courts, the Mrągowo court from March 31, 2022, in its decisions on the appointment of a temporary guardian, additionally extended the powers to: representing the minor and making all decisions in medical matters (including treatment, diagnostics, research, hospital stays, pharmacology, rehabilitation treatments), therapy and education (including diagnosis, participation in therapies, decisions about school and out-of-school activities) and in the field of recreational trips.

As of June 15, 2022, the district court in Olsztyn received 175 applications for the appointment of a temporary guardian. All cases were initiated upon request. On the basis of partially shared research material, it was found that the guardian was the minor's aunt, the minor's sister, and the grandmother.

Summary

The actions of the Polish legislator to support minor Ukrainian citizens should be assessed positively. However, the act drafted under time pressure requires elaboration and supplementation. In practice, bothering issues appeared that are not regulated by the legislator. One of them is the supervision of the temporary caregiver. Pursuant to Art. 25 sec. 3 of the Act. Supervision over the implementation of the rights and obligations of a temporary guardian is exercised by a social welfare center or a social service center or other organizational unit indicated by the head of the commune, mayor or city president competent for the minor's place of stay. However, the legislator did not indicate the method of carrying out the control or the scope of these activities. Taking into account a similar institution, ie foster care, solutions similar to the supervision of foster care should be adopted. As a demand, the legislator may supplement the provision of Art. 25 sec. 3 with the following wording: The controlling entity has the right to:

1) request information, documents and data necessary to exercise control;
2) access during the day, including at night - in the event of a threat to the health or life of the child, to the premises and rooms of the controlled family;
3) inspecting the facilities and rooms where the controlled family is staying;
5) requests from the temporary guardian to provide information in the oral or written form in the scope of the conducted control;
6) observation of children placed in custody;
7) conducting individual interviews with children placed in custody, including seeking the opinion of children, taking into account their age, intellectual abilities and the degree of cognitive maturity.

Similarly, the legislator does not specify what it means to ensure supervision support by poviat family support centers (Article 25 (3a)). Taking into account the tasks of the poviat family support center, it can be assumed that this support may consist in periodical assessment of the situation of children in care and assessment of the family in which they stay. Help in assessing the situation of children may be provided when the human resources of social welfare centers, social services center or organizational unit are insufficient.

As for the summary of the conducted research, it should be noted that the data come from northern Poland, 2.5 months after the Russian invasion of Ukraine. To a large extent, applications are submitted by persons related to the minor. Moreover, it should be pointed out that the District Court in Mrągowo adjudicates exemplary decisions. For some time, this court has ex officio extended the powers of a temporary guardian to include medical, educational and recreational issues. As it should be presumed, this court, after issuing the decisions on the appointment of a temporary guardian, faced the problem of extending the scope of these rights by already established guardians. The actions of the court should be exemplary. Extending the catalog of temporary guardian's rights already at the stage of establishing care guarantees the stability of caring for minors, without the need to obtain consents for other activities.

BIBLIOGRAPHY

Act of March 12, 2022 on assistance to Ukrainian citizens in connection with an armed conflict in the territory of that state (Journal of Laws 2022 r. pos. 583).
Act of 25 February 1964 Family and Guardianship Code (Journal of Laws 2020, pos. 1359).
Sukiennik A., Regulations concerning minor children from Ukraine coming to Poland due to an armed conflict, LEX/el. 2022.
Reference number of court cases:
Information from the District Court in Nidzica A-063-22/22.
Information from the District Court in Szczytno A-41-27/22.
Information from the District Court in Biskupiec A-063-19/22.
Information from the District Court in Giżycko A-067-24/22.
Information from the District Court in Lidzbark Warmiński A-063-18/22
Information from the District Court in Bartoszyce A.0162.37.2022
Information from the District Court in Mrągowo A-063-12/22
E-mail information from the District Court in Olsztyn on June 24, 2022 from Anna Wierzbicka-Welanc, Deputy Head of the Secretariat, 3rd Family and Juvenile Department.

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Human rights in contemporary sustainable public procurement

Abstract
The objective of the work is a synthetic presentation of human rights issues present in public procurement in the global dimension. In the first part, the reference is made to public procurement as the tool of impact on social phenomena appearing not only within certain countries but also between countries active in the areas of free trade, cooperating within international organizations and connected by the supply chain. The other part pays attention to the fact of slow increase of the meaning of social matters in international documents and legal acts concerning international trade, including public procurement. However, it is stated in the work that the issue of human rights protection is not promoted enough in the area of public procurement. The article especially emphasises forced labour as a modern form of slavery. Against the international solutions, the European ones seem to be the furthest reaching. Nevertheless, even European law of public procurement treats human rights, including forced labour, selectively and secondarily. In conclusion, it is stated that the present possibilities of human rights protection in public procurement are insufficient.

Keywords: public procurement, human rights, forced labour

Public procurement as a tool of impacting social phenomena

Public procurement may be described as a set of procedures, regulations and institutions enabling effective commissioning of building tasks, deliveries and services in public interest. Naturally, each system of public procurement covers not only certain legal structures, but also standards or even beliefs and opinions of the organizers or participants of the public procurement market.

Moreover, the area of public procurement is a geographically complex phenomena. Here, it is possible to differentiate between public procurement systems of an international, regional and national character. International and regional public procurement systems are shaped mainly by international agreements as well as the activity of international organizations. Free trade agreements are an example. Among them, of primary value is "Agreement on Government Procurement" (GPA) concluded within World Trade Organization (WTO). The agreement is one of the most important multilateral international acts on public procurement and at the same time the only agreement functioning within World Trade Organization (WTO) referring only to public procurement. It is worth mentioning procurement financed by World Bank, which was established by Bretton Woods agreement in 1944 in order to help rebuild countries destroyed by World War 2. On the other hand, the European system of public procurement is connected with functioning of a single internal European market and it is shaped by EU

treaties as well as secondary legislation, including so called procurement directives . However, national public procurement systems, as the ones regulated by national law, assume a form characteristic for a system of a given country.

The existence of transnational and national public procurement systems does not mean their total individuality and independence. To the contrary, entering by certain countries into free market agreements as well as the membership in the European Union or other international group usually determines the directions of harmonization or coordination of the public procurement systems. It also results in an occurrence of a number of interactions and mutual interpenetration of values, standards, norms and even beliefs connected with the functioning of the public procurement system. The phenomenon is one of demonstrations of wider phenomena such as globalization, Europeanization, convergence etc., which also refer to the activities of countries in the economic sphere . The binder of the global phenomena of public procurement is also the fact that – in principle – making purchases by governments and international organizations within the free trade and single market is done respecting the ban on discrimination of contractors because of their nationality. That is why possible limitations of the access to public procurement require a significant justification. At the same time, the opposite phenomena impact public procurement, such as deglobalisation or regionalization of economic systems, and even armed conflicts. A significant function in this area is played by bottom-up supply chains understood as resources and activities necessary to provide deliveries, services and construction works. In fact, this phenomena covers entirety of the flow of different goods, in which the vital role is played by cooperating companies and institutions.

The above shows that public procurement needs to be perceived not only as an area impacted by different phenomena, but also as a tool of impact on processes taking place globally or nationally. The governments are ”mega consumers” and that is why willingly or unwillingly they influence their direct providers, and through the supply chains they also influence private and public entities involved in production processes .

Human rights in public procurement

Traditional goals of a public procurement procedure serve ensuring purchasing appropriate goods for appropriate price – value for money, by keeping fair competition and equal treatment of contractors. In international and European dimensions, traditional goals of public procurement additionally serve the need of guaranteeing free trade and freedom of the internal market.

However, for over a dozen years it has been possible to notice the increase of the meaning of non-economic goals of public procurement. The goals are expressed in different aspects that the commissioning party should take into consideration in the process of awarding the procurement, including ecological, innovative and social aspects. Non-economic factors are in literature referred to as secondary or complementary goals of public procurement, but it has also been suggested that aspects referring to widely understood issues which are not directly connected with economic effectives should be connected with horizontal goals of public procurement, this way they would not be perceived as assigned to economic goals but as determining a wider perspective of the plans of the commissioning institutions .

At present, social aspects in public procurement are generally accepted. However, still ”on the outskirts” of the area of public procurement functions the topic of human rights. The issue appears more often in practical studies, reports and handbooks . The presence of the issue of human rights is treated in these documents as an element of a wider phenomenon which is a

corporate social responsibility (CSR), expressed in orienting professional participants of the economic turnover onto non-economic effects of their activities . Relatively rarely the topic of human rights in public procurement appears in works of the legal character, and even less often in legal sources themselves .

In this context, the resolutions of the Union law are significant. In the Directive 2014/24/EU of the European Union and the Council of 26 February 2014 on public procurement (so called ”Classical Directive”) it is stated that, for example, the duty of the EU member states is to undertake appropriate means to ensure that while completing public procurement, a contractor is obliged to observe their obligations in the area of environmental law, social and labour law as established in EU and national legislation as well as collective agreements or regulations of the international environmental law, international social and labour law . The Classical Directive determines the necessity to observe social and labour law referring to the number of international conventions, among which it is worth mentioning the conventions on human rights issues (e.g. International Labour Organisation (ILO) Convention 29 on Forced Labour or Convention 182 on Worst Forms of Child Labour).

European Commission Guide is also worth mentioning as it touches upon considering social issues in public procurement. It is entitled Buying Social and it states that public procurement may be used to solve social issues in supply chains, e.g. concerning human rights or the fair trade principles. This view is dictated – as the authors of the Guide notice – by a wide range of the union public procurement as well as a global character of some of the supply chains.

The issue of human rights appears also in the concept of sustainable procurement realised based on the procedure of the World Bank. It does not result from the Bank’s regulations concerning procurement, but it is shaped by the voluntary guidelines issued by the Bank . The concept is based on three pillars: economical, environmental and social. Within the social pillar, procurement procedures foresee e.g. the possibility to form qualification requirements, specifications or contractors’ choice criteria referring to the observance of human rights. It is shown that there is a possibility to, for example, require from public procurement applicants the ownership of labels issued in the open and clear way procedure within certain classification systems. Such labels may be connected with fairtrade standards and refer to observing human rights or labour law .

The United Nations Guiding Principles on Business and Human Rights (UNGPs) also mention public procurement. It is written there that states should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights .

Public procurement and forced labour

In public procurement, special attention needs to be paid to modern forms of slavery, including preventing forced labour or using child labour. This direction seems totally understandable in the area of public procurement, in which deliveries, services or construction works are usually completed using physical persons working for contractors and subcontractors.

In literature and official documents it is stated that the number of people who can be called modern slaves may account to 25 to 40 million . Unfortunately, the acts regulating different systems of public procurement only to a small extent refer directly to forced labour. In the directions of the World Bank concerning sustainable procurement it is only stated that legal issues concerning forced labour and child labour are elements of a social pillar of sustainable procurement . GPA does not mention forced labour at all .

A bit more attention is paid to forced labour on the European ground. In the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee of 23.2.2022 on decent work worldwide for a global just transition and a sustainable recovery among others it is stated that Union policies and initiatives, which reach beyond the internal activity of the EU influence the wellbeing of workers in the whole world. The area of public procurement was indicated as a tool of "fighting child labour and forced labour" . On the other hand, the Classical Directive indicates the need to exclude from public procurement procedures the contractors who were finally convicted for a criminal offence such as the use of child labour or other types of trafficking in human beings . The Classical Directive in understanding these deeds refers to the regulations of the Directive 2011/36/EU of the European parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims . It obliges the member states to punish trafficking in human beings. The Directive understands trafficking as recruitment, shipment, transfer, holding and receiving people, including exchange or transferring power over the people, using the threat or violence or other forms of coercion, kidnapping, deception, deceit, by abuse of powers or exploitation of a vulnerability situation, as well as paying or accepting payments or benefits in order to receive a permission of a person with authority over another person, for the purpose of exploitation. Pursuant to the Directive 2011/36/EU, the same exploitation covers also exploitation of prostitution or other forms of sexual abuse, as well as forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs . In a specific way, Directive 2011/36/EU refers to the child trafficking. Mainly it states that in case of children, trafficking is valid also if there was no use of threat, violence or any other of the quoted means .

The indications of the EU secondary legislation on awarding public procurement as well as references to ILO Conventions correspond with the regulations of the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights. In the documents it is stated that no one shall be kept in slavery or servitude and no one shall be required to perform provide forced or compulsory labour .

On the one hand, the presented situation shows how important is the issue of protection against the use of forced labour in public procurement. On the other hand, it is visible that there is the lack of a complex regulation of detailed mechanisms of the protection of human rights in public procurement.

However, it needs to be emphasised that the mechanisms of protection against forced labour shall not be limited only to blocking the access to procurement of the entities exploiting forced labour. An additional source of challenges concerning human rights protection is the fact that the possible infringement of the ban on forced labour use may be revealed on the stage of the implementation of procurement and may refer not to the activity of the contractors of the ordering party but their subcontractors. In this case, human rights might be abused by other entities in a certain supply chain of the contractor, and consequently, of the commissioning party. In this scope, a legislative initiative undertaken by the European Commission needs to be positively assessed. It was started in May 2022 and is entitled "Effectively banning products produced, extracted or harvested with forced labour". The initiative is at the moment on the stage of public consultations. However, its goal is to keep the EU market free from products made, extracted or harvested with forced labour, whether they are made in the EU or elsewhere in the world. The European Commission states that the binding regulations do not control the process of placing on the market goods produced using forced labour or only

partially control this practice. The existing initiatives in the scope of due diligence do not refer directly to the goods, but are directed towards economic entities. As a result, the goods produced using forced labour may still, unfortunately, be present in the EU market.

Conclusion

Modern countries function not only as the distributors of social benefits, but also as active buyers of certain products, including services, goods and construction works. Such a role of public authorities and accompanying it present civilization challenges lead to a question to what extent national governments, public institutions as well as international organizations should take into consideration not only economic viability of the planned purchases but also their social circumstances, including human rights.

Expecting them to realise the idea of social justice and at the same time to purchase material goods assuring maximum viability and savings do not need to be seen as a contradiction . A traditional interest in economic considerations of public purchases should be completed in an increasing degree by social aspects, within which a vital place should be given to human rights. As a result of a specific character of public procurement, in this area a special attention shall be paid to the use of forced labour.

Unfortunately, the need is not accompanied by satisfactory official and legislative activities. The regulations of public procurement systems and official documents refer to the issues of human rights in an incidental and ancillary way. Most likely it is one of the reasons why there is noticeable lack of the appropriate use of human rights protection mechanisms in public procurement. Still, the vital role in the area is to be played by non-cod and unofficial instruments, such as professionalization of human resources involved in awarding public procurement, practical use of the supply chain management standards, and most of all, the sense of social responsibility of public entities expressed in formulating contract requirements concerning completed by them procurement.

BIBLIOGRAPHY

Legal acts:

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, EU Journal of Laws L 94 of 28.3.2014.

Directive 2014/25/EU of the European Parliament and Council of 26 February 2014 on procurement of entities operating in the water, energy, transport and postal services and repealing Directive 2004/17/EC, EU Journal of Laws L 94 of 28.3.2014, Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures of the award of certain work contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security and amending Directives 2004/17/EC and 2004/18/EC, EU Journal of Laws L 216 of 20.8.2009; and Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, EU Journal of Laws L 395 of 30.12.1989.

Commission Regulation (EU) No. 366/2011 amending Regulation (EC) No. 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) as regards Annex XVII (Acrylamide) EU Journal of Laws L 101 of 15.4.2011

Andhov M., Faracik B., Prawa Człowieka w Zamówieniach Publicznych (Human Rights in Public Procurement) (January 1, 2017). https://ssrn.com/abstract=2910882 or http://dx.doi.org/10.2139/ssrn.2910882, access from 22.8. 2022.

Bales K., Disposable People: New Slavery in the Global Economy, Berkelay, Los Angeles, London 1999, p. 9; Global Estimates of Modern Slavery (2017), https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575479.pdf

Martin-Ortega O., O'Brien C. M., Advancing Respect for Labour Rights Globally through Public Procurement, Politics and Governance Vol. 5, number 4/ 2017, p. 69

Martin-Ortega O., O'Brien C. M., Advancing Respect for Labour Rights Globally through Public Procurement, Politics and Governance Vol. 5, numer 4/ 2017, p. 69; A. Sanchez-Graells, Public Procurement and 'Core' Human Rights: A Sketch of the EU Legal Framework [w:] Public Procurement and Human Rights: Risks, Dilemmas and Opportunities for the State as a Buyer, O Martin-Ortega, M O'Brien (red.), 2019.

Martin-Ortega O., O'Brien C.M., Public Procurement and Human Rights: Interrogating the Role of the State as Buyer, [w:] Public Procurement and Human Rights, red. O. Martin-Ortega, C.M. O'Brien, Cheltenham 2019, s. 5-6.

McCrudden Ch., Buying Social Justice. Equality, Government Procurement, and Legal Change, Oxford 2007.

Outhwaite O., Human rights and national procurement rules in the World Trade Organization Agreement on Government Procurement, [w:] Public Procurement and Human Rights, red. O. Martin-Ortega, C.M. O'Brien, Cheltenham 2019.

Protecting human rights in the supply chain. A guide for public procurement practitioners, London Universities Purchasing Consortium, University of Greenwich, Chartered Institute of Procurement and Supply, 2017, https://respect.international/wp-content/uploads/2018/01/Protecting-human-rights-in-the-supply-chain-A-guide-for-public-procurement-practitioners.pdf

Second edition 2021/C 237/01 (OJ C, C/237, 18.06.2021, CELEX: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021XC0618(01)).

The European Commission and the European External Action Service, Guidance on due diligence for EU businesses to address the risk of forced labour in their operations and supply chains (12.07.2021), https://trade.ec.europa.eu/doclib/docs/2021/july/tradoc_159709.pdf

United Nations Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, (UN Doc A/ HRC/17/31) (21 March 2011) I..B.5.

Williams-Elegbe S., Human rights in the context of public procurements financed by the World Bank, [w:] Public Procurement and Human Rights, red. O. Martin-Ortega, C.M. O'Brien, Cheltenham 2019, pp. 52-54.

World Bank, Sustainable Procurement. An introduction for practitioners to sustainable procurement in World Bank IPF projects (April 2019); https://thedocs.worldbank.org/en/doc/788731479395390605-0290022019/original/GuidanceonSustainableProcurement.pdf, access from 21.8.2022.

World Bank, Sustainable Procurement. An introduction for practitioners to sustainable procurement in World Bank IPF projects (April 2019); https://thedocs.worldbank.org/en/doc/788731479395390605-0290022019/original/GuidanceonSustainableProcurement.pdf

Wróbel A., Europeizacja prawa administracyjnego, [w:] Europeizacja prawa administracyjnego, System Prawa Administracyjnego, vol.. 3, red. R. Hauser, Warszawa 2014, p. 25

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The distortion of human rights – some remarks on the topic in the second decade of XXI

Abstract

The concept of human right is a matter of recent research under many aspects: humanitarianism, needs and utility , adaptation to time and civilization progress , profitability etc.

The Author's aim is not to state that the concept of human rights is out of date or obsolete, but to show a few aspects that shall be considered in the future by stakeholders, policymakers, scientists, or activists.

There are some questions that need to be asked and they constitute the research questions in the article:

1. To whom do the belong to? Whom do they protect? Simultaneously who is obliged to provide the realization and execution of human rights?
2. How to ensure the proper realization of human rights?
3. Does the concept geographically differ? Isn't the concept westernized?

Having those questions in mind the aim of the article is to look at the actuality of the whole idea of human rights, not denying the need to protect them, but only whether they correspond to the conditions of today's world.

The article will apply secondary methods for legal sciences, i.e. empirical methods (following legal methods: logical-linguistic and formal-dogmatic, which are typical for legal texts). Empiric methods refer to the observation of legal norms, the process of their formation, operation, as well as their disappearance and their social consequences. The rationale for choosing such a method is the achievement of the aim of the article, i.e. the assessment of the adequacy and purposefulness of certain legal norms in the public perception.

Keywords: Human rights, abuse of human rights, obligation of public institutions, ethics

Introduction

Human rights are one of the youngest terms in the vocabulary of politics and societies. For some time, however, they have been a unique social and political value. They have become an important criterion for assessing the activities of the authorities, and even the constitution and legal regulations. Human rights underpin opposition and revolutionary movements. They can be the programmatic goal of governments. They are an essential element of international politics. There is no doubt for the need of them in the world, often struggling with wars, inequalities, poverty etc.

Since the 1950s, when the Universal Declaration of Human Rights was signed, the world has changed. The division of the world into the cultures described by Huntington, or spheres of influence, has deepened. Moreover, the dynamic technological development leaves its mark on people's lives and on meeting their needs. As a consequence of these changes, the individual content of the rights should also be modified to meet the requirements of modern times.

The recipient of the human rights

The legal relationship involves two parties: the entitled party and the obligated party. The first questions arise here: who is entitled and who is obliged. According to the definition of human rights, they are universal rights that belong to every individual in his dealings with the state. However, is the individual only a natural person? Legal personality is owned not only by individuals, but also by enterprises, NGOs and institutions. However, they are not subjects of human rights. In the event of any violations of human rights, the plaintiff would be the person, not the organization (even if represents it).

The opinion on 5 April 2018 of The Supreme Court of Colombia , which granted legal entity to the Amazon River, is a huge breakthrough in the general perception of law, but also in legal doctrine. And although it is not directly about human rights, in this case there is not a person behind the legal person, but an inanimate object, which, however, has an impact on human life. The Court declared that "for the sake of protecting this vital ecosystem for the future of the planet," it would "recognize the Colombian Amazon as an entity, subject of rights, and beneficiary of the protection, conservation, maintenance and restoration" that national and local governments are obligated to provide under Colombia's Constitution. In addition to this affirmation of rights, the Supreme Court's decision is remarkable in several other ways: it provides thorough, cogent analysis and application of key principles of environmental law and environmental ethics, including intergenerational equity and the precautionary principle, placing the rights of the Amazon within the context of Colombia's constitution as well as international law.

On the example of this case, it can be seen that the decision of the Court indirectly affects people's lives and their collective (third generation) rights: the right to live in a clean environment, the right to rational management of natural resources.

The second question is who is responsible for the proper execution of human rights. Going back again to the definition given by prof. W. Osiatyński human rights, they are universal rights that belong to every individual in his dealings with the state. From the definition it can be understood that the state is its entities are the obliged party. However, is it the only obliged party. Looking carefully at Universal Declaration of Human Rights it is stated in the Preambule that it is "a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."

Therefore at the beginning it is a duty of people to strive to enforce the human rights, secondly it is the obligation of the state.

In other words, in a negative interpretation, the obliged entities are indicated by the European Convention on Human Rights in Art. 17: "Nothing in this Convention may be interpreted as

implying for any State, group or person any right to engage in any activity orperform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

If people are the obligated party again, then we are all responsible for ensuring that human rights are respected. This imposes on us not only a moral obligation, but also a legal one.

It should be highlighted that responsibility is related to conscious human activity , so the world community is equally responsible for applying human rights.

The ambiguity of the content of individual human rights

The central problem with human rights and human rights law is that they are ambiguous. While some of the rights are clearly connected with a value ex.: the political right to elect or be elected (participate in political life) is a clear reflection of the right to democracy, the situation is not always so clear. They are often at the junction of different values, ex. abortion is an expression of the right to freedom of choice of a woman-mother and the right to life of a child-nasciturus. The right to privacy, home cooking or the protection of correspondence may be limited due to ensuring collective security. Even the content of each right is sometimes questionable, as it is not defined in treaties or the obligations of the parties are not clearly stated. Due to such ambiguity governments can use human rights to rationalize their activities.

Three biggest concerns about human rights in this view are:

– The lack of effectiveness of human rights and no good international tools of enforcement,
– The absence of sociological legitimacy – meaning that not all and not everywhere in the world particular rights are recognized and internalized in the society or group,
– They distribute inequality understood in different way. First of all inequality between parties: state is the dominant party, which a priori should seek ways to provide realization of rights of people, while individuals are the weaker party. Secondly due to "westernization" of the concept it brings even bigger inequality between individuals among the world. It can be understood as modern discrimination.

Due to the fact of non-obvious character of the concept it is difficult to prove the proper way of functioning the state/system or the abuse or omission of some obligation under the provision in the article 17 of European Convention on Human Rights. In the history there was only one case when the plaintiff claimed his right under art. 17 is violated. However the European Court of Human Rights did not recognize a violation of this right.

Geographical differentiation of the intensity of human rights

From press reports, we can learn about human rights violations in poor parts of the world: African and Asian countries, etc. Personal rights such as the right to life, freedom, security, personal integrity, and the prohibition of torture are violated.

On the other hand we can observe overactivity of the groups that want to impose the priority of minority rights over the majority, for example the right of LGBT persons to take part in competitions – is it equal if a transgender person takes part and wins in competition with a "weaker" gender?

In this regard, it is noticeable that human rights are going two ways: in underdeveloped, poor countries/regions they are not applied or not well executed, while in developed countries they are sometimes abused in an unproper way. Therefore the question arises is the concept of human

rights westernized? Authors claim that, the concept is not Western, but applies everywhere in the world, however, is understood differently. However, there are some that claim that human rights are part of European culture "European culture is able not only to unite Europe and give it its own identity on the basis of universal values, but it is also able to reconcile the universality of human rights with the particularity of civil rights in a globalizing world. Particularity and universality are two complementary aspects of culture that should not be won against each other. The complementary functioning of these categories presupposes the material existence and operation of a democratic state ruled by law. Were it not for this foundation, the very idea of either universalism or particularism would be suspended in a vacuum.

Conclusions

There is no doubt that human rights as a carrier of values which should be common for the whole world community should be protected. However, some concerns arise with the content of specific rights and their understanding in different cultural environment.

In the course of the research, it was shown what are the parties in the legal relationship regarding human rights, i.e. the entitled party is a person, a group of people, sometimes indirectly (as in the case of the Amazon River). And the obligated party are first of all people, and only then states and public institutions.

The concept of human rights is ambiguous, because of the lack of definition and strict borders they can be abused by the stronger party.

Finally it should be mentioned that the concept is westernized: in the Western world the rights are being abused for the sake of minorities, while in the other part of the world they are not applied in practice.

BIBLIOGRAPHY

Legal acts:

Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A).

Convention for the Protection of Human Rights and Fundamental Freedoms, proclaimed by The Council of Europe in Rome on 4 November 1950.

Judgements:

The opinion on 5 April 2018 of The Supreme Court of Colombia, STC4360-2018 Radicacion n. 11001-22-03-000-2018-00319-01 https://www.cortesuprema.gov.co/corte/wp-content/uploads/2018/04/STC4360-2018-2018-00319-011.pdf [access: 30.10.2022].

CASE OF ŞİMŞEK AND OTHERS v. TURKEY (Applications nos. 35072/97 and 37194/97) from 26 October 2005.

Literature:

Alman T. (2020) Possibilities of the public to influence decision-making of local self-government bodies, Political Science Forum, Vol. 9, No. 2, Fall 2020, 53-59.

Amy C. Finnegan, Adam P. Saltsman, Shelley K. White, Negotiating Politics and Culture: The Utility of Human Rights for Activist Organizing in the United States, Journal of Human Rights Practice, Volume 2, Issue 3, November 2010, Pages 307–333, https://doi.org/10.1093/jhuman/huq009

Anisiewicz, U., Wołowiec, T. (2022). Corporate social responsibility and an integrative vision of society - economic and social determinants. Journal of Modern Science, 48(1), 207-230. https://doi.org/10.13166/jms/150756.

Badaru, O. A. (2008). Examining the Utility of Third World Approaches to International Law for International Human Rights Law, International Community Law Review, 10(4), 379-387. doi: https://doi.org/10.1163/187197308X356903;

Barnett, M. (2018). Human rights, humanitarianism, and the practices of humanity. International Theory, 10(3), 314-349. doi:10.1017/S1752971918000118;

Brett Edwards, Mattia Cacciatori. (2018) The politics of international chemical weapon justice: The case of Syria, 2011–2017. Contemporary Security Policy 39:2, pages 280-297.

8. Bryner N. (2018) Colombian Supreme Court Recognizes Rights of the Amazon River Ecosystem, https://www.iucn.org/news/world-commission-environmental-law/201804/colombian-supreme-court-recognizes-rights-amazon-river-ecosystem [access: 30.10.2022].

Can, B. (2016), Human Rights, Humanitarianism, and State Violence: Medical Documentation of Torture in Turkey. Medical Anthropology Quarterly, 30: 342-358. https://doi.org/10.1111/maq.12259

Dozens killed in Chad after protesters demand civilian rule, https://www.aljazeera.com/news/2022/10/20/clashes-chad-protesters-demand-transition-civilian-rule [access: 20.10.2022].

Florek, I. B., Eroglu, S. E. (2019). The need for protection of human rights in cyberspace. Journal of Modern Science, 42(3), 27-36. https://doi.org/10.13166/jms/112765.

Graca T. (2019) The development of the contemporary world and threats to human rights, (ed.) Mamiński M., Rzewuski M., Wydawnictwo Naukowe Uniwersytetu Kardynała Stefana Wyszyńskiego, Warszawa, 395-407.

Laki I. (2014) The concept of discrimination nowadays, Political Science, 252-259.

Mamiński, M. (2022). The Protection of Human Rights as a Task of Local Government in Polish Law. Regional Formation and Development Studies, 32(3), 30-36. doi:10.15181/rfds.v32i3.2144

15. Mende, J. (2021). Are human rights western—And why does it matter? A perspective from international political theory. Journal of International Political Theory, 17(1), 38–57. https://doi.org/10.1177/1755088219832992;

Nigeria: Displacement Camp Closures Worsen Suffering, People Displaced by Boko Haram Conflict Stripped of Housing, Food https://www.hrw.org/news/2022/11/02/nigeria-displacement-camp-closures-worsen-suffering [access: 02.11.2022];

Osiatyński W. (2016) wprowadzenie do praw człowieka, Helsińska Fundacja Praw Człowieka, https://www.hfhr.pl/wp-content/uploads/2016/02/WiktorOsiatynskiWprowadzenieDoPojeciaPrawCzlowieka.pdf [access: 30.10.2022].

Perkowski, N. (2018). Frontex and the convergence of humanitarianism, human rights and security. Security Dialogue, 49(6), 457–475. https://doi.org/10.1177/0967010618796670;

Qatar: Security Forces Arrest, Abuse LGBT People. Discrimination, Ill-Treatment in Detention, Privacy Violations, Conversion Practices https://www.hrw.org/news/2022/10/24/qatar-security-forces-arrest-abuse-lgbt-people [access: 24.10.2022];

Reroń T. (2005) Urzeczywistnianie praw człowieka w XXI wieku : prawo i etyka, Wrocławski Przegląd Teologiczny 13/1, 230-232.

Russian Police are Torturing Anti-War Activists.Those standing up to the war report horrific instances of abuse at the hands of the authorities https://www.hrw.org/news/2022/10/20/russian-police-are-torturing-anti-war-activists [access: 20.10.2022];

Shaheed A., Parris Richter R. (2018) Is "Human Rights" a Western Concept?, https://theglobalobservatory.org/2018/10/are-human-rights-a-western-concept/ [access: 20.10.2022].

23. Sitek B. (2019) Human reputation from Roman law to cybersprace [in:] (ed.) Mamiński M., Rzewuski M., Wydawnictwo Naukowe Uniwersytetu Kardynała Stefana Wyszyńskiego, Warszawa, 339-352;

Sitek M. (2016), Prawa (potrzeby) człowieka w ponowoczesności, Wyd. C.H. Beck;

Sitek M. (2019) The human right to freedom of opinion and expression and the twilight of Western civilization [in:] (ed.) Mamiński M., Rzewuski M., Wydawnictwo Naukowe Uniwersytetu Kardynała Stefana Wyszyńskiego, Warszawa, 187-198;

Sitek, M. (2021). The participation of transgenders in sport. Right to equality and equal opportunities in sport. Journal of Modern Science, 46(1), 211-224. https://doi.org/10.13166/jms/138663.

Sitek P. (2015). The human right to the safe deposit-credit institutions. In Sitek, M., Terema, P., Wójcickiej, M. (Eds.), Collective human rights in the first half of the 21st century (pp. 437-450). WSGE.

Zutshi, A., Creed, A. and Sohal, A. (2009), „Child labour and supply chain: profitability or (mis)management", European Business Review, Vol. 21 No. 1, pp. 42-63. https://doi.org/10.1108/09555340910925175

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The right to privacy cyberspace

Abstract
The dynamic development of technology has led to significant changes in the concept of right to privacy. Currently, it is primarily a virtual space in which we communicate with each other using computers, phones and tablets connected by a network. Cyberspace protection has now become one of the most frequently discussed security-related topics. Social changes related to the development of civilization stimulate democratic processes, constitute a space for achieving various economic goals, but can also be a place of undesirable actions. This applies to virtually every sphere of human functioning, including his freedom and fundamental rights. The risk of threats to the individual increases in proportion to the process of weakening the state as a structure and institution. This article describes the concept of the right to privacy in cyberspace. The subject of the research is also to identify areas where there are threats to the individual and to determine the necessary regulatory directions in cyberspace as well as related with problems and dilemmas.

Keywords: cyber-attacks, cybersecurity, cyberspace, new technologies, privacy, right to privacy

The concept of privacy

The concept of the right to privacy as a personal interest subject to legal protection comes from the American "right of privacy" doctrine. In Poland, A. Kopff was the first to put forward a thesis that the sphere of private live belongs to the personal interests of individuals and is subject to protection under the provisions of the Civil Code. According to him, the sphere of private life constitutes personal interests which includes everything that, "due to the justifiable isolation of individuals from the society at large, is aimed at an individual's mental and personal development and the maintenance of the social position the individual has reached"[70].

The right to privacy was laid down *expressis verbis* in Article 47 of the Polish Constitution, in accordance with which everyone has the right to the legal protection of their private and family life, their honour and good reputation, and to decide about their personal life. Under this provision, everyone is guaranteed the right to the legal protection of their private life. Pursuant to the Polish Constitution, privacy has been assigned two meanings. From a comprehensive perspective, it is understood as the freedom from interference in the spheres unavailable to other persons and the freedom to decide about one's life, views, and convictions, while in the narrower sense, it is equivalent to the right to decide about the range of personal information to be disclosed to others[71].

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[70] A. Kopff, Koncepcja praw do intymności i do prywatności życia osobistego. Zagadnienia konstrukcyjne, „Studia Cywilistyczne" 1972, No. XX, pp. 32-33.

[71] J. Sieńczyło-Chlabicz, Z. Zawadzka, M. Nowikowska, Prawo prasowe, Warszawa 2019, p. 239.

The analysis of the provisions of the Polish Constitution demonstrates that, in addition to Article 47, the right to privacy is guaranteed under a number of other complementary provisions. For example, under Article 51(1), no one can be obligated to disclose their personal information otherwise than as provided in Acts – so-called right to information autonomy. This provision guarantees the protection of data and information concerning citizens – individuals – and the freedom to keep confidential any information which, in the view of such persons, belongs to the sphere of their private or intimate life. Any exceptions from the principle of information autonomy may be provided only where it is necessary in a democratic state of law, and subject to stringent formal and substantive rules in line with the principle of proportionality[72].

Similarly, under Article 53(7) of the Polish Constitution, it is indicated that no one can be obliged by public authorities to reveal their world views, religious convictions or religious affiliation. According to the literature on the subject, the broadly understood right to privacy also includes parents' rights to bring up their children in line with their convictions (Article 48 of the Polish Constitution), and to ensure moral and religious upbringing and education in line with their convictions (Article 53(3) of the Polish Constitution). It should be noted that the right to privacy is also expressed in the inviolability of housing premises, allowing searches only in circumstances and under the procedures provided by laws, as specified in Article 50 of the Polish Constitution, and the secrecy of correspondence[73].

In Polish case law, the right to privacy is defined as information autonomy[74], which is understood as the right to independently decide about the sphere in which individuals wish to remain anonymous, and to what extent they consent to the provision of their personal data to third parties[75]. It is the individual that specifies the range of the events from their life which may be disclosed to third parties[76].

The right to privacy also constitutes one of the personal interests whose protection is guaranteed under Articles 23 and 24 of the Civil Code[77]. The Polish legislator has not defined the concept of personal rights but only made a closer determination of the scope of personal rights by their exemplary listing in Article 23 of the Civil Code (1964). The structure of this provision, and especially the phrase „in particular" used in it, shows that the personal rights indicated in it are listed only exempli modo[78]. In Article 23 of the Civil Code the legislator mentions: health, freedom, honour, freedom of conscience, surname or pseudonym, image, secrecy of correspondence, inviolability of the home, scientific, artistic, inventive and rationalization work. Privacy has not been expressed in it expressis verbis. It should be noted that the catalogue of personal rights is constantly expanded by the doctrine[79] and the case law, and its open nature allows it to cover various values that the legislator is unable to foresee. As the Court of Appeal

[72] M. Safjan, Refleksje wokół konstytucyjnych uwarunkowań rozwoju ochrony dóbr osobistych, „Kwartalnik Prawa Prywatnego" 2002, No. 1, p. 234.

[73] Resolution of the Constitutional Tribunal of 20 June 2005, case file No. K 4/04, OTK 2005, No. 6, item 64; K. Chałubińska-Jentkiewicz, M. Nowikowska, Bezpieczeństwo informacji w cyberprzestrzeni, Warszawa 2021, p. 94.

[74] Resolution of the Court of Appeal in Białystok of 20 September 2018, case file No. I ACa 379/18, Lex No. 2574866.

[75] Resolution of the Court of Appeal in Poznań of 13 November 2018, case file No. I ACa 1140/01, „Wokanda" 2002, No. 11, p. 46.

[76] Resolution of the Court of Appeal in Warszawa of 29 July 2014, case file No. VI ACa 1657/13, Lex No. 1537498.

[77] The Civil Code, consolidated text of the Polish Journal of Laws of 2020, item 1740, as amended.

[78] 229

[79] Z. Radwański, Prawo cywilne - część ogólna, Warszawa 1997, p. 149.

in Bialystok aptly emphasized in its judgment of January 12, 2017, the definition of personal rights is based on an open catalogue, and the personal rights listed therein are exemplary. The nature of these goods is varied, because they are related to a human being and the sphere of private life of an individual.

The analysis of the Polish case law allows for the statement that in none of the judgments has the court made an attempt to exhaustively enumerate the circumstances covered by the right to privacy. Each time, courts individually, depending on a specific factual situation, assign a given situation to the scope of privacy or refuse protection in this respect. Based on the case law of the Supreme Court and common courts, an example catalogue of circumstances that have been included in the sphere of private life can be indicated[80].

The concept of cyberspace

The modern conditions of an individual's functioning in cyberspace determine the need to take new activities in the scope of establishing the norms, principles and values that are the standard in the real world. The need for protection and guarantee of security in the virtual reality is indicated by the European Commission in a Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, entitled „The European Union Cybersecurity Strategy: Open, Secure and Protected Cyberspace"[81].

In this Communication, the Commission emphasized that fundamental rights, democracy and the rule of law should be protected in cyberspace. Freedom in the internet environment requires security and protection. Cyberspace should be protected from incidents, harmful activities and abuse, with government administrations playing a significant role in ensuring free and secure cyberspace. Their mission should be to respect and protect fundamental rights on the internet and maintain internet reliability and interoperability. However, large parts of cyberspace are owned by the private sector and therefore, all initiatives in this area must take its leading role into account. As the result of the process of digitization and expanding the scope of electronic communication services, a new regulatory policy has become necessary[82].

One of the key regulatory goals is to ensure cyber security, which requires actions related to maintaining the availability and integrity of the network and infrastructure, as well as the confidentiality of information contained therein, taking into account the right to privacy and respect for identity. It should be noted here that cybersecurity is of particular importance in ensuring an individual's fundamental rights in terms of his/her privacy. Ensuring cybersecurity is becoming one of the basic goals of the state and the determinant of these principles is the protection of basic values that should have the same degree of protection in cyberspace as in the real world. It should be noted that the effectiveness of security protection in cyberspace depends primarily on the degree of protection of fundamental rights, freedom of expression, personal data protection and the right to privacy.

The term „cyberspace", the combination of the two words „cybernetics" and "space", meaning cybernetic space, was coined in the 1980s. It is thought that the originator of this term was William Gibson, a Canadian writer, who used it in his novel Neuromancer of 1984, to define computer-generated virtual realities, which the protagonists inhabit. The notion found its

[80] K. Chałubińska-Jentkiwiecz, M. Nowikowska, Security v. Privacy – Legal Aspects, Maribor 2021, p. 8.
[81] Communication from the EU Commission of 7.2.2013 (JOIN (2013) 1 final).
[82] K. Chałubińska-Jentkiwiecz, M. Nowikowska, Security v. Privacy – Legal Aspects, Maribor 2021, p. 8.

place in mass culture, and it is currently used to define virtual space, understood as space for communication via computer networks[83].

As regards Polish Law, cyberspace is defined, i.e., in Article 2(1a) of the State of Emergency Act of the 21st of June 2002,3 Article 3(1)(4) of the Natural Disasters Act of the 18th of April 2002,4 and Article 2(1b) of the Act of the 29th of August 2002 on Martial Law and the Competences of the Commander-in-Chief of the Army and the Rules of the Commander-in-Chief's Subordination to the Constitutional Authorities of the Republic of Poland, according to which the term is understood as „a space for the processing and exchange of information, created by information and communication systems, defined in Articles 3(3) of the Act of the 17th of February 2005 on the Computerisation of the Operations of Entities Performing Public Tasks, including the links between them and their relations with users." Within the meaning of the said Act on Computerisation, a communication and information system is a set of interfacing IT hardware and software, providing the facility to process, store, send, and receive data via ICT networks, with the use of an end device suitable for a given network type. According to this relatively comprehensive definition developed by the legislator, cyberspace includes not only communication and information systems, comprising hardware and software facilitating the performance of system functions (processing, storage and sending computer data), but also computer data and interactions between devices and their users[84].

The right to privacy in the cyberspace - on the example of cyber terrorism

The information revolution, manifested primarily in fast communication and data transfer, promotes the development of each individual. In addition to many advantages, it also has disadvantages, which include cyberterrorism. The ideas of terrorists hacking into computer systems to introduce viruses, stealing sensitive information is the essence of cyber terrorism, also known as info terror[85].

Cyber terrorism is not a new phenomenon. Already in 1979, the Swedish Ministry of Defence included cyber terrorism in a threat report, recommending that the government be involved in monitoring public and private computer networks[86]. It should be emphasized that a lot of network information has an impact on the types of targets and weapons chosen by terrorists and the methods of their operation. Cyber terrorism involves the use of information techniques, i.e. computers, software, telecommunications devices, the Internet, to achieve the goals intended by a given group. As B. Hołyst rightly observes, „like many corporations using the Internet for more efficient and flexible operations, terrorists harness the power of technical information (IT) to create new operational doctrines and organizational forms"[87].

The emergence of networked terrorist groups is part of the concept of "net war"[88]. Network

[83] J. Kosiński, Cyberprzestępczość. In: W. Jasiński, W. Mądrzejowski, K. Wiciak K (eds) Przestępczość zorganizowana. Fenomen. Współczesne zagrożenia. Zwalczanie. Ujęcie praktyczne, Szczytno 2013, p. 462.

[84] F. Radoniewicz, Cyberspace, Cybercrime, Cyberterrorism, In: K. Chałubińska-Jentkiewicz, F. Radoniewicz, T. Zieliński (eds), Cybersecurity in Poland Legal Aspects, Springer 2022, p. 33

[85] B. Bolechów, Terroryzm w świecie podwubiegunowym. Przewartościowania i kontynuacje, Toruń 2002, p. 51.

[86] B. Hołyst, Terroryzm, t. I, Warszawa 2011, p. 956.

[87] Ibidem, p. 952.

[88] P. Sienkiewicz, Terroryzm w cybernetycznej przestrzeni, In: T. Jemioło, J. Kisielniecki, K. Rajchel (eds) Cyberterroryzm – nowe wyzwania XXI wieku, Warszawa 209, p. 46.

war, cyber war, consists in disrupting or destroying the opponent's information systems, acquiring their strategic data[89].

Analysis of the security issue for the right of the individual citizen to privacy in the aspect of the phenomenon of cyber terrorism requires attention to the problem of the target of the attack. Classic terrorism is defined as the so-called blind crime, through random selection of victims. The purpose of the attack is not so much to commit a specific crime, e.g. murder, often of innocent people, but to create a specific effect and reaction from the throne of the authorities and public opinion. The literature on the subject indicates that "terrorism is intended for those who look, not for those who have become victims"[90].

Similarly in cyberterrorism, attacks on information stored on a computer system can have two types: as a desire to undermine the credibility of the system or the theft of information[91].

In the first case, online terrorists enter their own data or manipulate the data in the system. These attacks are designed to disorganize their actions, which is to the detriment of society. These activities may be directed towards critical infrastructure, water and energy supply, telecommunications infrastructure, etc. Influencing these systems can also lead to material damage or casualties, e.g. in the event of a train collision.

A cyber attack of theft of information can affect both domestic resources and information owned by an individual citizen. In the light of the above considerations, the thesis that cyber terrorism constitutes a violation of human rights seems to be irrefutable.

The European concept of human rights primarily concerns the state - citizen/individual relationship, and its basis is the protection of individual freedom against violations by the state. On the other hand, the state is also obliged to protect the rights and freedoms of the individual against violations by other persons, including cyber terrorism. In 2005, the Strategy on combating terrorism was adopted in the European Union (14469/05 of 30 November 2005). One of the tasks set for the Member States was to correlate Community mechanisms designed to protect citizens. The issue of respecting the rights of the individual citizen, including the right to privacy, in the sphere of combating cyberterrorism implies two problems:

1) cyber terrorism is a serious threat to the privacy of the individual,
2) preventive actions by the state (police services) may conflict with the right to privacy.

The thesis on the violation of human rights by cyber terrorism is beyond doubt. Cyber terrorism has a negative effect on the full exercise of the right to privacy. The second issue - implies a serious problem, the choice between freedom and security. On the one hand, the state is obliged to protect citizens against cyber-attacks. However, the main method of combating and preventing cyber terrorism is limiting the right to privacy and subjecting the state to control more and more numerous areas of citizens' lives and increasing the powers of security services. This shows that the conflict between fragrance and security is becoming more pronounced.

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[89] J. Sobczak, Cyberprzestrzeń jako obszar ochrony bezpieczeństwa narodowego, w optyce dokumentów europejskich, In: P. Herbowski, D. Słapczyńska, D. Jagiełło (eds) Pozyskiwanie informacji w walce z terroryzmem, Warszawa 2017, p. 44.

[90] T.R. Aleksandrowicz, Terroryzm międzynarodowy, Warszawa 2015, p. 29.

[91] K. Chałubińska-Jentkiwiecz, M. Nowikowska, Security v. Privacy – Legal Aspects, Maribor 2021, p. 87.

Summary

The right to privacy was laid down *expressis verbis* in Article 47 of the Polish Constitution, in accordance with which everyone has the right to the legal protection of their private and family life, their honour and good reputation, and to decide about their personal life.

The cybersecurity as a one of the task of the State, is also describes in Polish Constitution. The provision of Article 5 of the Polish Constitution entrusts to the Polish state the task of ensuring security to its citizens, which is of particular importance in contemporary times. It is stressed in the literature on the subject that the security of citizens should not be treated as equivalent to that of state security, although the two notions are interrelated. If state security is endangered, so is the security of citizens. It might happen that the security of citizens is jeopardised, but state security would not show any signs of a threat. Therefore, it can be assumed that threats to the security of citizens might include, for instance, the actions of other citizens which are not directed against the state itself. The state is obliged to ensure security to citizens in their mutual relationships. The need to ensure state security can legitimise the restriction of constitutional rights and liberties vested in citizens.

The notion of security as referred to in Article 5 of the Polish Constitution should be understood in broad terms as a state which gives a sense of confidence and stability and a guarantee of its protection. This includes not only military security, but also security in legal, substantive, social and environmental terms.

This means that the state is obliged to take preventive actions aimed at protecting its citizens.

The above analysis allows for the conclusion that cybersecurity and the right to privacy are legal principles. It is worth stressing that there is no uniform definition of the term "legal principle" in Polish literature. In their views, legal commentators place emphasis on the identification of the characteristic features of legal principles, and the significance and role they play in the legal system. As a rule it is indicated three properties which characterise legal principles. These are a binding legal force, precedence over other norms in the legal system and their special role. State security and the right to privacy meet the aforementioned criteria. Both values were expressly set out in the provisions of the Polish Constitution, and take precedence over other norms in the legal system, arising from the position of the Constitution in the hierarchy of the sources of law, and play a significant role in the legal system. They specify the values which we should strive towards. The principles mark the direction of the interpretation of law, contributing to the harmonisation of legal order through ensuring the uniform application of law.

The general rules and conditions for restricting liberties and rights vested in individuals were laid down by the legislator in Article 31(3) of the Polish Constitution. The basic rule which must be fulfilled to legitimise interference within the sphere of guaranteed individuals' liberties and rights is the principle of the exclusivity of Acts. The statutory completeness requirement refers to legal regulations which are repressive to citizens, in particular penal law. In addition to the rule of exclusivity, it is necessary to take into account the rule of proportionality. In the context of restricted rights vested in individuals, the objective is to stress that the adoption of specific statutory solutions may not exceed a certain degree of nuisance and in consequence it cannot constitute excessive interference with the sphere of values (liberties, rights)92. It is also stressed that it is necessary to maintain the right proportions between the scope

[92] M. Jabłoński, Ograniczenie konstytucyjnych wolności i praw osobistych w czasie trwania stanów nadzwyczajnych, „Przegląd Prawa Administracyjnego" Wrocław 2016, No 3782, p. 178.

of interference (restrictions), "and the rank of the public interest which is to be subject to protection". The decision is left to the legislator, and only then to the authority appointed to control the constitutionality of laws, the Constitutional Tribunal, and courts, at the stage of the application of laws.

The 21st century sets new challenges for humanity. We are dealing with huge technological development and the choice between freedom and security is a very difficult choice. The threat of cyber terrorism implies two problems. On the one hand, cyber-attacks pose a threat to the rights and freedoms of the individual, on the other, the excessive powers of the state to protect the individual against these threats can also be considered a threat. It is important to be aware not to break the rules you defend. If, by fighting cyber terrorism and defending democratic values, the state begins to unduly restrict the rights and freedoms of the citizen-individual, the choice between freedom and security will be false. It is important that the state manages to defeat terrorism by maintaining its principles of freedom on which it is built.

BIBLIOGRAPHY

Aleksandrowicz T.R., Terroryzm międzynarodowy, Warszawa 2015

Bolechów B., Terroryzm w świecie podwubiegunowym. Przewartościowania i kontynuacje, Toruń 2002

Chałubińska-Jentkiewicz K., Nowikowska M., Bezpieczeństwo informacji w cyberprzestrzeni, Warszawa 2021

Chałubińska-Jentkiewicz K., Nowikowska M., Security v. Privacy – Legal Aspects, Maribor 2021

Hołyst B., Terroryzm, t. I, Warszawa 2011

Jabłoński M., Ograniczenie konstytucyjnych wolności i praw osobistych w czasie trwania stanów nadzwyczajnych, „Przegląd Prawa Administracyjnego" Wrocław 2016, No 3782

Kopff A., Koncepcja praw do intymności i do prywatności życia osobistego. Zagadnienia konstrukcyjne, „Studia Cywilistyczne" 1972, No. XX

Kosiński J., Cyberprzestępczość. In: W. Jasiński, W. Mądrzejowski, K. Wiciak K (eds) Przestępczość zorganizowana. Fenomen. Współczesne zagrożenia. Zwalczanie. Ujęcie praktyczne, Szczytno 2013

Radoniewicz F., Cyberspace, Cybercrime, Cyberterrorism, In: K. Chałubińska-Jentkiewicz, F. Radoniewicz, T. Zieliński (eds), Cybersecurity in Poland Legal Aspects, Springer 2022

Radwański Z., Prawo cywilne - część ogólna, Warszawa 1997

Safjan M, Refleksje wokół konstytucyjnych uwarunkowań rozwoju ochrony dóbr osobistych, „Kwartalnik Prawa Prywatnego" 2002, No. 1

Sienkiewicz P., Terroryzm w cybernetycznej przestrzeni, In: T. Jemioło, J. Kisielniecki, K. Rajchel (eds) Cyberterroryzm – nowe wyzwania XXI wieku, Warszawa 2009

Sieńczyło-Chlabicz J., Zawadzka Z., Nowikowska M., Prawo prasowe, Warszawa 2019

Sobczak J., Cyberprzestrzeń jako obszar ochrony bezpieczeństwa narodowego, w optyce dokumentów europejskich, In: P. Herbowski, D. Słapczyńska, D. Jagiełło (eds) Pozyskiwanie informacji w walce z terroryzmem, Warszawa 2017

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Digital development, technological innovation and Metaverse: the implications of tax law

Abstract

Digital development, technological innovation and the metaverse have generated new manifestations of wealth to be subjected to taxation, calling the interpreter to verify the adaptability of their tools to the ever-expanding phenomenal reality. The implications on a legal and economic level are evident, due to the difficulties also of an application nature, accentuated by the attention that the main giants of the digital world have begun to pour into this ever-expanding area. It is easy to predict that many economic activities of a digital nature, in the near future, will find in this context a place of expression and realization, with consequent criticalities in various areas of legal knowledge, including tax law. The hope is that modern, fair and shared tax rules will be introduced to address the challenges posed by modernity, in order to encourage investments and growth with a view to redistributing wealth.

Keywords: Digital development; technological innovation; metaverse; implications of tax law.

Summary:

1. Digital development and technological innovation have favored the spread of new completely dematerialized activities , whose unifying data is the digital essence , generating new manifestations of wealth to be subjected to taxation .

In this context, the interpreter is called upon to verify the adaptability of their tools to phenomenal reality , to identify new taxation methods for digital development .

This new form of finance is a source of large incomes that ignore the presence of structures in the places where the sources of remuneration are located , escaping the traditional connecting criteria of taxation power, based on the concept of tax residence and permanent establishment .

This last figure, in the traditional sense, dating back to the beginning of the last century, allows a fiscal jurisdiction to tax the income received by a non-resident subject only in the presence of a „fixed place of business", whereas, instead, the digital development makes it possible to create an economic relationship „remotely", without requiring the requirements of the traditionally understood „permanent establishment" to be integrated

.

Although the pillar of digital development consists of information technologies, its scope of application, far from being limited to the analysis of the digital economy alone, is much broader as it includes the discipline of bitcoin and cryptocurrencies , that of e-commerce , sharing economy , computer algorithms and artificial intelligences .

Not without importance are the economic effects deriving from „telematic globalization" , from the use and transfer of hardware and software tools , together with forms of virtual advertising and the commercial exploitation of personal data provided by users at the time of registration to websites or social networks (so-called "data economy") and the reflections, also of a tax nature, raised by the „metaverse".

2. With this last term, coined by American literature and characterized by fluid and indefinite outlines, is designated, in a futuristic vision, a virtual reality (that is, without physical consistency), very similar to the real world, developed in several dimensions through the use of 3D technology and shared via the internet, in which to interact through an avatar, a virtual viewer or an app and carry out legally relevant acts and operations .

It is a parallel universe in which, through an augmented reality , real world mechanisms are emulated to give shape to alternative existences with respect to the physical dimension, allowing the transfusion of social and economic tools in a digital dimension, through the blockchain, digital identities and decentralized governance systems .

This virtual world belongs to the operators of the technological sector, who manage the servers, control the conduct of the users and set the rules of operation .

Despite the institution's embryonic state, the legal and economic implications are evident, due to the theoretical and practical difficulties (for example, relating to the identification of the applicable law, of the judge with jurisdiction to which one can turn to complain their rights and the manifestations of wealth to be subjected to taxation), accentuated by the attention that the main giants of the digital world have begun to pour into this new area in continuous expansion, through huge investments .

It is easy to predict that many economic activities of a digital nature in the near future will find in the „metaverse" a natural place of expression and realization, with consequent criticalities in various areas of legal knowledge : first of all, in the field of the collection and processing of personal data, considering that all data relating to any activity carried out in the „metaverse" will inevitably pass through the servers of the owner of the IT platform, with consequent difficulty for users to verify effective compliance with current legislation; secondly, with regard to the various service contracts, often characterized by a cryptic formulation, by obscure clauses, by obligations that are not clearly defined, whose legal status appears extremely questionable.

3. No less relevant is the issue of anti-money laundering regulations, especially in the presence of the use of cryptocurrencies as a payment method and the performance of services with some financial nature, in which the verification of the actual identity of the parties becomes crucial for the correct attribution of relationships and legal effects, also in consideration of the qualifications sometimes required for the performance of certain activities.

Finally, the implications in tax matters cannot be ignored, due to the multiple uses of the „metaverse", with the consequent creation of significant and not merely marginal value, suitable for being subjected to taxation.

Very often, however, the „wealth" generated in the virtual world escapes imposition in the real world, in which the associates benefit from the indivisible services made available by the legal system and are required to participate in public spending on the basis of their ability to pay .

It is therefore necessary to prepare a uniform legal framework between the various fiscal jurisdictions, due to the a-territoriality that characterizes the „meta-world" .

In this perspective, the „metaverse" could rise to a new way of experiencing the network: a virtual place in which to carry out a plurality of economic activities, including speculative ones, whose exchange currency is cryptocurrency.

An example is offered by „crypto-art" , an expression referring to the dissemination of works of art in virtual reality , made unique and interchangeable through registration on the blockchain . These virtual entities can be the object of investment and sale (including through smart contracts) by using the „NFT" system, acronym of the term Non-Fungible Token , with which the certificate of ownership is designated which, via a link, refers to a digital file containing the virtual work of art together with the certificate certifying its exclusive ownership.

When an „NFT" is purchased on the blockchain, immutable proof is recorded that represents said transaction, indissolubly binding that particular token to its new owner . Precisely the exclusive ownership of Non-Fungible Tokens, ensured by cryptography and the use of specific metadata, is one of the characteristics that have allowed their diffusion, in the context of the digital economy, especially for speculative purposes .

In the art sector, these crypto-assets are exchanged through the use of dedicated platforms (MakersPlace, OpenSea, Nifty Gateway, Rarible, Mintable and SuperRare), on block chains that operate according to the distributed ledger technology scheme, in the absence of a central authority. However, it cannot be excluded that, in the future, the circulation of Non-Fungible Tokens may take place on private block chains (so-called "permissioned"), specially dedicated to the world of digital art and managed by a central authority .

The apparent anonymity of Non-Fungible Tokens could generate dangerous money laundering phenomena, which, in the short term, could be dealt with by extending the current anti-money laundering legislation to platforms that offer exchange services in the crypto-art sector .

In the long term, on the other hand, it would be appropriate to adopt a legislative intervention aimed at preparing a system for the circulation of digital works that is potentially attractive at a global level, also from a fiscal point of view, while at the same time placing adequate limits on the possible injection of illicit capital into the crypto-art ecosystem, which would end up polluting this new market, already exposed to the risk of possible speculation .

4. In the near future, a further field of application of the „metaverse" could be that relating to the portions of space that compose it (so-called "virtual real estate"), subject to subdivision, sale and leasing, with evident repercussions also in the tax field , both for the purposes of direct taxation and for the purposes of indirect taxation, since these are entities which, although virtual and intangible, appear susceptible to economic evaluation and inventory (possibly, also through the adaptation of the current cadastral models).

The incomes produced in the „metaverse", while originating an ability to pay in the real world, could escape taxation, not finding a place in the current declarative models (anchored to the manifestations of wealth produced in physical reality): a solution could consist in the prediction of a specific declaration model or in updating the instructions

for filling in the models in force, establishing, ex ante, whether this virtual reality can be considered a foreign state or become the residence state of the taxable person .
In consideration of the a-territorial character of the „metaverse", one could finally think of connecting the taxation of the income generated to the tax residence of the taxpayer, equating the metaverse to the State in which the physical person, who interacts through his avatar, for most of the tax period, is registered in the registries of the resident population or has their domicile or residence in the territory of the State pursuant to the Civil Code .
The hope is that, in the near future, modern, fair and shared tax rules will be introduced to address the challenges posed by the metaverse, technological innovation and digital development, in order to allow the redistribution of wealth and encourage investments and growth.

BIBLIOGRAPHY

P. Adonnino, voce Internet IV) Diritto Tributario, in Enc. giur. Treccani, Aggiornamento, vol. XIX, Istituto della Enciclopedia Italiana, Roma, 2002, p. 4.
F. Antonacchio, Criptoarte e Non Fungible Token alla ricerca di nuove regole, in Il fisco, 2021, 21, p. 2023 ss.
M. Aulenta, Flessi istituzionali nelle riforme del catasto, in Riv. dir. fin. sc. fin., 2016, 3, p. 364 ss.
M. Aulenta, Capacità contributiva ed equilibri finanziari dei soggetti attivi, Cacucci, Bari, 2022.
A. Baiocco, Pictet: il metaverso è un'opportunità di investimento da 800 miliardi, in https://www.milanofinanza.it/news/pictet-il-metaverso-e-un-opportunita-di-investimento-da-800-miliardi-202202021552498925.
A. Bal, Stateless Virtual Money in the Tax System, in European Taxation, 2013, 7, p. 351 ss.
A. Bal, Taxing Virtual Currency: Challenges and Solutions, in Intertax, 2015, 5, p. 381 ss.
A. Bal, Taxation, Virtual Currency and Blockchain, Wolters Kluwer, Alphen ann den Rijn, 2019.
R. Battaglini, M.T. Giordano (a cura di), Blockchain e Smart Contract. Funzionamento, profili giuridici e internazionali, applicazioni pratiche, Giuffrè, Milano, 2019.
B. Bellicini, G.L. Comandini, La fiscalità delle criptovalute tra rischi di evasione, problemi di tracciabilità e future prospettive, in Riv. dir. trib. – Supplemento online, 3 marzo 2022, p. 1 ss.
A. Bisioli, A. Zullo, Web tax: una lettura in chiave comunitaria, in Corr. trib., 2018, 13, p. 1032.
P. Boria, Il potere tributario. Politica e tributi nel corso dei secoli, Il Mulino, Bologna, 2021, p. 445 ss.
A. Bracchi, Il trattamento fiscale delle plusvalenze derivanti dalla cessione di criptovalute, in Boll. trib., 2018, 5, p. 341-342.
C. Buccico, Il catasto. Profili procedimentali e processuali, Jovene, Napoli, 2008.
C. Buccico, Problematiche e prospettive della tassazione dell'economia digitale, in Dir. proc. trib., n. 3/2019, pag. 255 ss.
S. Capaccioli, Regime impositivo delle monete virtuali: poche luci e molte ombre, in Il fisco, 2016, 37, p. 3538 ss.
L. Carpentieri, La tassazione delle imprese al tempo dell'economia digitale, in L. Carpentieri (a cura di), Profili fiscali dell'economia digitale, Giappichelli, Torino, 2020, p. 1 ss.
L. Carpentieri, La deriva dei territori e le nuove vie per il coordinamento della tassazione societaria, in Riv. trim. dir. trib., n. 1/2022, p. 7 ss.

A. Cinque, La blockchain. Smart contract – cripto-attività – applicazioni pratiche, Pacini Giuridica, Pisa, 2022.
C. Cipollini, Diritto tributario ed economia digitale: riflessioni sul metodo di ricerca, in Riv. dir. trib., 2022, 1, I, p. 43 ss.
A. Concas, Crypto Arte. Tutto quello che devi sapere sugli NFT, Blockchain e Arte Digitale, Piemme, Milano, 2021, p. 9 ss.
A. Contrino, G. Baroni, The Cryptocurrencies: fiscal issues and monitoring, in Dir. prat. trib. int., 2019, 1, p. 11 ss.
G. Corasaniti, L'imposta sui servizi digitali: una vera rivoluzione, oppure il messaggio in una bottiglia gettata in mare per i posteri?, in Dir. prat. trib., 2022, 1, p. 1 ss.
R. Cordeiro Guerra, S. Dorigo (a cura di), Fiscalità dell'economia digitale, Pacini Giuridica, Pisa, 2022.
N. D'Amati, voce Catasto. II) Diritto tributario, in Enc. giur. Treccani, vol. VI, Istituto della Enciclopedia Italiana, Roma, 1988, p. 1 ss.
G. Dan, Problematiche IVA relative all'acquisto di un software via internet o via modem, in Il fisco, 1999, p. 1759 ss.
A. De Stefano, La stabile organizzazione nel sistema dell'economia digitale, in A. Persiani (a cura di), La tassazione dell'economia digitale tra sviluppi recenti e prospettive future, Nuova Editrice Universitaria, Roma, 2019, p. 131 ss.
L. Del Federico, La tassazione nell'era digitale. Genesi, diffusione ed evoluzione dell'equalisation levy, in Dir. prat. trib. int., 2020, 4, p. 1431 ss.
E. Della Valle, G. Fransoni (a cura di), L'imposta sui servizi digitali, Wolters Kluwer - Cedam, Milano, 2021.
A. Dignani, Gli ambiti di applicazione della Blockchain nel settore dei beni artistici e culturali, in Diritto Mercato Tecnologia, 20 luglio 2021, p. 1 ss.
S. Dorigo, "Sharing economy" e imposta sui servizi digitali: le piattaforme per affitti brevi, in Corr. trib., 2020, 6, p. 607 ss.
S. Dorigo, The "algorithmic revolution": fair taxation, social pact and global governance, in M. Belov, The IT Revolution and its Impact on State, Constitutionalism and Public Law, Hart Publishing, Oxford, 2021, p. 161 ss.
EU Blockchain Observatory and Forum, Demystifying Non-Fungible Tokens (NFTs), available at the link: https://www.eublockchainforum.eu/news/new-thematic-report-demystifying-nfts.
A. Fantozzi, L'imposizione fiscale delle stabili organizzazioni: problematiche e prospettive, in Riv. dir. trib. int., 2002, 1, p. 9 ss.
E. Ferrari, Bitcoin e criptovalute: la moneta virtuale tra fisco ed antiriciclaggio, in Il fisco, 2018, 9, p. 862 ss.
A. Fidelangeli, F. Galli, Artificial Intelligence and Tax Law: Perspectives and Challenges, in CERIDAP, n. 4/2021, p. 32 ss.
G. Finocchiaro, C. Bomprezzi, A legal analysis of the use of blockchain technology for the formation of smart legal contracts, in Media-Laws – Riv. dir. media, n. 2/2020, p. 111 ss.
G. Fransoni, Note sul presupposto dell'imposta sui servizi digitali, in Rass. trib., 2021, 1, p. 13 ss.
F. Gallo, Fisco ed economia digitale, in Dir. prat. trib., n. 4/2015, p. 604 ss.
F. Gallo, Prospettive di tassazione dell'economia digitale, in Dir. mer. tecn., n. 1/2016, pag. 154 ss.
F. Gallo, Introduzione, in A. Persiani (a cura di), La tassazione dell'economia digitale tra sviluppi recenti e prospettive future, Nuova Editrice Universitaria, Roma, 2019, p. 11 ss.

A.M. Gambino, C. Bomprezzi, Blockchain e criptovalute, in G. Finocchiaro, V. Falce (diretta da), Fintech: diritti, concorrenza, regole. Le operazioni di finanziamento tecnologico, Zanichelli, Bologna, 2019, p. 277 ss.
C. Garbarino, voce Stabile organizzazione (nel diritto tributario), in Dig. disc. priv., sez. comm., Aggiornamento, vol. 5, Utet Giuridica, Milanofiori Assago (MI), 2009, p. 663 ss.
C. Garbarino, L'impatto del progetto BEPS sul concetto di stabile organizzazione, in Dir. prat. trib., 2019, 2, I, p. 587 ss.
C. Garbarino, Diritto convenzionale tributario, Giappichelli, Torino, 2019.
S. Ghinassi, voce Catasto, in Enc. dir., Aggiornamento, vol. IV, Giuffrè, Milano, 2000, p. 241 ss.
M. Giaccaglia, Considerazioni su Blockchain e smart contracts (oltre le criptovalute), in Contr. impr., n. 3/2019, p. 966-967.
B. Inzitari, Contratti su Internet: aspetti della dematerializzazione, in R. Rinaldi (a cura di), La fiscalità del commercio via Internet: attualità e prospettive, Giappichelli, Torino, 2001, p. 128 ss.
M. Logozzo, Tassazione della digital economy: l'imposta sui servizi digitali (ISD), in Riv. trim. dir. trib., n. 4/2020, p. 805 ss.
A. Lovisolo, Il concetto di stabile organizzazione nel regime convenzionale contro la doppia imposizione, in Dir. prat. trib., 1983, p. 1128 ss.
R. Luna, Nft, noi boomer e la cryptoarte: il rischio di un futuro nel Metaverso, in https://www.repubblica.it/esteri/2022/01/21/news/nft_cryptoarte_criptovaluta-334748373/.
A. Magliocco, Bitcoin e tassazione, in Strumenti finanziari e fiscalità, 2016, p. 22.
A. Magliocco, Le criptovalute: i profili fiscali nell'ordinamento italiano, in A. Persiani (a cura di), La tassazione dell'economia digitale tra sviluppi recenti e prospettive future, Nuova Editrice Universitaria, Roma, 2019, p. 223 ss.
G. Magri, La Blockchain può rendere più sicuro il mercato dell'arte?, in Aedon, n. 2/2019, available at the link: http://www.aedon.mulino.it/archivio/2019/2/magri.htm.
A. Manca, L'opera d'arte nell'epoca degli NFT, in https://www.artribune.com/progettazione/new-media/2022/01/nft-mercato/.
E. Marello, Le categorie tradizionali del diritto tributario ed il commercio elettronico, in Riv. dir. trib., 1999, 6, I, p. 595.
G. Marino, La residenza nel diritto tributario, Cedam, Padova, 1999.
G. Marino, Aspetti fiscali del commercio elettronico, in G. Sacerdoti, G. Marino (a cura di), Il commercio elettronico: profili giuridici e fiscali internazionali, Egea, Milano, 2001, p. 145.
S. Mayr, B. Santacroce (a cura di), La Stabile Organizzazione nelle Imprese Industriali e Commerciali, Wolters Kluwer, Milanofiori Assago (MI), 2016.
E. Mignarri, Bitcoin e criptovalute: il trattamento fiscale delle valute virtuali, in Bancaria, 2018, 7-8.
S. Morabito, L'applicabilità della Blockchain nel diritto dell'arte, in BusinessJuss, available at the link: https://www.businessjus.com/wpcontent/uploads/2018/07/180709-Lapplicabilita%CC%80-della-blockchain-nel-dirittodellarte.pdf.
M. Nicotra, La Blockchain, in Diritto di INTERNET. Smart contract, criptovalute e blockchain, 2021, p. 145.
S.A. Parente, Digital reality and tax rules: from the bit tax to the web tax, in M. Sitek, L. Tafaro, M. Indellicato (edited by), From human rights to essential rights, Alcide De Gasperi University of Euroregional Economy in Jósefów, Jósefów, 2018, p. 259-260.
S.A. Parente, Il catasto e gli estimi catastali: funzione impositiva e regole di governo, Cacucci, Bari, 2020.

S.A. Parente, Il sistema catastale: struttura, funzioni, fonti, in A. Uricchio, M. Aulenta, P. Galeone, A. Ferri (a cura di), I tributi comunali dentro e oltre la crisi, Tomo I, Prelievi e basi imponibili, Cacucci, Bari, 2021, p. 123 ss.
S.A. Parente, Robotica e intelligenze artificiali: forme di prelievo e dinamiche impositive, in Corti Umbre, n. 2/2021, p. 645 ss.
F. Pepe, Dal diritto tributario alla diplomazia fiscale. Prospettive di regolazione giuridica delle relazioni fiscali internazionali, Wolters Kluwer – Cedam, Milano, 2020.
F. Petrucci, voce Catasto, in Noviss. dig. it., Appendice, vol. I, Utet, Torino, 1980, p. 1080 ss.
F. Petrucci, voce Catasto, in Dig. disc. priv., Sez. comm., vol. III, Utet, Torino 1988, p. 31 ss.
M. Pierro, La qualificazione giuridica e il trattamento fiscale delle criptovalute, in Riv. dir. trib., 2020, 2, I, p. 103 ss.
A. Purpura, Note minime sulla configurabilità di un indice di capacità contributiva "digitale", in Riv. trim. dir. trib., 2021, 4, p. 929 ss.
L. Quarta, Metaverso e diritti, in https://cryptonomist.ch/2022/01/14/metaverso-e-diritti/.
S. Rapuano, M. Cardillo, Le criptovalute: tra evasione fiscale e reati internazionali, in Dir. prat. trib., 2019, 1, p. 44 ss.
M. Ravaccia, Brevi note in materia di corrispettivi per l'acquisto di software nei rapporti transnazionali, in Dir. prat. trib., 1998, III, p. 623 ss.
R. Razzante, Bitcoin e monete digitali: problematiche giuridiche, in Riv. it. intelligence, 2018, p. 107 ss.
R. Razzante (a cura di), Bitcoin e criptovalute. Profili fiscali, giuridici, finanziari, Maggioli, Santarcangelo di Romagna (RN), 2018.
C. Ricci, La digital economy ed il problema della stabile organizzazione nell'esperienza italiana, in L. Del Federico, C. Ricci (a cura di), La digital economy nel sistema tributario italiano ed europeo, Amon, Padova, 2015, p. 57 ss.
M. Romani, D. Liakopoulos, La globalizzazione telematica. Regolamentazione e normativa nel diritto internazionale e comunitario, Giuffrè, Milano, 2009.
G. Salanitro, Profili sostanziali e processuali dell'accertamento catastale, Giuffrè, Milano, 2003.
G. Salanitro, voce Catasto (dir. trib.), in Diz. dir. pubbl., vol. II, Giuffrè, Milano, 2006, pag. 814 ss.
L. Salvini, La dimensione valutaria dell'economia digitale: le criptovalute, in L. Carpentieri (a cura di), Profili fiscali dell'economia digitale, Giappichelli, Torino, 2020, p. 165 ss.
O. Salvini, Redditi generati nel Metaverso: ricondurre all'imposizione reale la ricchezza di origine "virtuale", in Il fisco, 2022, 13, p. 1207.
L. Scarcella, Taxation issues rising from trading activities involving bitcoins, in Riv. dir. trib. int., 2018, 2, p. 112-113.
G. Scarlata, R. Lupi, voce Catasto, in Il Diritto. Enciclopedia giuridica del Sole 24-Ore, vol. 3, Corriere della Sera – Il Sole 24 Ore, Milano, 2007, pag. 23 ss.
F.P. Schiavone, Profili fiscali delle operazioni di scambio di criptovalute, in Dir. prat. trib. int., 2019, 3, p. 681 ss.
C. Sciancalepore, Appunti sulla tassazione dell'economia digitale come nuova risorsa propria europea, in Riv. dir. trib., 2019, 6, I, p. 686.
G. Selicato, S.A. Parente - La "riforma del catasto fabbricati" nella recente proposta di delega per la revisione del sistema fiscale: linee di sviluppo e criticità, in Riv. dir. trib. – Supplemento online, 16 dicembre 2021, p. 1 ss.
A.D. Signorelli, E se il vero metaverso fosse in realtà aumentata?, in https://www.wired.it/article/metaverso-realta-aumentata/.

S. Spiniello, M. Bisogno, Compravendite di opere d'arte tra privati: il difficile confine tra speculazione e collezionismo, in Il fisco, n. 36/2017, p. 3431 ss.
G. Stanzione, Beni culturali, realtà aumentata e nuove tecnologie dell'informazione: profili giuridici, in Comparazione e diritto civile, 2019, p. 1 ss.
N. Stephenson, Snow Crash, New York, Bantam Books, 1992.
A. Tomassini, I profili IVA e reddituali dei non fungible token, in Corr. trib., 2022, 3, p. 276 ss.
C. Trenta, Bitcoin and virtual currencies. Reflections in the wake of the CJEU's bitcoin VAT judgement, in Riv. trim. dir. trib., 2016, 4, p. 949 ss.
A. Uricchio, Evoluzione tecnologica e imposizione: la cosiddetta «bit tax». Prospettive di riforma della fiscalità di internet, in Dir. informaz. e informat., 2005, p. 753-754.
A. Uricchio, La fiscalità dell'intelligenza artificiale tra nuovi tributi e ulteriori incentivi, in U. Ruffolo (a cura di), Intelligenza artificiale. Il diritto, i diritti, l'etica, Giuffrè, Milano 2020, p. 490 ss.
A.F. Uricchio, Manuale di diritto tributario, Cacucci, Bari, 2020.
A. Uricchio, S.A. Parente, G. Cartanese, La riforma del catasto nella nuova legge delega di riforma del sistema fiscale, in Gazz. forense, 2014, 6, p. 179 ss.
A.F. Uricchio, S.A. Parente, Data driven e digital taxation: prime sperimentazioni e nuovi modelli di prelievo, in Dir. prat. trib. int., 2021, 2, p. 606 ss.
A. Uricchio, W. Spinapolice, La corsa ad ostacoli della web taxation, in Rass. trib., 2018, 3, p. 451 ss.
P. Valente, Bitcoin and virtual currencies are real: are regulators still real?, in Intertax, 2018, 6-7.
B. Westberg, Tassazione del reddito derivante dal commercio elettronico internazionale, in R. Rinaldi (a cura di), La fiscalità del commercio via Internet: attualità e prospettive, Giappichelli, Torino, 2001, p. 100.

SECTION II

Human rights as an accelerator in promoting social inclusion and reducing inequalities

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Possible ways of social inclusion

Abstract
Equality and equity are based on the assumption that unequal people and groups exist in society. All related measures and actions aim to identify and address disadvantages at individual or group level. However, this is only possible if society itself becomes inclusive. Inclusion is seen from the perspective of society as a whole. system of inequalities by creating a framework in which exclusionary and exclusionary social forces are eliminated.
The present study aims to provide a brief glimpse into the subject of integration and inclusion, which cannot be ignored in the issue of human rights in the 21st century.

Keywords: equal, integration, social problem inclusion, voluntering

Introduction

One of the most frequently voiced issues in the national and international scene is that of inclusion or rejection, of identifying with a sense of exclusion. Among different social groups, being different, being different, being different, is sometimes more or less of a problem, if only because all people are different, some are manual and some are stronger in their thinking, some are black, some are white, etc. All are the same, all want to belong to something or someone. We want to be accepted.

Social inclusion and the more commonly used term today, inclusive society, can be imagined and implemented in many different ways in a community. However, one fact is certain: members of society have a very eclectic view of these two processes, activities and their implementation in different arenas. It is precisely for this reason that it is necessary to circumscribe and summarise the concepts in order to understand the main thrust of this study.

Inclusive society, social inclusion and volunteering are permanent players on the 21st century scene, be it social issues, economic rethinking or disability issues.

Social inclusion is the most commonly used concept in various fields, not necessarily only

in the social sciences. „In sociology it does not have a sufficiently fixed and defined meaning. As in ordinary conversation, it can mean a state of strong interdependence or cohesion of elements or the process leading to this state." (Dictionary of Sociology, 1998)

The notion of inclusion, in Niklas Luhmann's thought, is presence in the system. In his theory, inclusion refers to the state of being in a system or subsystem. In sociology, the concept of inclusion does not have a well-defined content. In science, in ordinary life, it means a strong interdependence, interconnectedness or belonging.

One of the participants in this process is the inclusive society, a „society of all" in which all individuals play an active role" (based on UN text). This concept implies diversity, a desire for equality and the principles of social justice. „Inclusive societies involve all individuals and groups based on age, gender, sexual orientation, ethnicity, race, ability, religion, immigration status and access to socio-economic status. Full participation is reserved, but not limited, to cultural, economic, social, environmental, legal, physical and political domains. An inclusive society challenges exclusionary laws and traditions that most often marginalise individuals and groups on the basis of their identity.

Thus, it can be said that „inclusion - inclusion - is a consciously operated system of social action that can prevent exclusion and marginalisation and ensure real access (not only in the physical sense). Inclusion is based on the view of cultures and communities that inclusion is a never-ending process, a constant work towards an ideal, when the constraints of exclusion in society disappear. One of the most important arenas for mainstreaming inclusion in society is education. Inclusive society is a fundamental source of education for the community, and education itself is more than schooling - it is action with the community, in the community, for the community." (Varga, 2015)

In addition to all this, and as a link between the assumption of community tasks and the realisation of these two processes, volunteering has become the most important activity and mechanism in recent decades. Numerous national and international studies and research show that volunteering can make society stronger and less fragmented.

Previous research has looked at volunteers in terms of organisational expectations, but more recently the focus is now on volunteers' expectations, motivations and needs. According to Anna Mária Bartal, „The Volunteering in Hungary 2018 survey and the latest European Values Survey" (EVS, 2017/18) indicate that there is a generational shift in volunteering in Hungary. The growing proportion of young people is posing new challenges for organisations, the so-called episodic volunteering is increasing, and as a result organisations need to become more flexible and better build on the motivation of volunteers." (Bartal, 2019)

There are many definitions of volunteering. „The intersection of these definitions has three main features. The activity is voluntary, uncoerced, not performed for remuneration (although reimbursement is allowed), for the benefit of others (non-household members - individuals, groups, communities, society)." (Perpék, 2017)

A more general perspective is that „volunteering is a community tool for social, cultural, economic or environmental development. Voluntary activity covers different areas; from providing humanitarian assistance in times of disaster, protecting human rights, providing health and social assistance, to advocacy, participating in public affairs and political action." (Info sheet, 2021)

Ferenc Péterfi (2002) also highlighted the main characteristics of voluntary work in a study. According to him, the main characteristics of voluntary work are: ‚personally motivated, based on free, individual choice, free of financial interests, serving the benefit of others, helping

individuals and communities to be part of the solution to their own problems and at the same time benefiting those in need and those doing voluntary work' (Péterfi 2002). „In the literature on volunteering, mainly international, there has been a wide debate in recent decades about the extent to which the volunteer's own choices, motives, motivations or external circumstances, opportunities, „the call", influence why and in what fields of activity one becomes a volunteer. Volunteering patterns have changed over the last half century or more. There are now very few „lone" volunteers, most people who volunteer do so in an organised context" (Volunteer Motivation 2009).

„Volunteering is one of the best ways to build the team spirit that is so fashionable today. Volunteering is a real way to learn to work in a team and to experience the joy of working together. Often companies also encourage volunteering among their employees, for example by taking employees out for a day to do some voluntary work" (Farkas et al., 2012).

Basic issues

Society and its environment have changed significantly in the last few years. The scope of these changes includes, on the one hand, the complexity of meeting the challenges and, on the other hand, the factors that affect the different people in society, who are less or differently able to integrate. The intersection of these factors has also led to a strategy to resolve this dissonance.

„We must therefore seek and find ways of eliminating the range of problems associated with increasing social pressures. Research on the benefits of volunteering shows that volunteering can play a significant role in the process of education and the subsequent inclusion of people with disabilities, as well as in meeting the expectations of the environment in later life. With this in mind, the term ‚inclusive volunteering' has emerged in recent years to support society's efforts to achieve inclusion." (Markova, 2018)

„A new approach to the relationship between the vulnerable group and volunteering started in the 2000s, with the development of the theory and practice of inclusive/inclusive volunteering in the US and the European Union. A major role in this was played by the resolution adopted by the UN General Assembly in 2001, which valorised the role of volunteering in combating social exclusion and promoting social inclusion. In the framework of the Life Learning Programme, supported by the European Social Committee, the Inclusive Volunteering Programme was launched in 2013-2015 with the participation of seven countries, one of which was Hungary. Unfortunately, in Hungary this programme has not been fully disseminated, while in Ireland a whole startegy has been built to promote inclusive volunteering." (Bartal, 2021)

Inclusionary volunteering can be defined as volunteering opportunities that are available to all people, regardless of age, culture, gender, sexual orientation, ethnicity. However, the formulation requires a strong explanatory note. A group that should be singled out is people with disabilities. The so-called normalisation principle is the basis of the change in attitudes in recent decades, which can be seen as a professional endeavour to create normal living conditions for people with disabilities, to the detriment of the institutional system at individual level. The basic thesis of this principle is to create a social environment that creates the most optimal individual life path for the person concerned, one that is oriented towards an open society and that promotes development and quality of life.

In the 21st century, this principle of normalisation is at work in the inclusion of new types of social connections, including specific social groups involved in inclusive volunteering.

People with disabilities are generally assumed to be mostly in the role of service users and

are not given the opportunity to benefit from the provision of services in this position.

The theory and practice of inclusive volunteering (Miller et al. 2002, Lindsay 2015) draws on the findings of volunteering research (Clary et al1998, Wilson-Musik 1999; Dekker-Halman 2003) that, in addition to its social significance (active citizenship), volunteering contributes greatly to the development of the individual's personality through the development of sociability, self-confidence, skills, experiences, etc. According to the generalist view of inclusive/inclusive volunteering, this inclusion applies to everyone (InclusiveVolunteering-Ireland 2015), while the minimalist approach understands it only for people with disabilities (Miller et al. 2011) and the intermediate view is that it provides an opportunity for people with disabilities and non-disabled members of society to meet and engage in activities through volunteering (Stroud et al. 2010). (based on Anna Maria Bartal)

The acceptance of people with disabilities is a key issue, as disability is part of being human. As we progress in life, we may become temporarily or permanently disabled ourselves, and thus need the help and support of society. Currently, more than one billion people - around 15% of the world's population - live with a disability, and this number is only gradually rising. These factors also show that social action is needed, or is becoming necessary, to make people from the groups concerned feel that they can make a difference to other people.

People with disabilities are one of the most disadvantaged groups in Hungarian society. In addition unsatisfactory state of health, they also face a number of difficulties in their social circumstances, which have a significant impact on their daily lives and on their ability to adapt to the norms accepted by society. The question in this case is how to change all this, what tools can be used for integration strategies that can make them more sensitive to the contradictions inherent in society.

Viktor Kiss (2013) summarizes his ideas on people with disabilities, which raise further questions in the implementation of inclusive volunteering. „The objective of ‚normal life' is often expressed, i.e. that people with disabilities should also be able to play sports, work, study, run errands, activate human relations. This way of speaking, along the lines of ‚equal opportunities', ‚disadvantage', ‚inclusion', believes that society offers more and more opportunities for people with disabilities to integrate - it is up to people with disabilities to take advantage of them. At the forefront are education and the labour market: as individual ways of overcoming the disadvantages of people with disabilities." (Kiss, 2013)

Inclusive thinking deliberately seeks to override this situation. It aims to create a situation in which social coexistence - formal and informal - is achieved in the long term, and in which people with disabilities can find their personal territories linked to their individual life paths. As values and humanity, in a spirit of mutual recognition, they can comply with the principles that are reflected in voluntary activity.

Inclusive volunteering

The research on the practical results and implementation of inclusive volunteering (Miller et al 2002; 2003; Marková,2017; Shandra ,2017; Yanay-Ventura, 2018) confirms that volunteering can also bring positive benefits for people with disabilities in terms of social inclusion and personal development. At the same time, they point out that inclusive/inclusive volunteering is a multifactorial process involving: barriers due to disability and the attitude and resources of the host organisation; self-image (motivations, fears, coping), support (socialisation environment and coordination of the host organisation), and the interpretation of volunteering versus the realisation of personal „benefits" (quoted from Anna Maria Bartal).

Being a volunteer is a fundamental way for members of a community to be active and vital in the community, to feel connected and to be seen as a value to the community. With more than 56% of Americans volunteering (Independent Sector, 1999), it is clear that many of their citizens recognize the dual nature of volunteering - while helping others, they can become members of the community, sparking community discourse. Research has shown that volunteers also benefit psychosocially in ways such as increased self-esteem, attitudinal changes, improved self-concept, reduced alienation, increased sense of helpfulness and a greater sense of social responsibility (Finn & Checkoway, 1998; Hamilton and Fenzel, 1988); Johnson, Beebe, Mortimer and Snyder, 1998; Moore & Allen, 1996; Omoto and Snyder, 1990; Omoto, Snyder and Berghuis, 1992). (Stroud - Miller - Schleien – Merrill, 2010)

For social inclusion, all members must feel able to contribute meaningfully to the satisfaction of needs. Volunteering can transform volunteers, which increases self-confidence and the positives of personal achievement. As a result, volunteers with disabilities help to dispel stereotypes and change perceptions about what they can and cannot do.

Summary

The present study was intended as a brief overview of the basics of inclusive volunteering and the importance of the activity. The essence of inclusive volunteering is strong social cohesion, trust, inclusion and its social realisation, as well as the commitment that underpins volunteering and, not to be forgotten, the principle of normalisation. The introduction of concepts in a study often seems tedious, but in many cases it is significant because it makes the meaning of the content undertaken more understandable and complex to highlight.

The theory of inclusive volunteering, with its social realisation as its basis, can be seen as a rudimentary foundation, as it plants the seeds of a new kind of volunteering in the field of dealing with groups that are different from the rest of society. In this case, the people with disabilities in the spotlight are building on their own situation by providing specific assistance to themselves on the one hand, and to their non-disabled peers on the other, to demonstrate their values and their role. Acceptance of disability is a differentiated process, and in many cases it is still a major challenge to incorporate it into individual values.

Inclusive volunteering aims to build social solidarity by empowering volunteers as social actors who benefit themselves and many others through various civic initiatives and social sensitisation.

Inclusive volunteering is also an activity based on individual choice. It is a factor in improving quality of life in modern societies and is now taking this path in Eastern European societies. It is characterised by community thinking and a sense of security for those in society who need help.

BIBLIOGRAPHY

Anna Mária Bartal (2010): Adaptation, development and testing of the Volunteer Motivation Inventory among Hungarian volunteers. Civil Szemle, 1., pp 5-33.

A. M. Bartal – Z. Kmetty (2011): Hungarian Volunteer Motivation Questionnaire. Civil Szemle, 4., pp 7-30.

A.M. Bartal – Z. Kmetty (2011): Reformed religious volunteers. Confessio 1, pp. 55-65.

A. M. Bartal (2019). On thirty years of Hungarian volunteering in three movements. Civil Szemle, 1. pp.15-33
D. Tracey J. -Darcy, Simon- A. Benson, (2017): Event Management, 21(3), pp 301-318.
K. Farkas- A. Hegedűs – B. Katona- Zs. Máhl – A. Mátyus – Á. K. Molnár (2012). Volunteering in Hungary. Vezetéstudomány, vol. 43, no. 4,
K. Forrai -A. Varga (2011): Inclusion in higher education. Pécs, University of Pécs
V. Kiss (2013): The policy of wholeness: Discourses about disability and the ideologies of normality in Hungary. In: I. Laki, (ed.) (2013) A 21st century overview of the international and domestic disabilitypolicies. L'Harmattan, Budapest
A. Marková (2018): The phenomenon of «inclusive volunteering»: research on volunteering of people with disabilities. Contact, 20(1), pp 48-56.
Miller, Kimberly D, Schleien, Stuart J, Rider, Cecilia, Hall, Crystal (2002): Inclusive volunteering: benefits for participants and the community. Therapeutic Recreation Journal. 36., 3., 247-259.
Miller, Kimberly D, Schleien, - Bedini, L. (2003): Barriers to engaging volunteers with developmental disabilities. The Journal of Volunteer Administration, 21. 1, pp. 25-30.
Miller, K. - Simpson, B. - Lieben, J. - Simpson BJ. (2011) Understanding the role of volunteering in creating social inclusion. A report prepared for the South West Centre for Community Resources. Calgary, Brenda J. Simpson and Associates;
Info Note 2021/35.
É. Perpék (2017): Volunteering near and far: a national and international perspective. In. K. Janák K, Katalin Szép, K.Tokaji. (eds.): Household work, voluntary work, - invisible work. Hungarian Statistical Office, Budapest, pp. 108-121.
F. Péterfi (2002): The Volunteering (Study)
S. Stroud. - K Miller. – S. Schleien. - A. Merrill (2010): Engaging volunteers with disabilities: a qualitative study. International Journal Voluntary Administration 27,2,pp. 75-86.
Volunteer Motivation (2009): Volunteer motivation.
Aranka Varga (2015): Perspectives and practice of inclusion and practice. University of Pécs Faculty of Humanities Institute of Educational Sciences Department of Romology and Sociology of Education Henrik Wlislocki College

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Discrimination in the age of algorithms

Abstract
The application of artificial intelligence (AI) is expanding into more and more areas of life (e.g., it can improve healthcare, help law enforcement authorities fight crime more effectively, make transport safer, or even help detect fraud and cybersecurity threats, etc.). It is therefore undoubtedly one of the biggest challenges of our time, both from an economic and regulatory perspective. Not least because the European Commission has published a White Paper on Artificial Intelligence in 2020, which will form the basis for specific regulation of AI developments and applications at EU level.

The most important step forward in the regulation of AI is the publication in April 2021 of the Commission's proposal for a draft Artificial Intelligence Act (EU AI Act), which contains important restrictions on AI systems used in or in connection with the EU. The use of AI with specific characteristics may adversely affect a number of fundamental rights enshrined in the Charter of Fundamental Rights of the European Union. Therefore, the proposal aims to ensure a high level of protection of these fundamental rights. Closely related to this is one of the fundamental rights most at risk: the right to equal opportunities and the prohibition of discrimination. The focus of this study is the regulation of data and datasets used to train AI applications.

Keywords: Artifical Intelligence, Draft Artificial Intelligence Act, discrimination in artificial intelligence, data protection and artificial intelligence.

Introduction

The application of artificial intelligence (AI) is expanding into more and more areas of life (e.g. it can improve healthcare, help law enforcement authorities fight crime more effectively, make transport safer, or even help detect fraud and cyber security threats, etc.). It is therefore undoubtedly one of the biggest challenges of our time, both from an economic and regulatory perspective. Not least because the European Commission has published a White Paper on Artificial Intelligence in 2020, which will form the basis for specific regulation of AI developments and applications at EU level. It sets out that AI can have a significant impact on our society and that it is necessary to build trust and confidence in it, and that it is crucial that the AI sector is based on fundamental rights and values such as human dignity and privacy. Human-centred AI presupposes technology that people trust because it is in line with the values that underpin human societies. Ethical principles play a crucial role in establishing trust, assessing risks and managing regulation. In the overall design of AI regulation, four main ethical directions

should be highlighted: respect for human autonomy: do not control/manipulate people, do not compromise democratic processes; prevention of harm: including resistance to unintended external influences that may result in harm; fairness: the development, deployment and use of AI systems should be equitable; and explainability: means transparency of operation (trusted AI systems can be traced and their decisions explained, in particular users should be informed that they have been exposed to an AI system and also how the AI system works, what its capabilities are, how and with what reliability it uses the datasets provided to it).

The most important step forward in the regulation of AI is the publication in April 2021 of the Commission's proposal for a draft Artificial Intelligence Act (hereinafter EU AI Act) , which contains important restrictions on AI systems used in or in connection with the EU. The use of AI with specific characteristics (e.g. opacity due to the black box effect, complexity, dependence on data, autonomous behaviour) may adversely affect a number of fundamental rights enshrined in the Charter of Fundamental Rights of the European Union (hereinafter the Charter). Therefore, the proposal aims to ensure a high level of protection of these fundamental rights and to address the different sources of risk through a clearly defined risk-based approach. However, the White Paper, the accompanying Commission report on the responsibility and safety of AI, and the draft Regulation mention several times an area at the intersection of law and AI that has hardly been analysed from a legal perspective and which is the focus of this study: the regulation of data and datasets used to train AI applications.

Closely related to this is one of the fundamental rights most at risk: the right to equal opportunities and the prohibition of discrimination. The main cause of this is the incompleteness or flaw in the data set used by the AI sytem or used in the training of the AI, or the inherent bias in the system. The bias in algorithmic decision-making that can be caused by the aforementioned problems in the dataset can lead to infringement without any intentionality or human awareness behind it. AI can also produce discriminatory results in decision-making if the system learns from discriminatory training data. Distorted training data can have the following discriminative effects: the AI can be trained on biased data; problems can arise if the AI system learns from a discriminative sample; in both cases, the AI system will reproduce this bias. Increasingly, experts are exploring ways to detect and improve algorithms that may be potentially discriminatory against individuals or groups based on specific characteristics, such as gender or ethnicity. This occurs when the outcome for a particular group is systematically different from other groups, and therefore one group is consistently treated differently from others. This can occur when the data used to teach the algorithm contains information on proprietary characteristics (e.g. gender, ethnicity, religion, etc.). Furthermore, the data sometimes contain so-called „surrogate information". This could be, for example, the postcode, which may indirectly refer to ethnic origin in segregated urban areas, or more directly to the country of birth of the person. Unequal outcomes and differential treatment, particularly in relation to proxy information, should be assessed to determine whether they constitute discrimination. Discrimination may be based not only on differences in outcomes between groups, but also when the data selected for use are not neutral. This means that if the data used to build the algorithm reflects a bias, for example against one group, then the algorithm will replicate the human bias in the selection process and learn the data, i.e. discriminate against that group. The data may reflect bias for several reasons, including decisions made in the selection, collection and preparation of the data. For example, an automated image description was trained based on thousands of images described by humans. However, people do not describe images in a neutral way. Notably, an infant white baby was described as a „baby", but a black- baby was described as a „black

baby". This is biased data because it attributes additional characteristics to only one group, whereas objectively both cases should be described including skin colour, or neither. If such information is included in the training data and used to develop algorithms, the results will not be neutral. The data may be poorly selected, incomplete, incorrect or out of date. Poorly selected data may include ‚non-representative data' that do not allow generalisations to other groups. For example, if an algorithm is created based on data for a particular group of job applicants, then predictions for other groups may not be correct. In addition, an algorithm can only be as good as the data it works with, which means that the data model that makes decisions based on the analysis of the algorithm may be biased and discriminatory. In this case too, the principle of „garbage in, garbage out", as used in statistics, applies, meaning that poor quality input data will itself produce poor quality results (predictions). Therefore, algorithms can (still) disadvantage historically disadvantaged groups if they are based on negative and unsubstantiated assumptions. In this sense, data quality control and proper documentation of data and metadata are essential for high quality data analysis and the use of algorithms for decision making.

At first glance, algorithms sort, categorise and organise information in a way that eliminates human biases and prejudices. They should therefore be able to ensure the expected equal treatment by applying the same criteria and weighting, regardless of, for example, the origin of the person. In reality, however, there is no technological wizardry or mathematical neutrality: algorithms are designed by humans using data that reflect human practice. Bias and prejudice can creep into any stage of algorithm system development.

Discrimination in the criminal justice system

A notorious example of an AI system with a discriminatory effect is the system known as Correctional Offender Management Profiling for Alternative Sanctions, or COMPAS for short. COMPAS is used in the criminal justice system in some parts of the United States to predict the likelihood that offenders will re-offend. The basis for the use of this system is that COMPAS can assist the court's work by providing concrete recommendations for decisions. COMPAS can indicate three indicators for the person concerned: the risk of pre-trial release; the recidivism coefficient and the violent recidivism coefficient. Although the COMPAS may not explicitly include a racial factor, it could arguably be programmed to correlate strongly with the ethnic background of the defendant, and thus raise concerns about its use, particularly in relation to due process.

However, a study conducted in 2016 highlighted that the COMPAS system's risk classification reflects a bias against black people. While it correctly predicts recidivism in 61% of cases, it is almost twice as likely to result in a higher risk classification for black than for white. In fact, in their case, the system makes the opposite mistake by being more likely to classify them as lower risk. Furthermore, black-skinned pregnant women are twice as likely as white-skinned pregnant women to be wrongly classified as higher risk for violent recidivism. And white-skinned violent recidivists were 63 percent more likely to be misclassified as low risk.

As promising as these systems are, the inherent bias and discrimination in their data sources, the „black box" problem inherent in the algorithms, is present. Hence, misinterpretations and inferences from data analysis have quickly triggered huge debates among policy makers, practitioners and academics. The consequences of this were illustrated in a recent case, State v. Loomis, in which the Wisconsin Supreme Court upheld a lower court ruling based on the COMPAS risk

assessment system and dismissed the defendant's appeal alleging a violation of his right to due process. In addition, it is worth noting that the law enforcement also use AI systems for predictive policing, which involves automated predictions of who will commit a crime, when and where. Similarly, predictive policing systems can replicate or even amplify existing discrimination.

Discrimination and online advertising

Algorithmic decision-making can also have discriminatory effects in the private sector. A good example of this is the increasingly common case of automated decision-making in recruitment. For example, the hiring of a new employee can be ‚outsourced' to an analytics software that imports and transforms CVs and automatically extracts, stores, analyses, sorts and reviews the information submitted, possibly using other data sources such as the applicant's social media accounts. One prominent example is Amazon's CV filtering software, which was trained on distorted historical data, resulting in a bias towards male candidates, as in the past Amazon has more often hired men as software engineers than women, and the algorithm was trained on this data. Amazon is also reported to have stopped using the AI system to screen job applicants because it was discovered that its new system was not assessing applicants for software engineering and other technical jobs in a gender-neutral way. It is therefore recommended that sources of human bias such as gender, race, ethnicity, religion, sexual orientation, age and information that could indicate membership of a protected group be removed from the system and dataset.

The European Union's draft Artificial Intelligence Regulation

The draft EU AI Act aims at a minimum of horizontal regulation, using a risk-based approach, classifying AI applications into risk classes. The draft distinguishes a fully prohibited category (Title II), which includes the prohibition of facial recognition programmes (with exceptions) in public places; subliminal manipulation; mass surveillance or the unlawfulness of a social point system (similar to the one used in China). In addition, it defines high-risk AI applications (Title III), for which it establishes binding rules, and other applications that are less risky (Title IV) but still deserve some attention (it addresses the risks associated with these applications by supporting transparency provisions), and finally AI applications that do not fall into either category, which it leaves to codes of conduct, i.e. self-regulation.

Of most interest to us in this topic is the regulation of high-risk AI. An AI system is considered high-risk if it is either a safety component of an already tightly regulated group of products (listed in Annex II, from toys to craft to medical devices), or because it is used in an area where human rights are particularly affected. The latter list includes two dozen specific applications in eight areas, such as AIs for biometric identification of natural persons, AIs for the control of critical infrastructures (transport, gas, water, electricity), and some other AIs (such as recruitment, university admissions, credit assessment and advice to judges).

Indeed, the draft regulation states that AI systems used in the context of employment, management of workers and access to self-employment, in particular recruitment and selection of persons, decisions on promotion and dismissal, and the allocation of tasks to persons with a contractual employment relationship, as well as the monitoring or evaluation of such persons, should be considered as high risk, as they may have a significant impact on the future career prospects and livelihood of these persons.

Actions by law enforcement authorities involving the use of certain AI systems are characterised by a significant imbalance of power and can lead to the surveillance, arrest or deprivation of liberty of a natural person, as well as other adverse effects on the fundamental rights guaranteed by the Charter. In particular, if an AI system is not trained with good quality data, does not meet adequate standards of accuracy or stability, or is not properly designed and tested before being placed on the market or otherwise put into service, it may select people in a discriminatory or otherwise unfair or unjust manner. It may also hinder the enforcement of important fundamental procedural rights, such as the right to an effective remedy and to a fair trial, as well as the rights of the defence and the presumption of innocence, if such AI systems are not sufficiently transparent, explained and documented.

The AI systems used in migration management, asylum and border management affect people who are often in a particularly vulnerable situation and whose lives are affected by the outcome of actions taken by the competent authorities. The accuracy, non-discriminatory nature and transparency of the AI systems used in this context are therefore of particular importance in ensuring respect for the fundamental rights of the persons concerned, namely their rights to free movement, non-discrimination, privacy and protection of personal data, international protection and due process.

Some AI systems designed to administer justice and manage the democratic process should be considered high risk, given their significant impact on democracy, the rule of law, individual freedoms and the right to an effective remedy and to a fair trial. In particular, in order to address the risk of possible distortions, errors and opacity, AI systems which aim to assist judicial authorities in researching and interpreting factual and legal elements and in applying the law to specific facts should be considered as high risk. However, this classification should not cover AI systems intended for purely ancillary administrative activities which do not affect the actual administration of justice in individual cases, such as the anonymisation or pseudonymisation of court decisions, documents or data, staff communications, administrative tasks or the allocation of resources.

The requirements for high-risk AI in the EU AI Act (Chapter 2) are: risk assessment systems must always be established, implemented, documented and maintained (Article 9); they must be operated in conjunction with appropriate data governance systems; and the data used for teaching, validating and testing must be „clean" (Article 10). High-risk AIs should be accompanied by detailed documentation and event logging systems (Articles 11-12). Systems of this type should operate transparently and always retain human oversight and intervention (Articles 13-14). They should also meet the requirements of accuracy, robustness and cyber security (Article 15).

It is worth taking a closer look at the provisions in Article 10 on instructive data, which define a governance regime for instructive data that includes comprehensive requirements for the entire lifecycle of such data sets when used to teach high-risk AI applications. The draft regulation goes on to define three important sets of specific quality criteria for high-risk systems. Firstly, Article 10(3) states that the training data should be „relevant, representative, error-free and complete", which reflects, but does not elaborate on, several data quality requirements found in the IT literature discussed above. Second, the training data must have appropriate statistical properties, including with respect to the individuals or groups of individuals to whom or to which the high-risk AI system is intended to be applied. Although the groups constituted by the protected characteristics are not explicitly mentioned in this section, the criterion does seem to include the issue of balance between members of protected groups in

the datasets. However, statistical adequacy must be met for all sufficiently distinct groups, whether defined by protected characteristics or not, which makes the provision equally broad (think for example of different socio-economic groups) and vague. It prescribes appropriate statistical characteristics for each group, but without providing any further guidance on what is meant by appropriateness in this context. Thirdly, the criterion of representativeness is further clarified in Article 10(4), which states that the training data should take into account and reflect, to the extent necessary for the purpose, characteristics or elements that are related to the specific geographical, behavioural or functional context in which the high-risk AI system is intended to be used. This provision therefore forces developers to consider the specific context of the intended use of the system. The draft Regulation presumes in Article 42(1) that the context representativeness criterion is met if the training data are derived from the intended geographical, behavioural and functional environment.

The EU AI Act provides for an important exception to the prohibition on processing sensitive data in Article 9(1) of the General Data Protection Regulation (hereinafter GDPR). Article 10(5) rightly resolves the tension between data protection and non-discrimination areas. To the extent strictly necessary to ensure the monitoring, detection and correction of bias in relation to high-risk AI systems, the providers of such systems may handle special categories of personal data, subject to appropriate safeguards for the fundamental rights and freedoms of natural persons, including technical limitations on the further use and application of state-of-the-art security and privacy measures, including pseudonymisation or, where anonymisation significantly affects the intended purpose, encryption.

The EU AI Act provides for strict sanctions (Article 71) for failure to comply with the requirements set out in Article 10 and for failure to comply with the prohibition of AI practices referred to in Article 5, with administrative fines of up to EUR 30 000 000 or, in the case of undertakings, up to 6% of the total annual worldwide turnover of the preceding financial year, whichever is the higher. Where the AI system does not comply with the requirements or obligations under this Regulation, other than those laid down in Articles 5 and 10, it may be subject to an administrative fine of up to EUR 20 000 000 or, in the case of undertakings, up to 4 % of its total annual worldwide turnover in the preceding financial year, whichever is the higher.

In addition, the obligations on prior testing, risk management and human oversight in the draft Regulation will also help to ensure respect for other fundamental rights by minimising the risk of erroneous or biased decisions based on AI in critical areas such as education and training, employment, essential services, law enforcement and justice. If violations of fundamental rights continue to occur, ensuring transparency and traceability of AI systems and rigorous ex-post monitoring will allow for effective redress for the individuals concerned. Enhanced transparency obligations are limited to the minimum information necessary for individuals to exercise their right to effective redress and to the transparency necessary for supervisory and enforcement authorities, in accordance with their mandate, thus not disproportionately affecting the right to the protection of intellectual property [Article 17(2)]. Where public authorities and notified bodies need to have access to confidential information or source code for the purpose of verifying compliance with the relevant obligations, they are bound by a duty of confidentiality.

Summary

The legal standards on algorithmic discrimination are clear. Our societies do not and should not accept discrimination based on protected characteristics such as ethnic origin or gender. This raises the question of how to improve the enforcement of non-discrimination norms in the field of algorithmic decision making? As already mentioned, one of the main problems of AI systems is their black box nature. This opacity can be seen as a problem in itself, but opacity is also a barrier to detecting discrimination. However, appropriate legal regulation can help to make algorithmic decision-making more transparent. For example, in the European Union, the draft AI Act already sets minimum requirements for high-risk AI to be developed in a way that allows for verification and explanation, and includes specific provisions on the datasets used by the system. However, there are still unanswered questions about regulation. Furthermore, it is an important step to ensure that, in the case of high-risk AI, the competent authorities have access to the underlying code (software) and datasets of algorithmic systems in case of a serious breach, as the examination of the code may provide information on the functioning of the system. However, it can be agreed that code reviews can be most useful when there is a clearly defined question about how an algorithm operates in the controlled space and there are specific standards against which the behaviour or performance of the system can be measured.

BIBLIOGRAPHY

Angwin, Julia et al.: Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And It's Biased Against Blacks, ProPublica, 2016

Borgesius, Frederik Zuiderveen: Discrimination, artificial intelligence, and algorithmic-decision making. Council of Europe, 2018.

Dastin, Jeffrey: Amazon scraps secret AI recruiting tool that showed bias against women. Reuters, https://reut.rs/3vvkHsh

Dieterich, William - Mendoza, Christina - Brennan, Tim: COMPAS Risk Scales: Demonstrating Accuracy Equity and Predictive Parity, Northpointe, 2016

Dumbrava, Costica: Artificial intelligence at EU borders. European Parliamentary Research Service, Brussels, 2021.

Hacker, Philipp: Teaching fairness to artificial intelligence: Existing and novel strategies against algorithmic discrimination under EU law. Common Market Law Review 2017.

High Level Expert Group on Artificial Intelligence: ethics guidelines for trustworhy AI. Brussels, 2019.

Köchling, Alina - Wehner, Marius Claus: Discriminated by an algorithm: a systematic review of discrimination and fairness by algorithmic decisionmaking in the context of HR recruitment and HR development. Business Research 2020/13.

Körtvélyesi, Zsolt: Coded inequalities? Coding discrimination in the age of algorithms. JTI blog, https://bit.ly/3K0Zfk5

Karsai, Krisztina: The European draft for the regulation of artificial intelligence, or the signs of the rise of algorithms in (criminal) justice. Forum: Acta Juridica Et Politica 2021/3. 189-196.

Kullmann, Miriam: Discriminating job applicants through algorithmic decision-making. https://bit.ly/3vr6NaF, European Union Agency for Fundamental Rights: Data quality and artificial intelligence - mitigating bias and error to protect fundamental rights. Vienna, 2019

Larson, Jeff et al.: How We Analyzed the COMPAS Recidivism Algorithm, ProPublica, 2016.
Berk, Richard: Criminal justice forecasts of risk: a machine learning approach. Springer, 2012
Rieke, Aaron - Bogen, Miranda - Robinson, David G.: Public scrutiny of automated decisions: early lessons and emerging methods, Upturn and Omidyar Network. 2018.

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How should Polish electoral law be modernized to better serve people with disabilities ?

Abstract
Undoubtedly, one civilizational challenges today is to legally grant rights to people with disabilities and to implement them fully in practice. In this paper I will seek to analyze the extent and direction of amendments that should be made to the Polish electoral law to make it more accessible for this social group. I will examine the reports of the National Electoral Commission on the elections to the European Parliament, the national parliamentary elections of 2019, and the Reports of the ODIHR Election Observation Mission with regard to how the electoral rights of disabled voters are realized.

Keywords: electoral law, disabled voters, NEC, ODIHR, UN Convention

Introduction

The purpose of this study is to examine the relevance of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) for national legal orders. I will focus mainly on Polish law, with some references to Hungarian law. I will analyze the amendment of the Polish Electoral Code legislated in 2018 in terms of enabling people with disabilities to exercise their active electoral right. I will determine whether amendments to the law (2018-2019) and practice in Poland put into effect the CRPD objectives. I will examine the reports of the National Electoral Commission on the elections to the European Parliament and the parliamentary elections held in Poland in 2019, as well as the reports of the ODIHR Election Observation Mission to see how the electoral rights of voters with disabilities are implemented.

The 2020 presidential election will be omitted from our deliberations. Due to complications caused by the COVID-19 pandemic, an analysis of its organization and conduct would go beyond the scope of this study. It ends with conclusions concerning the functioning of the adopted legal regulations in Poland and postulates further changes to the law for the social inclusion of people with disabilities. In the conclusions, I will try to determine which course the modernization of the electoral law should take so that it may better serve disabled people—all based on Poland's experience in 2018-2019.

United Nations Convention on the Rights of Persons with Disabilities

Development is not and cannot be about undercutting their own roots. Human rights, growing out of the inherent dignity of the human person, are a refuge for further development. Their purpose is to serve for future generations of humanity . As the first 21-st century human rights treaty, the CRPD protected some 650 million people with disabilities . The CRPD was

negotiated largely because the existing system had utterly failed to address disability rights in an on-going, consistent, and competent manner. There is an undeniable tension between calls to adopt a comprehensive and more holistic approach to treaty monitoring and the interest in developing expertise and specialization vis-à-vis specific human rights areas and the protection of groups subjected to egregious discrimination, including the disabled .

Besides traditional enforcement tools, the CRPD establishes a framework to foster international cooperation and inclusive development programming . This provision may extend CRPD standards, via development programming, to effect change in discrete contexts such as electoral-law reform and practice . Article 3 is fundamental to the crafting of any national-level law and policy framework insofar as it catalogues the CRPD's general principles that guide its application and interpretation. General principles should also serve as a filter through which discrete pieces of existing law should be run to assess conformity with the object and purpose of the CRPD. For example, the review of a country's electoral code can be facilitated by using this article to make the following types of assessments:

(1) Independence: Does the election code or regulation provide means for independent voting? (2) Participation: Does the code provide for voter registration and equal eligibility to stand for office?
(3) Accessibility: Do provisions enable alternative technology and facilitated voting?
(4) Non-Discrimination: Are there illicit discriminatory provisions which exclude persons with disabilities from participation, for example, by barring otherwise qualified voters with developmental disabilities from voting?

CRPD states in Article 29 letter a) (concerning participation in political and public life) that States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:

a) To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:
1. Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;
2. Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;
3. Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice .

Disability is not formally defined in the CPRP, allowing individual states considerable latitude in how they define disability in their legal orders. People with disabilities are characterized as follows: "persons with disabilities" include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder full and effective participation in society on an equal basis with others." It is accepted by the Committee on the Rights of Persons with Disabilities that people with a mental illness (referred to as having a "psychosocial disability") fall under the Convention . On the basis of

the Optional Protocol, the Committee may receive communications (complaints) and make recommendations thereon. One case is certainly worth mentioning, i.e., Zsolt Bujdosó and five others against Hungary (Communication No. 4/2011).

Disability as a civilizational challenge for Polish electoral law

An efficient state must be able to make such changes that the protection of human rights keeps abreast of civilizational changes . The publication of accurate data on people with disabilities obtained by the 2021 National Census of Population and Housing has been announced for September–November 2022 , therefore, I provide the official results from the 2011 census. Based on the 2011 Census of Population and Housing, the total number of people with a mobility disability was 1,101,781 (478,871 men and 622,910 women). Over 3.1 million people had a legally confirmed disability .

Unquestionably, the modern creed of civilization is to ensure equal rights for people with disabilities . It is no longer just a matter of granting them, but implementing them. The reasons for this are the ageing of the population due to the declining birth rate and increasing life expectancy . The need to pay attention to the needs of the elderly and to raise awareness of the effects of long-term disability was highlighted . It should be noted that the terms "disability" and "functioning" encompass three dimensions: body structure or function, personal action, and participation in society. The term "disability" refers to the consequences of a health condition on a person's functioning at these three levels . Representatives of the doctrine formulate a thesis on the dynamic nature of human rights and the need for them to respond to current, real needs . In 2010, Sebastian Kubas argued that "any assessment of the quality of Polish democracy must take into account the status of persons with disabilities in elections ".

Amending Article 52 of the Electoral Code with § 2a

The Sejm, at its session on 11 January 2018, passed a law under which Article 52 of the Electoral Code was extended by paragraph 2a, which in the wording proposed to the Sejm by the Extraordinary Committee for Consideration of Bills on Election Law ("If the person receiving the ballot paper referred to in § 2, who is significantly or moderately disabled within the meaning of the Act of 27 August 1997 on Vocational and Social Rehabilitation and Employment of Disabled Persons [Journal of Laws of 2020, item 426, 568 and 875] cannot therefore confirm receipt of the ballot paper, the member of the district election commission for conducting voting in the district issuing the ballot paper together with the chairman or deputy chairman shall state the fact of issuance and the reason why the person receiving the ballot paper does not have a signature ". The amendment of the EC made in 2018 in this regard should be assessed as fully justified. It has long been advocated that the needs of persons with disabilities should be recognized and that they should be granted the same rights as non-disabled members of society . The issuance of a ballot to a voter with a severe or moderate disability, in the situation specified by EC Article 52 § 2a, fulfills the demands for accessibility of materials and equipment in the voting process arising from Article 29 a, point 1 of the CRPD .

Signatures of support

In Polish law the condition for registering candidates in elections is the required number of signatures supporting them. According to the EC, a voter may sign only in person. This requirement

was also stressed in the doctrine. According to Agnieszka Bień-Kacała, "since the Electoral Law does not require a handwritten signature, but only the signature of the voter giving their support, and the commission examines only the reliability of the signatures, the voter may give their support by putting their signature in any manner ". However, despite the fact that the NEC emphasizes that the lack of a signature means that support has not been given, in connection with the amendment of the electoral law made in 2018 to facilitate the voting of disabled persons — in my opinion — one should consider the advisability of enacting appropriate legislation to facilitate their participation also in the stages preceding the vote — in order to allow them to sign in a general and not only an arbitrary manner. Thus, the addition of § 2a to EC Article 52 by way of the 2018 amendment dictates the need to reflect on the possibility of establishing, analogous to § 2a of Article 52 of the EC, the possibility of providing a signature of support (by proxy rather than by a person collecting signatures) by a person with severe or moderate disabilities. I believe that such a solution would promote social inclusion of people with disabilities, involving them more in the political and legal life of the state.

Taking this into account and interpreting it linguistically, it should be concluded that the amendment to the EC made in 2018 and consisting in adding § 2a to its Article 52 should be applied to the submission of signatures of support. This is due to the same rationale behind the enactment of the aforementioned amendment. Moreover, I agree with the view of Andrzej Sokala that it follows from the directive of the principle of universality that the range of those exercising their electoral rights should be as broad as possible, and in any case should be free of discriminatory exclusions or limitations .

Adopting such a view would make it necessary to consider enabling a person deemed to have a significant or moderate degree of disability within the meaning of the Act of 27 August 1997 on Vocational and Social Rehabilitation and Employment of Persons with Disabilities— who cannot affix their own signature of support—to have someone they have authorized to do so in their name, e.g., a third person (but not the one collecting the signatures) ascertain the fact of giving support and the reason why the person giving support has not put their signature .

Implementation of the Convention by Poland

The CRPD was signed by the Polish government on 20 March 2007 and ratified by Poland on 6 September 2012 . It prohibits discrimination. In Article 29(a) the State undertakes to ensure that disabled individuals can participate effectively and fully in political and public life, on an equal basis with others.

The CRPD regulates matters in many areas, therefore its implementation rests with the competent ministers. On 4–5 September 2018 in Geneva, the Polish governmental delegation presented to the Committee for the Rights of Persons with Disabilities the first Polish report on the implementation of the CRPD .

The UN Committee on the Rights of Persons with Disabilities, in its closing remarks on Poland's preliminary report of 29 October 2018, welcomed the progress our state has made implementing the CRPD. In particular, the Committee appreciated the adoption of the 2011 Electoral Code, which enables persons with disabilities to vote and facilitates voting procedures .

The Disability Committee expressed its concern about the lack of instruments enabling independent and secret voting for people with severe hand paresis and no voting support for deaf people . The Committee recommended that the State Party ensure that all polling stations are accessible to all disabled persons, including by taking measures to enable people

with severe hand weakness to vote independently and secretly and to provide support for deaf people voting . In my view, the Committee in its assessment failed to take into account that The Sejm, at its session on 11 January 2018, passed a law under which Article 52 of the Electoral Code was extended by paragraph 2a. Especially since the first application of the procedures under the amended law took place during voting in the 2018 local elections and then in the European Parliament elections on 26 May 2019.

The National Electoral Commission reports on elections

In 2019, two elections were held in Poland, one to the European Parliament and the other to the Polish parliament. The reports of the National Electoral Commission come up with interesting observations.

In its report on the 2019 elections to the European Parliament the NEC emphasized that it had taken various measures to ensure the smooth preparation of the elections. Information was made public on pkw.gov.pl, including that on the rights of disabled voters and the dates of related activities . In each municipality, in accordance with the statutory requirements, at least a half of the polling stations had been adapted to the needs of the disabled; nationwide, there were 14,346 such establishments .

On the other hand, in its report on the parliamentary elections held in 2019, the NEC stressed that information spots were regularly posted on the website (also in Polish sign language) on the rights of voters with disabilities . In each municipality, voting circuits were created to the meet the needs of the disabled—a total of 14,498 such establishments. Moreover, in many municipalities, disabled persons and senior citizens were provided with assistance in getting to polling stations and other facilities enabling them to participate in the vote .

Our comparison of the two reports leads to the conclusion that the NEC has formally ascertained that it has taken more effort to facilitate the participation of people with disabilities in elections to the Polish Sejm and Senate than in the elections to the European Parliament. However, that was not based on the EC; therefore, guarantees of universality not provided for in the EC were applied.

OSCE reports

As it has been noted by the OSCE Office for Democratic Institutions and Human Rights in its Regular Report (10-24 September 2019), Poland is a party to major international and regional agreements as well as treaties related to the organization of democratic elections, including 2006 CRPD . The EC contains provisions facilitating voting to persons with physical disabilities or reduced mobility, including voting by proxy or correspondence voting, provided that the voter has a disability certificate. In addition, polling stations must meet requirements to facilitate voting for people with physical disabilities or visual impairments, including Braille voting overlays . Citizens aged 18 or over have the right to vote, unless they have been deprived of this right by a final court ruling, including a declaration of intellectual disability, despite previous ODIHR recommendations—a fact repeatedly criticized by the Ombudsman and international organizations. The Commissioner for Civil Rights Protection has previously called on the authorities to review the provisions of the Constitution, the Civil Code and other acts related to the incapacitation of disabled people, in order to, for example, abolish restrictions on the active electoral right .

OSCE observers following the voting in the elections to the Sejm and Senate of the Republic of Poland on 13 October 2019 once again noted the problem of limited accessibility of polling stations (and more broadly, the entire electoral process) for people with disabilities . The 2022 Election and Electoral Law Study Group recommended the creation of an electronic central voter registry, as well as supplementing and improving existing and emerging opportunities for voters to participate electronically .

Conclusions:

Citizens who are 18 years of age or older have the right to vote unless they have been deprived of that right by a final court judgment, including a judicial declaration of intellectual disability, despite ODIHR's previous recommendations to lift restrictions on active voting rights. Thus, the denial of the right to vote to this group turned out to be a common problem of both Hungarian and Polish law. Polish law has not been amended in this regard.

The Committee on Persons with Disabilities noted in 2018 that measures should be in place to enable people with severe hand paresis to vote independently and secretly and to provide voting support for deaf people.

The effect of the report on the implementation of the CRPD are the final remarks in the form of recommendations, and the information on how to use them in the course of creating and implementing the national policy for people with disabilities will be presented in the next Polish report on the implementation of the CRPD. Based on the OSCE's 2019 observation results, it appears that measures should be taken to make the entire electoral process more accessible to people with disabilities, including electronically. It is worth considering the establishment of a central register of voters.

BIBLIOGRAPHY

Sources of Law:

Convention on the Rights of Persons with Disabilities adopted by the United Nations General Assembly on 13 December 2006 (Journal of Laws 2012, item 1169).

Act of 5 January 2011, the Electoral Code, Journal of Laws of 2019, item 684 as amended.

Literature:

Bień-Kacała A., Osobisty udział w procesie wyborczym (zagadnienia wybrane) [in:] Alternatywne sposoby głosowania a aktywizacja elektoratu. Międzynarodowa Konferencja Naukowa, ed. S. Grabowska, R. Grabowski Rzeszów, 26-27 marca 2007 r., Rzeszów 2007.

Convention on the Rights of Persons with Disabilities. Committee on the Rights of Persons with Disabilities. Concluding observations on the initial report of Poland, 29. 10. 2018.

Florek-Łuszczki M., S. Lachowski S., Działania instytucjonalne na rzecz osób niepełnosprawnych, „Medycyna Ogólna i Nauki o Zdrowiu" 2013, t. 19, no. 4.

Jasudowicz T., Time and Human Rights. A few reflections, "Prawo i Więź" 2013, no. 1.

Kirenko J., Jakość życia w niepełnosprawności, [in:] Jakość życia osób niepełnosprawnych i nieprzystosowanych społecznie, ed. Z. Palak, Lublin 2006.

Kołodziej D., Społeczne kwestie w funkcjonowaniu osób niepełnosprawnych, „Społeczeństwo i Rodzina" 2012, no. 3.

Kubas S., Aktualne dylematy parlamentarnego prawa wyborczego (wybrane zagadnienia), „Przegląd Sejmowy" 2010, no. 5.
Lord J. E., Stein M. A., The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities, "Faculty Publications" 2008.
Lord J. E., Stein M. A., Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential, "Human Rights Quarterly" 2010, vol. 32.
Łopatka A., Międzynarodowe prawo praw człowieka, Warszawa 1998.
OSCE Office for Democratic Institutions and Human Rights, Regular Report (10-24 September 2019) Short-term Election Observation Mission Republic of Poland Parliamentary elections, 13 October 2019.
Reguły, zamiary, praktyki. Prawo wyborcze i wybory 2017-2020, M. Cześnik, J. Flis, A. Gendźwiłł, J. Haman, A. Materska-Sosnowska, A. Rakowska-Trela, A. Rychard, M. Wrzalik, J. Zbieranek, Warszawa 2022.
Slany K., Osoby niepełnosprawne w świetle Narodowego Spisu Powszechnego Ludności i Mieszkań z 2011 r. – wybrane aspekty, „Niepełnosprawność – zagadnienia, problemy, rozwiązania" 2014, no. 2.
Sokala A., Głos w dyskusji, [in:] Międzynarodowa Konferencja Naukowa Alternatywne sposoby głosowania a aktywizacja elektoratu, Rzeszów 26-27 marca 2007 r., ed. S. Grabowska, R. Grabowski, Rzeszów 2007.
Szmukler G., Daw R., Callard F., Mental health law and the UN Convention on rights of persons with disabilities, "International Journal of Law and Psychiatry" 2014, no. 37.
Szyszkowska M., Niezbędność ideałów w polityce, [in:] Ideowość w polityce, ed. M. Szyszkowska, Warszawa 2007.
UN Committee on the Rights of Persons with Disabilities, Concluding Observations 2018.
Ziółkowski M., głos w debacie, [in:] Kim jesteś obywatelu?, ed. M. Wyrzykowski, Warszawa 2008.
Zubik M., „Wolność" a „prawo" (pięć hipotez o stosowaniu pojęć konstytucyjnych dotyczących praw człowieka), „Państwo i Prawo" 2015, no. 9.
Zych R., Nowelizacja z 2018 r. (art. 52 §2a kodeksu wyborczego) na tle rozważań o gwarancjach realizacji czynnego prawa wyborczego przez osoby niepełnosprawne. Aspekty praktyczne, „Przegląd Prawa Konstytucyjnego" 2020, no. 2.
Zych R., Nowelizacja z 2018 r. (art. 52 § 2a kodeksu wyborczego) jako gwarancja realizacji czynnego prawa wyborczego przez osoby niepełnosprawne. Analiza zarysu procesu legislacyjnego i aspekty teoretycznoprawne, „Przegląd Prawa Konstytucyjnego" 2021, no. 1.

Websites:

Committee on the Rights of Persons with Disabilities. Concluding observations on the initial report of Poland, 29. 10. 2018,
http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsnLFjcXmd8Ilx1hLUlxYOlolNx89NMrEyKDrTPKg7T8aUMAwDVPc%2fx6%2fd5Qg%2bJxRYV2Gi33mW2TralO6fd4KvKjXpOp0ORybDYY4RQBf5HB9 (access: 5.05.2022).
Convention on the Rights of Persons with Disabilities adopted by the United Nations General Assembly on 13 December 2006, (CRPD), https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html#Fulltext, (access: 7.05.2022).
Data from the Office of the Government Plenipotentiary for Disabled Persons' Affairs, https://niepelnosprawni.gov.pl/index.php?c=page&id=78 (access: 23.02.2022).

Framework schedule for sharing the results from the National Census of Population and Housing (NSP 2021), https://stat.gov.pl/spisy-powszechne/nsp-2021/harmonogram-publikacji-wynikow-nsp-2021/ (access: 4.05.2022).

OSCE Office for Democratic Institutions and Human Rights, Regular Report (10-24 September 2019), Short-term Election Observation Mission Republic of Poland Parliamentary elections, 13 October 2019, https://www.osce.org/files/f/documents/6/8/433979_0.pdf (access: 7.06.2022).

Report on the implementation of the Convention on the Rights of Persons with Disabilities, https://www.gov.pl/web/rodzina/sprawozdanie-z-wykonywania-konwencji-o-prawach-osob-niepelnosprawnych (access: 5.05.2022).

Report of the National Electoral Commission on the elections to the European Parliament held on 26 May 2019; https://pkw.gov.pl/wybory-i-referenda/wybory-do-parlamentu-europejskiego/wybory-do-parlamentu-europejskiego-w-2019ampnbspr/informacje-ogolne/sprawozdanie-z-wyborow-do-parlamentu-europejskiego-przeprowadzonych-w-dniu-26-maja-2019-r (access: 7.05.2022).

Report of the National Electoral Commission on the elections to the Sejm of the Republic of Poland and the Senate of the Republic of Poland held on 13 October 2019, https://pkw.gov.pl/dla-mediow/informacje-prasowe/sprawozdanie-z-wyborow-do-sejmu-rzeczypospolitej-polskiej-i-do-senatu-rzeczypospolitej-polskiej-przeprowadzonych-13-pazdziernika-2019-r (access: 7.05.2022).

The Convention on the Rights of Persons with Disabilities Training Guide Professional Training Series, No. 19, United Nations, New York–Geneva 2014.

United Nations Department of Economic and Social Affairs Disability, https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html (access: 7.05.2022).

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Inclusive gender equality

Abstract
The submitted paper focuses on the legal and social status of transgender persons. I will analyse possibilities of treatment and inclusive coexisting of trans gender people in Slovak Republic. I am also going to discuss the therapy process neccesary for inclusive gender equality after a brief historical introduction to the context.

Keywords: gender, sex, trans gender persons, gender incongruence, inclusiveness

I will focus in submitted paper[93] on personal identity and its components, how gender and sex are related to person´s identity. Firstly I am going to discuss the phenomenon of gender. As the philosopher Mariana Szapuová states, „in the Western thought tradition, a person's gender was perceived as something irrelevant. Traditional philosophy, even if it noticed the issue of the difference between men and women, understood it as a difference between the sexes in a biological sense and assumed the existence of an essential and immutable, nature-given difference between men and women."[94] At this point, we must mention the importance of philosopher Simone de Beauvoir, who drew attention to the difference between biological sex and social gender. Although, it should be remembered that Simone de Beauvoir did not fix the concept of gender terminologically, the term gender only started to be used in the seventhies of the twentieth century. She strictly rejected biological determinism: „These biological assumptions are extremely important: in history, women play a primary role, they are an essential factor in its setting: in all other parts we will have to refer to them. Because, as the body is a tool for our knowledge of the world, the world is presented to us according to the way in which we take possession of it. That's why we dealt with them for so long. They are one of the keys to understanding a woman. However, we definitely reject the opinion that these assumptions determine her destiny once and for all. They are not enough to decide the gender hierarchy; they do not explain why the woman is the Other, they do not condemn the woman to forever play a subordinate role".[95]

The conceptual distinction between gender and sex was directed against biological determinism, i.e. against the concept in which being a woman or being a man is a biological given. According to this approach, the differences between men and women are determined by nature. Thus, gender gradually began to be understood as everything that forms and co-forms femininity and masculinity in specific social and historical conditions. The distinction between sex and gender was led by an effort to point out that attempts to derive a bipolar model of psychological

[93] This work was supported with project VEGA č. 1-0350-21 „Trans-Identita pri maloletých Etické a právne aspekty spojené s informovaným súhlasom."
[94] Szapuová, Mariana. Kategória rodu vo feministickom diskurze. In: Aspekt, 1, 1998, s. 32.
[95] Beauvoirová, Simone de. Druhé pohlavie. Bratislava: obzor, 1967, s. 53.

or moral characteristics from anatomical differences between the sexes and to explain or justify the situation of women in society are unsustainable.[96]

An important philosophical contribution to the mentioned issue can also be found in the book The Subjection of Women by John Stuart Mill, where he rejects the traditional idea that differences in behavior, life possibilities, thinking or feelings of men and women are innate. He perceives them as the result of the company's actions. This understanding was preceded by Mill's reevaluation of man as a subject. In The Subjection of Women, he already sees a person as an intersubjective being, which is fundamentally formed by relationships, social expectations and cultural patterns. Mill develops this concept of a person only with a new understanding of female emancipation, since even in his earlier work On Freedom he perceived a person as a being largely independent of society and public authority.

For Mill, man is already an intersubjective being, whose identity is dependent on the forms of recognition provided to him by others.[97] John Stuart Mill lived in the ninetienth century and Simone de Beauvoir in the twentieth century, so they understandably reflected the identity of the people in the context of their time. Later Umberto Eco mentioned intolerance to otherness as intolerance with biological origin. Animals show it as territoriality and it is based (not only in animal realm, but in human as well) on superficial emotional reactions. We hate those who seem to be different because of other skin colour, because of eating frogs, garlic, pigs, because of tattooing…And in addition to perception of difference we experience physical disgust.[98]

Now, in the twentyfirst century, thinking about gender must be shifted and include trans gender persons: persons who were born as women but experience, perceive and identify as men or vice versa, they were born as men but experience as women . A child is assigned a gender after birth by doctors based on external sexual characteristics.

According to psychologists, the first „assertion" of the transgender identity and thus the discrepancy between the gender determined in this way and the actual self-identification of a person occurs even before the onset of puberty. This is followed by a demanding, long-term, sometimes lifelong formation called transition[99]. Slovak law does not recognize the concept of gender or gender identity. It deals with the concepts of natural or legal person. A transgender person experiences gender nonconformity. A cisgender person, on the other hand, is one who experiences conformity with the assigned gender. The Latin prefix „trans" means „through", „behind", „beyond", „on the other side" and „cis" is translated as „on this side". Gender transition is a continuous process of social, legal and physical changes (Changing hairstyles, clothes, hormone replacement, medical procedures, asking people around to address the person by the gender and name they are asking for, etc.) that can lead to the expression of a chosen gender identity. A positive result of the transition is a higher quality of life, self-acceptance, acceptance of the environment, a lower rate of depression, anxiety and suicide attempts.

The legal status of transgender persons is very complicated in the context of the Slovak Republic. In practice, sex change means the surgical removal of the ovaries or testicles. This is a practice which, however, is not in accordance with basic human rights or with our highest law, which guarantees everyone's right to preserve human dignity. However, it also contradicts international conventions (for example, the prohibition of torture, the prohibition of discrimination, the right to private and family life.) Until 2019, transsexuality was classified according to the

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[96] Szapuová, Mariana. Kategória rodu vo feministickom diskurze. In: Aspekt, 1, 1998, s. 32.

[97] Mill, John Stuart. The Subjection of Women. Bratislava: Kalligram, 2003.

[98] Eco, Umberto.: Migrace a nesnášenlivost. Věčný fašismus. Argo, 2021.

[99] Markos, Ján. Medzi dobrom a zlom. Bratislava: N Press, 2020, s. 79.

International Classification of Diseases among gender identity disorders, and presented as a certain defect of the individual. In 2019, improvement in this situation has happened by the fact that The World Health Organization changed the classification of transsexualism in the international classification diseases on the so-called gender incongruence, which represents a significant and permanent incongruence between the experienced the birth of an individual and the gender assigned to him, which often leads to a desire for change gender, so that the individual can live and be accepted as a person of the surviving gender.[100]

The significant change in conditions and opinion of the company is in our geographical area (in Slovakia) alarming. Based on available surveys of the state of tolerance and perception of trans persons within the European Union and the so-called map of the rights of trans gender persons from the year 2021 shows that the growing progress in tolerance of the third genus has been largely halted over the past year, whereas trans people's rights are even increasingly being denied and taken away.[101] Currently, sterilization or even castration is required of persons applying for legal recognition of transsexual gender still in ten European countries (within EU Finland, the Czech Republic, Latvia, Romania and the Slovak Republic) while it has been said, that there are countries where the existence of the third gender is completely prohibited (Kazakhstan, Kyrgysztan and Hungary). Regarding legal regulation and protection of the rights of trans gender persons, despite the growing efforts made both at the international level, there is no regulation that would deal exclusively with this issue. The only shift that can be investigated is the approach of public authorities and international institutions and organs that interpret the existing regulation, i.e. primarily the basic documents ensuring and protecting basic human rights, regardless of their exact wording, so that they also follow the interests of transgender people.[102]

Now, the main question of my submitted paper is, how to incude and how to heal, accept, how to coexist with otherness of trans persons. Let me start with pointing out the importance of language. I am considering so callled gender inclusive language. It means writing and speaking in a way that does not discriminate against a particular sex, gender identity, personal idetity, social gender. Mainly, it does not perpetuate gender or identity stereotypes. „Given the key role of language in shaping cultural and social attitudes, using gender-inclusive language is a powerful way to promote gender equality and eradicate gender bias."[103] In order to move forward in practical dealing with trans gender inclusive equality, there is a certain therapy provided by experts. The treatment, or therapy may be divided into three groups: 1. supportive psychotherapy. 2. The treatment of accompanying psychiatric disorders and complications. 3. The treatment procedures aimed at the gender incongruance itself.[104]

After a diagnosis of gender incongruence, after a trans gender person has confided in his or her trans gender identity to his or her environment so called trans gender coming out and expressed a desire for transition, the stability of this desire over time and in different contexts is verified, during the period in which the individual harmonizes his or her appearance and

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[100] Metenkanyc, M., O. Nútená kastrácia ako povinná podmienka pri prepise rodu v podmienkach Slovenskej republiky. In: COMENIUS, časopis. Univerzita Komenského v Bratislave, Bratislava, 2021. p. 6-8.

[101] See more details on https://transrightsmap.tgeu.org/home/.

[102] Metenkanyc, M., O. Nútená kastrácia ako povinná podmienka pri prepise rodu v podmienkach Slovenskej republiky. In: COMENIUS, časopis. Univerzita Komenského v Bratislave, Bratislava, 2021. p. 24.

[103] https://www.csha.org/gender-equality-and-inclusivity/

[104] Fifková Hana: Poruchy pohlavní identity. In: Weiss P et al. Sexuologie. Praha: Grada Publishing; 2010, p. 439-460.

behavior in accordance with the experienced gender. It is a real life experience, RLE and at the same time a test of whether a person's decision to live as a member of the race is correct, so called real life test, RLT. Trans gender people very often come for their first psychiatric or sexological examination after a varying length of time, which could be considered RLE and RLT, and request transition based on that.[105] During this period, trans gender persons often change their name to neutral, which facilitates many aspects of social transition. Hormonal treatment is next part of the medical transition.

„It is approached only after an endocrinological and internal examination, which could eventually reveal its obstacles and contraindications. Hormone replacement has a masculinizing effect in the case of FtM and a feminizing effect in the case of MtF individuals, while subjective satisfaction with it can be inter-individual, but also intra-individual variable. Suppression of natal or biological sex is never complete, because the previous influence of androgens and estrogens cannot be completely reversed."[106] Supportive psychotherapy is also recommended during the difficult transition process. For members of both trans genders, genital reconstruction can also be performed, respectively phalloplasty for FtM and vaginoplasty for MtF individuals.[107]

Legal transition is the completion of the transition process, in which, following a recommendation issued by a psychiatrist and sexologist for the registry office, a change of name, surname, birth number and gender marker M/F on the identity card and legal documents is implemented. The exact and unified procedure for individual medical interventions and the issuing of the medical report necessary for genealogy transcription is currently the subject of professional discussions in Slovakia and should be updated in the near future (this text was prepared in in beginning of the year 2022).

BIBLIOGRAPHY

Beauvoirováb, Simone de. *Druhé pohlavie.* Bratislava: Obzor, 1967.

Eco, Umberto.: *Migrace a nesnášenlivost. Věčný fašismus.* Argo, 2021.

Fifkova Hana: Poruchy pohlavní identity. In: Weiss P et al. Sexuologie. Praha: Grada Publishing; 2010.

Markos, Ján. *Medzi dobrom a zlom.* Bratislava: N Press, 2020.

Metenkanyc, M., O. Nútená kastrácia ako povinná podmienka pri prepise rodu v podmienkach Slovenskej republiky. In: COMENIUS, časopis. Univerzita Komenského v Bratislave, Bratislava, 2021.

Mill, John Stuart. *The Subjection of Women.* Bratislava: Kalligram, 2003.

Patarák, Michal.: *Gender incongruence.* In: Psychiatria pre prax. 2020, (21) 4.

Szapuová, Mariana. *Kategória rodu vo feministickom diskurze*. In: Aspekt, 1, 1998.

https://transrightsmap.tgeu.org/home/.

https://www.csha.org/gender-equality-and-inclusivity/

[105] Patarák, Michal.: Gender incongruence. In: Psychiatria pre prax. 2020, (21) 4, p. 156.

[106] Ibid, p. 156.

[107] Ibid,p.156.

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Role of the minimum wage in promoting decent work and reducing inequality in a cohesive society[108]

Abstract

This paper sets out to analyse the minimum wage as an instrument to ensure a decent life for workers and their families as well as reduce social inequalities. The author draws on the regulations of the International Labour Organization, as well as EU law, including the draft directive on adequate minimum wages in the European Union. The Constitution of the Republic of Poland and national statutory legislation are referred to as well. Against this background, the author characterises the essence of minimum wage and defines its relation to a fair wage. Furthermore, poverty and social inequality are discussed to assess the impact of minimum wage on their reduction.

Keywords: minimum wage, fair wage, poverty, social inequality, wage gap.

Introduction

The concept of minimum wage as payment established irrespective of the market value of the work performed emerged in the second half of the 19th century.[109] Initially, minimum wage served to reduce poverty among those most vulnerable to exploitation, namely women, children and unskilled workers. In the circumstances of the liberal market and given inferior strength of the trade union movement, leaving wage setting entirely to the discretion of the involved parties led to large-scale exploitation and, consequently, to negative social aftermath. Countering such adverse phenomena required the state to take action in the interests of workers deprived of adequate legal protection so as to adjust the functioning of the market and ensure workers an income which would meet their basic needs. [110]

In the 20th century, minimum wage would be coupled with the increasingly widespread anti-poverty policies of states. That trend was in line with the International Labour Organization regulations, which gradually extended the subjective scope of the minimum wage to include other categories of workers. Faced with unequal access to the benefits of global economic

[108] The elaboration is the effect of the research project No. 2017/26/D/HS5/01050, financed by the National Science Centre, Poland.

[109] More broadly in: W. Cunningham, Minimum Wages and Social Policy. Lessons from Developing Countries, Washington 2007, p. 16; A. Krajewska, S. Krajewski, Kontrowersje wokół płacy minimalnej, IX Kongres Ekonomistów Polskich 2015, p. 2.

[110] More broadly in: L. Mitrus, Powstanie i ewolucja prawa pracy, (in:) K. W. Baran (ed.), System Prawa Pracy. Tom I, Część Ogólna, Warsaw 2017, p. 346.

growth, ILO efforts—focused on protecting selected groups of workers—did not lead to a general improvement in living standards. Achieving that goal required extending protection against abnormally low wages to all workers and establishing a universally applicable minimum wage.[111] Thus, minimum wage transitioned from being an instrument aimed at selected groups of the most disadvantaged workers in the labour market to an anti-poverty policy instrument defined in international law, deriving from the idea of due share for workers in the benefits of economic progress. This paper aims to assess the minimum wage as a measure to ensure a decent life for workers and their families as well as reduce social inequalities. For this purpose, I refer to the foundations of minimum wage in international law, as well as in European and Polish legislation, as a background to consider the relationship between minimum wage and fair wage. Furthermore, poverty and social inequality are analysed in their essentials to explore the significance of minimum wage in the process of their reduction.

Legal foundations of minimum wage

The minimum wage has been provided for in international law, as well as European and Polish enactments in varying degrees of detail.[112] At the international level, the minimum wage is addressed explicitly in the regulations adopted by the International Labour Organization. In Part III(d) of the Philadelphia Declaration—which sets out the aims and objectives of the ILO[113]—its solemn obligation to further among the nations of the world programmes which will achieve policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection. The underlying idea is to ensure subsistence at a socially acceptable level while taking economic factors into account.[114] Recent ILO programme documents, such as the 2008 Declaration on Social Justice for a Fair Globalisation[115] and the 2019 Centenary Declaration for the Future of Work[116] , eloquently demonstrate that the task is still relevant. In the lower-tier instruments of the ILO, i.e. Conventions and Recommendations, that goal has been pursued through the formula of minimum wage.[117]

ILO standards on minimum wage have evolved as to the subjective scope of that wage as well as the criteria and mechanisms for its determination.[118] Their most comprehensive outline is to be found in Convention No. 131 of 1970 concerning Minimum Wage Fixing,

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[111] G. Starr, Minimum wage fixing: international experience with alternative roles, International Labour Review, Vol. 120, No. 5, September – October 1981, p. 554.

[112] More broadly in: K. Bomba, Minimalne wynagrodzenie za pracę jako instrument realizacji społecznych praw człowieka, Warsaw 2022, p. 75 ff.

[113] ILO Declaration of Philadelfia, 10.05.1944, https://www.ilo.org/ (last access: 29.08.2022).

[114] International Labour Organization, Committee of Experts on the Application of Convention and Recommendation, General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135), Report III (Part 1B), Geneva 2014, p. 27.

[115] ILO Declaration on Social Justice for a Fair Globalization, 10.06.2008, https://www.ilo.org/ (last access: 29.08.2022).

[116] ILO Centenary Declaration for the Future of Work, 16.06.2019, https://www.ilo.org/ (last access: 29.08.2022).

[117] E. Reynaud, The International Labour Organization and the Living Wage: A Historical Perspective, Conditions of Work and Employment Series No. 90, International Labour Office, Geneva 2017, p. 11.

[118] More broadly in: A. Świątkowski, Międzynarodowe prawo pracy. Tom I. Międzynarodowe publiczne prawo pracy – standardy międzynarodowe, Wolumen 2, Warsaw 2008, p. 274-276.

with Special Reference to Developing Countries[119] and its complementary Recommendation No. 135. The Convention is the first legally binding document of the ILO, under which states are obligated to establish a minimum wage system applicable to all groups of workers whose conditions of employment are such that the system will be adequate to ensure their protection (Art. 1(1)). Furthermore, states are to set that wage relative to social and economic factors and to review its rate periodically (Art. 3 and 4). Today, Convention No. 131 is considered to be the piece of legislation which formulates the most consummate minimum wage standard.[120] The requirements it stipulates provide some of the major benchmarks for assessing how states implement the social aspect of the sustainable development paradigm which the ILO adopted at the beginning of the 21st century.[121] The ILO standards establish a threshold of minimum protection for those who work. They constitute guarantees that appear to have become even more relevant in the face of the crisis resulting from the Covid-19 pandemic.[122]

ILO legislation does not contain an explicit definition of minimum wage. According to the Committee of Experts on the Application of ILO Conventions and Recommendations, it may be understood to mean "the minimum sum payable to a worker for work performed or services rendered, within a given period, whether calculated on the basis of time or output, which may not be reduced either by individual or collective agreement, which is guaranteed by law and which may be fixed in such a way as to cover the minimum needs of the worker and his or her family, in the light of national economic and social conditions".[123] Thus, the minimum wage should enable the worker and his or her family to meet their basic and developmental needs. At the same time, the wage shall be determined with the national economic conditions taken into consideration. The ILO Committee of Experts asserts that the minimum wage should not have a significant negative impact on the level of employment in the lowest-paid sectors of the economy. For these reasons, a minimum wage policy may be considered both an effective instrument of social protection and a component of an economic development strategy.[124] The minimum wage is intended to provide adequate means of subsistence, but it does not guarantee that the amounts fixed in a particular country at a particular time will suffice to meet that goal.[125] It is in this respect that it differs from fair wage, which aims primarily to ensure an adequate (decent) standard of living for workers and their families.

With respect to the legal foundations of minimum wage, one should also draw on European Union regulations, among which special attention should be paid to the European Pillar of

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[119] ILO Convention No. 131 concerning Minimum Wage Fixing, with Special Reference to Developing Countries, 3.06.1970, https://www.ilo.org/ (last access: 29.08.2022).

[120] A. Sobczyk, Prawo pracy w świetle Konstytucji RP. Tom II. Wybrane problemy i instytucje prawa pracy a konstytucyjne prawa i wolności człowieka, Warsaw 2013, p. 38.

[121] K. Bomba, Minimalne wynagrodzenie za pracę w działalności Międzynarodowej Organizacji Pracy, Praca i Zabezpieczenie Społeczne 2021, No. 10, p. 14 ff.

[122] J-M. Servais, The ILO and the social consequences of the COVID-19, (in:) M. Borski, B. M. Ćwiertniak, M. Lekston (editors.), Roczniki Administracji i Prawa. Rok XXI, Zeszyt specjalny. In Labore virtus et vita. Księga jubileuszowa Prof. Marka Pliszkiewicza, Sosnowiec 2021, p. 63 ff.

[123] International Labour Organization, Committee of Experts…, General Survey…, 2014, p. 19, sec. 35.

[124] International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, General Survey of the Reports on the Minimum Wage-Fixing Machinery Convention (No. 26) and Recommendation (No. 30), 1928; the Minimum Wage Fixing Machinery (Agriculture) Convention (No. 99) and Recommendation (No. 89), 1951; and the Minimum Wage Fixing Convention (No. 131) and Recommendation (No. 135), 1970, Report III (Part 4 B), Geneva 1992, p. 17–18, sec. 65 and 68.

[125] International Labour Organization, Committee of Experts…, General Survey…, 2014, p. 27, sec. 51.

Social Rights, adopted on 17th November 2017 in Gothenburg.[126] In Chapter II, section 6(a), the pillar affirms that workers have the right to fair wages that provide for a decent standard of living. Subsequently, section 6(b) expresses that adequate minimum wages shall be ensured, in a way that provide for the satisfaction of the needs of the worker and his / her family in the light of national economic and social conditions, whilst safeguarding access to employment and incentives to seek work. This provision also highlights the need to prevent in-work poverty.

The Pillar of Social Rights is a landmark prompting further EU-level legislative efforts pertaining to social rights in the broadest sense.[127] Acting on its inspiration, the European Commission presented a proposal for a Directive on adequate minimum wages in the European Union on 28th October 2020.[128] On 7th June 2022, the Council and the European Parliament reached a political agreement regarding the adoption of the Directive[129], which increases its chances of becoming law.

The proposal seeks to ensure that workers are guaranteed a minimum wage fixed at an adequate level by statute or collective agreements. The amount of such wage is not specified, but its adequacy is contingent on the ability to provide decent working and living conditions, social cohesion and positive convergence. At the same time, it is left to the discretion of the Member States to establish their respective minimum wages, either by collective agreement or by law, provided that national regulations meet the EU criteria for fixing adequate minimum wages.[130] Under the proposal, minimum wages should aim to ensure decent wages in the Member States and thus contribute to making fair working conditions a reality. Simultaneously, wage fixing should make allowances for the various legal, social and economic circumstances in particular countries. Thus, it is not certain that it will be set at a decent level in each case.[131]

In Polish law, pursuant to Art. 65(4) of the Constitution of the Republic of Poland[132], the minimum wage or the manner of fixing it is determined by statute. That particular provision does not contain guidelines on how the minimum wage should be established.[133] In this respect, one might refer to Art. 2 and 20 of the Constitution, from which it follows that the Republic of Poland is a democratic state governed by the rule of law, one which pursues the principles of social justice and relies on a social market economy. One cannot fail to mention Art. 24 of the Constitution, according to which labour is under the protection of the Republic of Poland and the state exercises supervision over the conditions in which it is performed. In its ruling of 7th May 2001[134], the Constitutional Tribunal was of the opinion that the state is obliged to

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[126] Interinstitutional Proclamation on the European Pillar of Social Rights, O.J. EU C 2017/428/10.

[127] L. Mitrus, Komentarz do art. 31 Karty, (in:) A. Wróbel (ed.), Karta Praw Podstawowych Unii Europejskiej. Komentarz, Warsaw 2020, p. 831.

[128] Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, COM(2020)682 final, Brussels 28.10.2020.

[129] Council of the EU, Press release, 7.06.2022, Minimum wages: Council and European Parliament reach provisional agreement on new EU law, https://www.consilium.europa.eu (last access: 29.08.2022).

[130] A. Aranguiz, S. Garben, Combating income equality in the EU: a legal assessment of a potential EU minimum wage directive, European Law Review, 2021, No. 2, p. 164.

[131] For a broader discussion of the draft directive see K. Bomba, Collective voice in fixing minimum wages: social partners' participation from the ILO and EU perspectives, Italian Labour Law e-Journal 2022, Issue 1, Vol. 15, https://illej.unibo.it/ (last access: 19.08.2022 r.)

[132] Constitution of the Republic of Poland, 7.4.1997 r., O.J. 1997, No. 78, sec. 483.

[133] E. Mróz, Minimalne wynagrodzenie zatrudnionych w postindustrialnej Polsce i Niemczech, (in:) B. Godlewska-Bujok, K. Walczak (editors), Zatrudnienie w epoce postindustrialnej, Warsaw 2021, p. 243.

[134] K 19/00, OTK 2001, No 4, sec. 82.

guarantee fair conditions of paid work, including a wage that enables the employed to satisfy their basic needs. It was found that Art. 65(4), in conjunction with Art. 2 of the Polish Constitution, invokes the principles of social justice, "(...) provides comprehensive grounds for recognising the principle of equitable (fair) wage as a premise of constitutional rank." According to the Tribunal, equitable (fair) wage is not determined solely by the value of labour dictated by the laws of the market, "as regardless of the market value, labour is to be remunerated fairly in the sense that it satisfies certain legitimate needs of the individual (a minimum standard of a decent life). This provision is not only (...) an exception to the principle of the freedom of terms in employment contracts (and the resulting employment relationships), but also a reification of the general principle of social justice" (Section 6 of the rationale).

Thus, the Constitution delegates the duty to determine the amount of minimum wage or the manner of fixing it to the statutory legislator.[135] This obligation was discharged through the adoption of the Minimum Wage Act of 10th October 2002.[136] Again, a specific legal definition of minimum wage was not formulated. In essence, however, it involves limitation of the freedom of parties with respect to wage setting, in view of the fact that its minimum amount has been statutorily and bindingly established. It is noted in doctrine that minimum wage rates are determined with the exclusion of criteria relating to the quantity and quality of the work performed (Art.78 § 1 of the Labour Code). Instead, the criterion of decent wage is applied (Art. 13 of the Labour Code).[137] On the grounds of the Act of 10th October 2002, the amount of the minimum wage is fixed while taking into account social and economic conditions alike. Given these requirements, ensuring a decent living by way of minimum wage may not be accomplished in practice.[138]

The impact of minimum wage on poverty

The impact of minimum wage on poverty reduction is anything but easy to determine. As a reciprocal benefit, a minimum wage is due to the worker for the work he performs, yet the way in which poverty levels are defined focuses on the household rather than the individual. Poverty is computed with respect to the household, considering the total needs of all the individuals who make up the household and the sum of their income from different sources. Wages are one of the sources of livelihood, alongside, e.g. income from self-employment, capital gains, and social transfers in the form of social security benefits. The household poverty level is therefore ascertained in view of the amount of income from different sources and by the number of household members. For this reason, the minimum wage is likely to contribute to poverty reduction to a minor degree.[139]

Nonetheless, the role of the minimum wage cannot be completely dismissed. Pertinent literature underscores that a significant proportion of workers earning the minimum wage

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[135] M. Florczak-Wątor, Komentarz do art. 65 Konstytucji, (in:) P. Tuleja (ed.), Konstytucja Rzeczypospolitej Polskiej. Komentarz, Warsaw 2019, p. 221.

[136] O.J. 2002, No. 200, sec. 1679 as amended.

[137] M. Seweryński, Minimalne wynagrodzenie za pracę – wybrane zagadnienia, (in:) W. Sanetra (ed.), Wynagrodzenie za pracę w warunkach społecznej gospodarki rynkowej i demokracji, Warsaw 2009, p. 58.

[138] K. Bomba, Minimalne wynagrodzenie za pracę jako instrument…, p. 11 ff.

[139] More broadly in: C. Saget, Minimum wage – does it cut poverty?, Labour education: Trade unions and poverty reduction strategies, International Labour Office, Geneva, No. 134-135, 2004/1-2, p. 111 ff.

make up low-income households.[140] In these cases, irrespective of the income structure in such households and their size, the minimum wage can play a role in ensuring income to the most economically disadvantaged, even if it does not cause said households to exceed the national poverty line.[141] In addition, a number of countries have adopted minimum wage as a benchmark used to determine specific social benefits, and, in this context, it indirectly influences the amount of certain non-work household income.[142]

A well-devised minimum wage strategy can therefore be approached as a means of reducing poverty; simultaneously, it enables one to avoid a range of issues faced by social assistance, among other things. The conjunction of minimum wage and labour market mechanisms facilitates effective identification of the most economically disadvantaged workers, who may thus be provided means to meet their basic needs. Moreover, as an instrument for alleviating poverty, the minimum wage does not induce passive attitudes in those who receive it, which is due to the fact that it involves gainful activity. The assessment of the minimum wage as a tool of poverty alleviation must not overlook that it is based on the redistribution of the market income as opposed to budgetary revenue, so its application does not require an extensive public administration apparatus.[143]

The impact of minimum wage on social inequality

In highly developed countries, growing wage inequality has been the most significant factor behind the increase in social inequality since the 1980s.[144] In order to mitigate them, integrated action is required, including investment in adapting workers' professional skills to the requirements of the modern labour market, for instance, by ensuring equal access to education. It is also essential to intensify efforts to ensure decent working conditions by means of such measures as pertinent legal guarantees and adequate incentives for employers to create quality jobs.[145]

The minimum wage is a major component of public policies aiming to reduce inequality. With a higher minimum wage, the earnings of low-paid workers increase, and income inequality may be subsequently reduced.[146] The minimum wage plays a particularly important role in addressing the gender-based wage gap. In numerous countries, since women are over-represented among low-paid workers, a minimum wage level may be particularly advantageous in their case.[147]

However, the contribution of the minimum wage to reducing inequality depends primarily on its impact on the overall rate of employment and increased openness of the labour market,

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[140] More broadly in: F. Rycx, S. Kampelmann, Who earns minimum wages in Europe? New evidence based on household surveys, Brussels 2012, p. 26.

[141] International Labour Organization, Monitoring the effects of minimum wages…, sec. 7.1.

[142] International Labour Organization, Committee of Experts…, General Survey… 2014, p. 32, sec. 65.

[143] More broadly in: K. Bomba, Minimalne wynagrodzenie za pracę jako instrument…, p. 22 ff.

[144] B. S. Litwin, Determining the Effect of the Minimum Wage on Income Inequality, The Cupola Scholarship at Gettysbug Collage 2015, https://cupola.gettysburg.edu/ (last access 29.08.2022).

[145] M. Tomei, Addressing inequality through wage policy, New York 2019, https://www.un.org/ (last access: 29.08.2022)

[146] More broadly in: C. Lin, M. Yun, The Effects of the Minimum Wage on Earnings Inequality: Evidence from China, IZA – Institute of Labor Economics, Discussion Paper No. 9715, February 2016, https://docs.iza.org/dp9715.pdf (last access: 29.08.2022).

[147] M. Caliendo, L. Wittbrodt, Did the Minimum Wage Reduce the Gender Wage Gap in Germany?, IZA – Institute of Labor Economics, Discussion Paper Series No. 14926, December 2021, https://docs.iza.org/dp14926.pdf (last access: 29.08.2022).

especially for those who are in the course of acquiring professional skills and young persons. In this respect, the view of the minimum wage in the doctrine is not uniform. On the one hand, attention is drawn to the negative impact of the minimum wage on employment rates, whereby one is critical not so much of the introduction of a minimum wage but of its amount, which is deemed too high.[148] On the other hand, recent studies have shown that an increased minimum wage may potentially have a favourable impact on employment rates. A minimum wage could even boost employment, as it encourages people to take up work and contributes to providing businesses with an adequate workforce more promptly.[149] Regarding this issue, the ILO Committee of Experts observes that government policies should ensure the right balance between the level of the minimum wage and social benefits so that recipients of the latter are not discouraged from engaging in work.[150] Other analyses tend to infer that a minimum wage exerts no significant impact on employment.[151] In essence, such a view relies on the assumption that increased labour costs do not necessarily lead to a reduction in employment, as they can be offset, e.g. by lower profits, diminished wage spread in the company or increased motivation and productivity. It is, therefore, difficult to state conclusively that an increased minimum wage leads to decreasing employment.[152] However, it should be noted that fixing the minimum wage at a lower level for young people or those acquiring professional qualifications (e.g. trainees) may facilitate securing their first job.[153] Another noteworthy aspect is that the doctrine asserts that the minimum wage is not suitable as a policy instrument for promoting more extensive employment. It is primarily a social rather than an economic category.[154]

The impact of a minimum wage on undeclared employment deserves separate attention.[155] There is no consensus in the literature as to the impact of minimum wage on the undeclared employment sector, where its legal guarantees are not respected. The first position, rooted in the neoclassical supply and demand theory, links minimum wages to a drop in declared employment and simultaneous expansion of the undeclared employment sector. As the labour supply in the informal sector increases, the wages in that sector diminish.[156] The second position also cites the interdependence of demand and supply of labour in undeclared employment but arrives at distinct conclusions. It presumes that an increase in wages in declared employment causes correspondingly higher demand for goods and services, which are also provided in the

[148] T. Piketty, Kapitał XXI wieku, Warsaw 2015, p. 383; B. Godlewska-Bujok, Płaca minimalna – druga strona medalu, Praca i Zabezpieczenia Społeczne 2007, No. 4, p. 10 ff.

[149] W. Cunningham, Minimum Wages and Social Policy…, p. 3.

[150] International Labour Organization, Committee of Experts…, General Survey… 2014, p. 31, sec. 63.

[151] Z. Jacukowicz, Analiza minimalnego wynagrodzenia za pracę, Instytut Pracy i Spraw Socjalnych, Warsaw 2007, pp. 83, 139; W. Rutkowski, Makroekonomiczne konsekwencje wzrostu wynagrodzeń, (in:) M. Bednarski (ed.), Wynagrodzenia w Polsce. Przesłanki i hamulce wzrostu, Instytut Pracy i Spraw Socjalnych, Warsaw 2016, p. 49.

[152] E. S. Phelps, Płaca za pracę, Warsaw 2020, p. 169 ff.

[153] M. Seweryński, Minimalne wynagrodzenie za pracę – wybrane zagadnienia…, p. 59-60.

[154] J. Wratny, Dylematy polityki prawa w zakresie wynagrodzenia za pracę, (in:) M. Matey-Tyrowicz, L. Nawacki, B. Wagner (ed.), Prawo pracy a wyzwania XXI-go wieku. Księga jubileuszowa Profesora Tadeusza Zielińskiego, Warsaw 2002, p. 533.

[155] More broadly in: K. Walczak, Szara strefa i zatrudnienie „na czarno", (in:) K. W. Baran, M. Włodarczyk (editors), System prawa pracy. Prawo rynku pracy. Tom VIII, Warsaw 2018, p. 222 ff.

[156] P. Belser, U. Rani, Minimum Wages and inequality, (in:) J. Berg (ed.), Labour Markets, institutions and Inequality. Building just societies in the 21st century, Cheltenham, UK Northampton, MS, USA, International Labour Office, Geneva 2015, p. 127 ff.

informal employment sector, which, in turn, contributes to increased wages in the latter.[157] The third position approaches a minimum wage as a point of reference for wage bargaining in the formal sector (by way of the so-called lighthouse effect) in which a minimum wage increase exerts pressure resulting in increased wages in undeclared employment.[158]

In Polish studies, the impact of a minimum wage on undeclared employment is a poorly explored phenomenon.[159] A minimum wage seems to produce an indirect effect on undeclared employment, and the outcomes can be twofold. A higher minimum wage may prompt an increase in unemployment and the growth of the "shadow economy", though it may also contribute to increased wages in the informal sector if a minimum wage serves as a benchmark when they are being fixed.

Conclusions

The minimum wage is an institution of great social importance which, conceivably, should enable the worker and his or her family to meet their needs. In this sense, it bears a resemblance to a decent wage, but the concepts are not synonymous. The minimum wage does not make it possible to achieve a decent living standard in all socio-economic circumstances. After all, its amount is set by balancing the needs of workers and their families, the economic capabilities of the employers and the overall degree of development in particular countries. The minimum wage is, therefore, a compromise between the premise of making a decent standard of living a reality and what is economically feasible in a given state.

A minimum wage is expected to accomplish a wide variety of social and economic goals. In my opinion, defining such aims should begin by approaching the minimum wage as an instrument of income redistribution. Such a perspective is in line with the original purpose for which the minimum wage was conceived—as a tool to alleviate poverty— as well as other social objectives, such as reducing social inequality. However, social objectives should be pursued with the least possible negative impact on the economic situation. An excessively high minimum wage may negatively impact employment rates (by increasing unemployment). Such outcomes may be particularly acute for the lowest-paid workers, i.e. those whom the minimum wage was intended to protect. The minimum wage may thus produce the opposite of the intended effect, resulting in greater poverty and inequality.

The efficacy of a minimum wage with respect to the objectives it is set requires that the role it plays in the social and economic policies of the state is precisely defined, whereby one must take into account the complexity of phenomena such as poverty or social inequality, on which a minimum wage is intended to have an impact. It needs to be noted that a minimum wage should not be the only means of reducing poverty, as social security benefits are also important.[160] Moreover, the positive influence of that instrument on poverty in a given country is contingent on the subjective scope of minimum wage and the effectiveness of its enforcement

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[157] W. Cunningham, Minimum Wages and Social Policy…, p. 2.

[158] More broadly in: T. Boeri, P. Garibaldi, M. Ribeiro, The Lighthouse Effect and Beyond, Carlo Alberto Notebooks, No. 193, December 2010 Collegio Carlo Alberto, p. 3 ff.

[159] E. Kryńska, Zatrudnienie nierejestrowane w oczach pracodawców, (in:) R. Cz. Horodeński, C. Sadowska-Snarska (editors), Gospodarowanie zasobami pracy na początku XXI wieku. Aspekty makroekonomiczne i regionalne, Białystok-Warsaw 2009, p. 47 ff.

[160] S. Borkowska, Płaca minimalna a ograniczenie ubóstwa, Polityka Społeczna 1999, No. 10, p. 18.

there.[161] As an instrument which has become a permanent component of measures to improve working conditions, a minimum wage may also contribute to reducing social inequality. This, however, requires that the wage is fixed in a manner preventing increased unemployment. It should also be noted that a minimum wage establishes the lowest legally permissible rate of remuneration. Taking advantage of collective bargaining, the parties involved may fix wages above the minimum level, thus allowing workers to fully enjoy the fruits of progress. Consequently, minimum wage exerts its effect on the entire wage structure, affecting the situation of both the lowest earners and other strata of workers.

BIBLIOGRAPHY

Aranguiz A., Garben S., Combating income equality in the EU: a legal assessment of a potential EU minimum wage directive, European Law Review, 2021/2

Belser P., Rani U., Minimum Wages and inequality, (in:) J. Berg (ed.), Labour Markets, institutions and Inequality. Building just societies in the 21st century, Cheltenham, UK Northampton, MS, USA, International Labour Office, Geneva 2015

Boeri T., Garibaldi P., Ribeiro M., The Lighthouse Effect and Beyond, Carlo Alberto Notebooks, No. 193, December 2010 Collegio Carlo Alberto

Bomba K., Collective voice in fixing minimum wages: social partners' participation from the ILO and EU perspectives, Italian Labour Law e-Journal 2022, Issue 1, Vol. 15, https://illej.unibo.it/ (last access: 19.08.2022)

Bomba K., Minimalne wynagrodzenie za pracę jako instrument realizacji społecznych praw człowieka, Warsaw 2022

Bomba K., Minimalne wynagrodzenie za pracę w działalności Międzynarodowej Organizacji Pracy, Praca i Zabezpieczenie Społeczne 2021/10

Borkowska S., Płaca minimalna a ograniczenie ubóstwa, Polityka Społeczna 1999/10

Caliendo M., Wittbrodt L., Did the Minimum Wage Reduce the Gender Wage Gap in Germany?, IZA – Institute of Labor Economics, Discussion Paper Series No. 14926, December 2021, https://docs.iza.org/dp14926.pdf (last access: 29.08.2022)

Cunningham W., Minimum Wages and Social Policy. Lessons from Developing Countries, Washington 2007

Godlewska-Bujok B., Płaca minimalna – druga strona medalu, Praca i Zabezpieczenia Społeczne 2007/4

Jacukowicz Z., Analiza minimalnego wynagrodzenia za pracę, Instytut Pracy i Spraw Socjalnych, Warsaw 2007

Florczak-Wątor M., Komentarz do art. 65 Konstytucji, (in:) P. Tuleja (ed.), Konstytucja Rzeczypospolitej Polskiej. Komentarz, Warsaw 2019

International Labour Organization, Committee of Experts on the Application of Convention and Recommendation, General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135), Report III (Part 1B), Geneva 2014

International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, General Survey of the Reports on the Minimum Wage-Fixing Machinery Convention (No. 26) and Recommendation (No. 30), 1928; the Minimum

[161] P. Belser, U. Rani, *Minimum Wages and inequality…*, p. 139 ff.

Wage Fixing Machinery (Agriculture) Convention (No. 99) and Recommendation (No. 89), 1951; and the Minimum Wage Fixing Convention (No. 131) and Recommendation (No. 135), 1970, Report III (Part 4 B), Geneva 1992

Krajewska A., Krajewski S., Kontrowersje wokół płacy minimalnej, IX Kongres Ekonomistów Polskich 2015

Kryńska E., Zatrudnienie nierejestrowane w oczach pracodawców, (in:) R. Cz. Horodeński, C. Sadowska-Snarska (editors), Gospodarowanie zasobami pracy na początku XXI wieku. Aspekty makroekonomiczne i regionalne, Białystok-Warsaw 2009

Lin C., Yun M., The Effects of the Minimum Wage on Earnings Inequality: Evidence from China, IZA – Institute of Labor Economics, Discussion Paper No. 9715, February 2016, https://docs.iza.org/dp9715.pdf (last access: 29.08.2022)

Litwin B. S., Determining the Effect of the Minimum Wage on Income Inequality, The Cupola Scholarship at Gettysbug Collage 2015, https://cupola.gettysburg.edu/ (last access: 29.08.2022)

Mitrus L., Komentarz do art. 31 Karty, (in:) A. Wróbel (ed.), Karta Praw Podstawowych Unii Europejskiej. Komentarz, Warsaw 2020

Mitrus L., Powstanie i ewolucja prawa pracy, (in:) K. W. Baran (ed.), System Prawa Pracy. Tom I, Część Ogólna, Warsaw 2017

Mróz E., Minimalne wynagrodzenie zatrudnionych w postindustrialnej Polsce i Niemczech, (in:) B. Godlewska-Bujok, K. Walczak (editors), Zatrudnienie w epoce postindustrialnej, Warsaw 2021

Phelps E. S., Płaca za pracę, Warsaw 2020

Piketty T., Kapitał XXI wieku, Warsaw 2015

Reynaud E., The International Labour Organization and the Living Wage: A Historical Perspective, Conditions of Work and Employment Series No. 90, International Labour Office, Geneva 2017

Rutkowski W., Makroekonomiczne konsekwencje wzrostu wynagrodzeń, (in:) M. Bednarski (ed.), Wynagrodzenia w Polsce. Przesłanki i hamulce wzrostu, Instytut Pracy i Spraw Socjalnych, Warsaw 2016

Rycx F., Kampelmann S., Who earns minimum wages in Europe? New evidence based on household surveys, Brussels 2012

Saget C., Minimum wage – does it cut poverty?, Labour education: Trade unions and poverty reduction strategies, International Labour Office, Geneva, No. 134-135, 2004/1-2

Servais J.-M., The ILO and the social consequences of the COVID-19, (in:) M. Borski, B. M. Ćwiertniak, M. Lekston (editors), Roczniki Administracji i Prawa. Rok XXI, Zeszyt specjalny. In Labore virtus et vita. Księga jubileuszowa Prof. Marka Pliszkiewicza, Sosnowiec 2021

Seweryński M., Minimalne wynagrodzenie za pracę – wybrane zagadnienia, (in:) W. Sanetra (ed.), Wynagrodzenie za pracę w warunkach społecznej gospodarki rynkowej i demokracji, Warsaw 2009

Sobczyk A., Prawo pracy w świetle Konstytucji RP. Tom II. Wybrane problemy i instytucje prawa pracy a konstytucyjne prawa i wolności człowieka, Warsaw 2013

Starr G., Minimum wage fixing: international experience with alternative roles, International Labour Review, Vol. 120, No. 5, September-October 1981

Świątkowski A., Międzynarodowe prawo pracy. Tom I. Międzynarodowe publiczne prawo pracy – standardy międzynarodowe, Wolumen 2, Warsaw 2008
Tomei M., Addressing inequality through wage policy, Nowy Jork 2019, https://www.un.org/ (last access: 21.08.2022)
Walczak K., Szara strefa i zatrudnienie „na czarno", (in:) K. W. Baran, M. Włodarczyk (editors), System prawa pracy. Prawo rynku pracy. Tom VIII, Warsaw 2018
Wratny J., Dylematy polityki prawa w zakresie wynagrodzenia za pracę, (in:) M. Matey-Tyrowicz, L. Nawacki, B. Wagner (editors), Prawo pracy a wyzwania XXI-go wieku. Księga jubileuszowa Profesora Tadeusza Zielińskiego, Warsaw 2002

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Social development on a municipality's scale in the scope of human rights protection

Abstract
The essence of the commune is independence in terms of freedom in creating one's own system, that is, inter alia, in creating the organizational structure of a commune, creating its own organs or also in the field of human rights protection. Certain system solutions may result directly from the Constitution or the Act, then the commune is not independent in shaping these elements of its own system, while certain issues from the systemic sphere that are not exhaustively regulated by law are performed by the commune as its own tasks. The purpose of this article is to present the legal regulations concerning the functioning of municipal self-government in Poland and to present the changes made in this field after Poland's integration with the European Union. Local self-government pursuant to art. 16 sec. 2 of the Constitution of the Republic of Poland participates in the exercise of public authority. It can be inferred from this provision that it results from the constitutional empowerment of self-government by the state to exercise power. Units of local self-government are admitted to the participation of public authorities with the consent of the state, which, however, leaves itself the possibility of supervising the activities of the entities that handed over this authority in this respect. However, it is imperative that local government be equipped with appropriate law-making and enforcement powers that can be found in the Polish Constitution and laws.

Keywords: local government, human rights, development of society, community, Constitution of the Republic of Poland, local society, local government authority

Introduction

Municipal self-government is defined as "a separate association of local society in the state structure, established by law, appointed to carry out public administration independently, equipped with material means enabling the implementation of the tasks imposed on them". The functioning of self-government is based on a corporate form of activity. The municipality performs its tasks through bodies elected by universal suffrage. Such a solution is necessary because a local community is not able to perform its activities with the participation of all its residents. The bodies, usually collegiate, perform public tasks entrusted to them to satisfy the needs of the local government community. Public tasks performed by local self-government are subject to action "on the basis and within the limits of the law". This principle stipulates that all actions of both local and central government public administration bodies must be carried out on the basis and within the limits of the law laid down in statutes, i.e. the bodies local self-government units may perform the tasks entrusted to them only on the basis

The scope of activities of the individual levels of local government must be executed on the basis and within the limits of the law as set out in the acts. The scope of activities of particular levels of local self-government is defined in local self-government acts. In order to fully discuss the analysed matter a dogmatic, theoretical and legal method has been used, as well as a historical method - to a small extent.

Concept and scope of protection of human rights in the municipality

As a result of the changes in Poland's political system after 1989, local self-governments regained their agentship and were given the obligation to satisfy collective needs of local communities, listing the basic tasks in this respect. These tasks can summarised as caring for proper execution of human rights and for the well-being of the local community[162].

Local governments have become the actual managers of the area, responsible for the living conditions of the population, such as: fulfilling collective needs of the community, i.e., local residents of the municipality, which is enshrined in the Act on Municipal Self-Government of 8 March 1990[163]. It is worth mentioning that the idea of the rule of law is based on making laws that integrate rulers and citizens. Determining the scope of competence of state bodies and coupling the competence with liberal democracy results in that the citizens are legally guaranteed a number of rights and freedoms. State institutions function according to the powers vested in them by normative acts, while citizens can do whatever the law does not prohibit. A state of law in conditioned upon obeying the law.

Due to its position in the legal order and its competences the territorial self-government, plays various roles determining its role in the state and the economy. Being a community of residents living in a certain territory, it carries out certain tasks of the state in their local and regional form to meet the needs of the citizens. It facilitates a sense of identification with the place and provides legally defined opportunities for the inhabitants to participate in the governance and control[164].

Local self-government is an integral part of the state system, which performs specific sets of public tasks. We can agree with Eugeniusz Wojciechowski that self-government is a different kind of state, functioning at the regional and local levels. Local self-government constitutes the foundation of a democratic state of law and occupies an important position in the structure of the state. This position is defined in legal regulations, in constitutions and laws[165].

The division of tasks between state and local self-government bodies is regulated by the principle of subsidiarity expressed in the preamble to the Constitution. It means that public tasks should be performed at the lowest possible level of authority and public administration - by the bodies which are closest to the citizens.

The legislator in Article 164 (1) of the Constitution of the Republic of Poland indicates that: „municipality is the basic unit of local self-government" Paragraph 2 of Article 164 of the Constitution of the Republic of Poland provides, in turn, that „their units of regional or local and regional self-government shall be determined by law." The fundamental importance of the

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[162] J. J. Parysek, Rola lokalnego samorządu terytorialnego w rozwoju społeczno-gospodarczym i przestrzennym gmin, Poznań 2015 pp. 10ff.

[163] Act of 8 March 1990 on municipal self-government (Polish Journal of Laws 1990 No. 16 item 95).

[164] E. Wojciechowski, Gospodarka samorządu terytorialnego, Warsaw 2012, p. 27.

[165] E. Wojciechowski, Zarządzanie w samorządzie terytorialnym, Difin, Warsaw 2014, p. 11

municipality as a unit of local self-government is a point of reference for the ordinary legislature in regulating specific legal issues concerning its functioning. In legal studies, an important element constituting the basic character of the municipality among other local government units is its independence, which is at the same time a manifestation of the decentralisation of public power. Therefore, the sovereignty of the municipality is a constitutionally guaranteed right to independence in undertaking public tasks entrusted to it, which comprises many factors, mentioned above. It is also matched with responsibility for actions and negligence made. It should not be overlooked, however, that the wording of Article 164 Paragraph 2 of the Constitution of the Republic of Poland indicates that the municipality is not the only local government unit. Admittedly, the constitutional legislator does not explicitly provide for other units besides municipalities, not definitively determining the structure of the territorial self-government in Poland, nonetheless, when providing for other units, he assumes that they must be established. Apart from municipalities, poviats and voivodships have also been created in Poland. However, special attention should be paid to the role of the municipality in the protection of human rights.

The idea of the rule of law is based on procedural lawmaking that integrates rulers and citizens. The delimitation of the scope of competences of state bodies and their association with liberal democracy legally guarantees citizens a range of rights and freedoms166. State institutions function according to granted powers specified in normative acts, while citizens can do whatever the law does not forbid.167 Human rights are an inalienable and natural consequence of the dignity of the human being, and the state is obliged to respect them by establishing a procedure to ensure their protection. We can thus distinguish a twofold understanding of human rights protection - as a state and as a process: the state as the supranational and internal legal provisions in force to date, and the actual procedures for enforcing one's rights; the definition as a process points to dynamic development of the catalogue of rights and freedoms with simultaneous increase activity of non-governmental organisations.

Sources of human rights protection

Proclaiming human rights and freedoms in normative acts does not solve the problem of their observance, or their protection. It is also essential to set up appropriate, integrated mechanisms to accommodate cases where the rights and freedoms will have to be pursued by an individual. Such is the role of human rights guarantees.[168]

Public safety and order, and human rights protection form a very special scope of interests of the public administration which is particularly important not only for the normal functioning of public state and self-government institutions, but also for the need to satisfy the basic needs of the society – including the need for safety. The above sphere concerning the protection of human rights, and in fact the effectiveness of the tasks carried out in this area, determines the stability of public institutions, as well as shapes public sentiments. It is clear that the sphere of public order and security is primarily the domain of the state and its numerous institutions, mainly of a civilian nature, but it must not be forgotten - if only by referring to

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[166] A. Gołębiowska, Local government in the Constitution of Republic of Poland of 1997, [in:] ius novum 2 (2105), pp. 25 – 43.

[167] J. Zakrzewska, Państwo prawa a nowa konstytucja, [in:] G. Skąpska, Adam Marszałek (ed): Prawo w zmieniającym się społeczeństwie, Warsaw 1992, p. 326.

[168] A. Bisztyga, M. Jabłoński, K. Wójtowicz, System ochrony praw człowieka, Chełm 2003 p. 13

the constitutional principle of subsidiarity or ordinary local social ties - that these overriding values of order and security, as well as life and health, are also cared for, with the appropriate legal empowerment, by local self-government units.169

On the outset, it should be mentioned that the Constitution plays a fundamental role in the protection of fundamental human rights. The norms contained in the Constitution, as the normative act of the highest legal force and the greatest power of influence, encompassing the entire legal order, constitute the fundamental criterion of assessment from the point of view of compliance of statutory norms with them, as well as in the aspect of determining the scope of permissible actions of the legislator and the bodies applying the law, encroaching upon the sphere of a given individual entitlement. As a result, the constitutional rules of admissibility of limitations to human rights acquire paramount importance. In this respect, the role of the Constitutional Tribunal, supported by the case law of the European Court of Human Rights, cannot be overestimated. An important factor that may contribute to strengthening the protection of rights and freedoms may also be the direct application of the provisions of the Constitution. In this way it is possible not only to determine the direction of the legislator's activity, but also the direction of interpretation of particular statutory norms, and thus to guarantee the consistence of the legal order.170

It should be noted that nowadays the respect for human rights is regarded as an essential condition for the fair functioning of the state order and local self-government units. In view of the above, it is necessary to harmonise domestic law with the international system of human rights, which entails not only the introduction of provisions of a specific wording, but also a consensus on arrangements of an axiological nature. It should be stressed at this point that the contemporary solutions concerning the characteristics of human rights were not deduced from some a'priori assumed conceptions, but mainly resulted from the reaction to the evil caused, such as mass crimes, discrimination, denial of the status of being human to some people. This specific theoretical character of human rights increases their adaptive potential. In practical terms (in politics and in normative systems) they are more and more widely recognised, although in the theoretical aspect ambiguities related to the analysis of their content accumulate.

In the context of reflections on human rights and freedoms, there are there are also problems related to the determination of the limits and conditions which enable their equal and just exercise. There is the question of the responsibility of one towards the other, or the question of the protection of human beings against self-destructive sovereign acts, such as euthanasia, abortion or the use of drugs. Given these and other uncertainties surrounding the understanding of rights and freedoms, it is not difficult to see that their articulation and assertion should be a process which involves many actors working towards a common consensus171.

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[169] M. Karpiuk, M. Mazuryk, I. Wieczorek, Zadania i kompetencje samorządu terytorialnego w zakresie porządku publicznego i bezpieczeństwa obywateli, obronności oraz ochrony przeciwpożarowej i przeciwpowodziowej, Łódź 2017 pp. 10ff.

[170] R. Kopera, Konstytucyjne podstawy ochrony praw człowieka, Katowice 2017, pp. 15ff.

[171] A different approach to freedom is represented by line of thoughts: indeterministic (e.g. Democritus, Epicurus, Thomas Aquinas, Nietzsche), which claims that humans have the power of free will independent of external factors and deterministic (e.g. Stoics, Spinoza,Determinist (e.g. Stoics, Spinoza, Hobbes, Hegel, Marx), which denies the functioning of free will because of its overdependence on external factors such as biology, economics, fate, etc. Comapre: Konstytucyjne wolności i prawa w Polsce, Vol. I, Zasady ogólne, edited by M. Chmaja, Kraków 2002, p. 11.

Society's development with regard to the protection of human rights

In the light of Talcott Parsons' theory, social changes, including the development of society, are a side effect of systemic transformation and occur when existing institutions fail to fulfil their functions. Neil Smelser, a continuator of the aforementioned line of thought, believes that social changes are a side effect of systemic transformation. Their emergence is indicative of a crisis situation in society, when individuals are unable to satisfy their needs within the family, the local community, and with the help of local and state institutions.

According to Locke, the foundations of modern civil society are raised upon the ideas of democracy, freedom, self-government, and collective responsibility: "Wherever, therefore, a certain class of people unite into a single society, in which everyone gives up to the public authority the executive power vested in him by the law of nature, there and there only is a political or civil society [...] Hence, it is evident that absolute monarchy, which some treat as the only form of government in the world, being in reality incompatible with civil society, cannot form the basis of civil government" (Locke 1992: 224-225)[172].

A new opening in the functioning of the social sector occurred at the beginning of the 21st century. However, it started with signs of stagnation. After 2000 it became quite clear that, due to economic development and ongoing political processes, Poland and other countries had a real chance of imminent accession of the European Union[173]. Under the circumstances, in April 2003, a new Act on Public Benefit Activity and Volunteerism was adopted in Poland, which in a way became a milestone regulating relations between public administration and civic organisations, especially at the level of local self-government. The Act also introduced another important source of funding for organisations - the mechanism of allocating a part of the income tax paid by each citizen (the so-called „one per cent" mechanism, where the citizens are allowed to decide about allocation of 1% of their taxes.) [174].

The aforementioned events opened the ways to a new wave of development of the society, and influenced changes in the local self-government of Poland related to the integration with the European Union (EU). When analysing the development of society on the scale of the municipality, it should be emphasised that the essence of self-government is defined by the subject, i.e. the community living in a specific, territorially organised area, and the object, i.e. the performance of state administration. The territorial self-government is a component of the state structure, which was formed by law and is a corporation of the local society, called to carry out the state administration independently under proportional and lawful administrative supervision[175].

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[172] Locke's views, growing out of the need to specify needs at the individual and supra-individual level, echoed the theories of Georg Wilhelm Friedrich Hegel. This German philosopher, author of the Principles of the Philosophy of Law, created a vision of a modern society consisting of strongly individualised and even atomised individuals. The imperative to build a civil society is the driving force behind all human activity, for civil society is "a powerful force that pulls man to its side, demands that he work only for society, that all that everything he represents is owned to this society, and that everything he does, he does through this society". (Hegel 1969: 238).

[173] On 1 May 2004 Poland joined the European Union along with Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Slovakia and Slovenia. It was the biggest enlargement in the EU's history

[174] Act of 24 April 2003 on public benefit activity and volunteerism (Polish Journal of Laws 2003 No. 96, item 873).

[175] Prawo administracyjne, Z. Niewiadomski (ed.), Warsaw 2011, p. 144.

The members of a local government are the people who live in the area, i.e. belongness to it by law is directly dependent on the place of residence. A person residing in a local government unit is, de facto, a member of the local government association. There is no possibility of renouncing membership. The only way to change the membership of individual local self-government units is to change the place of residence.[176] It is worth mentioning that in the light of the Constitution of the Republic of Poland in Article 16 (1) "The entire population of individuals from the basic territorial unit constitutes by law a self-governing community"[177].

The Constitution of the Republic of Poland does not define the system of territorial self-government, but only contains regulations mandating decentralisation of public administration[178], which means that the Polish self-government is a result of decentralisation performed by the state and the existence of local communities.

As underlined by S. Fundowicz, decentralization is „the distribution of administrative tasks (activities) to different organisations, which are legal persons of public law"[179].

Conclusion

Summing up the considerations concerning the constitutional and statutory empowerment of local self-government in the field of human rights protection, it should be emphasised that the communal self-government is an important element of the territorial system in Poland. It is a community of residents of one region, who are united by common goals, plans for the future, identity and culture, which undertakes actions resulting from the needs of its residents. Territorial self-government functioning in a democratic state guarantees the possibility of exercising public authority to its citizens - free and equal before the law. Thus, every citizen has an influence on shaping his/her homeland as a natural environment. The essence of local government is the management of local affairs by the residents themselves. Certainly, its functioning depends on the level of involvement, knowledge and awareness of those in charge, who are ready to accept responsibility for the local community. The development of municipal self-government favours local communities who exercise authority directly or indirectly, thus causing the authority to take care of the current affairs of the residents and create conditions for development and respect for the protection of human rights; in this sense, municipal self-government is a prerequisite for the functioning of civic society, while bringing tangible benefits on a local scale.

BIBLIOGRAPHY

Bisztyga A., Jabłoński M., Wójtowicz K., System ochrony praw człowieka, Chełm 2003, p. 13

Chmaj M., Konstytucyjne wolności i prawa w Polsce, vol. I, Zasady ogólne, edited by M. Chmaja, Kraków 2002, p. 11.

Fundowicz S., Decentralizacja administracji publicznej w Polsce, Lublin 2005, p. 28.

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[176] W. Góralczyk, Zasada kompetencyjności w prawie administracyjnym, Warsaw 1986, p. 105.

[177] Article 16(1) of the Constitution of the Republic of Poland of 2 April 1997 adopted by the National Assembly on 2 April 1997, approved by the Nation in a constitutional referendum on 25 May 1997, signed by the President of the Republic of Poland on 16 July 1997 (Polish Journal of Laws 1997 No. 78, item 483)

[178] Article 15(1) of the Polish Constitution

[179] S. Fundowicz, Decentralizacja administracji publicznej w Polsce, Lublin 2005, p. 28.

Gołębiowska A., Local government in the Constitution of Republic of Poland of 1997, [in:] ius novum 2 (2105), pp. 25 – 43.
Góralczyk W., Zasada kompetencyjności w prawie administracyjnym, Warsaw 1986, p. 105.
Karpiuk M., Mazuryk M., Wieczorek I., Zadania i kompetencje samorządu terytorialnego w zakresie porządku publicznego i bezpieczeństwa obywateli, obronności oraz ochrony przeciwpożarowej i przeciwpowodziowej, Łódź 2017, pp. 10ff.
7. Constitution of the Republic of Poland of 2 April 1997 (Polish Journal of Laws 1997, No. 78, item 483)
Kopera R., Konstytucyjne podstawy ochrony praw człowieka, Katowice 2017, pp. 15ff.
Kuczyński W., (ed). Dziesięciolecie Polski niepodległej 1989 – 1999, Warsaw 2001. Z. Niewiadomski, Ustrój samorządu terytorialnego i administracji rządowej po reformie. Zbiór aktów prawnych z wprowadzeniem i objaśnieniami prof Zygmunta Niewiadomskiego, wydanie i uzupełnione, difn, Warsaw 2000.
Niewiadomski Z. (ed.), Prawo administracyjne, Warsaw 2011, p. 144.
Parysek J. J., Rola lokalnego samorządu terytorialnego w rozwoju społeczno-gospodarczym i przestrzennym gmin, Poznań 2015, pp. 10ff.
Piechowiak M., Pojęcie praw człowieka (w:) Podstawowe prawa jednostki i ich sądowa ochrona, pod red. Wiśniewski L., Warsaw 1997, s. 10
Act of 24 April 2003 on Public Benefit Activity and Volunteerism (Polish Journal of Laws 2003, No. 96, item 873).
Wojciechowski E., Gospodarka samorządu terytorialnego, Warszawa 2012, p. 27.
Wojciechowski E., Zarządzanie w samorządzie terytorialnym, Difin, Warszawa 2014, p. 11
Zakrzewska J., Państwo prawa a nowa konstytucja, [in:] G. Skąpska, Adam Marszałek (ed.): Prawo w zmieniającym się społeczeństwie, Warsaw 1992, p. 326.

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The right of elderly people to proper functioning in the current world

Abstract
The quality of life is a very important factor in each age. Since some time, especially in European context, we are talking about ageing society. It means that each year, in our societies, the number of elderly people is growing. Therefore, the states and other institution and organizations should focus on this age group to prevent the exclusion and to provide proper functioning of senior citizens in current world. The main focus of this study is to see what is the quality of life of elderly people, to analyze their situation and identify the biggest problems. Also, we will try to find some solutions for improvement

Keywords: senior citizen, elderly people, ICT, quality of life, rights of elderly people

Introduction

Each human being has the right to proper functioning in the current right. The quality of life is a particularly key factor in each age. Since some time, especially in European context, we are talking about ageing society. It means that each year, in our societies, the number of elderly people is growing. Therefore, the states and other institution and organizations should focus on this age group to prevent the exclusion and to provide proper functioning of senior citizens in current world.

The main purpose of this study is to see what is the quality of life of elderly people. The study will try to see the elderly people as a part of society and to analyze their situation as well as to identify the biggest problems. In addition, we will show what kind of rights and freedoms are especially important and critical for elderly people.

The working hypothesis is that elderly people faced many problems in their everyday life and that there are many areas where the life of senior citizens may be improved. It is especially valid in the situations of crises as it was seen during the crises of pandemic covid19 where not only their health security was in danger but also because of isolation, they faced many other problems in much bigger amount than people of other age.

In addition, the studies will try to find some solutions for improvement in the area of providing the proper functioning of elderly people in current world.

Elderly people as a part of our societies

One of the currently most used terms is ageing society. The term ageing means that our societies become older. According to World Health Organization, the population aging means the increase of average of people (median age) caused by two factors: continued decline in

fertility rates as well as increased life expectancy. Such demographic situation appears in increased number and rate of people who are over 60 years old. According to analyzes, we will see soon the situation where there are more elderly people than younger[180].

There are different definition of the term elderly or order people. According to the United Nations description from World Population Ageing 2013, the older people or those who are of 60 or more age[181]. The World Health Organization states that in current world with developed economy, the older people are in age of 65 or more. At the same time, WHO also says that older people can be defined as those who have passed the median life expectancy at birth[182]. In turn, the Eurostat, for example in its publication Ageing Europe, took the practical approach where the term "older people" means those aged 65 years or more and expression "very old people" means those who are 85 years or more[183].

The fact that we are living in aging world can be easily proved by showing few numbers taken from worldwide, European, or Polish statistical data. First of all, according to World Health Organization, the pace of population ageing is much faster that in the past. In the year of 2020, in the world, the amount of people who are in age of 60 or more outnumbered the number of children younger than 5 years. Also, between 2015 and 2050, the proportion of population in the world over 60 years will increase from 12% to as much as 22%. Right now, the statistical data is showing that 1 of 8 people in the world is in the age of 60 or more. But in 2030, this ration will change and according to estimated data, 1 of 6 people will be in such age and in 2040, 1 of 5 people living in the world will be 60 years old or older. The data shows that the population aged 60 years and over will change from 1 billion in 2020 to 1.4 billion in 2030 and as much as 2.1 billion by 2050. At the same time, the estimates show that the number of people aged 88 years or older will reach the amount of 426 million which means that the number will triple between 2020 and 2050[184].

The data of Population Reference Bureau developed based on World Population Prospects 2019 by UN and 2019 World Population Data Sheet by Toshiko Kaneda, Charlotte Greenbaum, and Kaitlyn Patierno shows that the biggest number of people in age of 65 or more live in China. There are 166 million of people in this age group but because of the total number of population it is only 11,9%. On the second place, there is India with 85 million of elderly people but again, the share in total population is only 6,1%. The top five countries, there are also: the USA with 53 million (16%), Japan with 35,5 million (28,2%) and Russian Federation with 21,5 million (16,6).[185]

The total number of elderly people in the country is less important that the ration between this number and the amount of total population. Therefore, it is important to show, in which

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[180] World Health Organization (2010). Ageing: Global Population. In: https://www.who.int/news-room/questions-and-answers/item/population-ageing (access: 20.10.2022)

[181] United Nation (2013). World Population Ageing 2013. United Nation Publication - ST/SEA/SER.A/348, New York. In: https://www.un.org/en/development/desa/population/publications/pdf/ageing/WorldPopulationAgeing2013.pdf (access: 20.10.2022).

[182] Eurostat (2019). Ageing Europe — looking at the lives of older people in the UE. Luxembourg: Publications Office of the European Union. In: https://ec.europa.eu/eurostat/documents/3217494/10166544/KS-02-19%E2%80%91681-EN-N.pdf/c701972f-6b4e-b432-57d2-91898ca94893 (access: 20.10.2022).

[183] Ibidem, p. 9

[184] World Health Organization (2022). Ageing and health. In https://www.who.int/news-room/fact-sheets/detail/ageing-and-health (access: 20.10.2022).

[185] Population Reference Bureau (2020). Countries With the Oldest Populations in the World. In: https://www.prb.org/resources/countries-with-the-oldest-populations-in-the-world (access: 20.10.2022).

countries there is the biggest ration of people who are in age 65 or older. The country which has here the biggest ration is Japan with 28,2%, then we have Italy with 22,8%, Finland with 21,9% and Portugal and Greece with 21,8. At the same time, the Hungary is placed on 18 position with 19,3% and Poland is on 28 place with 17,5%[186].

Also, the society of European Union is older every year. Eurostat, in its publication titled Ageing Europe 2021, is showing how fast the population of EU and particular states is getting older. Even from previous data, it could be noted that some of the European Union states are in the top of the list of countries with the highest share of the number of older people in the total population. When we analyzed the data from 2001 to 2020 as well as estimations for the years of 2030, 2040 and 2050, we can see that the amount of people in age of 65 and more has been growing. The following facts can be pictured by the date gathered in the below tables. We will show there the share of the number of elderly people in the total of population in all European Union states, the same numbers in Italy – the country of the biggest percentage of older people in the entire UE as well as the numbers in Poland and Hungary.

Table no 1: Elderly population (65 years and over) between 2001 and 2020.

Year	UE28	Italy	Poland	Hungary
2001	15,8%	18,4%	12,4%	15,1%
2010	17,6%	20,4%	13,6%	16,6%
2015	19%	21,7%	15,4%	17,9%
2020	20,6%	23,2%	18,2%	19,9%

Source: Eurostat (2021). Ageing Europe - 2021 interactive edition. Elderly population (65 years and over): Development. In: https://ec.europa.eu/eurostat/cache/digpub/ageing (access: 20.10.2022)[187].

Table no 2: Elderly population (65 years and over) estimated data between 2001 and 2020.

Year	UE28	Italy	Poland	Hungary
2030	24,2%	27%	22,7%	21,6%
2040	27,6%	32%	25,3%	24,3%
2050	29,5%	33,7%	30,1%	27,7%

Source: Eurostat (2021). Ageing Europe - 2021 interactive edition. Elderly population (65 years and over): Projections In: https://ec.europa.eu/eurostat/cache/digpub/ageing (access: 20.10.2022)[188]

In addition, we need to say that also in Poland we can see the process of ageing of the society. At the end of 2021, the average Polish resident was almost 42 years old (median age). As a result of increasing the duration of life, as well as changes in the age structure of the population, the median age grows year by year - since 2000 it has increased by over 5 years, and since the beginning of the 1990s - by over 8 years[189].

The ongoing process of aging of the Polish population is also caused by phenomenon

[186] Ibidem.

[187] Eurostat (2021). Ageing Europe - 2021. In: https://ec.europa.eu/eurostat/web/products-interactive-publications/-/ks-08-21-259 (access: 20.10.2022).

[188] Ibidem.

[189] Główny Urząd statystyczny (2022). Ludność. Stan i struktura oraz ruch naturalny w przekroju terytorialnym w 2021 r. Stan w dniu 31 grudnia. In: https://stat.gov.pl/obszary-tematyczne/ludnosc/ludnosc/ludnosc-stan-i-struktura-oraz-ruch-naturalny-w-przekroju-terytorialnym-w-2021-r-stan-w-dniu-31-grudnia,6,31.html (access: 20.10.2022), p16.

of extending life expectancy and it is exacerbated by the low fertility rate. Currently, the so-called "the old age index" is 122, which means that for 100 "grandchildren" (children aged 0-14) there are 122 "grandparents" (people aged 65 and over)[190].

The population of Poland decreased. In the year of 2000, we have 38 254 000 people in total of which, 4 726 000 people (10,2%) where in age of 65 or more. In 2021, the total population was 37 908 000 and the number of older people was 7 175 000 (18,9%)[191].

The above-mentioned data shows clearly that the population of the world, European Union as well as particular country is getting older. The numbers point out that the amount of people who are in age of 65 or more is growing. Based on this we can say that the world's population is ageing. Therefore, it is necessary to focus in the unique way on this age group in order to be sure that they are provided with the quality of live and that their rights are satisfied.

Situation of elderly people

The situation of elderly people is not easy in general. They are facing different problems. Those problems occur on the physical as well as on psychological and social levels.

The biggest physical problem is heath. There are many different areas of health issues which are common to elderly such as: hearing loss, cataracts, and refractive errors, back and neck pain and osteoarthritis, chronic obstructive pulmonary disease, diabetes, depression, and dementia. Many older people faced more then one health issue at the same time. They also experience other type of diseases of individual nature[192].

Next to serious health problems, there are so issues from the psychological and social area which impact the life of senior citizens. The life of older people is difficult because they are facing some issues and troubles. Those problems may be concluded in two terms – isolation and security issues. Older people feel isolated and alone as they are not anymore part of mainstream of society and family life. Also, due to different issues, they do not feel secure.

The main problems and issues of elderly people life are:

1. They are spending more time at home, and they are less mobile.
   Older people usually are retired and not working anymore as well as they are less mobile due to health issues. Therefore, are not able to participate in social and family events.
2. They are feeling lonelier.
   Loneliness is a state which is experienced by older people. They are not so active anymore and they have less friends – some of them died, some are sick. Their children have now own families and often they moved far away from them.
3. The are feeling more worries
   Older people's life is a worry life. They are not able to take care of many matters therefore they are so worried about it. They are worried about their families, their everyday live, about their health, etc.
4. They are having less fun in their everyday life
   People in older age usually have less or no fun. Their life is very often sad and bored. Their previous life was focused on family and job and many of them have no chance to

[190] Ibidem, p. 10.
[191] Ibidem, p. 17.
[192] World Health Organization. Ageing and health. In: https://www.who.int/news-room/fact-sheets/detail/ageing-and-health (access: 20.10.2022).

think about themselves. They are not able to be active anymore, they are not participating in entertainment events.

5. It is hard to satisfy their everyday needs
   Many older people have problem with satisfying their daily needs. Due to economical or physical issues, they are not able to take care of those needs. Sometimes, even going to grocery store to buy some goods is a problem[193].

Older people, facing isolation and the lack of security, are experiencing fear and threats. Therefore, it is worthy to point out all these areas of fear and ask the question - What elderly people are afraid of? Analyzing the situation of older people as well as issues and problems faced by them, there are some answers to this question coming into the picture. Elderly people are afraid and worried:

1. About family (children, grandchildren) – they are so used to take care of family so if they are not able to do so anymore, they are afraid that their family will not manage without their help.
2. There is nobody to help them – isolation and staying home alone make them worry that in some issues nobody will help them
3. Being alone – their family moved away, their friends are sick are some of them have already died and there are much less people around them.
4. Lost of independence – they are not able to take care of themselves and of many matters and this is why they feel depended from others.
5. Health issues – in old age, so many health and physical problems are being experienced by older people.
6. Economical issues – in many countries, together with retirement and not working anymore, alder people are having less money as the pension not always is able to replace the salary from work.
7. Crime and violence in real world – there are a lot of these situation in real world happening next to older people and they are so worried that it will touch them.
8. Unsure while using technology (fraud, hacked, fake news) – they are lost in the new technological world due to the fact that the development of modern technology is so fast and older people are not able to follow it and to catch up with it.
   No more possibility of development – they feel like their life is going to the end and there are no more options for development194.

All this issues related to isolation and lack of security are connected with the life of older people. Those problems occur in a very stronger way during different crises – for example during last humanitarian crises related to the pandemic Covid19. In many situation, elderly people were left alone without much help. The entire world, due to some restrictions and limitations moved from real world to virtual reality (work, shopping, communication, etc.). Many of older people were not prepared for such transfer – they have no knowledge, no skills, and very often no proper devises[195].

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[193] See: Kosold, D. (2017). 7 Major Fears Elderly People Face. In: https://www.homecareassistancetampabay.com/common-fears-of-the-elderly (access: 20.10.2022).

[194] Huetter, R. (2020). Seniors' Top 10 Fears of Aging: Senior Living 101. In: https://info.daystarseattle.com/senior-living-blog/understanding-your-aging-parents-seniors-top-10-fears (access: 20.10.2022).

[195] See: Help Age International (2021). Bearing the brunt The impact of COVID-19 on older people in Eurasia

According to data given by STATISTICS POLAND (GUS - Central Statistical Office), the situation of older people with the use of the Internet and new technology is much worse than other age groups. In the year of 2018, the number of Internet users in the entire Polish population was on the level of 76% while among the people aged 65 or more was on the level of 30%. The situation in 2020 changed but still was not favorable for old people. In this year 86,8% of the entire population was using the internet while this ration among elderly people was 59,2%. In the same year 13,2% of the entire population has never used the Internet and 40,8% of the age group of 65 and more[196].

The example of Polish senior citizens shows that those people, during the crises caused by pandemic Covid19, were especially vulnerable to different problems and issues and dealing with everyday matters became even more difficult for them.

Above mentioned issues and problems related to older people's life are profoundly serious. It is obvious that, those people are not able to care anymore for themselves and they need to be helped. The feeling of being isolated and feeling of lack of security make the life of elderly people difficult.

Elderly people and human rights

Each human being has the rights and freedoms which can be concluded in the statement that all of us have the right to proper functioning in the world. The proper functioning of a person in the world can be described as a state when the person has an ability to live, to survive and to develop his and her life. In other words, the proper function of a person can be described as a state of feeling social security which can be guaranteed if all human needs are satisfied. And we are here not only talking about lower-level needs such as physiological or security but also about those from higher level such as love and belonging, esteem and self-actualization. Only then, we can speak about proper functioning of a person and about quality of life[197].

The human needs are connected and related to human rights. Each human need is translated into human right[198]. Taking care of those rights can give us feeling about proper functioning in the world and feeling about the quality of our lives. Therefore, if we want to speak about proper functioning of older people in current world as well as about the quality of their life, we need to talk about their needs and rights as well as about the process of taking care of satisfying those needs.

Elderly people have the rights the same as other age groups. Universal Declaration of Human Right is talking in the right to an adequate standard of living. In the article 25, it is stated that *Everyone has the right to a standard of living adequate for the health and well-being of him/herself and of his/her family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond*

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and the Middle East – insights from 2020. In: https://www.helpage.org/what-we-do/bearing-the-brunt (access: 20.10.2022).

[196] Główny Urząd Statystyczny (2021). Sytuacja osób starszych w Polsce w 2020 r. In: https://stat.gov.pl/files/gfx/portalinformacyjny/pl/defaultaktualnosci/6002/2/3/1/sytuacja_osob_starszych_w_polsce_w_2020_r.pdf (access: 20.10.2022), pp. 62-63.

[197] See: Banaszak, A. (2021). Social security of foreigners in Poland – the level of satisfaction of human needs among immigrants living in Poland. Journal of Modern Science, 47(2), pp. 13-30. In: https://www.jomswsge.com/pdf-144363-72010?filename=Social%20security%20of.pdf (access: 20.10.2022).

[198] See: Sitek, M. (2016). Prawa (potrzeby) człowieka w ponowoczesności. Warszawa: Wydawnictwo C.H. Beck.

his/her control[199]. Similar guarantees are given by the article 11 of International Covenant on Economic, Social and Cultural Rights where we can read that *The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions*[200]. This adequate standard of living is important to the entire population but assuring that those needs are satisfy for older people is of special importance.

All human right should be observed when we are talking about older people. But because this age group is of special needs, there also should be rights specially focus on them. The article 25 of Charter of Fundamental Rights of the European Union is directly talking about right of older people. It states that: *The Union recognizes and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life*[201].

Also United Nations Organization is showing exceptional care for older people. It is manifested in the United Nations Principles for Older Persons. Those principles as a document were adopted by General Assembly Resolution 46/91 of 16 December 1991. This resolution is talking about different rights of older people which are gathered in the five areas:

1. Independence – the rights of satisfying their everyday physiological needs, the right to work and get proper income and the right to stop work due to age, the right to education, the right to save environment and the right to reside at home.
2. Participation – the right to be integrated with society and be active, the right to have development opportunities and the right to be able to form movements and association of older people.
3. Care – the right to benefit from family and community, the right to health care, the right to have access to legal and social services, and the right to enjoy all human rights and freedom even they are in the shelter and treatment facilities.
4. Self-fulfilment – the right to pursue the opportunities for the development and the right to have access to educational, spiritual, cultural, or recreational resources of society.
5. Dignity – the right to live in dignity and security without any physical or mental abuse as well as the right to be treated fairly without any prejudice202.

All this rights both from the general area or directly focused on older people should help satisfying their needs and thanks to this elderly people will be able to properly function in current world. All this rights and freedoms can be concluded in seven points such as:

1. The right to social security and social assistance
2. The right to healthcare

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[199] United Nations, (1948). Universal Declaration of Human Right. In: https://www.un.org/ en/about-us/universal-declaration-of-human-rights (access 20.10.2022).

[200] United Nations, (1966). International Covenant on Economic, Social and Cultural Rights. Adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27. In: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights (access: 20.10.2022).

[201] Charter of Fundamental Rights of the European Union. Official Journal of the European Union, of 26.10.2012, C326/391. In: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2012.326.01.0391.01.ENG&toc=OJ%3AC%3A2012%3A326%3ATOC (access:20.10.2022).

[202] United Nation, (1991). United Nations Principles for Older Persons Adopted by General Assembly resolution 46/91 of 16 December 1991. In: https://www.ohchr.org/sites/default/files/olderpersons.pdf (access: 20.10.2022).

3. The right to be treated with dignity
4. The right to respect for family life
5. The right to respect for private life
6. The right and the ability to make decisions about oneself
7. The right to be a full member of society.

Also, we can formulate one statement which says that all those rights can be sum up as - the right of elderly people to proper functioning in the current world

Quality of life elderly people – recommendations for improvement

Satisfying the needs of older people and taking care of their rights will make their life easier and more valuable as well as it will increase the quality of life of older people. There are several areas in which elderly people's life may be improved and when their functioning in current life will be more proper. These areas are:

1. HOME – safety, existential needs
2. WELLBEING – health care, mental filling, activities
3. SOCIAL LIFE – contacts, communication, family, friends, socializing
4. MOBILTY – personal mobility, access to goods and services
5. INFOTAINMENT – information and entertainment

Elderly people, during their life, have already contributed to the family and to the society. Now – it is duty of family and society to take care of them in order to improve the quality of their life. Therefore:

1. It is necessary to show them that they are still important members of family and society, and they are still useful and needed.
2. It is necessary to take care of their existential needs (social policy - accommodation, living expenses, social help, health care)
3. It is necessary to activate them – education, groups of interests, sport
4. It is necessary to teach them how to use modern technology in safe and secure way (skills and devises adjusted to their abilities and age).

All those actions should be focused on two main tasks – to reduce feelings of isolation and loneliness and increase the sense of security and dignity. Only then, we can talk about quality of life of older people and about their proper functioning in current world.

Conclusion

The life of elderly people has major value. In today's world they are becoming the especial part of our modern society. Their number is growing as our population is getting older. Therefore, it is necessary to take special care of this age group. Older people are particularly important part of societies. They have already contributed a lot to the world and therefore, now those who are younger should be able to give them back.

Older people are facing so many different problems. From the physical point of view, there are many health issues. Also, from psychological as well as social point of view, there are many matters causing problem to elderly people. Those problems could be concluded in two fundamental areas – isolation and security issues. Simple, they feel marginalized and not secure as they are not able to take care of themselves anymore.

Elderly people have right as each and every human being. Also, there should be set of special

rights for older people as they required special care. It is little bit similar as with children. We have general human rights and children's rights, and both are used for people who are under 18 years old. Because this kind of age group is not able fully take care of themselves, it was decided that they need special set of right dedicated only to them. The same should be done with elderly people.

There are many areas where life of older people should be improved. We are talking here about areas related to their physical life as well as mental and social functioning in the current world. Taking care of those areas will make life of elderly people betters and the quality of their existence will be improved.

BIBLIOGRAPHY

Banaszak, A. (2021). Social security of foreigners in Poland – the level of satisfaction of human needs among immigrants living in Poland. Journal of Modern Science, 47(2), pp. 13-30. In: https://www.jomswsge.com/pdf-144363-72010?filename=Social%20security%20of.pdf (access: 20.10.2022).

Charter of Fundamental Rights of the European Union. Official Journal of the European Union, of 26.10.2012, C326/391. In: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2012.326.01.0391.01.ENG&toc=OJ%3AC%3A2012%3A326%3ATOC (access:20.10.2022)

Eurostat (2019). Ageing Europe — looking at the lives of older people in the UE. Luxembourg: Publications Office of the European Union. In: https://ec.europa.eu/eurostat/documents/3217494/10166544/KS-02-19%E2%80%91681-EN-N.pdf/c701972f-6b4e-b432-57d2-91898ca94893 (access: 20.10.2022).

Eurostat (2021). Ageing Europe - 2021. In: https://ec.europa.eu/eurostat/web/products-interactive-publications/-/ks-08-21-259 (access: 20.10.2022).

Główny Urząd statystyczny (2022). Ludność. Stan i struktura oraz ruch naturalny w przekroju terytorialnym w 2021 r. Stan w dniu 31 grudnia. In: https://stat.gov.pl/obszary-tematyczne/ludnosc/ludnosc/ludnosc-stan-i-struktura-oraz-ruch-naturalny-w-przekroju-terytorialnym-w-2021-r-stan-w-dniu-31-grudnia,6,31.html (access: 20.10.2022), p16.

Główny Urząd Statystyczny (2021). Sytuacja osób starszych w Polsce w 2020 r. In: https://stat.gov.pl/files/gfx/portalinformacyjny/pl/defaultaktualnosci/6002/2/3/1/sytuacja_osob_starszych_w_polsce_w_2020_r.pdf (access: 20.10.2022), pp. 62-63.

Help Age International (2021). Bearing the brunt The impact of COVID-19 on older people in Eurasia and the Middle East – insights from 2020. In: https://www.helpage.org/what-we-do/bearing-the-brunt (access: 20.10.2022).

Huetter, R. (2020). Seniors' Top 10 Fears of Aging: Senior Living 101. In: https://info.daystar-seattle.com/senior-living-blog/understanding-your-aging-parents-seniors-top-10-fears (access: 20.10.2022).

Kosold, D. (2017). 7 Major Fears Elderly People Face. In: https://www.homecareassistancetampabay.com/common-fears-of-the-elderly (access: 20.10.2022).

Population Reference Bureau (2020). Countries With the Oldest Populations in the World. In: https://www.prb.org/resources/countries-with-the-oldest-populations-in-the-world (access: 20.10.2022).

Sitek, M. (2016). Prawa (potrzeby) człowieka w ponowoczesności. Warszawa: Wydawnictwo C.H.Beck.

United Nation (2013). World Population Ageing 2013. United Nation Publication - ST/SEA/SER.A/348, New York. In: https://www.un.org/en/development/desa/population/publications/pdf/ageing/WorldPopulationAgeing2013.pdf (access: 20.10.2022).

United Nation, (1991). United Nations Principles for Older Persons Adopted by General Assembly resolution 46/91 of 16 December 1991. In: https://www.ohchr.org/sites/default/files/olderpersons.pdf (access: 20.10.2022).

United Nations, (1948). Universal Declaration of Human Right. In: https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf (access 20.10.2022).

United Nations, (1966). International Covenant on Economic, Social and Cultural Rights. Adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27. In: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights (access: 20.10.2022).

World Health Organization (2010). Ageing: Global Population. In: https://www.who.int/news-room/questions-and-answers/item/population-ageing (access: 20.10.2022)

World Health Organization (2022). Ageing and health. In https://www.who.int/news-room/fact-sheets/detail/ageing-and-health (access: 20.10.2022).

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Strengths and weaknesses of telemedicine in Poland (medical and ethical aspects)

Abstract

The development of a new concept of providing health services described as telemedicine started in the 1960s in the United States. In the beginning, it served for medical purposes in army and space programs. The development of technologies facilitating the imagine techniques (RTG, microscopic, or histopathological) and the Internet accelerated progress of telemedicine.

The purpose of the study is to identify and evaluate some medical and ethical aspects of the development of telemedicine in Poland. In the 21st century, on the one hand, telemedicine as a form of providing health services facilitates contact between the patient and the doctor. On the other hand, there might be observed some risks resulting from the lack of a personal physical examination of a patient. There are some doubts concerning the ethical aspects of telemedicine referring to technical or legal safety. Patients should be precisely informed about some limitations and shortcomings of providing health services on-line. Telemedicine should be treated as a form of supplementing traditional medicine. It is significant that state-funded health care resources are limited. Some organizational guidelines and standards are indispensable in order to provide with better diagnostics and treatment. In this context, the directives referring to telemedicine provided as part of POZ (podstawowa opieka zdrowotna) activities are of great importance. It is significant that during the pandemic Covid-19, patients were entitled to teleconsultations with primary healthcare physician under the National Health Fund (NFZ).

It was conducted a scoping review in Pub.Med.gov, Google Scholar, and Scopus to identify the available literature reporting data. Subject related legal texts were analyzed. *Unfortunately, since* the modest scope of this article does not allow for an exhaustive treatment of the subject, the present work is contributory in nature.

K*eywords*: *telemedicine, technology, telepractice, pandemic, e-health*

Introductory remarks

Telemedicine is changing the way healthcare is delivered. The origins of telemedicine, to some respect, can be traced even in the Medieval times. The development of a new concept of providing health services described as telemedicine started in the 1960s in the United States. In the beginning, it served for medical purposes in army and space programs[203]. The Ame-

[203] K.M. Zundel, Telemedicine: history, application, and impact on librarianship, "Bulletin of the Medical Library Association" 1996, vol. 84(1), p. 72, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC226126/pdf/mlab00098-0087.pdf. Accessed 2 June, 2022. According to K.M. Zundel, "the exact date when telecommunications first were used is unknown. The concept may have originated centuries ago if, for example, information about bubonic plague

rican government provided funding to support the implementation of telemedicine research and projects. The advancement of technologies facilitating the imagine techniques (RTG, microscopic, or histopathological), computer networks, and the Internet accelerated progress of telemedicine. Currently, many states have made significant investments in developing information and communication technologies in healthcare. E-health is gaining acceptance and is increasingly used across the EU, however these solutions still face some barriers: financial, social, legal, and ethical. Faulty use of new technologies such as telemedicine can be the source of serious violation of fundamental rights of the individual.

The term telemedicine comes from the Greek word *tele* – at a distance, and Latin *medicina* – the science of recognizing and treating diseases. It is interesting to consider that the meaning of the term of telemedicine has evolved. K. Flaga-Gieruszyńska at al. are of the opinion that most common definition of telemedicine emphasize the "distance medical activity"[204]. Regardless of the diagnosis and the process of treatment, it indicates the main importance of medical education. The Polish doctrine of medical law adopts the meaning accepted by the American Telemedicine Association. The Association promotes the definition of telemedicine according to which it is 'the use of medical information exchanged from one site to another via electronic communications to improve a patient's clinical health status"[205]. The term of e-medicine seems to be a broader concept than telemedicine itself because it also refers to on-line medical education and some financial and organizational instruments (e.g. on-line registration, or statistics). Medical telecare concerns one of the forms of telemedicine – monitoring the health of the patient. Telecare (without medical), on similar basis as telemedicine, performs tasks from the scope of social assistance rather than healthcare.

The term of e-Health is broader than telemedicine. It includes such scope of elements as telecare, telehealth, medical informatics, health information management, and information and communication technologies in healthcare[206]. IT platforms referring to health are also included in this area[207]. E-prescriptions, on-line patient registration, on-line sick leave certificates, on-line medical documentation are considered to be part of e-health. The overmentioned activities should not be equated with telemedicine or telecare. E-health means the use of information and communication technology tools and services in the context of widely understood healthcare. According to the definition formulated by WHO, telemedicine is characterized by the following features which occur together: provision of health services, separation of place, participation of a person or persons exercising medical profession (relations involving medical professionals, or a medical professional and a patient), the use of ITC technology, established goals such as

was transmitted across Europe by heliograph or bonfires as information about war or famine". Ibidem, p. 72.

[204] K. Flaga-Gieruszyńska, M. Kożybska, T. Osman, I. Radlińska, P. Zabielska, K. Karakiewicz-Krawczyk, A. Jurczak, B. Karakiewicz, Telemedicine services in the work of a doctor, dentist, nurse and mid-wife – an analysis of legal regulations in Poland and the possibility of their implementation on the example of selected European countries, "Annals of Agricultural and Environmental Medicine" 2020 Dec. 22, vol. 27(4), pp. 680, doi:10.26444/aaem/116587. See also the comparative overview of the telemedicine definition in M. Chojecka, K. Nowak, Telemedycyna na tle polskich regulacji prawnych – szansa czy zagrożenie?, "Internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2016, vol. 8, pp.75-76, https://ikar.wz.uw.edu.pl/archiwalne-2012-2016/13-2016/33-numer-8-5-seria-regulacyjna-sektor-life-sciences.html. Accessed: June 2, 2022.

[205] Ibidem, p. 680.

[206] I. Wrześniewska-Wal, D. Hajdukiewicz, Telemedycyna w Polsce – aspekty prawne, medyczne i etyczne, "Studia Prawnoustrojowe" 2020, vol. 50, p. 510.

[207] D. Gęsicka, Usługi medyczne jako usługi społeczeństwa informacyjnego, [in:] Telemedycyna i e-zdrowie. Prawo i informatyka, eds. I. Lipowicz, G. Szpor, M. Świerczyński, Wolters Kluwer, Warszawa 2019, p. 75.

prevention, diagnosis, treatment of diseases and injuries, conducting patient examination and their evaluation, providing and continuing medical education in order to improve the health of individuals and communities[208]. It is also interesting to consider that there are a lot of medical fields in which it is possible to provide services remotely, e.g., telepsychiatry, telecardiology, teleaudiology, telerehabilitation, teledermatology.

The purpose of the study is to identify and evaluate some medical and ethical aspects of the development of telemedicine in Poland. *It was conducted a scoping review in Pub.Med.gov, Google Scholar, and Scopus to identify the available literature reporting data.* Subject related legal texts were analyzed. *Unfortunately, since* the modest scope of this article does not allow for an exhaustive treatment of the subject, the present work is contributory in nature.

Development of telemedicine and e-health in Poland

In 2001 the Telemedicine Section of the Polish Medical Association was created, however, progress in this field was slow. In 2007, M. Karlińska and R. Rudowski presented the article concerning e-health in Polish hospitals. They examined the state of that time, requirements, and possibilities of development. In order to evaluate e-Health in Polish hospitals, 346 hospitals were invited to take part in the study. They analysed the received data from 96 local hospitals (27,7%). According to their evaluation, e-health had been limited mostly by the technical (a number of available devices with digital output), economic, and infrastructural reasons. It was significant that the majority of hospitals declared the will to enhance consultation activeness and the quality of their digital resources[209].

In 2018, Wojciech M. Glinkowski et al. presented the study concerning the development of telemedicine and e-health in Poland from 1995 to 2015[210]. The review was based on the literature and proceedings from selected telemedicine conferences. They searched for telemedicine-related terms and Poland in the Embase and PubMed literature databases. They identified 129 eligible articles in the databases and 85 in conference proceedings until July 2015. According to the research, 59% of the articles were published in impacted journals, and almost half works presented original papers. The publications focused on cardiology (16%, family medicine (15%), and pathology (11%.), while orthopaedics (29%) and cardiology (14%) were the concern of conference proceedings. The authors were of the opinion that that time scientific activity of practitioners and researchers in the field of telemedicine in Poland was not high. However, it has been increasing over time. It was noticed that there was a tendency to publish the research in high-scored journals instead of conference proceedings. The authors emphasized that the occurrence of individual medical specialty telemedicine in Poland might have reflected country-specific needs[211]. They also were of the opinion that the scientific activities

[208] WHO, Telemedicine. Opportunities and development in Member States. Report on the second global survey, Global Observatory for eHealth Series vol 2, 2010, p. 9, https://apps.who.int/iris/handle/10665/44497. Accessed: June 6 2022.; A. Nowak, Medycyna transgraniczna – problematyka prawa właściwego dla przypadków odpowiedzialności cywilnej podmiotów medycznych na gruncie ustawodawstwa unijnego, "Prawo Mediów Elektronicznych" 2018, vol. 1, p. 37.

[209] M. Karlińska, R. Rudowski, E-Health in Polish hospitals: Present state, requirements and possibilities, pp. 236-239, https://medetel.eu/download/2007/Med-e-Tel_2007_Proceedings_book.pdf. Accessed: May 30, 2022.

[210] W.M. Glinkowski, M. Karlińska, M. Karliński, E.A. Krupiński, Telemedicine and eHealth in Poland from 1995 to 2015, "Advances in Clinical and Experimental Medicine" 2018, vol. 27(2), pp. 277-282, doi: 10.17219/acem/74124.

[211] Ibidem, pp. 277-182.

in the field of implementation of telemedicine and e-Health did not achieve the anticipated level in comparison to the growing use of telemedicine across Europe, nevertheless, it has increased over the time[212].

According to European Union strategies and action plan for 2012-2025, e-health strategies are spreading in all member states[213]. In order to strengthen systemic activities it was adopted the strategy for e-health development in Poland for 2018-2022[214]. It should be also taken into account that in order to bolster digital foundations for the national development (common access to a high-speed internet, effective and user friendly public e-services, and a continuously rising level of digital competence of the society) Poland benefits from the European funds according to Operational Programme Digital Poland for 2014-2020[215].

Legal solutions, data protection, telemedicine barriers and advantages

The development of telemedicine has contributed to some new administrative[216] and legal challenges, e.g. in the area of personal data protection[217], patient's rights, liability for damages[218]. The Polish legislator should have created a legal framework in order to take into account the flexibility of telemedicine services in health care[219]. The starting point for the analysis of national regulation is the Act of 15 April 2011 on medical activity[220]. It is significant that due to the development of telemedicine practices, some legal regulations which included refences to services of telemedicine (e.g. Act of 5 December 1996 on the professions of a doctor and a dentist; Act of 15 July 2011 on the professions of a nurse and a midwife; Act of 6 November 2008 on Patients' Rights and Patients' Rights Ombudsman; Act of 15 July 2011 on the Information System in Health Care) were insufficient especially in the mentioned context.

It should be taken into account that Polish scholars emphasize the problem of cybersecurity concerning e-health and telemedicine[221]. Medical information is a subject of communication

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[212] Ibidem, p. 281.

[213] I. Wrześniewska-Wal, D. Hajdukiewicz, Telemedycyna w Polsce…, op.cit., p. 511.

[214] Strategia rozwoju e-zdrowia w Polsce na lata 2018-2022, 12 grudnia 2017 r. Ministerstwo Zdrowia oraz Ministerstwo Cyfryzacji, https://www.gov.pl/web/cyfryzacja/prezentacja-strategii-rozwoju-e-zdrowia-w-polsce-na-lata-2018-2022.

[215] Operational Programme Digital Poland for 2014-2020, on-line http://www.fundusze europejskie.gov.pl/media/10410/POPC_eng_1632015.pdf. Accessed: May 29, 2022.

[216] S. Sikorski, M. Florczak, Telemedycyna w prawie administracyjnym, [in:] Telemedycyna i e-zdrowie. Prawo i informatyka, eds. I. Lipowicz, G. Szpor, M. Świerczyński, Wolters Kluwer, Warszawa 2019, pp. 40-65; I. Lipowicz, Administracja świadcząca na odległość – nowe wyzwania administracyjnoprawne, [in:] Telemedycyna i e-zdrowie…, op.cit., pp. 15-39.

[217] B. Marcinkowski, Ochrona danych osobowych pacjenta w telemedycynie w świetle RODO, [in:] Telemedycyna i e-zdrowie…, op.cit., pp. 164-186.

[218] M. Wałachowska, Odpowiedzialność cywilna w związku z zastosowaniem telemedycyny, [in:] Telemedycyna i e-zdrowie…, op.cit., pp. 296-328.

[219] Act of 5 December 1996 on the professions of a doctor and a dentist, Journal of Laws 2017, item 125 (consolidated text: Journal of Laws 2019, item 537); Act of 15 July 2011 on the professions of a nurse and a midwife, Journal of Laws 2016, item 1251; Act of 6 November 2008 on patients' rights and patients' rights Ombudsman, Journal of Laws 2017, item 1318; Act of 28 April 2011 on the information system in health care, Journal of Laws 2017, item 1845.

[220] Journal of Laws 2011, No. 112, item 564.

[221] P. Durbajło, A. Piskorz-Ryń, Problemy cyberbezpieczeństwa w telemedycynie, [in:] Telemedycyna i e-zdrowie…, op.cit., pp. 273-295; G. Szpor, Wpływ transformacji cyfrowej na zdrowie i medycynę, [in:] Telemedycyna i e-zdrowie…, op.cit., pp. 329-348.

among entities and structures created within e-Health and participating in networks. The transfer of information takes place among medical professionals, in personalized actions between medical professionals and patients, as well as in the circulation of documents within ICT systems. The last mentioned include those of principal operation within telemedicine services (descriptions, examinations, diagnoses, and other documents in the digitalized form). The range of e-health tools includes the transfer of information, its collection, analysis, and processing. Interoperability in information application and communication technologies in the Polish health care system in the context of information security are taken into closer consideration[222].

In Poland, the protection of medical information in telemedicine has been facing some problems concerning technical issues related to the shortages in broadband connections, some special needs in the field of telemedicine of the areas located in the long distance from urban centers, or problems of digital exclusion of inhabitants of rural areas. K. Flaga-Gruszyńska et al. emphasize that the Polish legislator distinguishes documents which contain text and the documents that constitute image records or sound. All of them are components of the medical documentation, means of conveying medical information collected within the telemedicine services. The authors also distinguish three types of data transmission models: real-time (when patient and entity which perform the medical activity communicate 'live', e.g. teleconsultation); store and forward (digital data collected and stored – video, photos, sound files stored on a computer); remote monitoring (patient are monitored by monitoring devices and the data is transmitted to the external entity)[223]. With the deployment of e-prescription, Internet registration, and electronic medical documentation exchange, the complexity of health services has improved[224].

It is significant that e-health tools facilitated the patient's involvement in the treatment process and increased the patient's knowledge. They also personalised and individualised medical care, and strengthened the role of patients in the decision-making process. Therefore, the position of patients is enhanced[225]. Telemedicine makes it possible to monitor the health of a patient who stays at a distance. The patient's physical presence is unnecessary, which is essential when the health condition of the patient does not allow him to reach the doctor. Remote monitoring of a patient's health condition facilitates the improvement of medical services and consequently the whole healthcare system. It is significant that teleconsultations are important in the context of prevention of disease which symptoms are underestimated[226]. It should be also emphasized that telemedicine improved the exchange of knowledge among medical specialists.

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[222] K. Świtała, Interoperacyjność i bezpieczeństwo danych medycznych w systemach e-zdrowia i telemedycynie, [in:] Telemedycyna i e-zdrowie…, op.cit., pp. 260-272.

[223] K. Flaga-Gieruszyńska, M. Kożybska, T. Osman, I. Radlińska, P. Zabielska, K. Karakiewicz-Krawczyk, A. Jurczak, B. Karakiewicz, Telemedicine services in the work of a doctor…, op.cit., p. 683.

[224] M. Brożyna, S. Stach, Z. Wróbel, Rozwój telemedycyny w Polsce po wdrożeniu „Elektronicznej Platformy Gromadzenia, Analizy i Udostępniania zasobów cyfrowych o Zdarzeniach Medycznych (P1)", [in:] Telemedycyna i e-zdrowie…, op.cit, pp. 89-104.

[225] Cf. M. Dymyt, T. Dymyt, E-Health as a Tool for Strengthening the Role of Patient in the Process of Providing Health, "Modern Management Review" 2018, vol. 23, no. 25(4), pp 21-34, doi: 10.7862/rz.2018.mmr.40.

[226] K. Furlepa, A. Tenderenda, R. Kozłowski, M. Marczak, W. Wierzba, A. Śliwczyński, Recommendation for the Development of Telemedicine in Poland Based on the Analysis of Barriers and Selected Medicine Solutions, "International Journal of Environmental Research and Public Health" 2022 Jan 22, vol. 19(3):1221 doi: 10.3390/ijerph19031221. Th research was supported by project "InterDoctorMan – Building new quality and effectiveness of education in the formula of doctorate studies for healthcare managers nd th Healst Science Faculty at the Medical university in Łódź; A. Nowak, Medycyna transgraniczna…, op.cit., p. 38.

It should be taken into consideration that development of the advanced technologies, their application in telemedicine, and improvement of telemedicine encounters some barriers to its effective implementation. Observing the development of telemedicine service, K. Furlepa et. al. consider the most common barriers to the use of telemedicine in the world. They divide them into for areas: legal, financial, awareness-related, and ITC technology. Some impediments may concern patients, healthcare professionals, as well as the organization of medical entities. Undoubtedly, the use of telemedicine generates high costs. However, the lack of sufficient research that documents the profitability of telemedicine programmes discourage the investments in telemedicine applications[227]. Unclear legal provisions concerning telemedicine practices may trigger significant impediments to the activities of medical entities and professionals. Awareness-related obstacles for telemedicine relate to the opposition to adopting models other than the traditional model. Patients, especially the elderly people, sometimes contest the reliability of the remote medical examination[228]. M. Chojecka and K. Nowak argue that patients are prone to the higher risk of the lack of professionalism due to the fact that there are applied more and more sophisticated technologies[229]. The digital divide is also the challenge for the development of telemedicine.

H.K. Almathami et.al. investigated the barriers and facilitators that influence the use of home consultations system in the healthcare context. They are of the opinion that the use of e-consultation services may be positively or negatively influenced by internal or external factors. External factors refer to the environment surrounding the system as well as the system itself. Internal factors concern the user behaviour or motivation[230].

K. Furlepa et.al. argue that the development of organisational, legal, and ICT solutions is noticeable in the field of telemedicine in Europe. Denmark, Norwey, Sweden, Finland, and Iceland through their attention to intelligent digital solutions support Smart Digital Health ("healthcare solutions that facilitate communication among healthcare professionals, between healthcare professionals and patients/clients, and solutions that enable patient/client to practise self-care"[231]). The authors also present a comparative research study concerning policy and telemedicine solutions in European countries with samples of applied digital solutions (the 'Thriva' application in the United Kingdom, the 'Kry' application available in Sweden, the 'Skin Vision' application available in the Netherlends, the 'Feetme' application used in France, etc.)[232].

It should be taken into consideration that K. Furlepa et. al. present an actual list of recommendations which may contribute to the development of telemedicine services in Poland: "1. to ensure consistency in the provisions regulating the scope of admissibility of providing telemedicine for medical profession (…); 2. Implementation of the process/procedures for evaluating services using artificial intelligence (…); 3. To introduce a series of educational training sessions for the

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[227] K. Furlepa, A. Tenderenda, R. Kozłowski, M. Marczak, W. Wierzba, A. Śliwczyński, Recommendation for the Development of Telemedicine…, op.cit., p. 3.

[228] Ibidem, p. 3.

[229] M. Chojecka, K. Nowak, Telemedycyna na tle polskich regulacji prawnych…, op.cit., p. 81.

[230] H.K. Y Almathami, K.T. Khin, E. Vlahu-Gjorgiewska, Barriers and Facilitators that Influence Telemedicine-Based, Real-Time, Online Consultations at Patients' Homes: Systematic Literature Review, "Journal of Medical Internet Research" 2020, vol. 22, no. 2, p. 1, doi: 10.2196/16407.

[231] K. Furlepa, A. Tenderenda, R. Kozłowski, M. Marczak, W. Wierzba, A. Śliwczyński, Recommendation for the Development of Telemedicine…, op.cit., p. 8. The authors presents a comparative research concerning policy and telemedicine solutions

[232] Ibidem, pp. 10-12.

citizens on the use of digital solutions (…); 4. Reimbursement/co-financing of solutions used in telemedicine (…); 5. Providing financial support for new, developing enterprises related to telemedicine (…); 6. Creation of one superior telemedicine system (…)"[233].

Pandemic Covid-19 - teleconsultations with primary healthcare physician under the National Health Fund (NFZ)

In 2020-2022, the world has been struggling with the pandemic caused by the SARS-CoV-2 virus (COVID-19), called the coronavirus. Undoubtedly, the pandemic can be seen as the time of crisis at many levels, including state economy, political, socio-cultural, health-care system, or religious planes. During the time of coronavirus crises, Polish authorities undertook some steps in order to counteract the negative effects. The so-called 'anti-crisis shield' was the complex package of laws, which purpose was to protect the society from the adverse economic consequences of the pandemic caused by the SARS-CoV-2 virus (COVID-19). A part of the package of laws came into force on the 1st of April 2020. The package consisted of a series of legal acts. One of them was the Act of 31 March 2020 on special solutions related to the prevention, avoidance, and eradication of COVID-19, other infectious diseases and crisis situations caused by them, as well as some other acts[234]. The previous act issued by the Polish legislator in the context of healthcare in the time of COVID-19 crisis was Act of 2 March 2020 on special solutions related to the prevention, avoidance, and eradication of COVID-19, other infectious diseases and crisis situations caused by them [235].

According to the regulations presented above, medical on-line visit its treated the same as an in-person visit. This means that doctor is obliged to provide medical services using ITC technology with accordance with art. 4 of the Act of 5 December 1996 on the professions of a doctor and a dentist. This provision imposes an obligation on the doctor to provide services in accordance with the current knowledge, using available methods and means, with due diligence and professional ethics. The conscious consent of the patient is also necessary during on0-line visits. That consent requires that all necessary information regarding the characteristics of the telemedicine visit should be fully explained to the patient. The physician should inform the patient about the limitations resulting from this model of providing the service, and make sure that the used devices function in a proper way. All elements of the visit should be documented by entries in the medical records. The identity of the patient should be also confirmed.

Some organizational guidelines and standards were indispensable in order to provide with better diagnostics and treatment. In this context, the directives referring to telemedicine provided as part of POZ (podstawowa opieka zdrowotna) activities were of great importance. It is significant that during the pandemic Covid-19, patients were entitled to teleconsultations with primary healthcare physician under the National Health Fund (NFZ). The purpose of teleconsultations was to provide with information the persons who suspected the presence of Sars-CoV-2 in their body. Teleconsultation became a medical service related to counter COVID-19 provided via teleinformation system. The Regulation of the Minister of Health of 12 August 2020 on the organizational standard of teleconsultation in primary health care

[233] Ibidem, pp. 15-16.
[234] Journal of Laws 2020, item 568.
[235] Journal of Laws 2020, item 374.

precise the specific elements of such service[236]. The Regulation of the Minister of Health of 6 April 2020 on the types, scopes and format od medical records, and their processing[237] sets out detailed requirements and features, which should be taken into account during the preparation of the electronic documentation (e.g. confidentiality, integrity, availability).

Concluding remarks

The development of information and communication technologies has contributed to the emergence of e-health. The digitalization of the health system has been improving due to the development of new technologies that support the work of medical personnel and allow for a quick and accurate diagnosis. It is significant that the patients' involvement in the process of providing health services becomes an important factor conditioning the effectiveness of treatment.

In the 21st century, on the one hand, telemedicine as a form of providing health services facilitates contact between the patient and the doctor. On the other hand, there might be observed some risks resulting from the lack of a personal physical examination of a patient. There are some doubts concerning the ethical aspects of telemedicine referring to technical or legal safety. In my opinion, patients should be precisely informed about some limitations and shortcomings of providing health services on-line. Telemedicine should be treated as a form of supplementing traditional medicine.

In Poland, over the last years, impressive development has been observed in telemedicine, including e-health, m-health, and other related terms used to describe the delivery of healthcare at a distance by the means of a variety of telecommunication systems and devices. At present, even cursorily examined PubMed data shows 663 results (searching only 'telemedicine in Poland').

It should be taken into consideration that in Poland, in the context of the latest events concerning COVID-19 crisis, we may observe the development of the activities of legislative and administrative authorities are in connection with the idea of the so-called the 'digital state'[238]. The Polish legislator also gradually introduces new legal solutions that are necessary for the development of telemedicine services.

BIBLIOGRAPHY

Brożyna M., Stach S., Wróbel Z., Rozwój telemedycyny w Polsce po wdrożeniu „Elektronicznej Platformy Gromadzenia, Analizy i Udostępniania zasobów cyfrowych o Zdarzeniach Medycznych (P1)", [in:] Telemedycyna i e-zdrowie. Prawo i informatyka, eds. I. Lipowicz, G. Szpor, M. Świerczyński, Wolters Kluwer, Warszawa 2019, pp. 89-104.

Chojecka M., Nowak K., Telemedycyna na tle polskich regulacji prawnych – szansa czy zagrożenie?, "Internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2016, vol. 8, pp.75-81, https://ikar.wz.uw.edu.pl/archiwalne-2012-2016/13-2016/33-numer-8-5-seria-regulacyjna-sektor-life-sciences.html. Accessed: June 1, 2022.

[236] Journal of Laws 2020, item 1395.

[237] Journal of Laws 2020, item 666.

[238] More about the development of the digital state, see M. Kowalczyk, *Cyfrowe państwo. Uwarunkowania i perspektywy*, Wydawnictwo PWN, Warszawa 2019, 414 pp.

Durbajło P., Piskorz-Ryń A., Problemy cyberbezpieczeństwa w telemedycynie, [in:] Telemedycyna i e-zdrowie. Prawo i informatyka, eds. I. Lipowicz, G. Szpor, M. Świerczyński, Wolters Kluwer, Warszawa 2019, pp. 273-295.

Dymyt M., Dymyt T., E-Health as a Tool for Strengthening the Role of Patient in the Process of Providing Health, "Modern Management Review" 2018, vol. 23, no. 25(4), pp 21-34, doi: 10.7862/rz.2018.mmr.40.

Flaga-Gieruszyńska K., Kożybska M., Osman T., Radlińska I., Zabielska P., Karakiewicz-Krawczyk K., Jurczak A., Karakiewicz B., Telemedicine services in the work of a doctor, dentist, nurse and mid-wife – an analysis of legal regulations in Poland and the possibility of their implementation on the example of selected European countries, "Annals of Agricultural and Environmental Medicine" 2020 Dec. 22, vol. 27(4), pp. 680-688, doi:10.26444/aaem/116587.

Furlepa K., Tenderenda A., Kozłowski R., Marczak M., Wierzba W., Śliwczyński A., Recommendation for the Development of Telemedicine in Poland Based on the Analysis of Barriers and Selected Medicine Solutions, "International Journal of Environmental Research and Public Health" 2022 Jan 22, vol. 19(3):1221 doi: 10.3390/ijerph19031221.

Gęsicka D., Usługi medyczne jako usługi społeczeństwa informacyjnego, [in:] Telemedycyna i e-zdrowie. Prawo i informatyka, eds. I. Lipowicz, G. Szpor, M. Świerczyński, Wolters Kluwer, Warszawa 2019, pp. 66-88.

Glinkowski W.M., Karlińska M., Karliński M., Krupiński E. A., Telemedicine and eHealth in Poland from 1995 to 2015, "Advances in Clinical and Experimental Medicine" 2018, vol. 27(2), pp. 277-282, doi: 10.17219/acem/74124.

Karlinska M., Rudowski R., E-Health in Polish hospitals: Present state, requirements and possibilities, pp. 236-239, https://medetel.eu/download/2007/Med-e-Tel_2007_Proceedings_book.pdf. Accessed: May 30, 2022.

Kowalczyk M., Cyfrowe państwo. Uwarunkowania i perspektywy, Wydawnictwo PWN, Warszawa 2019.

Lipowicz I., Administracja świadcząca na odległość – nowe wyzwania administracyjnoprawne, [in:] Telemedycyna i e-zdrowie. Prawo i informatyka, eds. I. Lipowicz, G. Szpor, M. Świerczyński, Wolters Kluwer, Warszawa 2019, pp. 15-39.

Marcinkowski B., Ochrona danych osobowych pacjenta w telemedycynie w świetle RODO, [in:] Telemedycyna i e-zdrowie. Prawo i informatyka, eds. I. Lipowicz, G. Szpor, M. Świerczyński, Wolters Kluwer, Warszawa 2019, pp. 164-186.

Nowak A., Medycyna transgraniczna – problematyka prawa właściwego dla przypadków odpowiedzialności cywilnej podmiotów medycznych na gruncie ustawodawstwa unijnego, "Prawo Mediów Elektronicznych" 2018, vol. 1, pp. 36-45.

Operational Programme Digital Poland for 2014-2020, on-line http://www.fundusze europejskie.gov.pl/media/10410/POPC_eng_1632015.pdf. Accessed: May 29, 2022.

Sikorski S., Florczak M., Telemedycyna w prawie administracyjnym, [in:] Telemedycyna i e-zdrowie. Prawo i informatyka, eds. I. Lipowicz, G. Szpor, M. Świerczyński, Wolters Kluwer, Warszawa 2019, pp. 40-65.

Strategia rozwoju e-zdrowia w Polsce na lata 2018-2022, 12 grudnia 2017 r. Ministerstwo Zdrowia oraz Ministerstwo Cyfryzacji, https://www.gov.pl/web/cyfryzacja/prezentacja-strategii-rozwoju-e-zdrowia-w-polsce-na-lata-2018-2022.

Szpor G., Wpływ transformacji cyfrowej na zdrowie i medycynę, [in:] Telemedycyna i e-zdrowie. Prawo i informatyka, eds. I. Lipowicz, G. Szpor, M. Świerczyński, Wolters Kluwer, Warszawa 2019, pp. 329-348.

Świtała K., Interoperacyjność i bezpieczeństwo danych medycznych w systemach e-zdrowia i telemedycynie, [in:] Telemedycyna i e-zdrowie. Prawo i informatyka, eds. I. Lipowicz, G. Szpor, M. Świerczyński, Wolters Kluwer, Warszawa 2019, pp. 260-272.

Wałachowska M., Odpowiedzialność cywilna w związku z zastosowaniem telemedycyny, [in:] Telemedycyna i e-zdrowie. Prawo i informatyka, eds. I. Lipowicz, G. Szpor, M. Świerczyński, Wolters Kluwer, Warszawa 2019, pp. 296-328.

WHO, Telemedicine. Opportunities and development in Member States. Report on the second global survey, Global Observatory for eHealth Series vol 2, 2010, p. 9, https://apps.who.int/iris/handle/10665/44497. Accessed: June 2, 2022.

Wrześniewska-Wal I., Hajdukiewicz D., Telemedycyna w Polsce – aspekty prawne, medyczne i etyczne, "Studia Prawnoustrojowe" 2020, vol. 50, pp. 509-524.

Y Almathami H.K., Khin K.T., Vlahu-Gjorgiewska E., Barriers and Facilitators that Influence Telemedicine-Based, Real-Time, Online Consultations at Patients' Homes: Systematic Literature Review, "Journal of Medical Internet Research" 2020, vol. 22, no. 2, pp. 25, doi: 10.2196/16407.

Zundel K.M., Telemedicine: history, application, and impact on librarianship, "Bulletin of the Medical Library Association" 1996, vol. 84(1), pp. 71-79, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC226126/pdf/mlab00098-0087.pdf. Accessed 2 June, 2022

Legal acts

Act of 5 December 1996 on the professions of a doctor and a dentist, Journal of Laws 2017, item 125 (consolidated text: Journal of Laws 2019, item 537).

Act of 6 November 2008 on patients' rights and patients' rights Ombudsman, Journal of Laws 2017, item 1318.

Act of 15 April 2011 on medical activity, Journal of Laws 2011, No. 112, item 564.

Act of 15 July 2011 on the information system in health care, Journal of Laws 2017, item 1845.

Act of 15 July 2011 on the professions of a nurse and a midwife, Journal of Laws 2016, item 1251.

Act of 2 March 2020 on special solutions related to the prevention, avoidance, and eradication of COVID-19, other infectious diseases and crisis situations caused by them, Journal of Laws 2020, item 374.

Act of the 31 March 2020 on special solutions related to the prevention, avoidance, and eradication of COVID-19, other infectious diseases and crisis situations caused by them, as well as some other acts, Journal of Laws 2020, item 568.

Regulation of the Minister of Health of 6 April 2020 on the types, scopes and format od medical records, and their processing, Journal of Laws 2020, item 666.

Regulation of the Minister of Health of 12 August 2020 on the organizational standard of teleconsultation in primary health care, Journal of Laws 2020, item 1395.

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The right to secure functioning in digital world

Abstract
Each human being has a right to safety and security. This right is guaranteed by different provisions of national and international law. Because in today's world, a human being functions both – in real and virtual world, the security and safety in digital world (cyberspace) is also important. The subject of this study is the issue of safety and security in cyberspace and the right to secure functioning in digital world. The work will try to show that modern human being is functioning in both – real and virtual world. Then, we will analyze the documents of international and national law which guaranteed the right to safety and security. Also, we will create the conclusions showing what can be done in order to improve the safety and security in cyberspace for members of society.

Keywords: cyberspace, digital world, virtual world, right to security, right to cybersecurity.

Introduction

Each human being has a right to safety and security. This right is guaranteed by different provisions of national and international law. Because in today's world, a human being functions both – in real and virtual world, the security and safety in digital world (cyberspace) is also important.

The subject of this study is the issue of safety and security in cyberspace and the right to secure functioning in digital world. The goal of this work is to show that human being should be secured not only in real world but also in the virtual reality, because in this part of the world a person spends a lot of his or her life. The goal is also to show that different subjects and institutions must take steps in order to improve the sense of safety of human being. It is necessary and crucial because a person has the right to secure life.

The work will try to show that modern human being is functioning in both – real and virtual world. Then, we will analyze the documents of international and national law which guaranteed the right to safety and security. Also, we will create the conclusions showing what can be done in order to improve the safety and security in cyberspace for members of society.

Human being in virtual world

Modern human being lives in two worlds - real and virtual (digital). Professor Michał Ostrowicki from the Institute of Philosophy of the Jagiellonian University and the founder of Academia Electronica, a virtual academic unit where, inter alia, in 2015 public defense of the doctoral dissertation was conducted, he uses the slogan - "Human being is one and worlds

are two"[239]. This means that modern human being lives in both worlds and spends more and more of his or her time in the virtual world.

The annual reports *Digital around the world*[240], prepared jointly by *We Are So*cial and *Hootsuite*, indicate that every year the number of users of the virtual world is growing. A comparison of data from reports from the years 2020, 2021 and 2022 shows that each year we have more Internet users in the world and people who systematically and actively use social media. In January 2020, as much as 59% of the world's population were Internet users. In the following year, 2021, it was already 59.5%, and in 2022 this number grew to 62.5% of the world's population. The number of active social media users is growing in an analogous way, with 49% of the global population in 2020, 53.6% in 2021 and as much as 58.4% in 2022. This means that in January 2022, the population of the entire world is 7.91 billion people, of which 4.95 billion were using the Internet and 4.62 billion from social media. Moreover, as many as 5.31 billion (67.1% of the global population) used mobile phones, where in most cases it is not only making phone calls, but also access to the Internet. [241].

Even before pandemic covid19, people did a lot of activities in digital world but because of restriction and limitation related to pandemic, humankind made huge shift and moved to virtual world even more aspects of our live. The number of people using the Internet is growing every year. Last three years we could notice growth but if we compare those number from 2020 – 2022 with those before pandemic (as an example we can take: 2015 and 2019), the growth is huge.

Table 1: The use of Internet in the world 2015-2022

	2015	2019	2020	2021	2022
Population	7,21 billion	7,67 billion	7,75 billion	7,78 billion	7,91 billion
The Internet users	3,01 billion	4,38 billion	4,54 billion	4,66 billion	4,95 billion
	42%	57%	59%	59,5%	62,5%
Active users of social media	2,08 billion	3,48 billion	3,80 billion	4,20 billion	4,62 billion
	29%	45%	49%	53,6%	58,4%

Source: Own work based on the reports "Digital around the world" from 2015, 2019, 2020, 2021 and 2022

[239] Academia Electronica Uniwersytetu Jagiellońskiego. In: http://www.academia-electronica.net (access: 29.04.2022)

[240] DATAREPORTAL.COM, About us. In: https://datareportal.com/about (access: 29.04.2022)

[241] Data based on the reports: DATAREPORTA.COM, (2015). Digital 2015: Global Overview Report. In: https://datareportal.com/reports/digital-2015-global-digital-overview (access: 29.04.2022); DATAREPORTA.COM, (2019). Digital 2019: Global Overview Report. In: https://datareportal.com/reports/digital-2019-global-digital-overview (access: 29.04.2022); DATAREPORTA.COM, (2020). Digital 2020: Global Overview Report. In: https://datareportal.com/reports/digital-2020-global-digital-overview (access: 29.04.2022); DATAREPORTA.COM, (2021). Digital 2021: Global Overview Report. In: https://datareportal.com/reports/digital-2021-global-overview-report (access: 29.04.2022); DATAREPORTA.COM, (2022). Digital 2022: Global Overview Report. In: https://datareportal.com/reports/digital-2022-global-overview-report (access: 29.04.2022).

Statistical data shows that in the virtual world, it is on the Internet, the average person spends almost 30 percent of his or her life. Research conducted by NordVPN - a provider of virtual networks shows that, for example, with the average age of Poles being 77.8 years old - on average, we spend almost 23 and a half years on the Internet . This study also shows that during a week, a statistical Pole uses the Internet for over 50 hours, of which only 16 hours are work-related Internet use. Social media take over 7 hours a week for the average Polish242.

According to the same research, average Polish person spends 50 hours and 39 minutes per week on the Internet. It means that almost one of third of the time (30,15%) in the week, a person spends using his or her computer, tablet, smart phone, or other device with the connection to the Internet. Average week of a Pole on the Internet:

- online shopping - 1 hour 44 minutes,
- watching series / movies - 4 hours 38 minutes,
- using social media - 7 hours 4 minutes,
- listening to music - 3 hours 20 minutes,
- watching videos - 6 hours 2 minutes,
- everyday life - 3 hours 18 minutes,
- searching for information - 2 hours 49 minutes,
- video calls - 1 hour 30 minutes,
- playing - 1 hour 39 minutes,
- online classes / guides - 1 hour 28 minutes,
- searching for recipes - 1 hour 45 minutes,
- work - 15 hours 56 minutes.[243]

The situation with the use of Internet and different tools and application of digital world is similar in other countries. The below table shows the examples from some of the European countries as well as countries from other continents.

Table 2: The use of Internet in the world in live time

Country	Average of lifetime	Time used on the Internet during lifetime
Poland	77,8 years	23 years, 5 months, 16 minutes
Germany	80,89 years	24 years, 8 months, 14 minutes
France	82,72 years	27 years, 7 months, 6 minutes
Spain	83,43 years	24 years, 8 months, 14 minutes
United States of America	78,79 years	21 years, 5 months, 29 minutes
Canada	82,05 years	22 days, 2 months, 12 minutes

Source: Own work based on Szutiak, M. (2021). Polacy spędzają w sieci 23 lata swojego życia. W: TELEPOLIS.PL, in: https://www.telepolis.pl/wiadomosci/prawo-finanse-statystyki/polacy-spedzaja-w-sieci-ponad-23-lata-swojego-zycia (access: 29.04.2022)

[242] Szutiak, M. (2021). Polacy spędzają w sieci 23 lata swojego życia. W: TELEPOLIS.PL, in: https://www.telepolis.pl/wiadomosci/prawo-finanse-statystyki/polacy-spedzaja-w-sieci-ponad-23-lata-swojego-zycia (access: 29.04.2022)

[243] Ibidem.

The outlined statistical data confirm Professor Ostrowicki's thesis about two worlds. They also confirm the fact that human being's functioning in the digital world is increasing. We have the situation where more and more people are spending more and more time on the Internet. So, a person is really leaving in two words – this real as well as this digital. Therefore, just as we care about security in the real world, we should also care about security in the virtual world, because there, too, people experience many threats.

The right to security

The right to security and safety is one of the most important and basic rights of human being. The base of this right is established in the one of the basic human needs. In general, the connection between human needs and human rights let us understand in much better way the concept of rights of human being in the current world. Each human being has needs and those needs are the criterion of the categorization of human right. For example – there an existential need to live and consequently there is also right to live, there is a human need for security and at the same time there is a right to security.[244]

Safety should be understood as a mental state, Therefore from a psychological point of view, the sense security is connected with the conditions in which human being lives. It means that environment has substantial impact on the sense of security.[245] A person must feel safe and comfortable in certain environment in order to have the feeling that his or ger right to security is satisfy. If an environment of human being is safe, the sense of security of bigger.

Therefore, it must be said that right to security is connected with the strong need for security. The right to security is guaranteed in different documents of international as well as national regulations. The number of different provisions on cybersecurity is significant. There is the entire legal framework on security in cyberspace[246], but for the purpose of this work, I will only focus on some chosen examples of the documents which are talking about this human right.

First document is the article 3 of the Universal Declaration of Human Rights. We can read there: *Everyone has the right to life, liberty, and the security of person*[247]. Then, we can point out to the article 9 of the International Covenant on Civil and Political Rights, which states: *Everyone has the right to liberty and security of person*[248]. We can also show some examples of European regulation – for examples, the article 5 of the European Convention on Human Rights saying *Everyone has the right to liberty and security of person*[249] or the article 6 of the European Union Charter of Fundamental Rights, where it may be read: *Everyone has the*

[244] See: Sitek, M. (2016). Prawa (potrzeby) człowieka w ponowoczesności. Warszawa: Wydawnictwo C.H. Beck, pp. 38-43

[245] Sitek, M. (2108). The legal framework for the security of the individual in cyberspace. Journal of Modern Science, 37(2), p. 178.

[246] More details on the legal framework for the cybersecurity see: Sitek, M. (2108). The legal framework for the security of the individual in cyberspace. Journal of Modern Science, 37(2).

[247] United Nations Organization (1948). Universal Declaration of Human Rights, In: https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf (access: 18.06.2022).

[248] United Nation Organization, (1966). International Covenant on Civil and Political Rights. In: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights (access: 18.06.2022).

[249] Council of Europe (1950). Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005). In: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=005 (access: 18.06.2022).

right to liberty and security of person[250].

There are also some examples of national provisions on human right to security. First of all, in the Constitution of the Republic of Poland, it is written that: *The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development* (article 5)[251]. Also, the constitutions of other countries are talking about the right to security. As the examples, there are: the Constitution of Hungary, which states: *Everyone shall have the right to liberty and security of the person* (article IV)[252] and the Constitution of the United States Of America, where it is written: *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated* (amendment IV)[253].

The right to security is guaranteed by various international and national provision. From those examples it is clearly seen that both on national and international levels this right is important and crucial.

The issues of personal security, human security, and cyber security

The need to security and related with this need, the right to security is one of the basic and crucial need and right of human being. Satisfying this need and taking care if this right is an especially important issue. The security may be seen from objective and subjective point of view, but it is necessary for a person to feel comfortable and not to feel state of danger. Security gives a person state of mental and physical stability and psychological comfort.[254]

The right to security is a principal issue. Specially now, when we see the wars and military conflicts not only on different continents but also, very close – just outside of our border. Therefore, we can speak about various aspects of security. It is possible to speak about security from state or society perspective and then we have: national security, social security, internal or external security, economical security, etc. In addition, we can see the security from the individual point of view, and we can speak here about personal security or human security.

First of all, we need to explain the meaning of the term personal security. It can be understood as the state free from threats or as a state in which the individual is protected against different kinds of violence[255]. This is a considerably basic understanding of security. But first of all, a human being must be free from threats and protected in order to feel secure.

The second term, human security was introduced and implemented thanks to the United Nations Development Programme – Report of 1994. It must be said that the concept was developed even

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[250] Charter of Fundamental Rights of the European Union. Official Journal of the European Communities of 18.12.2000 (2000/C 364/01). In: https://www.europarl.europa.eu/charter/pdf/text_en.pdf (access 18.06.2022).

[251] The Constitution of the Republic of Poland of 2nd April 1997. Journal of Laws, 1997, no. 78, item 483. English language version in: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (access: 18.06.2022).

[252] Ustawa Zasadnicza Węgier. Seria Konstytucje Świata. Translation: Jerzy Snopek. In: http://libr.sejm.gov.pl/tek01/txt/konst/wegry2013.pdf (access: 18.06.2022).

[253] The Constitution of the United States of America. In: https://www.govinfo.gov/content/pkg/CDOC-110hdoc50/pdf/CDOC-110hdoc50.pdf (access: 18.06.2022)

[254] Sitek, M. (2016), op. cit., p. 127.

[255] See more: Majer, P. (2012). W poszukiwaniu uniwersalnej definicji bezpieczeństwa wewnętrznego, Przegląd Bezpieczeństwa Wewnętrznego no. 7(4), pp. 16-17; Rychły-Lipińska, A. (2017). Model bezpieczeństwa jednostki we współczesnym zmieniającym się otoczeniu – wstępne rozważania. Studia nad bezpieczeństwem, no. 2. In: https://journals.indexcopernicus.com/api/file/viewByFileId/84432.pdf (access: 18.06.2022), p. 35.

earlier, directly after World War II. This concept was understood as freedom from want (misery) as well as the freedom from fear. In the Report of 1994, there is not one definition of this term. However, the Report stated that this concept is based on the following ideas:

- human security is a universal concept related to all people,
- focusing rather on individual security, not on state security,
- investing in human development not in arms race,
- there are different dimensions of human security, and they all are related and connected[256].

When the Report is talking about different dimensions and different areas of human security, they mention such components as: economic security, food security, health security, environmental security, personal security, community security and political security. This document is also stating that: *The world will never be secure from war if men and women have no security in their homes and in their jobs*[257]. Therefore, it seems to be necessary to add one more component to the list given by Report. Due to the fact that human being recently, being in own is existing in digital world, we need to talk also about digital security or cybersecurity.

The US federal agency - Cybersecurity and Infrastructure Security Agency defines cybersecurity as *art of protecting networks, devices, and data from unauthorized access or criminal use and the practice of ensuring confidentiality, integrity, and availability of information*[258].

According to US Cybersecurity and Infrastructure Security Agency, now everything is based, and it relies on computer and the Internet. There are:

- communication (for example: email, smartphones, communicators),
- entertainment (for example: interactive video games, social media, music, and video streams),
- transportation (for example: navigation systems),
- shopping (for example: online shopping, credit cards),
- medicine (for example: medical equipment, medical records)[259].

It must be notice that above-listed areas cover most of the human being activities. We could add to this also other, such us religion (for example, there is more and more religious websites and portals as well during there is more and more religious celebration live streamed on the Internet) or official matters (for example, digital office, digital administration procedures). There is so many different issues related to cybersecurity and to functioning of human being in virtual reality. There is a lot of good things related to use of digital world but also a lot of threats which may harm a human being.[260] It means that this part of human life must be protected to and therefore cyber security or security of digital human existence is also crucial and important.

Protection of the right to secure functioning in digital world

[256] United Nations Development Programme (1994). Human development report 1994: New dimensions of human security, New York. Oxford University Press. In: https://hdr.undp.org/system/files/documents//hdr1994encompletenostatspdf.pdf (access: 18.06.2022).

[257] Urbanek, A. (2013). Ludzki wymiar bezpieczeństwa. (ed.) Andrzej Urbanek, Wybrane problemy bezpieczeństwa. Dziedziny Bezpieczeństwa (pp. 41-59). Słupsk: Wydawnictwo Społeczno-Prawne, pp. 47-53.

[258] US Cybersecurity and Infrastructure Security Agency, (2009/2019). What is Cybersecurity? In: https://www.cisa.gov/uscert/ncas/tips/ST04-001 (access: 18.06.2022).

[259] Ibidem.

[260] United Nations Development Programme (2022). SPECIAL REPORT New threats to human security in the Anthropocene. Demanding greater solidarity. In: https://www.undp.org/germany/publications/2022-special-report-human-security (access: 18.06.2022).

The main duty of taking care of human security in general lays on the state. According to already mentioned article 5 of the Constitution of Poland, the constitutional state organs are responsible for developing the defensive system of country and at the same time taking care of security of citizens[261]. In a narrow interpretation, it is about ensuring the defense of the state, but in a broader sense, we can talk about ensuring any type of security, including cybersecurity, both at the state level and at the level of the citizen. So, we can assume that state is responsible for securing the right to secure functioning in digital world.

When we are talking about cybersecurity, the most important document in this area is the Convention on cybercrime also known as the Budapest Convention. The convention is the first international treaty on crime committed via the Internet and other computer networks. Countries decided that cybercrime and cybersecurity is so important issue and in order to fight against it, we need international cooperation on the level of legislation and on the level of taken action[262].

The convention is pointing out the following offenses related to cyber crime: illegal access, illegal interception, data interference, system interference, misuse of device, computer related forgery, computer related fraud, offences related to child pornography and offenses related to copyright and neighboring rights[263].

But next to different legislative initiative and formal actions taken by the governments in order to protect people while they are functioning in digital world, it is important to point one more area, which needs to be taken care of in this regard. We are talking here about education

The education is the area which can improve the level of human safety in digital world. In the Council Recommendation from 22nd May 2018 on key competences for lifelong learning is mentioned the digital competence. It is saying that digital competency "*involves confident, critical, and responsible use (...) of digital technology*." It means that one of the most important skill is not only to know how to use the computer and the Internet. But also, to know how to use it in the safe way[264].

The education for safety and security in cyberspace is a particularly important issue. Therefore, state but also other institutions and organizations should focus on this area. The education on how to be a saved member of virtual world should be done in schools starting from the kindergarten. Also, the teaching should be done for people of different age including senior citizens who are particularly exposed to danger. This kind of education should be done in formal and informal way, it means during the regular classes and school subjects as well as during diverse types of courses, programs and social campaign dedicated to various age or social groups[265].

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[261] See: Padzik, J. (2018). Rola i znaczenie normy art. 5 konstytucji rzeczypospolitej polskiej dla obszaru prawa kształtującego system obronny państwa. Studia bezpieczeństwa narodowego, 14(2), in: http://sbn.wat.edu.pl/pdf-132126-60750?filename=ROLA%20I%20ZNACZENIE%20NORMY.pdf (access: 18.06.2022), pp. 101-110.

[262] Council of Europe (2001). Convention on Cybercrime (ETS No. 185). In: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=185 (access: 18.06.2022).

[263] Ibidem.

[264] Council Recommendation from 22nd May 2018 on key competences for lifelong learning. Official Journal of the European Union of 04.06.2018, (2018/C – 189/01). In: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018H0604(01)&rid=7 (access: 18.06.2022)

[265] More about education to security in cyberspace: Erazmus, E., Banaszak, A. (2018). Edukacja dla bezpieczeństwa – jak być bezpiecznym w sieci? (eds.) Ł. Roman, K. Krassowski, S. Sagan, D. Wróblewski, Wykorzystanie nowoczesnych narzędzi informatycznych w identyfikacji zagrożeń, (pp. 91-103). Józefów: Wydawnictwo

The action on legislation level as well as on the practical level aimed to protecting digital security but also aimed on teaching people how to be safe and secure in virtual world must be support by the focusing on ethics. It is necessary to build kind of ethical decalogue for those who create the content of virtual reality as well as for those who are using the digital world as the receivers of those content[266]. Following the ethical and moral rules both by providers and the users of cyberspace, will improve the level of cybersecurity.

Conclusion

The right to secure functioning in digital world is an important issue in current world. It is important to fell safety and security in real world but because we are spending so much time in digital reality, to be secure there is also crucial.

Different provisions of international and national law give us guarantee of the right to security. This general statements may be understood in different way and there is so many components related to the sense of personal or human security. Among many dimensions of security – the cybersecurity is the one of which we need to focus and take care of in the current world.

To protect of security while we are functioning in virtual reality, it is states and governments duty. But it is necessary to remember, that also a particular human being needs to take care of it by him or herself. The most successful way of taking care of cybersecurity is to be aware of different threads and dangers existing in cyberspace. The governmental actions in this matter are necessary both on legislative and practical level. However, education and self-education should be considered as very important tool in the area of combat against cyber-threads and the tool of improving the level of cybersecurity.

BIBLIOGRAPHY

Academia Electronica Uniwersytetu Jagiellońskiego. In: http://www.academia-electronica.net (access: 29.04.2022).

Charter of Fundamental Rights of the European Union. Official Journal of the European Communities of 18.12.2000 (2000/C 364/01). In: https://www.europarl.europa.eu/charter/pdf/text_en.pdf (access 18.06.2022).

Council of Europe (1950). Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005). In: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=005 (access: 18.06.2022).

Council of Europe (2001). Convention on Cybercrime (ETS No. 185). In: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=185 (access: 18.06.2022).

Council Recommendation from 22nd May 2018 on key competences for lifelong learning. Official Journal of the European Union of 04.06.2018, (2018/C – 189/01). In: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018H0604(01)&rid=7 (access:

Wyższej Szkoły Gospodarki Euroregionalnej im. Alcide De Gasperi w Józefowie.

[266] See more on ethical principles in virtual reality: Sitek, B (2016). Zasady etyczne stosowane w cyberprzestrzeni. (eds.) B. Sitek, J. Knap, S. Sagan, Ł. Roman, Nowoczesne narzędzia informatyczne w przeciwdziałaniu zagrożeniom bezpieczeństwa, (pp. 71-84). Józefów: Wydawnictwo Wyższej Szkoły Gospodarki Euroregionalnej im. Alcide De Gasperi w Józefowie.

18.06.2022).
DATAREPORTA.COM. (2015). Digital 2015: Global Overview Report. In: https://datareportal.com/reports/digital-2015-global-digital-overview (access: 18.06.2022).
DATAREPORTA.COM. (2019). Digital 2019: Global Overview Report. In: https://datareportal.com/reports/digital-2019-global-digital-overview (access: 18.06.2022).
DATAREPORTA.COM. (2020). Digital 2020: Global Overview Report. In: https://datareportal.com/reports/digital-2020-global-digital-overview (access: 18.06.2022)
DATAREPORTA.COM. (2021). Digital 2021: Global Overview Report. In: https://datareportal.com/reports/digital-2021-global-overview-report (access: 18.06.2022).
DATAREPORTA.COM. (2022). Digital 2022: Global Overview Report. In: https://datareportal.com/reports/digital-2022-global-overview-report (access: 18.06.2022).
Erazmus, E., Banaszak, A. (2018). Edukacja dla bezpieczeństwa – jak być bezpiecznym w sieci? (eds.) Ł. Roman, K. Krassowski, S. Sagan, D. Wróblewski, Wykorzystanie nowoczesnych narzędzi informatycznych w identyfikacji zagrożeń, (pp. 91-103). Józefów: Wydawnictwo Wyższej Szkoły Gospodarki Euroregionalnej im. Alcide De Gasperi w Józefowie.
Majer, P. (2012). W poszukiwaniu uniwersalnej definicji bezpieczeństwa wewnętrznego, Przegląd Bezpieczeństwa Wewnętrznego no. 7(4). In: https://www.abw.gov.pl/download/1/1756/Majer.pdf (access: 18.06.2022).
Padzik, J. (2018). Rola i znaczenie normy art. 5 konstytucji rzeczypospolitej polskiej dla obszaru prawa kształtującego system obronny państwa. Studia bezpieczeństwa narodowego, 14(2), in: http://sbn.wat.edu.pl/pdf-132126-60750?filename=ROLA%20I%20ZNACZENIE%20NORMY.pdf (access: 18.06.2022), pp. 101-110.
Rychły-Lipińska, A. (2017). Model bezpieczeństwa jednostki we współczesnym zmieniającym się otoczeniu – wstępne rozważania. Studia nad bezpieczeństwem, no. 2. In: https://journals.indexcopernicus.com/api/file/viewByFileId/84432.pdf (access: 18.06.2022), p. 35.
Sitek, B (2016). Zasady etyczne stosowane w cyberprzestrzeni. (ed.) B. Sitek, J. Knap, S. Sagan, Ł. Roman, Nowoczesne narzędzia informatyczne w przeciwdziałaniu zagrożeniom bezpieczeństwa, (pp. 71-84). Józefów: Wydawnictwo Wyższej Szkoły Gospodarki Euroregionalnej im. Alcide De Gasperi w Józefowie.
Sitek, M. (2016). Prawa (potrzeby) człowieka w ponowoczesności. Warszawa: Wydawnictwo C.H. Beck.
Sitek, M. (2108). The legal framework for the security of the individual in cyberspace. Journal of Modern Science, 37(2).
Szutiak, M. (2021). Polacy spędzają w sieci 23 lata swojego życia. In: TELEPOLIS.PL, https://www.telepolis.pl/wiadomosci/prawo-finanse-statystyki/polacy-spedzaja-w-sieci-ponad-23-lata-swojego-zycia (access: 18.06.2022)
The Constitution of the Republic of Poland of 2nd April 1997. Journal of Laws, 1997, no. 78, item 483. English language version in: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (access: 18.06.2022).
The Constitution of the United States of America. In: https://www.govinfo.gov/content/pkg/CDOC-110hdoc50/pdf/CDOC-110hdoc50.pdf (access: 18.06.2022)
United Nation Organization, (1966). International Covenant on Civil and Political Rights. In: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights (access: 18.06.2022).
United Nations Development Programme (2022). SPECIAL REPORT New threats to human security in the Anthropocene. Demanding greater solidarity. In: https://www.undp.org/

germany/publications/2022-special-report-human-security (access: 18.06.2022).

United Nations Development Programme. (1994). Human development report 1994: New dimensions of human security, New York. Oxford University Press. In: https://hdr.undp.org/system/files/documents//hdr1994encompletenostatspdf.pdf (access: 18.06.2022).

United Nations Organization (1948). Universal Declaration of Human Rights, In: https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf (access: 18.06.2022).

Urbanek, A. (2013). Ludzki wymiar bezpieczeństwa. (ed.) Andrzej Urbanek, Wybrane problemy bezpieczeństwa. Dziedziny Bezpieczeństwa. Słupsk: Wydawnictwo Spoleczno-Prawne.

US Cybersecurity and Infrastructure Security Agency, (2009/2019). What is Cybersecurity? In: https://www.cisa.gov/uscert/ncas/tips/ST04-001 (access: 18.06.2022).

Ustawa Zasadnicza Węgier. Seria Konstytucje Świata. Translation: Jerzy Snopek. In: http://libr.sejm.gov.pl/tek01/txt/konst/wegry2013.pdf (access: 18.06.2022).

SECTION III

Sustainability as an expression of the concern for the future

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Solidarity in the field of environmental protection in the context of the theory of law of Léon Duguit

Abstract
The environment is a basic substrate that fulfills the essential needs of the man and all mankind. Threats in this area, in fact, are threats to the man. Nowadays, awareness of this dependency has been growing. This is reflected, inter alia, in in discourses undertaken on many levels of culture. The aim of the paper is to analyze the impact of the increasing need for environmental protection in individual consciousness on the law-making process. The thought of Léon Duguit (1859-1928) will be the context of considerations. Solidarity plays here a key role. Solidarity determines a fundamental direction of the actions taken by the state. In this perspective, it should be recognized that since environmental protection has become more common social need, it is the duty of the state to regulate and define the conditions of usage of environment in order to guarantee fair access to natural resources for present and future generations. This obligation results from the substantive law and it is part of the so-called public service. From this perspective, the main premise legitimizing the goals of legislative and institutional activities of the state is whether they aim at harmonization of social life based on solidarity.

Keywords: solidarity, environmental protection, social life, law-making process, sustainable development, public service

Introductory remarks

The idea of solidarity appears in the history of political and legal thought in a variety of contexts. It became an essential category of solidarism, which is the current referring to axiology based on social justice, care, trust, common good, and cooperation. The leading representatives of this trend can be found at the turn of the 19th and 20th centuries in France. French intellectuals, e.g. Léon Bourgeois, Émil Durkheim, Charles Gide, Pierre Leroux, Henri Bergson, or Léon Duguit deal with the interpretation of solidarity through the prism of various aspects. In

the perception of the mentioned scholars, solidarity should be treated as a multidimensional phenomenon. The reflection referring to solidarity takes place within the scope of various discourses, e.g. legal, political, psychological, sociological, ethical, philosophical, or evolutionist. In fact, the basic axis of the considerations is determined by the sense of balance between number of requirements of individual and collective life. Solidarity is even raised to the rank of the determinant of the desired changes in the political, social, and economic life[267]. The mentioned thinkers search for the basis for legitimacy of specific legal solutions in this idea.

The purpose of the article is to analyze the impact of the increasing need for environmental protection in individual consciousness on the law-making process. The thought of one of the French leading scholars of public law - Léon Duguit (1859-1928) - will be the context of considerations. The main questions the present study strives to answer are: How is the principle of solidarity understood by Léon Duguit in the context of environmental protection? Which obligations of the state in the field of environmental protection are determined by the principle of solidarity? Unfortunately, since the modest scope of this article does not allow for an exhaustive treatment of the subject, the present work is contributory in nature. In this particular study the historic-descriptive method of theoretical analysis and legal methods (including formal legal method) were applied to address the research questions and to reach the conclusions.

The work consists of two parts. At first, there is a short exposition of the concept of Léon Duguit referring to the state as a public service organization. The principle of sustainable development and the obligations of the state in the field of environmental protection in the context of the principle of solidarity are taken into closer consideration in the second part of the article.

A state as an originator and organizer of public service

The starting point of Léon Duguit's theory of law is the setting of human life in a social context. The most important element of the functioning of the human community is cooperation, and its essence is such targeting of the realization of the individual needs and values, in which one person can do something for the others (the society), and everyone is able to use the goods created by other members of the community. Solidarity (understood as a bond based on interdependence that unites people belonging to a given community with their 'social functions') is a crucial factor that constitutes the society[268]. Among the factors determining the specificity of this bond, Duguit included two coexisting, though opposing phenomena - the similarity and diversity of the needs and talents of individuals belonging to a specific community. The law is at the same time the effect of relations occurring in this community and the tool for their regulation. The basis of the law is the social conviction that certain norms are right and justified.

In the perspective adopted by the French thinker, jurisprudence, along with economics, politics, and morality, belongs to the social sciences, which do not have absolute and universal laws. The essential aim of these sciences is to use the actual and updating knowledge, including that from the natural sciences, to strengthen society and enable it to achieve its best possible condition. The usefulness of the social sciences, like prevention or medicine, is based on

[267] M. Augustyniak, Solidaryzm i idea solidarności we francuskiej myśli polityczno-prawnej przełomu XIX i XX wieku, Wydawnictwo UWM w Olsztynie, Olsztyn 2021, pp. 381-382.

[268] L. Duguit, Kierunki rozwoju prawa cywilnego od początku XIX w., Księgarnia Powszechna, Warszawa-Kraków 1938, p. 23.

providing optimal solutions to the problems faced by the people who make up a community.

According to Duguit's assumptions, a social norm takes legal form when, for certain reasons, the whole of individuals becomes convinced that it should be permanently sanctioned[269]. The primary sources of law are those values and needs which are rooted in the individual consciousness, but which, due to their importance for community life, have gained validity. The emergence of a legal norm is therefore linked to the spread of the conviction that a given norm is so important for the maintenance of solidarity that the guarantees of its observance should be strengthened. Duguit accepts that legal norms must have an objective basis, which implies that they must be linked to social facts. In this sense, the law must reflect an anthropological truth that gains confirmation in the collective, organized response when it is violated. Thus, the law is here the result of a conscious action in order to protect the social balance, and to eliminate harmful barriers[270]. In this perspective, the state undoubtedly contributes to the full formation of the law, but it is not to be seen as the source of its binding force. Duguit assumes that the final recognition of a given norm as legal does not depend on whether it originates from the legislator in one way or another, as the legislator does not create law, but only extracts those norms which are already embedded in the culturally determined shape of needs and relations between people, and then he formulates and sanctions them[271]. The legislator's role is similar to that of a scientist who establishes facts that exist objectively and independently of his will, and he must therefore constantly seek - in the light of the changing conditions of life - a law that is just and appropriate in the light of the changing circumstances of community life. In Duguit's view, the state does not have the power to make binding the norm which previously had no more or less clear social significance only by virtue of the state's authority. The social recognition of a norm determines the possibility of using coercion to enforce it, but the power of the state does not create norms, "[...] the force does never create the law. In fact, people are aware that the use of force to guarantee certain rules is right. And even as civilization appears and develops, as the distinction between rulers and ruled becomes clearer, there is understanding that the force wielded by those who hold power will be organized and used lawfully if it guarantees the rules which are essential for the realization of social life and justice"[272] (trans. E.S.).

For Duguit, the state is first and foremost a public service organization that flows from the natural need to integrate and coordinate activities that condition the balance between the social whole and its constituent parts. With the variability of organizational forms, the purpose of the state - to maintain harmony in the social world - remains constant. Duguit thus defines the state through the prism of the function it performs, i.e. the realization of the principle of solidarity. In this principle, the scholar also sees the basis of the binding force of the entire legal order. Using the law, a state creates the framework for the realization of the freedoms, liberties and rights to which citizens are entitled, thus setting their limits. These freedoms are not of an absolute or absolute nature. At this point, it should be noted that Duguit questioned the validity of the concept of subjective rights, considering it to be an 'individualistic and metaphysical' construction, outdated and incapable of expressing the totality of the varied relations occurring between the individual and the collective. Hence, neither individuals,

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[269] L. Duguit, Traité de droit constitutionnel, vol. 1, E. de Boccard, Paris 1921, p. 41.

[270] Ibidem, p. 20-21.

[271] Ibidem, p. 43.

[272] Ibidem, p. 92-93. For more, see M.C. Mirow, Léon Duguit, [in:] Great Christian Jurists in French History, eds. O. Descamps, R. Domingo, Cambridge University Press 2019, pp. 358-371.

nor the state, which Duguit in fact denied legal personality, are the bearers of the subjective rights[273]. Only an individual can be placed in a legal situation from which certain rights and duties arise. Legal norms arise and are valid only as substantive law - in connection with society's awareness of the existence of needs that should to be satisfied.

Duguit pointed out that since legal relations arise between the concrete subjects, the rights can only be enjoyed by an individual if he lives in a society, and because of his functioning in it[274]. Therefore, individuals can only be subjects (addressees) of a right, but they do not have any inalienable subjective rights. No group has such rights, there are only objectives that the participants in collective life can pursue, and if these objectives are admissible from the point of view of compliance with the social rule of solidarity, then those who pursue them should find themselves protected by the subjective law[275]. In the same way, it must be assumed that those who govern the state are also the subjects of the law, and they perform their respective social functions within it. The rulers, however, cannot have a higher will than the will of the governed[276]. Ultimately, Duguit concludes that the concept of the sovereignty of the state or of the nation should be replaced by that of the public service and that, on the basis of this, a law should be created which could be described as social[277]. It would foster the connection between the political space and the space of needs, goals, and values relevant to citizens.

Duguit's approach led him to question the validity of the distinction between the public and private law. In particular, he questioned the criterion that served as the basis for this distinction, namely the separation of the interests of private persons from those of the state. The boundary between these interests is fluid, which is not only due to the fact that they interpenetrate and condition each other, but also that in many situations they are determined by one and the same function, i.e. the realization of the principle of solidarity. It unites two tendencies present in every human being - individualistic and social. The proper regulation of these tendencies determines the possibility of interaction and the satisfaction of similar and differentiated needs of individuals, which takes place primarily through the exchange of goods and services[278].

The prominence of public service in Duguit's concept leads to the recognition that the origin of power itself is of little importance for its legitimacy. It is important whether those in power use their powers to fulfil the social function to which they are committed. Thus, power in the state is not an autotelic value, its function is to administer society effectively. This function justifies the interference of the state in certain spheres of social life, with the possible limitation or even exclusion of the rights and freedoms of citizens in a given sphere, in order to meet social needs and protect values relevant to the public interest. Defining the public interest requires constant confrontation with the changing requirements of the social life. Depending on cultural and historical conditions, even trivial and individual matters,

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[273] "Nobody has subjective rights and nobody can have them, because a right is an abstraction without reality. But by the very fact that an individual is a member of a certain community, an individual has an actual duty to fulfil a certain social function, and everything that is done for this very purpose has its social value and it will be socially protected" (trans. E.S.), L. Duguit, Kierunki rozwoju…, op.cit., p. 26.

[274] Ibidem, pp. 20-22.

[275] L. Duguit, Traité de droit constitutionnel, op.cit., p. 358.

[276] H. Dembiński, Teorie Duguit'a i Kelsena, Wilno 1931, p. 4.

[277] L. Duguit, Les transformation du droit public, A. Colin, Paris 1913, p. 33.

[278] L. Duguit, Kierunki rozwoju…, op.cit, p. 24. See also here W.Y. Elliott, The Metaphysics of Duguit's Pragmatic Conception of Law, "Political Science Quarterly" 1922, vol. 37, no. 4, pp. 640-641.

such as the number and type of meals eaten, the time of rest, the ability to leave home at any time, may, for example, in times of war or epidemic danger, become the subject of regulation by the state apparatus[279].

In order to provide a public service, the state must sometimes undertake management of public services that are too expensive or too unprofitable for private initiative. Governments, unlike private entrepreneurs, cannot treat public services solely through the lens of their financial profitability. It is crucial whether a given public service responds to a justified social need, whether it can make access to certain services more widespread, e.g. education, transport, health, and those aimed at counteracting environmental damage. According to Duguit's assumptions, public service becomes a vehicle of solidarity and related justice, which helps to reduce social inequalities by striving to ensure equal access to public service for all citizens. Public service is available to anyone who complies with the general laws which establish and organize them[280]. Duguit noted that modern states must take more and more measures to implement a public service subordinated to the principle of solidarity[281].

With the development of civilization, the scale and type of needs that need to be met for the good of society and of the individuals who comprise it have been changing. In parallel with the benefits offered by the development of science and technology, some unknown threats are emerging, which gives rise to the need to ensure effective protection against them. As awareness of environmental problems, such as the depletion of the ozone layer, climate change, the risks related to the use of nuclear weapons, water and air pollution, is growing, there is a growing public need to address these issues. The emergence of new categories of needs should therefore be reflected on the ground of positive law and the activity of public authorities aimed at creating a structure ordering the human ecological niche. Effective environmental protection requires multifaceted and solidarity-based cooperation that goes beyond the borders of individual states. It is necessary to establish and apply legal norms enabling the public service to extend the implementation of the principle of solidarity to the supranational level. As a result, the role of regulations established under international law is increasing. It is within this framework that legal norms of fundamental importance are created, on the basis of which detailed legal norms defining methods, instruments and institutions for environmental protection at the regional and national level.

In the second half of the 20th century, public awareness of the perception of the environment as a global good increased significantly. According to Duguit's assumptions, if the importance of a given need becomes widespread and fixed at the level of social awareness, then the legislator, in the performance of his public service, is obliged to undertake activity in the given area. And if the need is global, then so must be the nature of the activities aimed at realizing it. Consequently, in the contemporary system of regulations aimed at ecological safety, it is important to work out universal principles within the framework of international environmental law. The essence and specificity of this law is specified by a definition describing it as a set of norms of international law and institutions created by them, which directly or indirectly serve environmental protection and their task is to create compromise solutions combining the principle of state sovereignty, fundamental for international law, with the necessity of

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[279] L. Duguit, Traité de droit constitutionnel, op.cit., p. 26-27.

[280] L. Duguit, De la situation des particuliers a l'egard des services public, „Revue du droit public *et de la sociologie politique en France et à l'étranger*" 1907, p. 421.

[281] More about the concept of the state, see C. Laborde, Pluralism, Syndicalism and Corporatism: Léon Duguit, and the Crisis of the State (1900-1925), "History of European Ideas" 1996, vol. 22, pp. 227-244.

social and economic development[282]. The principles adopted in international law set certain standards of behavior for the addressees of legal norms, and they contribute to the unification of applied legal regulations.

Environmental law and the principle of sustainable development

A fundamental principle in environmental law is the principle of sustainable development. Its foundations were laid in 1975 at the Second Session of the Governing Council of the United Nations Environment Programme, which stated that: "[...] a society which recognizes the primacy of ecological requirements, which should not be disturbed by the growth of civilization and cultural and economic development, capable of self-controlling its development in order to maintain homeostasis and symbiosis with nature, thus respecting economical production and consumption and the use of waste, caring for the future consequences of the actions taken, and thus for the needs and health of future generations"[283] (trans. E.S.). The essence of sustainable development was further defined in 1992 at the United Nations Conference, which adopted the Declaration on Environment and Development (also known as the Rio Declaration). The principle of sustainable development formulated therein is a structure based on three important pillars for world security and the development of civilization - international human rights, environmental rights and economic rights. This principle is linked to the relatively new need to extend justice with an ecological dimension that would take into account equal access of people, regardless of their nationality, religion, race, material status, etc., to a clean environment. This includes intergenerational justice, which seeks to ensure that environmental resources are available not only to present but also to future generations.

The principle of sustainable development has been implemented in many acts of European law, e.g. the Treaty on European Union (Maastricht Treaty of 7 February 1992), which provides for harmonization of economic development processes with social needs and environmental protection requirements. This principle has guided European Union policy as set out in subsequent international agreements, i.e. the Amsterdam Treaty of 1997, the Nice Treaty of 2001 and the Treaty on the Functioning of the European Union. As legislation evolved, the principle of sustainable development advances and became the basis for further principles: 1) prevention, which calls for combating negative environmental effects already at the planning stage, taking into account available knowledge, impact assessment procedures and monitoring; 2) precaution, which is an extension of the previous principle, but assumes additionally that preventive measures should be taken even when negative environmental effects are not fully recognized; 3) comprehensiveness, which calls for treating the environment as a whole made up of many interdependent elements; 4) subsidiarity allowing implementation of environmental protection by smaller communities which are able to identify the most important needs of the society in this respect; 5) the 'polluter pays' principle, ordering to bear the costs of the effects of environmental pollution and elimination of the damage caused; 6) high level of environmental protection through application of optimum legal and organizational instruments; 7) removal of ecological damage 'at source', ordering to take actions eliminating the effects of pollution at the place where it occurred. Based on these principles, a whole system of environmental

[282] J. Ciechanowicz, Międzynarodowe prawo ochrony środowiska, Wydawnictwo Prawnicze LexisNexis, Warszawa 1999, p. 12.

[283] Deklaracja z Rio w sprawie ochrony środowiska i rozwoju, http://libr.sejm.gov.pl/tek01/txt/inne/1992.html, accessed 10.06.2022; J. Ciechanowicz, Międzynarodowe prawo…, op.cit., p. 70.

law is being developed, which defines the way of using such resources as water, air, soil, flora, fauna and inanimate nature. In particular, it concerns rationing and protection instruments consisting, on the one hand, in limiting access to resources in the case of economic activity (e.g. requirements to obtain appropriate permits) and, on the other hand, in limiting emissions of pollutants to the environment through a system of environmental standards and liquidation of damages caused to the environment[284].

Recognition of the principle of sustainable development, in line with Duguit's conception of the social service, places an obligation on individual states to rationally shape the environment and to create conditions in which citizens can make real and equal use of its values. The means to achieve this task is the development of a comprehensive national law, consistent with international law or, in the case of Member States, with European Union standards, and its effective application, enabling the rational use of non-renewable resources, the restitution of renewable resources, not exceeding the limits of ecological safety, maintaining biodiversity and favoring pro-ecological technological solutions. The principle of sustainable development also obliges states to cooperate internationally, to report dangerous events, to take international responsibility for environmental damage, to settle amicably disputes concerning the use of the environment[285].

Since the natural environment is the basic substrate for satisfying the needs of man and the whole of mankind, the threats occurring in this area require regulation of the scope and determination of the conditions for using the environment, in order to guarantee fair access to natural resources to the present and future generations. Due to the specific nature of the environment and its importance to the human being, this protection can only be effective with the use of instruments of universal impact whose effectiveness is guaranteed by the state. The growing social awareness in this area is reflected not only on the grounds of positive law. It is also manifested at the linguistic level in the form of new concepts and expressions (e.g. biodiversity, ecological balance). Language is an important tool for the articulation and socialization of values and needs. In this context, it is worth mentioning the role that access to information plays in shaping the awareness of individuals, and thus society. To a large extent, it determines the participation of society, which may express its comments, opinions or conclusions, thus co-determining the implementation (or withdrawal from implementation) of a given project. This issue is regulated by the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, signed in Aarhus, Denmark, in 1998. It provides that the public shall have access to information, participation in decision-making and access to justice in environmental matters without discrimination as to citizenship, nationality or place of residence[286]. In Polish law, the regulations concerning this issue were transferred from the Act - Environmental Protection Law and are now to be found in the Act of 3 October 2008 on access to information on the environment and its protection, public participation in environmental protection and environmental impact assessments[287].

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[284] E. Zębek, Instrumenty administracyjno-prawne i ekonomiczne w ochronie środowiska, KPP Monografie UWM Press, Olsztyn 2017, pp. 6-7.

[285] J. Boć, E. Samborska-Boć, Ochrona środowiska. Źródła, Kolonia, Wrocław 1994, p. 101.

[286] Konwencja o dostępie do informacji, udziale społeczeństwa w podejmowaniu decyzji oraz dostępie do sprawiedliwości w sprawach dotyczących środowiska sporządzona w Aarhus dnia 25 czerwca 1998 r., Dz.U. 2001 No. 78, item 706.

[287] Ustawa z 3 października 2008 r. o udostępnieniu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz ocenach oddziaływania na środowisko, Dz.U. 2008 No. 199, item 1227.

From the point of view of Duguit's theory, the dissemination of a given need in social consciousness should be ascribed a law-making character. If there is social awareness of the need to protect the environment, the State should take action in this respect, which is its duty under the law, and it is part of the postulated public service. The public service must recognize that the environment is a common good, therefore, it is responsible for its protection[288]. In this perspective, protective regulations are the response to the public awareness of the state in the case of danger due to changes in the environment. Legal norms become a basic instrument for creating a framework of public ecological order, enabling the reconciliation of various interests by satisfying various, sometimes conflicting needs. Effective state interventionism in the sphere of environmental protection must not take the form of selective and specialized regulation, but constitute a comprehensive legal order. In this order, three categories of responsibility can be distinguished: administrative, civil and criminal. Administrative liability concerns enforcement by public administration bodies of appropriate administrative decisions, especially those obliging a given entity to limit its negative impact on the environment and to restore the previous state of affairs. Any activity that has a negative impact on the environment requires an appropriate administrative decision authorizing such activity in the form of: a permit to draw environmental resources in an amount exceeding the common use, emission of pollutants into the environment, a decision to operate an installation which must meet relevant environmental standards, a concession for prospecting and extraction of minerals, a permit to produce and process waste, removal of trees.

An important instrument prior to obtaining the mentioned above decisions is the system of environmental impact assessments which determines the potential negative impact of a given project on the environment already at the planning stage. The precautionary principle, mentioned earlier in the context of international law as formulated in the Rio Declaration, applies here. It is based on the view that it is better to react earlier, than to wait for official confirmation of ominous assumptions. The application of this principle obliges to apply due diligence in the assessment of the consequences for the environment of a decision or a real action. All projects which may have a negative impact on the environment should be preceded with analyses, opinions and expert reports. The application of all precautionary measures should make it possible to rationally resign from projects whose negative impact on the environment is greater than civilization benefits[289].

Civil liability assumes the need to protect the environment as a common good and includes a system of claims for the cessation of unlawful activities causing danger or harm to the environment. Criminal liability, on the other hand, is related to the sanctioning of failure to comply with environmental protection requirements. The enforcement of criminal sanctions for violations of environmental law is of primary importance here. These violations relate in particular to the handling of hazardous substances, ionizing radiation, waste, nuclear material, substances depleting the ozone layer, as well as the operation of a plant where hazardous

[288] B. Rakoczy, Konstytucyjna zasada sprawiedliwości społecznej a ochrona środowiska w działalności przedsiębiorcy, [in:] Prawo ochrony środowiska jako warunek prowadzenia działalności gospodarczej, red. J. Ciechanowicz-McLean, T. Bojar-Fijałkowski, Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk 2009, p. 92.

[289] The precautionary principle is expressed in Article 6 par. 2 of the Environmental Protection Act of 27 April 2001. The article states that "whoever undertakes activity whose negative impact on the environment is not fully recognised is obliged, guided by prudence, to take all possible preventive measures" (Prawo ochrony środowiska z dnia 27 kwietnia 2001 r., Dz.U. 2001 No. 62, item 627).

activities are carried out, killing and trading in specimens of protected species, destruction of a natural habitat in a protected area. It is worth adding that legal measures are complemented by economic instruments in the form of ecological taxes, fees for using the environment or subsidies subsidizing undertakings in this respect.

Concluding remarks

The environment is a basic substrate that fulfills the essential needs of the man and all mankind. According to Léon Duguit, solidarity determines a fundamental direction of the actions taken by the state. In this perspective, it should be recognized that since environmental protection has become more common social need, it is the duty of the state to regulate and define the conditions of usage of environment in order to guarantee fair access to natural resources for present and future generations. This obligation results from the substantive law and it is part of the so-called public service. From this perspective, the main premise legitimizing the goals of legislative and institutional activities of the state is whether they aim at harmonization of social life based on solidarity.

Environmental standards should not be selective and specialized regulations, but should take the form of a comprehensive legal order taking account the national, regional, and global dimensions. Environmental protection is a task of a social nature, as the environment determines the existence and fulfilment of current and future human needs. The principle of sustainable development plays an essential role in verifying these needs, and it can also be regarded as a manifestation of solidarity in the broad sense of the term, harmonizing relations not only between people, including within the framework of intergenerational justice, but also between people and the natural environment.

BIBLIOGRAPHY

Literature

Augustyniak M., Solidaryzm i idea solidarności we francuskiej myśli polityczno-prawnej przełomu XIX i XX w*ieku*, Wydawnictwo UWM w Olsztynie, Olsztyn 2021.

Boć J., Samborska-Boć E., Ochrona środowiska. Źródła, Kolonia, Wrocław 1994.

Ciechanowicz J., Międzynarodowe prawo ochrony środowiska, Wydawnictwo Prawnicze LexisNexis, Warszawa 1999.

Dembiński H., *Teorie Duguit'a i Kelsena*, Wilno 1931.

Duguit L., *De la situation des particuliers a l'egard des services public*, „Revue du droit public et de la sociologie politique en France et à l'étranger" 1907.

Duguit L., Kierunki rozwoju prawa cywilnego od początku XIX w., Księgarnia Powszechna, Warszawa-Kraków 1938.

Duguit L., *Les transformation du droit public*, A. Colin, Paris 1913.

Duguit L., *Traité de droit constitutionnel*, vol. 1, E. de Boccard, Paris 1921.

Elliott W.Y., *The Metaphysics of Duguit's Pragmatic Conception of Law*, "Political Science Quarterly" 1922, vol. 37, no. 4.

Laborde C., *Pluralism, Syndicalism and Corporatism: Léon Duguit, and the Crisis of the State (1900-1925)*, "History of European Ideas" 1996, vol. 22.

Mirow M.C., *Léon Duguit*, [in:] *Great Christian jurists in French History*, eds. O. Descamps, R. Domingo, Cambridge University Press 2019.

Prawo ochrony środowiska jako warunek prowadzenia działalności gospodarczej, ed. J. Ciechanowicz-McLean, T. Bojar-Fijałkowski, Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk 2009.

Rakoczy B., Konstytucyjna zasada sprawiedliwości społecznej a ochrona środowiska w działalności przedsiębiorcy, [in:] Prawo ochrony środowiska jako warunek prowadzenia działalności gospodarczej, ed. J. Ciechanowicz-McLean, T. Bojar-Fijałkowski, Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk 2009.

Zębek E., *Instrumenty administracyjno-prawne i ekonomiczne w ochronie środowiska*, KPP Monografie UWM Press, Olsztyn 2017.

Legal acts

Deklaracja z Rio w sprawie ochrony środowiska rozwoju (Declaration on Environment and Development - the Rio Declaration), http://libr.sejm.gov.pl/tek01/txt/inne/1992.html.

Konwencja o dostępie do informacji, udziale społeczeństwa w podejmowaniu decyzji oraz dostępie do sprawiedliwości w sprawach dotyczących środowiska sporządzona w Aarhus dnia 25 czerwca 1998 r., Dz.U. 2001 No. 78, item 706;

Ustawa z 3 października 2008 r. o udostępnieniu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz ocenach oddziaływania na środowisko, Dz.U. 2008 No. 199, item 1227.

Prawo ochrony środowiska z dnia 27 kwietnia 2001 r. (Environmental Protection Act of 27 April 2001), Dz.U. 2001 No. 62, item 627.

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Climate change in light of the rights of future generations

Abstract
Addressing the rights of future generations and today's society responsibility in ensuring the latter, is crucial when it comes to the progress and development of the society. Society today has made commendable progress in many aspects, creating endless development and progress opportunities. However, more and more we are realizing that we need the right mechanisms and care so that all this extraordinary progress ensures a sustainable development that will enable long-term results.

Keywords: Human Rights; Climate Change; Future Generations; Sustainable Developement;

The concept of "Sustainale developement" has been introduced since 1987 in the report of the World Commission on Environment and Development entitled "Our Common Future"[290]. This report acknowledges sustainable development as *development that meets the needs of the present without compromising the ability of future generations to meet their own needs"*.

One of the most current issues we are hearing being discussed intensively at the highest international levels is the issue of global warming and climate change. All the development and progress that man has achieved seems to "bother" nature and reduce its resources. This is a very delicate matter which requires urgent attention and response. The response to this risk applies especially to the future. It is very important that we make every effort to leave for future generations a clean and healthy environment, as we inherited from our ancestors. One of the greatest present threats to continued human existence comes from the deterioration of the human environment.

Human life and the human environment are inseparable. It is hard for each one of us to imagine ourselves living without nature, which represents the past, the present and the future, as the greatest wealth we can inherit to our descendants. Each and every one of us finds inspiration in nature when it comes to relaxing, painting, writing, breathing, walking, etc. Every one of us is part of nature and of the environment which we live in. Both nature and our environment enable us to breathe, drink, eat, therefore to live. It is therefore crucial to see environment protection and human rights as linked to one another, enabling each-other to be enjoyed, encouraging sustainable development every day more and more. The environment is part of everyone and should be protected by everyone. The environment is not our property,

[290] Report of the World Commission on Environment and Development : note / by the Secretary-General, A/42/427, chapter 2, paragraph 1, https://digitallibrary.un.org/record/139811/files/A_42_427-EN.pdf?ln=en

it was left to us in use by our ancestors and we must use it carefully to pass on, why not even better, to future generations.

Nowadays it is widely accepted that international life has been dramatically transformed under the overwhelming pressure of two major challenges of our time: the necessities and requirements of protection of the human person and of protection of the environment. Current environmental issues require new approaches. The linking of human rights to environmental priorities is an acknowledgement that conservation will not be successful without human development

One of the features of environment is that it transcends state borders. Global development has made the world we live in even smaller. We are therefore interconnected fare more than we think and the effects of climate change caused in different measures, individually, are suffered especially collectively. While globalization has been one of the factors with exponential influence in the evolution of our society to what it represents today, one of its most unfortunate consequences is inequitable sharing of the earth's resources, resulting in pressure on natural resources and eco-systems, and the development of unsustainable levels of consumption.

Therefore, there is an urge for attempts to address the long-term environmental costs of destructive policies on sustainable human development. Current environmental issues require linking human rights to environmental priorities in order to acknowledge that conservation will not be successful without human development. Human rights protection, and sustainable development, are to be pursued together in order to face and overcome the major challenges of our time.

In 2012 the UN Human Rights Council appointed John Knox as the UN Special Rapporteur on Human Rights and the Environment. After six years as mandate holder, he came to the conclusion that there is a glaring gap in the global human rights system[291]. His opinion was that it is time for the UN to recognize the fundamental human right to live in a safe, clean, healthy and sustainable environment. This right belongs to everyone, everywhere. Human life, health, well-being, and dignity depend on access to clean water, clean air, and a healthy environment. The Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, reported that[292] "*Concerns about future generations and sustainable development often focus on the state of the environment in particular years in the future, such as the year 2030 or 2100. Many people that will be living in 2100 are not yet born, and in that sense truly belong to future generations... It is critical, therefore, that discussions of future generations take into account the rights of the children who are constantly arriving, or have already arrived, on this planet. We do not need to look far to see the people whose future lives will be affected by our actions today. They are already here*".

Different states have created special instruments or structures of Human Rights for Future Generations. For exemple, future Generations Commissioner for Wales. The Well-being of Future Generations (Wales) Act 2015[293] is one the first legislation in the world to protect the

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[291] https://www.ohchr.org/en/statements/2018/10/statement-david-r-boyd-special-rapporteur-human-rights-and-environment-73rd

[292] Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, paragraph 68 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/017/29/PDF/G1801729.pdf?OpenElement

[293] Well-being of Future Generations (Wales) Act 2015, https://www.futuregenerations.wales/wp-content/uploads/2017/01/WFGAct-English.pdf

rights of future generations. The legislation seeks to ensure that all socio-economic, cultural and environmental considerations are taken into account when planning and delivering public services. The intention of this being that decisions made to meet the needs of current generations, do not compromise the needs of future generations. The legislation set seven national well-being objectives that take the UN Sustainable Development Goals into account. Public bodies have a duty to work to achieve all seven well-being goals. Each local authority must establish a public services board to devise local well-being plans.

Rights of future generations sometime are considered under-represented in current political structures. This is due to the political environment often focussing on short-term concerns. Consequently, extreme risks are systematically avoided, resulting in existential and cataclysmic challenges for future generations to resolve. For example, the effects of short-termism and rights of future generations have been discussed in relation to the climate crisis. The climate change campaigns, have argued that the existential threat posed by a lack of action on climate change mitigation has been disproportionately imposed on young people and future generations.

In their Submission to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change[294], the Office of the High Commissioner for Human Rights has highlighted numerous basic rights that are directly affected by climate change, such as the right to life, to self-determination, to development, to food, to water and sanitation, to health, to housing, to education, to meaningful and informed participation. Among these rights were also the rights of future generations[295], linking them with the concept of intergenerational equity to protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.

Now let us dwell on the current framework and actions for environmental protection in Albania. Albania has ratified the UN Framework Climate Change Convention (the UNFCCC) in September 2016. Albania has presented its Third National Communication in 2016 and its Intended Nationally Determined Contribution according to the Decisions No. 1/CP.19 and 1/CP.20 of the Conference of the Parties of the Convention. In this contribution it is stated that Albania's total greenhouse emissions are relatively low and the country has unique emission profile as its electricity generation is based on renewable source generation at currently, with hydro power providing dominant part of it. Unfortunately, this hydro power capacity is vulnerable to climate change impacts. The unique electricity mix of Albania is positive in the sense that electricity system is on a level of decarbonisation what other countries aim for only on the long term, but it also means that there is limited opportunity for further policies and measures in this sector to reduce emissions.

In 2020, the Republic of Albania has adopted the law "on climate change" which approximates the legislation of the European Union in this field. The purpose of this law is to accelerate adaptation to climate change, with the aim of mitigating the harmful effects of climate change, and to contribute to global climate change efforts. It sets out the general framework of national policy for action on climate change. It also sets out the approval of a Strategic Document on

[294] Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf

[295] Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change - https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf

Climate Change which creates the general national framework for action on climate change, part of which are The National Plan for Greenhouse Gas Mitigation and The National Plan for Adaptation to Climate Change.

To conclude, let's remember Principle 25 of Rio Declaration On Environment and Development: "*Peace, development and environmental protection are interdependent and indivisible*".

BIBLIOGRAPHY

Report of the World Commission on Environment and Development : note / by the Secretary-General, A/42/427, chapter 2, paragraph 1, https://digitallibrary.un.org/record/139811/files/A_42_427-EN.pdf?ln=en

Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, paragraph 68 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/017/29/PDF/G1801729.pdf?OpenElement

Well-being of Future Generations (Wales) Act 2015, https://www.futuregenerations.wales/wp-content/uploads/2017/01/WFGAct-English.pdf

Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf

Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change - https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf

https://www.ohchr.org/en/statements/2018/10/statement-david-r-boyd-special-rapporteur-human-rights-and-environment-73rd

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The legal aspects of the limitations regarding the use of photovoltaic technology as part of economic activity in Poland

ABSTRACT

The aim of this article has been to discuss the issues related to the possibility of utilizing solar energy for purposes of economic activity in Poland. The limitations in scope of the use of photovoltaic technology as part of economic activity under the act on renewable sources of energy have been presented. The conducted analysis of regulations provided for in the said act has led to a conclusion that generation of solar energy in micro- and small installations is, in general, possible only for own needs of the generator.

Key words: economic activity, solar energy, photovoltaic installation

INTRODUCTION

The economic crisis in years 2008-2010 contributed to the trend of establishing an environmentally-friendly economy. The premise for the development of such solutions was to counteract the economic crisis, which is depicted by economic recovery plans that highlight the necessity for development based on energy-efficient technologies[296]. The so-called green economy has also been associated with the concept of balanced and sustainable development, but there has been much more emphasis put on structural transformations in economy, based on technologies which effectively utilize natural energy and raw materials[297]. However, maintaining green economy requires a much greater involvement on the side of the government, the role of which must not only be limited to promotion of environmentally friendly solutions. The government should also establish legal instruments to facilitate the implementation of new technologies and allow for determination of rules under which such technologies should be used. High costs of green investments may constitute a realistic obstacle for their implementation. Thus, company owners should be supported by the state which needs to encourage them to make such investments.

There has been great interest in technologies connected with the use of renewable energy sources (hereafter referred to as: RES). Recently, great hopes have been associated with photovoltaic technology. Photovoltaic installations have even dominated the solutions used in construction for the purpose of reducing high energy costs as well as obtaining raw materials through environmentally-friendly processes. The normative solutions adopted in Poland do not, however, provide a complete freedom in the use of power generation at photovoltaic installations.

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[296] See European Economic Recovery Plan. Resolution of the European Parliament of 11 March 2009 on the European Economic Recovery Plan (2008/2334(INI)), (OJ C. 2010.87E.98;

[297] See P. Szyja, *Zielona gospodarka w Polsce – stan obecny i perspektywy,* [in:] Nierówności Społeczne a Wzrost Gospodarczy, issue 41 (1/2015), p. 435

Limitations have been introduced as to the possibility of generating power from RES and the ways to use such power. What is more, the legal situation of an entity governed by law has been differentiated based on the purpose renewable solar energy is acquired for. A natural person who installed photovoltaic panels which allow them to generate solar power from RES for the needs of, among others, a single-family house has to go through a much simpler procedure to utilize such generated energy than a company owner who wants to use similar energy as part of conducted economic activity, despite the fact that both entities use the power for own needs. This issue should be discussed in more detail. Hence the purpose of this article.

This elaboration will discuss the problems connected with legal limitations regarding the use of photovoltaic technology for economic activity in Poland. The subject hereof will be the presentation of rules concerning conduction of economic activity in Poland with the use of photovoltaic installations under the act of 20 February 2015 on renewable energy sources (hereafter referred to as: the act on RES)[298] and the analysis of applicable provisions of the act on RES which regulate the use of solar power to allow for outlining the problems which emerge based on the conducted analysis of legal acts.

RULES FOR CONDUCTING ECONOMIC ACTIVITY WITH THE USE OF SOLAR POWER

Conducting business activity in Poland is possible under rules set out in the act of 6 March 2018 – the Business Owners Act[299] – which have been based on the constitutional rule concerning the freedom of economic activity[300]. This constitutional freedom serves a particular systemic role since it has influence on the application of law. It should be highlighted that it does not constitute a right that is absolute[301]. It can be limited due to the existence of important public interest or by way of an act. Establishing and running economic activity within the scope of using RES for the generation of electric energy was regulated in a separate normative act i.e., the act on RES which remains strictly connected with the act of 10 April 1997 – the Energy Law Act[302]. Art. 32 of the Energy Law Act imposes the obligation to obtain a license in case of economic activity involving generation, processing, storage, transmission and distribution of or trade in fuels or energy. This obligation does not refer to processing of, among others, power in micro- or small installations (Art. 32 section 1 point 1c of the Energy Law Act). Activity involving generation of RES energy in a micro- or small installation is exempted from the obligation to obtain a license. The same regulation is provided for in the act on RES. The definitions of terms micro-installation and small installation provided for in the Energy Law Act directly refer to the definitions of those terms presented in the act on RES, where they leave no doubts as to the maximum power of the installed electric power that can be generated in an RES installation without a license.

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[298] Polish Journal of Laws of 2022, item 1378

[299] Polish Journal of Laws of 2021, item 162

[300] Art. 20 the Constitution of the Republic of Poland of 2 April 1997, Polish Journal of Laws of 1997, No. 78, item 483

[301] Cf. A. Kanarek-Równicka, *Stabilność prawa w systemie ochrony praw człowieka na przykładzie praw ekonomicznych,* [in:] Powszechny system ochrony praw człowieka w dobie kryzysu demokracji liberalnej, ed. nauk. J. Jaskiernia, K. Spryszak, Wydawnictwo Adam Marszałek, Toruń 2020, volume I, p. 569-582, ISBN: 978-83-8180-190-4

[302] Polish Journal of Laws of 2021, item 716

Pursuant to Art. 2 point 19 of the act on RES, a micro-installation constitutes "a renewable energy source installation with a total installed capacity not higher than 50 kW, connected to an electricity grid with nominal voltage lower than 110 kV or a combined generating heat capacity not higher than 150 kW, the total installed capacity of which is not higher than 50 kW"[303]. The term of small installation has covered a renewable energy source installation with a total installed capacity higher than 50 kW and not higher than 1 MW, connected to an electricity grid with nominal voltage lower than 110 kV or a combined generating heat capacity higher than 150 kW and lower than 3 MW, the total installed capacity of which is higher than 50 kW and not higher than 1 MW[304]. Both a micro- and a small installation refers to an installation of renewable energy source i.e., a renewable, non-fossil source of energy that includes wind energy, solar radiation energy, aerothermal energy, geothermal energy, hydrothermal energy, hydropower, energy of sea waves, currents and tides, energy generated from biomass, biogas, agricultural biogas and bioliquids[305]. Thus, a photovoltaic installation constitutes an installation of a renewable, non-fossil source of energy that involves energy from solar radiation. The general difference between the said two installations regards the values of maximum installed capacity.

Pursuant to provisions of Art. 4 section 8 of the act on RES, generation of electric energy, both in a micro- and a small installation, and transmission thereof to a distribution grid infrastructure by a prosumer of renewable energy, collective prosumer of renewable energy, or a virtual prosumer of renewable energy that is not an entrepreneur according to the Entrepreneurs Law Act, shall not constitute economic activity according to Art. 3 of the Entrepreneurs Law Act, provided that three conditions specified in the act on RES are met. Firstly, the electricity will be generated for own needs in a micro- or small installation with a total installed capacity: higher than 10 kW – in a quantitative proportion of 1 to 0.7; and not higher than 10 kW – in a quantitative proportion of 1 to 0.8 (Art. 4 section 1 and 1a of the act on RES). Secondly, electricity will be generated from RES solely by the final recipient and for their own use in a micro- or small installation, which was specified in the definitions of prosumer provided for in Art. 2 point 27a, 27b and 27c of the act on RES. Thirdly, the electricity generated in this manner must not be the subject of main economic activity pursuant to regulations issued under Art. 40 section 2 of the act on official statistics[306] (Art. 2 point 27a, 27b and 27c of the act on RES).

In other words, the act on RES allows for generating electricity from RES both in a micro- and small installation outside economic activity when it will be generated by the final recipient with a specific installed capacity, for their own needs. If the indicated conditions are not met, it will be assumed that the generation and transmission of electricity to a distribution grid infrastructure by a prosumer of renewable energy, collective prosumer of electricity or virtual prosumer of electricity[307] constitutes the subject of economic activity under provisions of the Entrepreneurs Law Act. The act on RES, however, exempts from the obligation of obtaining a license for starting and running economic activity within the scope of generation of electricity from RES, provided that it is generated in a micro- or a small installation (Art. 3 points 1 and 2 of the act on RES). Exceeding the maximum limit of the total installed capacity for a

[303] Art. 2 point 19 of the act on RES

[304] Art. 2 point 18 of the act on RES

[305] Art. 2 point 22 of the act on RES

[306] The act of 29 June 1995 on official statistics, Polish Journal of Laws of 2020, items 443 and 1486

[307] See M. Przybylska, *Prawa prosumenta na rynku energii elektrycznej,* [in:] Internetowy Kwartalnik Antymonopolowy i Regulacyjny 2017, issue 3(6), p. 101-107

micro- or installation that has been specified in the act will impose the obligation to obtain a license for generation of electricity from RES.

The crucial difference between generation of electricity from RES in a micro-installation and a small installation is constituted by the scope of obligations imposed on the prosumer under the act on RES, which in the case of the latter are only limited to the rules and conditions specified in chapter 2 of the act on RES. Such activity is not considered as licensed or regulated activity pursuant to provisions of the Entrepreneurs Law Act. Generation of electricity from RES in a small installation, on the other hand, requires adherence to rules and conditions thereof specified in chapter 2 of the act on RES, as well as is considered as regulated activity under provisions of the Entrepreneurs Law Act and requires an entry into the register of generators who conduct economic activity within the scope of small installations[308]. The said register is kept by the President of the Energy Regulatory Office as part of an information system and is open to the public[309].

The act on RES also imposes on the entity generating RES power in a small installation a set of obligations related to holding documentation listed in Art. 9 of the act. The entity generating RES power in a small installation can be someone who holds documents which confirm the ownership to the facility where the economic activity will be performed as part of small installations and confirm the ownership to the installation as such (Art. 9 section 1 point 1 of the act on RES), as well as someone who concluded an agreement for connecting the small installation to the grid (Art. 9 section 1 point 2 of the act on RES). The entity should also own proper facilities and installations that comply with the requirements specified in, among others, fire safety regulations, sanitary regulations and environmental regulations, which allow for appropriate performance of activity as part of a small installation (Art. 9 section 1 point 3 of the act on RES). The entity should then keep a record of the total amount of electricity discussed in Art. 9 section 1 point 5 of the act on RES[310] and prepare and file semi-annual reports to the President of the Energy Regulatory Office with information specified in Art. 9 section 1 point 5 of the act on RES[311]. They should also keep record to confirm the date of first generation of electricity in a small installation or its generation after modernizing the installation, with the date on which such modernization was completed, and file such information to the President of the Energy Regulatory Office[312]. Art. 9 section 1 point 4 of the act on RES also forbids the generator of energy from RES in a small installation, during generation of electricity, to utilize fossil fuels or fuels created from processing of fossil fuels, or biomass, biogas, agricultural biogas or bioliquids with additives that are not biomass, biogas, agricultural biogas or biofuels to increase their calorific value.

However, regardless of the value of maximum installed capacity i.e., both in the case of a small or a micro-installation, it is necessary to comply with the conditions stipulated in the act on RES. Obligations imposed on the generator of energy from RES in a small installation

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308 See Art. 7 section 1 of the act on RES

309 See Art. 8 section 1 and Art. 11 sections 2 and 3 of the act on RES

310 According to Art. 9 section 1 point 5 of the act on RES, the generator of power in a small installation must also keep a record of total electricity generated from RES in a small installation; electricity generated from RES in a small installation and transmitted to a distribution grid infrastructure and sold to an obligated seller specified in Art. 40 section 1; consumed fuels to generate electricity in a small installation and the type of fuel; and electricity sold to final recipients.

311 See Art. 9 section 1 point 5 and 7 of the act on RES.

312 See Art. 9 section 1 points 6 and 8 of the act on RES

refer to every stage of economic activity performed as part of a small installation, starting from building the installation itself, which is connected with holding proper documentation, to the stage of using the energy generated at the said installation and keeping records referred to in Art. 9 section 1 point 5 of the act on RES i.e., keeping records as to the total amount of electricity generated from RES, sold to an obligated seller and transmitted to a distribution grid, fuels consumed to generate the energy and the type thereof, as well as energy sold to final recipients and filing of periodic reports. It should also be highlighted that the lack of entry into the register of energy generators in a small installation or generating RES power as part of a small installation in breach of the contents of the entry in the register is subject to a pecuniary penalty (Art. 168 section 14 of the act on RES).

The amendment of the act on RES of 2021[313] also made it possible to generate electricity in a micro- or a small installation by more than one collective prosumer of electricity. Starting from 2 July 2024, the act will also give the possibility to generate electricity in an RES installation by more than one virtual prosumer of renewable energy. The definition of collective prosumer of electricity has also covered the final recipient that generates electricity solely from RES for own needs in a micro- or small installation connected to an electrical distribution grid through an internal electrical installation of a multi-apartment building that accommodates a power delivery point of the said recipient (Art. 2 point 27c of the act on RES). Energy produced in this manner, however, must not be the subject of main economic activity described in regulations issued under Art. 40 section 2 of the act of 29 June 1995 on official statistics in the case of a final recipient that is not a recipient of electricity in a household[314]. The term of virtual prosumer of renewable energy, defined in Art. 2 point 27b of the act on RES, has covered a final recipient that generates electricity solely from RES for their own needs in an RES installation connected to an electrical distribution grid in a location other than the place where the electricity is supplied to the recipient, whereby, at the same time, it is not connected to an electrical distribution grid via an internal electrical installation of a multi-apartment building. The limitation concerning the prohibition of generating energy as the main subject of economic activity also applies in the case of this type of entity.

The act on RES allows for generation of solar energy in an installation connected to the electrical installation of a multi-apartment building for the needs of users of several premises located at such a building. In such a case, the act on RES imposes on the prosumers an additional obligation in form of the need to regulate, by way of an agreement, the photovoltaic installation and settlement of electricity generated by such an installation. One of the obligatory elements of the prosumer agreement listed in the contents of Art. 4a section 1 of the act on RES is the requirement to specify the percentage share attributable to individual collective prosumers of renewable energy or virtual prosumers of renewable energy in generation of solar energy, and the maximum installed capacity corresponding to the said share (Art. 4a section 1 point 1 of the act on RES). One photovoltaic installation can be utilized to generate electricity for the use of several premises. Prosumers – users of those premises have a percentage share in the solar energy generated in this manner. However, they must specify a representative who will have the right to represent them, especially before the operator of the electrical distribution system, manager of a multi-apartment building or architecture and building administration authority[315].

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[313] The act of 29 October 2021 on amendment of the act on renewable energy sources and certain other acts, Polish Journal of Laws of 2021, item 2376

[314] Polish Journal of Laws of 2022, item 459

[315] Art. 4 a section 1 point 3 in relation to Art. 2 point 29b of the act on RES

TRADE IN ENERGY GENERATED IN A PHOTOVOLTAIC INSTALLATIONS

The term "photovoltaics" is frequently used in common language. Photovoltaic installations that allow for acquisition of sunlight and processing it into solar power are very popular. This is due to the fact that they constitute an innovative RES technology which gives the opportunity to reduce the costs of consumption of electricity and obtain an alternative source of energy. The act on RES and legal acts within the scope of energy law[316], construction law[317] and law on protection of the environment[318] provide for the possibility and specify the conditions for building a photovoltaic installation, although regulations of law do not provide a definition for this term. Photovoltaics is known, however, as a renewable source of energy mentioned in the act on RES.

The Polish legislator has provided quite restrictive rules, not only within the scope of permissions to install photovoltaic panels, but also in the scope of generation of electricity in such an installation. The legislator also provides separate rules for the settlement of amount of energy generated in a micro- and small installation or energy transmitted to a distribution grid.

In the case of electricity generated in an RES micro-installation, the grounds for the settlement of amount of energy is the amount of energy transmitted to the electrical distribution greed compared to the amount of energy collected from the grid in order to be used for own needs of the prosumer of renewable energy that generates electricity in a micro-installation with a total installed capacity compliant with Art. 4 section 1 of the act on RES. The amendment of the act on RES of 2021[319] introduced changes within the scope of settlement of electricity transmitted to the electrical distribution greed, making it dependable on the date of transmission to the grid[320]. Settlement of the amount of energy transmitted to the grid within the period from 1 April 2022 to 30 June 2022 includes the amount of energy transmitted within this period to the electrical distribution grid compared to the amount of energy collected from the grid in the said period to be used for own needs by the prosumer of renewable energy or collective prosumer of renewable energy that generates electricity in a micro- or small installation with a total installed capacity compliant with Art. 4 section 1a point 1 of the act on RES, as well as the value of electricity transmitted to the grid since 1 July 2022 and generated in an RES installation which the connection to the grid and transmission of energy of took place after 31 March 2022 compared to the value of energy collected from such a grid to be used for own purposes. This rule shall not apply to micro-installation connected to the grid according to Art. 4d sections 2-11 of the act on RES[321]. However, there is no exhaustive justification as to adoption of criteria regarding specification of periods that determine the rules for settlement of generated energy. Introduction of new rules for settlement of energy generated from RES for newly established investments may have a significant impact on the attractiveness thereof.

The installed capacity of an RES installation must not exceed the contractual capacity

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316 Act of 10 April 1997 – the Energy Law Act, Polish Journal of Laws of 2022, item 1385

317 The act of 7 July 1994 – Building Law (Polish Journal of Laws of 2021, item 2351), the act of 27 March 2003 on spatial planning and development (Polish Journal of Laws of 2022, item 503)

318 The act of 27 April 2001 – Environmental Law, Polish Journal of Laws of 2021, item 1973

319 The act of 29 October 2021 on amendment of the act on renewable energy sources and certain other acts, Polish Journal of Laws of 2021, item 2376

320 Cf. Art. 4 section 1a, 1b of the act on RES

321 See Art. 4 section 1a of the act on RES

determine for the power delivery point where it is installed and must not exceed 50 kW[322]. Generated solar energy must be transmitted to the electrical distribution grid, while its amount must be fully metered[323]. The role of the installed metering and settlement system (as it can be concluded from the name itself) is to settle electricity transmitted to the electrical distribution grid. For the settlement as such, the seller of electricity is obligated to purchase it under an agreement referred to in Art. 5 of the Energy Law Act[324] or under a comprehensive agreement or sales agreement concluded with the prosumer[325].

The settlement may cover energy generated from RES by a prosumer of renewable energy as part of a micro-installation and that has been transmitted to an electrical distribution grid and then obtained by the prosumer for their own needs. The term "prosumer of renewable energy" refers to a final recipient who generates electricity solely from RES for their own needs as part of a micro-installation, provided that in the case of the final recipient who is not a recipient of power at a household, it does not constitute the main economic activity specified pursuant to regulations issued under Art. 40 section 2 of the act of 29 June 1995 on official statistics. In other words, a prosumer of renewable energy can, as part of a micro-installation, generate electricity from sunlight for their own needs but must not use it for their own needs immediately. The prosumer is obligated to transmit such energy to a distribution grid i.e., a high, medium or low voltage electrical grid, the network traffic of which is managed by the operator of the distribution system[326], in the amount regulated by the act and according to reading of the metering and settlement system, and then they should collect the energy from the grid in order to use it. Such a solution will allow the seller to keep record of the energy generated in a photovoltaic installation. The prosumer of renewable energy is also obligated to collect energy transmitted to the grid within 12 months from the date on which it was transmitted to the grid. Uncollected energy shall be at the seller's disposal and it should be settled with the prosumer. The value of the unused energy will constitute an overpayment that is returned to the prosumer after the costs of settlement were covered[327]. The act on RES establishes a maximum amount of the overpayment, due to the fact that the amount of the reimbursed overpayment must not exceed twenty per cent of the value of electricity transmitted to the grid in the calendar month that the overpayment refers to[328]. If the consumed energy is higher than the electricity generated from RES that the prosumer is entitled to, it is subject to a fee just as in the case of electricity used from a distribution grid[329].

In the case of generation of solar energy as part of one installation by more than one collective prosumer of renewable of energy[330], they are entitled to a percentage share in generation of solar power under the agreement concluded by the prosumers. Each prosumer takes part in

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322 Art. 4 section 1c of the act on OZE

323 Art. 4 section 2 of the act on RES

324 Art. 5 section 1 of the Energy Law Act stipulates that provision of gas fuels or energy takes place after prior connection to the grid […], under a sales agreement and agreement for transmission and distribution or sales agreement, agreement for transmission and distribution services and agreement for services concerning storage of gas fuels or agreement for provision of gas liquefaction services.

325 Art. 40 section 1a of the act on RES

326 Art. 3 section 11b of the Energy Law Act

327 Art. 4 section 11 point 1 and 2 of the act on RES

328 Art. 4 section 11 point 2 of the act on RES

329 Art. 4 section 2c point 1 of the act on RES

330 Since 2 July 2024, this regulation will also refer to a virtual prosumer of renewable energy

the settlements concluded with the seller according to their respective share. The amendment of the act on RES of 2021 resolved doubts as to the possibility of trade in energy generated in an installation constructed by the owner or manager of a multi-apartment building and the use of such energy by tenants of premises located in that building. A rule was introduced that solar energy can be generated solely for own needs. This was distinguished by the act on RES which uses it both in the contents of regulations that permit generation of electricity from RES as well as in definitions of terms used in provisions of the said act. Thus, the legislator blocked the possibility of further sales of electricity, which can be exemplified by transmission of solar energy to premises of a multi-apartment building. A separate term was even introduced to define a user of premises in a multi-apartment building – i.e. collective prosumer of renewable energy and virtual prosumer of renewable energy. The act on RES qualifies the user of premises in a multi-apartment building who utilizes energy generated solar energy as a generator of the said energy and does not allow the generator of solar energy who is the owner of the multi-apartment building to interfere with the trade in electricity obtained from sunlight and its chargeable disposal in favor of their tenants.

CONCLUSIONS

According to provisions of the act on RES, trade in electricity generated from the sun is almost impossible in the case of generation of electricity as part of a micro- or small installation. Different regulations treat on conducting economic activity within the scope of generation of power at RES installations that are not micro- or small installations, which requires obtaining a license under rules and conditions stipulated in the Energy Law Act. In the case of a micro- or a small installation, the legislator highlights that generated solar energy can be used only for own needs, with the possibility of returning the excess of electricity generated in this manner to the electrical distribution grid owned by the energy company. The rule does not apply to the energy company. When the energy is accepted in the grid and remains unused by its prosumer within a specified period, the energy company can freely dispose of such energy after concluding a settlement with the prosumer. The act on RES is a continuation of the objectives of the Energy Law Act, according to which energy must not be disposed of at a price higher than the price of purchase[331]. Electricity generated in a photovoltaic installation must be considered as obtained for free. Thus, it can be disposed of further on free of charge. The amendment of the act on RES of 2021 complemented the said objectives by qualifying tenants of premises in multi-apartment buildings as co-generators of solar energy. The prosumers' obligation to conclude an agreement prevents any other form of settlement of costs of energy generated in a photovoltaic installation that will be used by tenants of a multi-apartment building.

[331] Art. 45a section 4 of the Energy Law Act

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The relationship between human rights and sustainable development

Abstract

The goal of countries over the years has been to increase gross domestic product accompanied by economic growth which leads to increased economic well-being of their citizens. In many countries economic growth has been the main purpose, so crucial as to sacrifice natural resources, damage the environment and restrict human rights. Such models have been applied in the economies of dictatorial and semi-free states. But states with functioning democracies have not sacrificed everything to achieve gross domestic product growth. Although for these countries the main goal is economic growth, the protection of human rights is a constitutional obligation for them. Also, the continuous awareness of civil society in environmental protection has forced the governments of many countries in the application of environmental protection measures and in the creation of economic models of sustainable development. Although economic growth (one of the goals of sustainable development) can violate human rights, the respect for human rights is one of the main pillars on which the concept of sustainable development is built. If we look at the United Nations 2030 Agenda for Sustainable Development, some of the 17 Sustainable Development Goals are about the protection of human rights. The purpose of this paper is to highlight the relationship between human rights and sustainable development. This paper also aims to answer the question: Are human rights a guarantee for sustainable development?

Keywords: sustainable development, human rights, constitutional obligation, 2030 Agenda.

Introduction

Increasing economic well-being and increasing the standard of living is one of the primary goals of every individual. Improving living conditions with the aim of ensuring life needs are among the objectives of every family economy. A reflection of the quality assurance of the living needs of individuals is also the economic policy followed by each state. The main goal of a state's policies is to improve the standard of living of its citizens. The increase in the standard of living leads to an increase in the consumption of natural resources, affecting in many cases irreversible damage to the environment where we live. For this reason, the policies of many UN member states are now oriented not only to the development of their economies, but to sustainable development. The aim of sustainable development is to preserve natural resources for future generations so that their quality of life will be not affected by the consequences of increasing the quality of life of today's generations. The right to a better quality of life, which includes the right to education, the right to food and the right health, is one of the economic, social and cultural rights. The enjoyment of these rights by future generations is included in some of the sustainable development goals. Therefore, human rights cannot

be seen separately from sustainable development. We can say that they are prerogatives for sustainable development. On the other hand, the unlimited enjoyment of these human rights from the today's generation constitutes a threat to sustainable development. It is the respect of the human rights of today's generation and at the same time of the human rights of the next generation that makes sustainable development necessary.

The concept of Sustainable Development

The concept sustainable development has its origins in the report "Our Common Future" publicized in 1987 by the United Nations World Commission on Environment and Development. Author of the report was the Norwegian Prime Minister Gro Harlem Brundtland, who was the head of this UN commission.[332] With the Brundtland Report the United Nations changed the development strategy, which until now was focused on market liberalization and growth. At the end of the 1970s it became clear that economic growth cannot be achieved without the consumption of ecological resources. It didn't lead to better social conditions and improvement of the quality of life, but rather industrialization and urbanization brought significant new poverty problems and risks.[333]

In the UN conference of states in Rio in 1992 the concept of sustainable development has been declared as the central guiding principle of the United Nations. This was also reflected in Agenda 21 approved in this conference. It combines two central dimensions: the integrative approach and future orientation. The integrative approach analyzes the economic, social, and ecological elements cumulatively. According to this approach, economic policies that aim at economic growth without considering the negative effects that this policy can cause to the environment and social balance are not sustainable. Future-oriented means that economic development and the increase of well-being should not be limited only to today's generations, but economic policies should be developed in such a way as to take future generations into consideration bringing positive results in the areas of economy, society, and the environment.[334]

From this point of view, it can be derived the concept that sustainable development in other words means that today's generations take responsibility for those of the future. Sustainable development is also to be understood as a protective reaction, which primarily reacts to the threat to nature and the environment from the global ecological crisis. Because economic growth not unlimited is and resource of nature not infinitely renewable are, this have led to a self-limitation-politic in many countries. The present generation must change their developing art and not consuming more than can be replaced in order that the future generation will have the necessary resources to satisfy their basic needs.[335] In this point the concept of sustainable development differs significantly from human rights. This way of thinking does not match with the previous understanding of human rights claims, but it can be morally and politically desired.[336] "The two concepts have different roots and serve different purposes. The Universal Declaration of Human Rights is intended to create a social and political order guaranteeing the development of every

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[332] Kaufmann, Menschenrechte als Fundament eines nachhaltigen Staates, SAGW 3/2020, 25.

[333] Wrase, Nachhaltigkeit braucht Menschenrechte: Die Umsetzung der UNO-Ziele ist auch eine juristische Aufgabe, WZB Mitteilungen 150/2015, 42.

[334] Idem, 43.

[335] Fritzsche, Zum Verhältnis von Menschenrechtsbildung und Bildung für nachhaltige Entwicklung – Gemeinsamkeiten verstehen und gestalten, ZEP 1/2013, 35.

[336] Lohmann, Umweltzerstörung, in Pollmann/Lohmann (ed.) Menschenrechte. Ein interdisziplinäres Handbuch (2012) 438–443.

individual human person and of humanity. Starting with the rights of the individual, it sets out the basic prerequisites for a just social order. It is not immediately concerned with preserving the planet. The concept of sustainability has developed out of the disturbing awareness that human activity has sparked off an inexorable process of destruction".[337]

One of the goals of the globalization processes is the economic growth and the eradication of poverty in the world. Thus, poverty in developing countries was identified as one of the key issues of global crises. But poverty is caused by the unequal use of natural resources in industrialized and developing countries creating a development gap between these two types of countries. If we aim to protect the future generation without considering the developmental needs of present generations, it is possible to violate their human rights, especially of those layers of society that are unable to provide their basic needs. Sustainable development should be interpreted in such a way that it can be applicable not only between generations but also within a generation.[338] Here the indivisibility of human rights from Sustainable development comes to the fore. This interpretation is also supported into the new guiding principle of the Brundtland report "Our Common Future" published in 1987 by the United Nations World Commission on Environment and Development, which states: „Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs "[339].

The same concept was applied also in the „2030 Agenda for Sustainable Development", which was adopted at the United Nations (UN) summit conference in New York at the end of September 2015 and consisted in 17 goals covering several fields necessary to improve the quality of life. Some of the goals are formulated in absolute terms applicable for all countries (like Sustainable Development Goal (SDG) 7: „Ensure affordable and clean energy sources for all"), but some are also relative applicable to the affected states (like SDG 10: „Reduce inequality within and between countries").[340] The 17 SDGs are: no poverty, zero hunger, good health and well-being, quality education, gender equality, clean water and sanitation, affordable and clean energy, decent work and economic growth, industry, innovation and infrastructure, reduce inequalities, sustainable cities and communities, responsible consumption and production, climate action, life below water, life on land, peace, justice and string institutions, partnership for the goals.

Many SDGs are requirement that are as important for industrialized countries as it is for developing countries, like reducing social inequality. The same applies to environmental policy goals such as the fight against climate change (SDG 13), where the European Union and the United States are among the main emitters of greenhouse gases alongside China.[341]

The Human rights and sustainable development

Sustainable development is a protective reaction to the threat to nature and the environment. Human rights arose also as protective responses to experiences of threat after the Second World

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[337] Vischer, Human Rights and Sustainability: Two Conflicting Notions? (2004) 48, <koed.hu/sw249/lukas.pdf> (06.07.2022).

[338] Fritzsche, Menschenrechtsbildung und Bildung für nachhaltige Entwicklung, ZEP 1/2013, 35.

[339] World Commission on Environment and Development (WCED) (Brundtland-Report) (1987), 43, <un-documents.net/ocf-ov.htm> (06.07.2022).

[340] Wrase, Nachhaltigkeit braucht Menschenrechte, WZB Mitteilungen 150/2015, 42.

[341] Wrase, Nachhaltigkeit braucht Menschenrechte, WZB Mitteilungen 150/2015, 42.

War. The international human rights protection system arose in 1948 with the passing of the Universal Declaration of Human Rights. After this non-binding declaration, a series of legal initiatives were undertaken at the international level with the approval of several international and regional treaties with a binding character. As a result of these treaties, human rights based on their development and spread are classified into three categories. The first category of political-civil rights, the second category of economic, social and cultural rights and the third category of solidarity rights. Because the political-civil rights were implemented in the capitalist states and the social and cultural rights in the socialist states there was a debate about the second-rate human rights of the second generation for decades. After the fall of the iron curtain and especially after the Vienna World Human Rights Conference in 1993, there was a reevaluation of the economic, social and cultural human rights, equating them with the political-civil rights. The goal of human rights is non-discrimination and the right to self-determination for everyone. They aim to protect the individuals from heteronomy and discrimination.[342] Both human rights and the SDGs aims to secure a decent life for the people. But the point of view in achieving this goal is different. Human rights pursue this goal in individual perspective protecting the rights of every single person, while the SDGs take a global perspective. However, some SDGs comply with the human rights, others contain a variety of references to human rights.[343]

The analysis carried out by the Danish Institute for Human Rights concluded that over 90 percent of the 169 sub-goals formulated in the 2030 Agenda refer to human rights. For example, Goal 13, "Climate Protection Measures", relates to the right to life, the right to physical and mental health, the right of children to development or the right of disabled people to safety and protection in risky situations.[344] Also the motto of the agenda, "leave no one behind", relates to the principle of non-discrimination or the principle of equality. Especially the economic, social and cultural human rights can be found incorporated in many SDGs. For example SDG 1 "no poverty" relates to the right to an adequate standard of living (Social Pact, Art. 11), SDG 2 "no famine" coincide with the right to food (Social Pact, Art. 11), the right to health (social package, Art. 12) has the same substance with the good health care (SDG 3), the right to education (social package, Art. 13) relates to the quality education (SDG 4), or the SDG 5 "gender equality" coincide with the equality principle (Civil Pact, Art. 26, Women's Rights Convention. On the other hand, the civil and political rights are not explicitly reflected in the SDGs. But some SDGs like SDG 16 ("peace, access to justice, accountable, inclusive institutions") cannot be achieved without the implementation of the civil and political rights. An indirect reference can be made here. There are also several SDGs that have no direct correspondence in human rights. But the fulfillment of this SDGs cannot be achieved without the implementation of the human rights, like for example, an intact environment cannot be achieved without the implementation of human rights to life and health.[345]

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[342] Fritzsche, Menschenrechtsbildung und Bildung für nachhaltige Entwicklung, ZEP 1/2013, 34.

[343] Wagner/Sattelberger, In welchem Verhältnis stehen die Menschenrechte und die 2030 Agenda?, KfW Development Research 12/2017, 1.

[344] Danish Institute for Human Rights Danish Institute for Human Rights (2018): Human Rights and the 2030 Agenda for Sustainable Development, Copenhagen, 9.

[345] Wagner/Sattelberger, Menschenrechte und die 2030 Agenda, KfW Development Research 12/2017, 1.

Conclusions

As a conclusion there are numerous SDGs that correspond to human rights. It is human rights that have made it necessary to create a common environment regulated by several SDGs that should serve the present and future generations.

Because human rights are binding under international law, they can be enforced in court. In the international treaties that regulate human rights, binding instruments are provided for their implementation. There are also several other instruments at international level that serve to monitor and interpret, like for example the UN treaty committees and special rapporteurs.

The 2030 Agenda, on the other hand, stems from a legally non-binding UN resolution. It cannot force UN member states to implement it. It is up to these countries to decide whether and what SDGs to implement. But although there are no mechanisms to force these countries to implement the SDGs, there are other instruments like the High-Level Political Forum, which monitors SDGs implementation and serves as a voluntary peer review mechanism.[346]

BIBLIOGRAPHY

Danish Institute for Human Rights Danish Institute for Human Rights (2018): Human Rights and the 2030 Agenda for Sustainable Development, Copenhagen, 9

Fritzsche Karl-Peter, Zum Verhältnis von Menschenrechtsbildung und Bildung für nachhaltige Entwicklung – Gemeinsamkeiten verstehen und gestalten, ZEP 1/2013, 35

Kaufmann, Menschenrechte als Fundament eines nachhaltigen Staates, SAGW 3/2020, 25

Lohmann Georg, Umweltzerstörung, in Pollmann/Lohmann (ed.) Menschenrechte. Ein interdisziplinäres Handbuch (2012) 438

Vischer Lukas, Human Rights and Sustainability: Two Conflicting Notions? (2004) 48, <koed.hu/sw249/lukas.pdf> (06.07.2022)

Wagner Léonie Jana/Sattelberger Julia, In welchem Verhältnis stehen die Menschenrechte und die 2030 Agenda?, KfW Development Research 12/2017, 1

World Commission on Environment and Development (WCED) (Brundtland-Report) (1987), 43, <un-documents.net/ocf-ov.htm> (06.07.2022)

Wrase Michael, Nachhaltigkeit braucht Menschenrechte: Die Umsetzung der UNO-Ziele ist auch eine juristische Aufgabe, WZB Mitteilungen 150/2015, 42

[346] Idem 1.

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Sustainability of social rights in relation to available economic resources

Abstract

This paper addresses the current issue of the legal sustainability of the modern welfare state system. The economic crisis makes it impossible to guarantee state intervention everywhere, especially in the social sphere, without any restrictions, as was the case in the past. The problem thus arose of balancing economic and financial needs with the protection of fundamental rights that can be exercised in the context of social security systems. The article deals with the complex search for an acceptable balance by legal systems to meet the need for the sustainability of social rights in relation to available economic resources. Future perspectives for reflection and action are outlined in connection with the problem of the sustainability of social rights in the face of unavailability of economic resources. The gradual duty of solidarity grants multilevel guarantees to the sustainability of the social human rights. The new Social Rights Pillar of the EU could offer an opportunity for strengthening European social solidarity that could be necessary and required for the consolidation of the fiscal compact.

Keywords: Human rights, social rights and social duties, sustainability, available economic resources, EU Social Rights Pillar.

According to an official definition, developed by the World Commission on Environment and Development (also known as the "Brundtland Commission"), contained in the document approved by the General Assembly of the United Nations in 1987, *the principle of sustainability* must guide "the development that meets the needs of the present without compromising the needs of the future generations"[347]. Again, according to the position taken by the United Nations Brundtland Commission, sustainable development is founded on four pillars: economic, social, environmental and institutional. The collapse of one of these pillars can lead to the unsustainability of the development process.

The Brundtland Commission's approach was reiterated and expanded by the United Nations General Assembly, with the unanimous approval, on 25 September 2015, of the document Transforming our world: the 2030 Agenda for Sustainable Development, containing the forecast of 17 goals and 169 targets, inspired by the purpose of leading the world on a path of sustainability and resilience, as well as the commitment to ensure that no one is left behind[348].

The principle of sustainability has passed into the sphere of law, because it has been included in the European legal system (Article 3 of the Lisbon Treaty), as well as having been incorporated among the fundamental principles in various Constitutions, for example

[347] Brundtland Commission (1987). Our Common Future. New York, NY: Butterworth.
[348] United Nations (2015). Sustainable development goals. Retrieved from http://www.un.org/sustainabledevelopment/sustainable-development-goals/.

in Norway and France, as well as mentioned in the constitutions of 54 countries of the 193 member states of the United Nations[349].

The problem that arises today in a relevant way is that of the legal sustainability of the modern welfare state system, understood as a social security apparatus managed by the public power through considerable spending commitments. A problem of balancing between economic and financial needs and the protection of fundamental rights that can be exercised in the context of welfare systems has inevitably emerged, since the satisfaction of social rights involves the use of large financial resources, taking into account the complexity of the society in which we live, crossed by divisions and inequalities, by poverty and social exclusion.

When considered as a means, human rights have often been deemed supportive of economic growth. In their quantitative study on "The Economic Effects of Human Rights", Blume and Voigt show that a high level of enjoyment of civil, political, economic, social or cultural human rights are generally significant drivers of economic growth[350].

On the other hand, when human rights are considered as goals, several authors have underlined how growth is a necessary condition to realize them. Using a qualitative approach, Feild and Mister already considered economic growth as "essential" to guaranteeing civil and political rights of minorities in the US in 1965[351]. In their review of theoretical and empirical studies, Sano and Marslev also conclude that economic development is undoubtedly important for securing social rights[352]. Using data from 138 countries between 1965 and 2010, Cole demonstrates for instance that economic growth has a favourable impact on human rights although the results decrease in depth and robustness when focusing on high income countries[353].

The current theme has become that of the need in situations of economic and financial crisis to limit social rights within the boundaries of the financial compatibility of the markets. This need is countered by the so-called thesis of the "constitutionalism of fundamental assets", which aims to subtract social assets from any comparison with other assets, considered essential elements of the coexistence pact and, therefore, orienting the public finance system towards the protection of fundamental rights.

The most recent comparative research on the constitutionalisation of social rights still clearly divides the constitutions of post-communist countries, flanked by those of Latin America, from those of "Western Europe and North America", which would be characterized by a strong rejection of the constitutionalisation of social rights[354]. However, after the fall of the Wall and of the Soviet systems, European ideological reserves can be considered to be in the process of overcoming. Although there are still divisions between north and south or between east and west, eg. on the human social rights of migrants, this political geography designed

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[349] Groppi, T. (2016). Sostenibilità e costituzioni: Lo Stato costituzionale alla prova del futuro. Diritto Pubblico Comparato ed Europeo, 1, 43-78.

[350] Blume L. and Voigt S. The Economic Effects of Human Rights, (2007) 60 Kyklos 509.

[351] Petel M., Vander Putten N. Economic, social and cultural rights and their dependence on the economic growth paradigm: Evidence from the ICESCR system. Netherlands Quarterly of Human Rights 2021, Vol. 39(1) 53–72.

[352] Marslev, K., & Sano, H-O. (2016). The Economy of Human Rights: Exploring Potential Linkages Between Human Rights and Economic Development. The Danish Institute for Human Rights.
URL: https://www.humanrights.dk/publications/economy-human-rights.

[353] Wade M Cole, 'Too Much of a Good Thing? Economic Growth and Human Rights, 1960 to 2010'. (2017) 67 Social Science Research 72.

[354] C. Jung, R. Hirschl and E. Rosevear. 2014. 'Economic and Social Rights in National Constitutions'. 62 American Journal of Comparative Law, 1043-1098. http://ssrn.com/abstract=2349680 .

from a US perspective nevertheless underestimates the cohesion of Europe which makes the rejection of social rights more and more a phenomenon of US "ecceptionalism" which is less and less able to satisfy expectations and claims of global hegemony.

The renewed temptations of unilateralism and obstruction in the face of a growing social consensus within the United Nations, for example, also correspond to this changing exceptionalism eg. on the objectives of the 2030 Agenda for Sustainable Development. The first of the objectives, the elimination of forms of extreme poverty is defined as a concretization of the right to a social protection system: *"All people must enjoy a basic standard of living, including through social protection systems"*. Social protection systems cannot fail to achieve even the last of the objectives linked to classical social rights, the reduction of inequalities *"within and among the countries"*.

One of the big problems is whether fundamental rights are proper to every human being, or whether it is possible to limit them only to the category of citizens and regular foreigners or whether it is possible to extend them to illegal foreigners as well. It should also be considered that social rights are more affected by the economic crisis than other rights, due to the costs that must be incurred for their application.

In the European Union, the impact of austerity measures on the protection of various fundamental human rights has been very significant. The European Parliament has carried out an in-depth analysis in this regard in 2015. The countries surveyed were not only the countries that requested financial assistance from the institutions of the European Union (Greece, Spain, Ireland, Portugal, Cyprus), but also other countries that had to adopt significant austerity measures (Italy and Belgium). In particular, with reference to the right to healthcare, changes have been made to health systems in all the states considered: in Greece and Cyprus these interventions have led to profound reforms of their respective systems. In particular, the austerity measures in this sector have led to the restriction of access to health services, the introduction or increase of costs to be borne by the user, the reorganization of hospitals and service providers, the reduction or freezing of staff wages, reduction of staff.

The United Nations General Assembly also recognized the considerable detriment to the enjoyment of social rights following the widespread austerity policies in the Troika States. With reference to Greece, it is noted that: «the measures implemented as part of adjustment, in particular the job cuts, and cuts to wages and pensions, have had the overall effect of compromising the living standards of the population and the enjoyment of human rights».

The recent "Reflection Paper on the Social Dimension of Europe" of the European Commission of 26 April 2017[355] therefore records considerable dissension on the idea of a social Europe. According to many, the EU is only a market economy, but it has nothing social. According to some, the EU must not even become a social union, since social affairs are the exclusive competence of the welfare states. According to others, the EU must instead reinvent itself as a social Europe. In fact, Europe boasts that it already hosts the fairest societies in the world, but 20% of the richest households still earn five times more than 20% of the poorest households and a quarter of the population is at risk of poverty or social exclusion.

Indeed, conflicts over the duties of solidarity and the sustainability of social rights in the EU returned to the agenda in 2018 when it came to transforming the rules of the Stability and Growth Pact translated into the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) of 2012, in particular those of the so-called Fiscal

[355] COM(2017) 206.

Compact to incorporate into the EU treaties. These solidarity rules could be integrated by the new "pillar of social rights" adopted in a "recommendation" pursuant to art. 292 CDFUE[356]. An interinstitutional declaration (like the CDFEU in its original version) is expected to "act as a guide to achieve effective social and employment outcomes in response to current and future challenges so as to meet the essential needs of the population and ensure better implementation and enforcement of social rights". The pillar was designed primarily for the euro area, but is applicable to all Member States wishing to be part of it. This is formally a new declaration of rights that "reaffirms some of the rights already present in the European Union acquis" and indicates how to "deliver new and more efficient rights to citizens, that is "European Union citizens and third country nationals legally resident in the Union", excluding citizens of third countries[357]: "The aim of the European Pillar of Social Rights is to serve as a guide towards efficient employment and social outcomes when responding to current and future challenges which are directly aimed at fulfilling people's essential needs, and ensuring better enactment and implementation of social rights"[358].

All rights - the rights of liberty no less than social rights - depend to a greater or lesser extent on "selective investments of scarce resources", and as Holmes and Sunstein write they have roots "in the most unstable terrain of politics", destined for this "to be more susceptible to weakening than the aspiration to legal certainty could lead us to wish"[359]. It should therefore not be surprising that the public budgets of European states have become the term of reference for selecting access to social rights and defining their positive contents, indeed, for some time now lawyers have been talking about social rights as "financially conditional rights", as we can notice it also in the jurisprudence of the Constitutional Court of Italy[360]. But what, on closer inspection, can make this crisis a breaking point, is that the restriction of social rights is not the result of discretionary choices by states or the outcome of conflicts on models of distributive justice, nor of scarcity of public resources, but rather of the "despotism" of the financial markets, able to escape the control of state devices and yet capable of over-determining public policies.

At this point, the question that inevitably arises is whether it is legitimate to believe that every fundamental right must always be subject to a sustainability check in relation to the available resources and whether it is permissible to set a limit to allow the exercise of these fundamental rights, by selecting the recipients of these rights.

In any case, it must be highlighted that only a state with a sustainable budget is able to give a concrete guarantee to the realization of social rights. It is therefore up to the legislator to make the choices necessary to assign the resources, identifying the priorities in assigning

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[356] C(2017) 2600 final Commission Recommendation of 26.4.2017 on the European Pillar of Social Rights.

[357] EUROPEAN COMMISSION, COM(201) 250 final "Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the regions establishing a European pillar of social rights (26. 4. 2017), http://eur-lex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:52017DC0250&from=EN .

[358] Cf. (14) The European Pillar of Social Rights expresses principles and rights essential for fair and well-functioning labour markets and welfare systems in 21st century Europe. It reaffirms some of the rights already present in the Union acquis. It adds new principles which address the challenges arising from societal, technological and economic developments."

[359] Fontana, G. (2013). Crisi economica ed effettività dei diritti sociali in Europa. Forum di quaderni costituzionali. Retrieved from: http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0439_fontana.pdf.

[360] Salazar C., Crisi economica e diritti fondamentali, Relazione al XXVIII Convegno annuale dell'Associazione Italiana dei Costituzionalisti (2013), in rivistaaic.it, 4.

them, while it is up to the judges to assess whether and how to restore the injured rights in the individual cases submitted for their consideration.

In reality, however, we are witnessing a different worrying phenomenon in relation to which the legislator, an expression of the electoral will, favors a short-term perspective, which does not respect the needs of sustainability, while the judges are entrusted with a difficult task of evaluating social needs, often to be balanced with other interests of significant importance.

According to the Committee on Economic, Social and Cultural Rights (CESCR) opinion - an economic recession or a lower growth rate – especially if combined with social tension and political instability – may be a legitimate "factor and difficulty affecting the degree of fulfilment" of the obligations deriving from the UN Pact for economic, social and cultural rights. The Committee very clearly acknowledged that a recession or slow growth may impede the further realization of ESC rights or affect their enjoyment. As an economic recession may legitimately explain a worsening of the situation of social rights in a country, the Committee particularly welcomes reports demonstrating that States continue to take actions for the realization of rights domestically and abroad in times of economic difficulties.

In that sense, the CESCR Chairperson's letter written in 2012 in response to the austerity programmes enacted by EU States Parties due to the sovereign debt crisis acknowledges that "economic and financial crises and a lack of growth can lead to retrogression in the enjoyment of rights" and that adjustments in the implementation of the Covenant during that period are "inevitable". Nonetheless, the Chairperson underlined the necessity "to avoid at all times taking decisions which might lead to the denial or infringement of ESC rights, especially those of the most vulnerable, marginalized and disadvantaged".

The central assumption of the Committee's case law is that economic growth is a means to achieve progress in the enjoyment of ESC rights in that it enables the creation of a conducive environment for their realization. In various Concluding Observations, the Committee considered that economic growth may help in combatting unemployment[361], food insecurity[362], lack of social security[363], inequalities[364] and poverty in general[365].

A stagnation or a worsening of the ESC rights situation in a state experiencing economic growth is regarded as either not acceptable. For instance, in its 1996 Concluding Observations concerning El Salvador, the Committee emphasised that "the continued existence of such a level of poverty in a country experiencing constant economic growth is unjustifiable"[366]. The CESCR, furthermore, regularly notes with concern "high levels of poverty, despite the fact that the State party has a high national income". This does not apply to poverty only: in its 2006 Concluding Observations related to Canada for instance, the Committee was concerned that the State had not increased its support for post-secondary education, social assistance and social services compared to former levels "in spite of the sustained economic growth in the State party during these last years"[367].

Economic growth does not necessarily suffice to improve the realization of ESC rights. It remains a means and not an *end per se*. In its General Comment No. 20 on non-discrimination

[361] CO, India, E/C.12/IND/CO/5 (2008) para 20.

[362] CO, India, E/C.12/IND/CO/5 (2008) para 28. See also CO, El Salvador, E/C.12/1/Add.4 (1996) para 12.

[363] CO, Canada, E/C.12/CAN/CO/5 (2006) para 20.

[364] CO, Tajikistan, E/2007/22 (2007) para 45. See also CO, Panama E/C.12/1995/8 (1995) para 2.

[365] CO, Republic of Korea, E/1995/3/Add.19 (1995) para 9.

[366] CO, El Salvador, E/C.12/1/Add.4 (1996) para 12.

[367] Petel M., Vander Putten N. Economic, social and cultural rights and their dependence on the economic growth paradigm: Evidence from the ICESCR system. Netherlands Quarterly of Human Rights 2021, Vol. 39(1) 53–72.

in ESC rights, the Committee underlined that "economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socio-economic inequality"[368].

In conclusion, according to the above mentioned, economic growth is a means to achieving greater realization of social rights. From this perspective, economic growth increases States' capacities and leads to the creation of jobs. However, this only happens if the fruits of economic growth are inclusively redistributed referring to the human rights oriented States' public policies.

BIBLIOGRAPHY

Blume L. and Voigt S. The Economic Effects of Human Rights, (2007) 60 Kyklos 509.

Brundtland Commission (1987). Our Common Future. New York, NY: Butterworth.

C(2017) 2600 final Commission Recommendation of 26.4.2017 on the European Pillar of Social Rights.

C. Jung, R. Hirschl and E. Rosevear. 2014. 'Economic and Social Rights in National Constitutions'. 62 American Journal of Comparative Law, 1043-1098. URL: http://ssrn.com/abstract=2349680 .

CESCR, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20 (2 July 2009) para 1.

CO, Canada, E/C.12/CAN/CO/5 (2006) para 20.

CO, El Salvador, E/C.12/1/Add.4 (1996) para 12.

CO, India, E/C.12/IND/CO/5 (2008) para 20.

CO, India, E/C.12/IND/CO/5 (2008) para 28. See also CO, El Salvador, E/C.12/1/Add.4 (1996) para 12.

CO, Republic of Korea, E/1995/3/Add.19 (1995) para 9.

CO, Tajikistan, E/2007/22 (2007) para 45. See also CO, Panama E/C.12/1995/8 (1995) para 2.

COM(2017) 206.

EUROPEAN COMMISSION, COM(201) 250 final "Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the regions establishing a European pillar of social rights (26. 4. 2017), http://eur-lex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:52017DC0250&from=EN

Fontana, G. (2013). Crisi economica ed effettività dei diritti sociali in Europa. Forum di quaderni costituzionali. Retrieved from: http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0439_fontana.pdf.

Groppi, T. (2016). Sostenibilità e costituzioni: Lo Stato costituzionale alla prova del futuro. Diritto Pubblico Comparato ed Europeo, 1, 43-78.

Marslev, K., & Sano, H-O. (2016). The Economy of Human Rights: Exploring Potential Linkages Between Human Rights and Economic Development. The Danish Institute for Human Rights. URL: https://www.humanrights.dk/publications/economy-human-rights.

Petel M., Vander Putten N. Economic, social and cultural rights and their dependence on the economic growth paradigm: Evidence from the ICESCR system. Netherlands Quarterly of Human Rights 2021, Vol. 39(1) 53–72.

Salazar C., Crisi economica e diritti fondamentali, Relazione al XXVIII Convegno annuale dell'Associazione Italiana dei Costituzionalisti (2013), in rivistaaic.it, 4.

United Nations (2015). Sustainable development goals. Retrieved from: http://www.un.org/sustainabledevelopment/sustainable-development-goals/.

Wade M Cole, 'Too Much of a Good Thing? Economic Growth and Human Rights, 1960 to 2010'. (2017) 67 Social Science Research 72.

[368] CESCR, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20 (2 July 2009) para 1.

SECTION IV

Varie

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La vita, il tempo e lo spazio: l'anzianità come categoria dell'adultità e del diritto

Abstract
L'esigenza di ricostruire i regimi di tutela della persona alla luce delle coordinate di tempo e di spazio del singolo ordinamento giuridico riguarda non soltanto la persona matura, considerata nel pieno delle sue potenzialità psico-fisiche, ma anche la persona immatura, secondo un'accezione ampia, che comprende l'anziano in età involutiva. L'invecchiamento è il risultato dell'allungamento della speranza di vita dovuto ai progressi della biomedicina e delle condizioni ambientali ed ecologiche e rappresenta una delle maggiori sfide politiche, sociali ed economiche per le società moderne. La tutela dell'anziano si traduce in una forma di protezione e promozione della persona umana, che, per la sua peculiarità, pur nel rispetto della libertà e della dignità, non può prescindere da una stretta interdipendenza tra il contesto valoriale ed affettivo, i profili economici, l'attività socio-assistenziale e il servizio medico-sanitario.

Keywords: Anzianità; categoria dell'adultità; soggetti deboli; profili giuridici.

Sommario:

1. La vita dell'uomo è legata a due coordinate inscindibili ma distinte: il tempo[369] e lo spazio. Queste due coordinate vanno intese «non solo come dimensioni naturali nelle quali si dipana la parabola» dell'esistenza umana, ma anche come "luoghi dello spirito" nei quali l'uomo può «trovare un senso al proprio esistere»[370].
Poiché «l'esperienza del tempo» comporta «necessariamente l'esperienza dello spazio», la coesistenza di questi due limiti della vita rappresenta il tramite con cui l'individuo percepisce e vive la propria quotidianità, considerato che in essi «prende forma e si muove tutto ciò che nasce, cresce, si sviluppa e muore»[371].
Inscritta «nel tempo, la vita umana si trova limitata ad alcuni decenni»; inscritta «nello spazio tramite la vita corporea, l'esistenza si trova limitata» da un corpo che rende possibili i rapporti umani, ma che, al tempo stesso, «ne impedisce la moltiplicazione all'infinito»[372].
In funzione delle sue peculiarità, per gli antichi greci, «il tempo era il chrónos ma anche il kairós»: il «primo scorre, il secondo è la dimensione in cui accade "qualcosa"»; quindi, una sorta di "spazio pensato". Perciò, il chrónos «è quantitativo», mentre il kairós ha «una natura qualitativa», essendo «il tempo delle scelte, quando la luce entra nelle tenebre e permette di distinguere il bene dal male»[373].
Nel tempo e nello spazio, perciò, la manifestazione sociale e giuridica della persona è «affidata alla corporeità»[374]: il corpo non è soltanto un aggregato di tessuti, organi e funzioni vitali, ma «è pure il segno tangibile della dimensione spazio-temporale dell'individuo e l'espressione della sua interiorità»[375].
È decisivo, dunque, «educare l'uomo all'ontologia del corpo»[376] per scongiurare la «progressiva eclissi del valore della vita umana»[377].

2. Le neuroscienze, studiando le relazioni tra il corpo e i processi cognitivi, «hanno dimostrato l'irriducibilità dell'individuo alla corporeità, sebbene i nuovi modelli epistemologici abbiano rimarcato che l'esperienza corporea della persona – che ha un inizio e una fine temporale – debba essere collocata in una ben delineata dimensione spaziale»[378].
L'esigenza di ricostruire i regimi di tutela della persona alla luce delle coordinate di tempo e di spazio del singolo ordinamento giuridico, ossia all'interno delle assiologie di un sistema normativo concreto e mobile - per superare la tradizionale astrattezza della categoria del «soggetto giuridico»[379] - riguarda non soltanto la persona matura,

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[369] C. Rovelli, L'ordine del tempo, Milano, 2017, p. 13 ss.
[370] D. Ogliari, Tempo e spazio. Alla scuola di san Benedetto, Noci, 2012, p. 5.
[371] D. Ogliari, o.l.c.
[372] J.M. Gueullette, Vivere con Cristo. Prospettive cristiane sull'esistenza umana, Cinisello Balsamo, 1998, p. 53.
[373] F. Occhetta, Fede e giustizia. La nuova politica dei cattolici, Cinisello Balsamo, 2021, p. 26.
[374] F. Parente, Dalla persona biogiuridica alla persona neuronale e cybernetica. La tutela post-moderna del corpo e della mente, Napoli, 2018, p. 51.
[375] F. Parente, Dalla persona biogiuridica alla persona neuronale e cybernetica, cit., pp. 51-52.
[376] F. Parente, Dalla persona biogiuridica alla persona neuronale e cybernetica, cit., p. 52.
[377] F. Urso e A. Scognamillo, Bioetica. Una proposta per la scuola, San Giorgio Jonico, 2008, p. 100.
[378] F. Parente, Dalla persona biogiuridica alla persona neuronale e cybernetica, cit., pp. 52-53.
[379] P. Perlingieri , Il diritto del minore all'assistenza: aspetti problematici ed attuativi, in Id., La persona e i suoi diritti. Problemi del diritto civile, Napoli, 2005, p. 295.

considerata nel pieno delle sue potenzialità psico-fisiche, ma anche la persona immatura, secondo un'accezione ampia, che comprende «l'anziano in età involutiva»[380].

L'esistenza umana, infatti, «è segnata ogni giorno dal potere trasformante del tempo», che genera invecchiamento e mutamenti diversi nel corpo[381]. Per tratteggiare i lineamenti dell'anzianità, nella seconda lettera ai Corinzi, San Paolo di Tarso significativamente utilizza un'immagine eloquente[382]: «se anche il nostro uomo esteriore si va disfacendo, quello interiore si rinnova di giorno in giorno» (2Cor 4,16).

L'invecchiamento è il risultato dell'allungamento della speranza di vita dovuto ai progressi della biomedicina e delle condizioni ambientali ed ecologiche e rappresenta una delle maggiori sfide politiche, sociali ed economiche per le società moderne[383].

In realtà, si dovrebbe più propriamente parlare di invecchiamenti, di «processi molteplici e diversi nei quali le vecchiaie sono vissute: si vive infatti da anziani, si vive da vecchi e si vive da vegliardi, anche se questi ultimi restano rari»[384]. In questi termini, la vecchiaia non è un situazione statica, ma «un'evoluzione, un movimento e dunque anche un divenire»[385].

In breve, la vecchiaia è l'età «in cui ci si addentra come in un paese straniero, in una terra di cui conosciamo solo poche cose» e di cui può parlare solo «chi la attraversa»[386].

3. Nell'introdurre il tema della «preghiera dell'anziano», il cardinale Carlo Maria Martini, in un'opera avvincente, sottolinea che l'anziano, «nella sua crescente debolezza e fragilità», può essere considerato come «colui che sente il peso della fatica fisica e mentale e si stanca facilmente», vale a dire come un soggetto tendenzialmente «debole e fragile» nel corpo e nella mente[387].

Pure nell'eredità culturale della Bibbia, il "grande codice" dell'umanità, non mancano riflessioni sulla vecchiaia. Dal punto di vista lessicale, ad esempio, è significativo che, nel linguaggio ebraico, la lingua usata nell'Antico Testamento, il "vecchio" fosse «definito zaqen, da zaqan, "barba"»: la vecchiaia, dunque, «era l'età in cui non ci si radeva più», ci «si lasciava crescere la barba, e per indicare un vegliardo si ricorreva all'espressione zaqen gadol, "grande vecchio"»[388].

E' straordinaria, poi, la definizione della vecchiaia contenuta in una stupenda pagina del libro biblico di Qoheèlet che, con linguaggio metaforico, definisce l'ultima tappa della vita sulla terra, appunto la tappa del tramonto, come un «soffio di soffi» (Qo 12, 1-8)[389].

Altrettanto suggestiva è la lettura della senilità offerta dal libro del Salterio (Sl 90) che, nel ribadire la finitudine dell'essere umano, descrive la vita come il «giorno di

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[380] F. Parente, Diritti della persona anziana, tutela della salute e autonomia della volontà, in Rass. dir. civ., 2013, p. 463 ss.

[381] J.M. Gueullette, Vivere con Cristo. Prospettive cristiane sull'esistenza umana, cit., p. 53.

[382] E. Bianchi, La vita e i giorni. Sulla vecchiaia, Bologna, 2018, p. 63.

[383] F. Parente, Dalla persona biogiuridica alla persona neuronale e cybernetica, cit., pp. 213-214.

[384] E. Bianchi, La vita e i giorni. Sulla vecchiaia, cit., p. 12.

[385] E. Bianchi, La vita e i giorni. Sulla vecchiaia, cit., p. 29.

[386] E. Bianchi, La vita e i giorni. Sulla vecchiaia, cit., pp. 11-12.

[387] C.M. Martini, Qualcosa di così personale. Meditazioni sulla preghiera, Milano, 2009, pp. 3-4.

[388] E. Bianchi, La vita e i giorni. Sulla vecchiaia, cit., p. 39.

[389] E. Bianchi, La vita e i giorni. Sulla vecchiaia, cit., p. 45.

ieri passato in fretta, come un turno di veglia nella notte, o come la giornata dell'erba, che al mattino germoglia, fiorisce e cresce, e alla sera è secca ed è falciata»[390].

4. Nell'itinerario del diritto, l'età (minore, matura o senile) non ha alcun rilievo sulla capacità giuridica della persona (art. 1 c.c.) o sulla sua soggettività e non incide sull'attitudine alla titolarità delle situazioni soggettive, ma può limitarne o escluderne l'esercizio in funzione della natura dell'interesse tutelato e della concreta capacità di discernimento[391]. Nel fenomeno della rilevanza normativa dell'età, la stessa capacità naturale, quale attitudine intellettiva e volitiva (art. 428, comma 1, c.c.), non è un parametro statico, ma dinamico, che, nel tempo, «si modifica costantemente, ora accrescendosi ora affievolendosi»[392]. Difatti, il mutamento qualitativo della nozione «è espressione oltre che del patrimonio biologico anche delle acquisite esperienze e sensibilità»[393]. In altri termini, la capacità effettiva di ogni individuo «si evolve perché a evolversi è la personalità dell'uomo»[394]. Pure la moderna scienza dell'adultità, oltre a ribadire la complessità della realtà dell'anziano, conferma la prospettiva dell'educazione permanente della persona come «processo continuo, che si svolge dinamicamente, per tutta la vita, in modo unitario e non secondo una successione "stadiale"»[395].

5. Nella visuale dell'educazione permanente, persino la definizione delle diverse età dell'adulto in termini di «prima adultità» (tra i 25 e i 40 anni), «adultità di mezzo» (dopo i 40 e fino ai 65 anni) e «tarda adultità» (dopo i 65 anni)[396] non ha la valenza di un'autonomia periodale o di una «intermittenza evolutiva» dell'esistenza della persona[397], ma assume il significato di una mera dimensione ordinante dell'articolazione della vita dell'adulto[398].
Nel contesto di questa raffigurazione, la capacità d'intendere e di volere e la capacità di discernimento sono espressioni della graduale evoluzione e della potenziale involuzione psico-fisica della persona, che deve poter esercitare i diritti fondamentali parallelamente alla sua effettiva idoneità[399].

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[390] E. Bianchi, La vita e i giorni. Sulla vecchiaia, cit., p. 49.

[391] F. Parente, Diritti della persona anziana, tutela della salute e autonomia della volontà, cit., pp. 463-464; P. Perlingieri, Diritti della persona anziana, diritto civile e stato sociale, in Id., La persona e i suoi diritti. Problemi del diritto civile, cit., p. 360; P. Stanzione, Le età dell'uomo e la tutela della persona: gli anziani, in Riv. dir. civ., 1989, I, p. 444 ss.; G. Lisella, Rilevanza della «condizione di anziano» nell'ordinamento giuridico, in Rass. dir. civ., 1989, p. 794 ss.; V. Zambrano, La tutela dell'anziano, ivi, 1990, p. 200 ss.; G. Sanfilippo, Autonomia contrattuale e tutela dell'anziano, ivi, 1990, p. 100 ss.; C.M. Bianca, Senectus ipsa morbus?, ivi, 1998, p. 241 ss.

[392] P. Perlingieri, Diritti della persona anziana, diritto civile e stato sociale, in Id., La persona e i suoi diritti. Problemi del diritto civile, cit., p. 356.

[393] P. Perlingieri, o.l.u.c.

[394] F. Parente, Diritti della persona anziana, tutela della salute e autonomia della volontà, cit., p. 464; P. Perlingieri, o.l.u.c.

[395] F. Parente, o.l.u.c.; V. Caporale, Una nuova risorsa. Gli anziani, Bari, 2011, p. 20.

[396] D.J. Levinson, Verso una concezione del corso della vita adulta, in N.J. Smelser e E.H. Erikson (a cura di), Amore e lavoro, Milano, 1983, p. 323 ss.; V. Caporale, o.l.c.

[397] V. Caporale, o.c., pp. 19-20.

[398] F. Parente, Diritti della persona anziana, tutela della salute e autonomia della volontà, cit., p. 464.

[399] F. Parente, Dalla persona biogiuridica alla persona neuronale e cybernetica, cit., p. 216.

Insomma, la prospettiva dell'assiologismo, attenta al valore unitario della persona[400], comporta il rigetto della dogmatica tradizionale, incentrata sul soggetto astratto, lontano dalla realtà concreta, la quale, invece, «conosce l'uomo con le sue peculiarità» esistenziali, «i suoi limiti, i suoi bisogni» e «la sua età»[401].

Ne consegue che, almeno per i diritti esistenziali, la scissione tra la titolarità e l'esercizio del diritto, vale a dire tra la capacità giuridica e la capacità di agire[402], non ha un fondamento assiologico, né «una sua giustificazione costituzionale»[403].

6. La ricostruzione è conforme alla visuale legislativa che riconosce ai soggetti deboli, privi in tutto o in parte di autonomia e bisognevoli di protezione, la titolarità di diritti che essi stessi possono esercitare per soddisfare le esigenze della propria vita quotidiana (art. 409, comma 2, c.c.)[404], «nella misura in cui lo consente la loro capacità di discernimento e valutazione», alla stregua di una realistica graduazione della capacità[405].

Per di più, nell'ordine dei valori costituzionali, su cui si fonda la legittimità dell'ordinamento, la condizione dell'anziano autosufficiente, per la perentorietà del divieto di discriminazione delle persone in base all'età (art. 3, comma 1, cost.), non può subire limitazioni della capacità di agire «fondate esclusivamente su ragioni di età»[406].

Difatti, in un sistema basato non solo sui valori, ma pure sui principi, una difforme conclusione comporterebbe la violazione irragionevole del principio di parità (art. 3 cost.)[407].

In tal senso, è emblematica la circostanza che, nella scienza dell'adultità, che si occupa dello studio delle diverse fasce di senilità, è diffusa la scansione in sei modelli ordinanti, graduali ma continui[408]: la vecchiaia anagrafica, fondata su un parametro ordinamentale che ha il pregio della precisione e della documentazione certificata dall'anagrafe civile; la vecchiaia apparente, basata sull'esteriorità corporea, in forza della quale l'età della persona è quella che appare e si dimostra fisionomicamente, non quella anagrafica; la vecchiaia biologica, legata all'invecchiamento organico fisiologico; la vecchiaia cerebrale, che deriva dalla capacità di adattamento e di autopotenziamento o di depotenziamento del cervello; la vecchiaia psicologica, espressione dello stile di vita e della qualità delle

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[400] P. Perlingieri, La personalità umana nell'ordinamento giuridico, in Id., La persona e i suoi diritti. Problemi del diritto civile, cit., p. 16; F. Parente, Diritti della persona anziana, tutela della salute e autonomia della volontà, cit., p. 465.

[401] P. Perlingieri, Diritti della persona anziana, diritto civile e stato sociale, in Id., La persona e i suoi diritti. Problemi del diritto civile, cit., p. 348.

[402] Cfr. A. Falzea, Il soggetto nel sistema dei fenomeni giuridici, Milano, 1939, p. 88 ss. Sul superamento della dicotomia capacità giuridica-capacità di agire, v. P. Perlingieri, La personalità umana nell'ordinamento giuridico, in Id., La persona e i suoi diritti. Problemi del diritto civile, cit., pp. 66 ss. e 133 ss.; P. Stanzione, Capacità e minore età nella problematica della persona umana, Camerino-Napoli, 1975, p. 130 ss; id., Capacità, I) Diritto privato, in Enc. giur. Treccani, V, Roma, 1988, p. 7.

[403] F. Parente, Diritti della persona anziana, tutela della salute e autonomia della volontà, cit., p. 465.

[404] F. Parente, Dalla persona biogiuridica alla persona neuronale e cybernetica, cit., p. 217.

[405] G. Lisella, Gli istituti di protezione dei maggiori di età, in G. Lisella e F. Parente, Persona fisica, in Tratt. dir. civ. CNN Perlingieri, II, 1, Napoli- Roma, 2012, p. 243 ss.

[406] P. Perlingieri, Diritti della persona anziana, diritto civile e stato sociale, in Id., La persona e i suoi diritti. Problemi del diritto civile, cit., p. 360.

[407] P. Perlingieri, Diritti della persona anziana, diritto civile e stato sociale, in Id., La persona e i suoi diritti. Problemi del diritto civile, cit., p. 357; F. Parente, Diritti della persona anziana, tutela della salute e autonomia della volontà, cit., pp. 465-466.

[408] F. Parente, Dalla persona biogiuridica alla persona neuronale e cybernetica, cit., p. 218.

relazioni esistenziali della persona; la vecchiaia sociale, la cui nozione varia secondo il contesto sociale, culturale e storico di vita[409].
Diversa, invece, è la posizione dell'anziano non autosufficiente, affetto da infermità, da menomazioni fisiche o psichiche (art. 404 c.c.), da affievolimento delle facoltà intellettive, volitive o mnemoniche[410] e da altre disabilità che compromettono la capacità di discernimento o l'autosufficienza nell'espletamento degli atti della vita quotidiana[411].
In questo caso, le criticità prescindono dall'età anagrafica[412] e rientrano, pur senza esaurirsi[413], nella tutela della salute della persona (art. 32 cost.), affidata alla flessibilità degli strumenti di protezione normativa (art. 404 ss. c.c., modificati dalla l. 9 gennaio 2004, n. 6)[414].

7. Senza una pacata esperienza della vecchiaia, dunque, «tutte le età della vita» rischiano di essere non soltanto danneggiate ma anche impoverite: ciò può compromettere la naturalità del processo dell'invecchiamento. Per prevenire questo rischio, occorre «avere il coraggio di invecchiare perché la vecchiaia è insieme «un compito e una sfida»[415]: essa richiede il coraggio «di vivere con semplicità, di vivere il presente senza lasciarsi imbrigliare dal passato» e di guardare al futuro senza l'angoscia del tempo[416].
Nella vecchiaia, infine, è necessario saper «lasciare la presa», ossia esercitare «l'arte del distacco», del prendere le distanze, «dell'accettare di non poter più tenere in mano tutte le corde»[417]. Lasciare la presa significa discernere ciò che non è essenziale da «ciò che è essenziale» per continuare «una vita sensata» e «affermare la dimensione della gratuità»; significa anche «esercitarsi ad accettare l'incompiuto»[418].
Nella fenomenologia delle vicende umane e nel quadro delle fonti, il problema dell'anziano assume ormai dimensioni individuali e sociali molteplici[419], che impediscono di ricostruire unitariamente il regime normativo della «senilità» della persona[420].
Difatti, in termini di assiologia giuridica, l'anzianità può essere connotata soltanto come categoria relativa, scarsamente omogenea[421], irriducibile ad un contenuto uniforme, condizionata dallo stato di alterazione diacronica della corporeità, dalle patologie del patrimonio biologico e genetico[422], dal mutamento delle potenzialità psico-fisiche della

[409] V. Caporale, Una nuova risorsa. Gli anziani, cit., pp. 31-32.
[410] R. Masoni, Presupposti sostanziali della protezione, in Id., L'amministrazione di sostegno. Orientamenti giurisprudenziali e nuove applicazioni, Rimini, 2009, p. 99 ss.
[411] F. Parente, Diritti della persona anziana, tutela della salute e autonomia della volontà, cit., p. 466.
[412] V. Caporale, Una nuova risorsa. Gli anziani, cit., p. 31 ss.
[413] P. Perlingieri, Diritti della persona anziana, diritto civile e stato sociale, in Id., La persona e i suoi diritti. Problemi del diritto civile, cit., p. 361.
[414] F. Parente, Diritti della persona anziana, tutela della salute e autonomia della volontà, cit., p. 466.
[415] E. Bianchi, La vita e i giorni. Sulla vecchiaia, cit., p. 61.
[416] E. Bianchi, La vita e i giorni. Sulla vecchiaia, cit., p. 62.
[417] E. Bianchi, La vita e i giorni. Sulla vecchiaia, cit., p. 69.
[418] E. Bianchi, La vita e i giorni. Sulla vecchiaia, cit., p. 71.
[419] F. Parente, Dalla persona biogiuridica alla persona neuronale e cybernetica, cit., p. 219 ss.
[420] V. Caporale, Una nuova risorsa. Gli anziani, cit., p. 17 ss.
[421] V.M. Caferra, Famiglia e assistenza. Il diritto della famiglia nel sistema della sicurezza sociale, 3ª ed., Bologna, 2003, p. 195 ss.; V.M. Caferra e D. Conserva, Emarginazione sociale e strumenti di tutela, in N. Lipari (a cura di), Techiche giuridiche e sviluppo della persona, Bari, 1974, p. 539.
[422] V. Caporale, Una nuova risorsa. Gli anziani, cit., p. 35 ss.

persona, dalla qualità dell'organizzazione socio-assistenziale-sanitaria e dalla struttura produttiva e culturale della comunità civile[423].

È stato correttamente sottolineato che non si è anziano soltanto «in base a soggettive caratteristiche fisio-psichiche», ma si diventa tale pure «per effetto di oggettive determinazioni socio-produttive»[424].

Per l'anziano, insomma, è notevole il rischio di un isolamento di vita[425], legato alla perdita dei rapporti lavorativi, affettivi, umani e sociali, in cui, invece, è necessario, per quanto possibile, «che continui la sua esistenza»[426].

Per tale motivo, la salvaguardia dell'anziano deve avere come punto di riferimento il suo «vissuto personale»[427], definito nella concretezza delle «coordinate di tempo e di luogo»[428].

Inoltre, per la naturale decadenza bio-psichica dovuta all'età[429], la condizione di anziano pone pure, come si è detto, un problema di carattere sanitario[430].

Nella complessità della prospettiva tracciata, la tutela dell'anziano si traduce in una forma di «protezione e promozione» della persona umana[431], che, per la sua peculiarità, pur nel rispetto della libertà e della dignità, non può prescindere da una stretta interdipendenza tra il contesto valoriale ed affettivo, i profili economici, l'attività socio-assistenziale e il servizio medico-sanitario[432].

BIBLIOGRAPHY

Bianca C.M., Senectus ipsa morbus?, ivi, 1998.

Bianchi E., La vita e i giorni. Sulla vecchiaia, Bologna, 2018.

Caferra V.M., Famiglia e assistenza. Il diritto della famiglia nel sistema della sicurezza sociale, 3ª ed., Bologna, 2003, p. 195 ss.; V.M. Caferra e D. Conserva, Emarginazione sociale e strumenti di tutela, in N. Lipari (a cura di), Techiche giuridiche e sviluppo della persona, Bari, 1974.

Caporale V., Una nuova risorsa. Gli anziani, Bari, 2011.

Falzea A., Il soggetto nel sistema dei fenomeni giuridici, Milano, 1939

Gueullette J.M., Vivere con Cristo. Prospettive cristiane sull'esistenza umana, Cinisello Balsamo, 1998.

Levinson D.J., Verso una concezione del corso della vita adulta, in N.J. Smelser e E.H. Erikson (a cura di), Amore e lavoro, Milano, 1983.

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[423] F. Parente, Diritti della persona anziana, tutela della salute e autonomia della volontà, cit., p. 477; V. Caporale, o.c., p. 27 ss.

[424] G. Napolitano, Anziani (assistenza agli), in Noviss. dig. it., App., I, Torino, 1980, p. 316.

[425] V. Caporale, Una nuova risorsa. Gli anziani, cit., p. 36 ss.

[426] V.M. Caferra, Famiglia e assistenza. Il diritto della famiglia nel sistema della sicurezza sociale, cit., p. 198; V. Caporale, o.c., p. 36 ss.

[427] F. Parente, Dalla persona biogiuridica alla persona neuronale e cybernetica, cit., p. 220.

[428] V.M. Caferra, o.l.u.c.

[429] V. Caporale, Una nuova risorsa. Gli anziani, cit., p. 25 ss.

[430] V.M. Caferra, o.c., p. 199; F. Parente, Diritti della persona anziana, tutela della salute e autonomia della volontà, cit., p. 478.

[431] P. Perlingieri, Diritti della persona anziana, diritto civile e stato sociale, in Id., La persona e i suoi diritti. Problemi del diritto civile, cit., p. 355; V. Caporale, Una nuova risorsa. Gli anziani, cit., p. 51 ss.

[432] V.M. Caferra, Famiglia e assistenza. Il diritto della famiglia nel sistema della sicurezza sociale, cit., p. 199; F. Parente, Diritti della persona anziana, tutela della salute e autonomia della volontà, cit., p. 478.

Lisella G., Gli istituti di protezione dei maggiori di età, in G. Lisella e F. Parente, Persona fisica, in Tratt. dir. civ. CNN Perlingieri, II, 1, Napoli- Roma, 2012.
Lisella G., Rilevanza della «condizione di anziano» nell'ordinamento giuridico, in Rass. dir. civ., 1989.
Martini C.M., Qualcosa di così personale. Meditazioni sulla preghiera, Milano, 2009.
Masoni R., Presupposti sostanziali della protezione, in Id., L'amministrazione di sostegno. Orientamenti giurisprudenziali e nuove applicazioni, Rimini, 2009.
Napolitano G., Anziani (assistenza agli), in Noviss. dig. it., App., I, Torino, 1980.
Occhetta F., Fede e giustizia. La nuova politica dei cattolici, Cinisello Balsamo, 2021.
Ogliari D., Tempo e spazio. Alla scuola di san Benedetto, Noci.
Parente F., Dalla persona biogiuridica alla persona neuronale e cybernetica. La tutela post-moderna del corpo e della mente, Napoli, 2018.
Parente F., Diritti della persona anziana, tutela della salute e autonomia della volontà, in Rass. dir. civ., 2013.
Perlingieri P., Diritti della persona anziana, diritto civile e stato sociale, in Id., La persona e i suoi diritti. Problemi del diritto civile
Perlingieri P., Diritti della persona anziana, diritto civile e stato sociale, in Id., La persona e i suoi diritti. Problemi del diritto civile.
Perlingieri P., Il diritto del minore all'assistenza: aspetti problematici ed attuativi, in Id., La persona e i suoi diritti. Problemi del diritto civile, Napoli, 2005.
Perlingieri P., La personalità umana nell'ordinamento giuridico, in Id., La persona e i suoi diritti. Problemi del diritto civile, cit., p. 16; F. Parente, Diritti della persona anziana, tutela della salute e autonomia della volontà,
Perlingieri P., La personalità umana nell'ordinamento giuridico, in Id., La persona e i suoi diritti. Problemi del diritto civile.
Rovelli C., L'ordine del tempo, Milano, 2017.
Sanfilippo G., Autonomia contrattuale e tutela dell'anziano, ivi, 1990.
Stanzione P., Capacità e minore età nella problematica della persona umana, Camerino-Napoli, 1975. Capacità, I) Diritto privato, in Enc. giur. Treccani, V, Roma, 1988.
Stanzione P., Le età dell'uomo e la tutela della persona: gli anziani, in Riv. dir. civ., 1989, I.
Urso F. e Scognamillo A., Bioetica. Una proposta per la scuola, San Giorgio Jonico, 2008.
Zambrano V., La tutela dell'anziano, ivi, 1990.

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Wizerunek współczesnego mediatora rodzinnego
The image of a modern family mediator

Abstract
The article is dedicated to the image of the modern family mediator, and the author draws attention to the important role played by the family mediator, his education, the characteristics of the disposition, the body language or the elements of the image. The article presents the results of research on the above topic

Keywords: family mediator, image

Wstęp

Coraz częściej różnego rodzaju konflikty rozstrzygamy korzystając z alternatywnego sposobu rozwiązywania sporu jakim są mediacje, rozumiane jako nowa pozasądowa metoda rozwiązywania sporów. To „dobrowolny, nieformalny i łagodny proces, w którym neutralny i bezstronny mediator pomaga stronom we właściwej komunikacji oraz osiągnięciu porozumienia i zawarciu ugody."[433] Istotną rolę w procesie mediacji odgrywa osoba mediatora a szczególnie jej obecność jest ważna w mediacjach rodzinnych ze względu na ich szczególny, osobisty charakter. Mediator występuje w procesie jako trzecia strona, która nie jest bezpośrednio zaangażowana w dany konflikt, ale obecność mediatora, czyli osoby z zewnątrz jest warunkiem do zarządzania konfliktem i dojściem stron do porozumienia. Zarówno w mediacjach sądowych jak pozasądowych strony pozostające w konflikcie mają możliwość wyboru mediatora. Dlatego bardzo istotną rzeczą jest jego wizerunek, które biorą strony pod uwagę dokonując owego wyboru. To min. od jego wykształcenia, umiejętności, pewnych zdolności, predyspozycji i jego cech spotkania mediacyjne mogą być prowadzone w sposób profesjonalny i gwarantujący u stron poczucie bezpieczeństwa i pewnego rodzaju komfort, tak istoty w procesie mediacji rodzinnych.

Wizerunek mediatora rodzinnego

Pojęcie wizerunku w literaturze jest różnie rozumiane, według jednego z autorów P. Kotlera wizerunek jest „zbiorem przekonań, myśli, wrażeń osoby lub grupy o jakimś obiekcie: firmie, produkcie, miejscu lub osobie".[434] Do wizerunku osoby należy min: wiedza, wykształcenie, cechy, zasady, którymi kieruje się dana osoba, a także mowa niewerbalna szczególnie istotna w pracy mediatora w trakcie spotkań w trybie stacjonarnym.

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[433] https://bip.warszawa.so.gov.pl/artykul/240/87/mediacja[20.08.22]

[434] *Kotler cyt. za: A. Waszkiewicz, Wizerunek organizacji. Teoria i praktyka badania wizerunku uczelni, Warszawa 2011, s. 26.*

Praca mediatora według Ch. W Moore polega na „pogodzeniu konkurencyjnych interesów dwóch stron. Zadania mediatora wiążą się ze wspieraniem stron w badaniu swoich interesów i potrzeb, pomocą w negocjacjach i wymianie obietnic oraz redefiniowaniu ich relacji w obopólnie satysfakcjonujący sposób, który będzie zgodny ze standardami sprawiedliwości"[435]

Aby sprostać powyższym zadaniom stałym mediatorem może być osoba fizyczna, która:

1) spełnia warunki określone w art. 183^2 § 1 i 2 ustawy z dnia 17 listopada 1964 r. - Kodeks postępowania cywilnego (tj. § 1. Mediatorem może być osoba fizyczna mająca pełną zdolność do czynności prawnych, korzystająca w pełni z praw publicznych.),
2) ma wiedzę i umiejętności w zakresie prowadzenia mediacji,
3) ukończyła 26 lat,
4) zna język polski,
5) nie była prawomocnie skazana za umyślne przestępstwo lub umyślne przestępstwo skarbowe,
6)została wpisana na listę stałych mediatorów prowadzoną przez prezesa sądu okręgowego.[436]

Oprócz wymogów formalnych ogromną rolę w pracy mediatora rodzinnego pełnią cechy i umiejętności które charakteryzują danego mediatora jako osobę, do nich można zaliczyć min:,

- cierpliwość,
- konsekwencję działaniu,
- empatię,
- Komunikatywność,
- okazywanie szacunku drugiej osobie,
- otwartość,
- posiadanie odpowiedniej wiedzy w zakresie postępowania mediacyjnego,
- umiejętność stosowania technik negocjacyjnych,
- umiejętność słuchania.

Z wizerunkiem mediatora rodzinnego ściśle związane są także zasady, takie jak neutralność, bezstronność, niezależność oraz profesjonalizm.

Społeczna Rada ds. Alternatywnych Metod Rozwiązywania Konfliktów i Sporów przy Ministrze Sprawiedliwości w roku 2006 uchwaliła standardy prowadzenia mediacji i postępowania mediatora, w których zawarte są owe zasady.

„Standard I brzmi: Mediator rodzinny dba o dobrowolność uczestniczenia przez strony w mediacji i zawierania przez nie porozumienia.

Mediator nie nakłania stron wbrew ich woli do podjęcia mediacji ani do osiągnięcia porozumienia.

Przed rozpoczęciem mediacji strony uzyskują jednoznaczną informację o możliwości wycofania się na każdym etapie z postępowania mediacyjnego oraz o możliwości wybrania innego mediatora.

W standardzie I jest mowa również o nazywanej przez mediatorów zasadzie akceptowalności, dotyczącej osoby mediatora. Aby zapewnić stronom komfort pracy, mediator informuje o możliwości wybrania innej osoby prowadzącej mediację.

Standard II „Mediator jest neutralny wobec przedmiotu sporu". Standard informuje o zasadzie neutralności, określającej w dużym stopniu rolę mediatora. Zatem mediator to osoba, która nie podpowiada stronom rozwiązań, choćby uznał, że są one najlepsze z możliwych lub sprawdziły się w wielu podobnych sytuacjach innych klientów.

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[435] Moore Ch. W., Mediacje praktyczne strategie rozwiązywania konflik*tów*, Wolter Kluwer business, Warszawa 2003, 3

[436] ustawy z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego

Standard III „Mediator jest bezstronny wobec uczestników mediacji". Mediator nie przychyla się do racji żadnej ze stron, prowadzi mediację w taki sposób, aby ewentualna nierównowaga między stronami nie wpływała na przebieg mediacji i na jej ostateczny rezultat.

1. Mediator wystrzega się jakiejkolwiek stronniczości, okazywania uprzedzeń i preferencji.
2. Jeśli mediator nie jest w stanie prowadzić mediacji w bezstronny sposób, jest zobowiązany do wycofania się z postępowania mediacyjnego.
3. Mediator musi ujawnić stronom wszelkie fakty świadczące o istniejącym lub potencjalnym konflikcie interesów. W przypadku konfliktu interesów mediator musi wycofać się z postępowania mediacyjnego, chyba że strony świadomie zdecydują się dalej korzystać z jego pomocy.
4. Mediator nie czerpie korzyści z tego, co jest przedmiotem mediacji, jak również nie czerpie żadnych korzyści z faktu zawarcia ugody.
5. Standard IV „Mediator dba o poufność mediacji". Mediacja jest poufna, jej efekty i przebieg objęte są tajemnicą. Mediatorzy nie ujawniają nikomu informacji, jakie uzyskują podczas prowadzenia mediacji, chyba że zostaną do tego zobowiązani przez prawo.
6. Mediator lub ośrodek mediacyjny dokumentuje prowadzenie mediacji w sposób respektujący zasadę poufności. Dokumentacja może obejmować pisemną zgodę stron na udział w mediacji, zarejestrowanie sprawy mediacyjnej, zebranie podstawowych danych od stron (wraz z zapisem o wyrażeniu zgody na przetwarzanie danych osobowych w celu realizacji postępowania mediacyjnego), deklaracje przestrzegania zasady poufności przez osoby trzecie obecne na sesjach mediacyjnych, kopię porozumienia mediacyjnego i kopię protokołu z postępowania mediacyjnego, przekazywanego do sądu, jeśli dotyczy. Wszelkie inne sposoby dokumentowania mediacji wymagają wyraźnej zgody stron.

Standard V Mediator rodzinny rzetelnie informuje strony o swojej roli, istocie i przebiegu mediacji oraz ocenia zdolność stron do uczestniczenia w postępowaniu mediacyjnym.

1. Przed rozpoczęciem postępowania mediacyjnego mediator rodzinny przedstawia stronom zasady, przebieg, cele i możliwe rezultaty mediacji.
2. Mediator rodzinny odbiera od stron wyraźną zgodę na udział w postępowaniu mediacyjnym.
3. Mediator rodzinny powinien umieć ocenić gotowość i zdolność stron do uczestniczenia w mediacji. Mediator nie powinien prowadzić postępowania mediacyjnego, jeśli uzna, że jedna lub więcej stron jest niezdolna, niegotowa lub niechętna do uczestniczenia w mediacji.
4. Mediator rodzinny powinien informować strony, że w trakcie postępowania mediacyjnego mogą korzystać z wiedzy i porady specjalistów.
5. Mediator wyraźnie odróżnia swoją rolę jako mediatora od innych ról zawodowych, jakie pełni, i upewnia się, że strony są świadome tej różnicy.

Standard VI „Mediator dba o wysoki poziom swoich kwalifikacji zawodowych". Mediator rodzinny osiąga wysoki poziom kwalifikacji dzięki:
– zdobyciu wiedzy i umiejętności zgodnie ze standardami Stowarzyszenia Mediatorów Rodzinnych. Standardy te wskazują obszar wymaganej wiedzy i umiejętności proceduralnych koniecznych przy specjalizowaniu się w tej dziedzinie praktyki.
– stałemu pogłębianiu i doskonaleniu własnych umiejętności. Kontynuowanie edukacji z zakresu mediacji rodzinnych może obejmować udział w szkoleniach lub konferencjach

pogłębiających i doskonalących dotychczasowe umiejętności a także udział w superwizjach. Mediator powinien być świadomy konieczności własnego rozwoju zawodowego i wziąć za to odpowiedzialność.

Standard VII Mediator rodzinny wyczerpująco objaśnia zasady i wysokość swego wynagrodzenia oraz wszelkich pobieranych od stron opłat.

1. Jeśli mediator pobiera wynagrodzenie za prowadzenie mediacji, to przed rozpoczęciem postępowania lub na początku pierwszej sesji mediacyjnej jasno i wyczerpująco wyjaśnia stronom zasady wynagradzania.
2. Mediator nie uzależnia swojego wynagrodzenia od wyniku mediacji ani od wartości sporu.
3. Zasady wynagradzania i pobierania opłat związanych z mediacją powinny być dostępne dla stron w formie pisemnej.

Standard VIII Mediator rodzinny pomaga stronom określić, w jaki sposób najlepiej dbać o interesy ich małoletnich dzieci.

1. W przypadku mediacji rodzinnej, w którą zaangażowane są dzieci, mediator powinien tak prowadzić postępowanie mediacyjne, aby rodzice (lub prawni opiekunowie) w największym możliwym stopniu skupili się na zaspokojeniu ważnych potrzeb dzieci.
2. Mediator powinien zachęcać strony do wnikliwego rozważenia zalet i wad różnych sposobów sprawowania pieczy rodzicielskiej w czasie separacji czy po rozwodzie.
3. Mediator powinien umożliwić stronom sformułowanie takiego planu sprawowania opieki rodzicielskiej, który zapewnia poczucie bezpieczeństwa oraz stabilności zarówno dla stron, jak i dla ich dzieci.
4. Mediator powinien zachować wrażliwość i tolerancję dla rozmaitych sposobów wychowywania dzieci przez rodziców.
5. Dzieci nie powinny być włączane do postępowania mediacyjnego bez zgody rodziców lub ich prawnych opiekunów.
6. Przed włączeniem dzieci do mediacji mediator powinien przedyskutować z rodzicami cel, zasady i różne formy udziału dzieci w postępowaniu mediacyjnym oraz zasadność wyboru konkretnej formy.
7. Mediator dba o to, aby dziecko nie czuło się obciążone żadną odpowiedzialnością za przebieg czy wynik mediacji.

Standard IX Mediator rodzinny efektywnie współpracuje z innymi specjalistami w celu jak najlepszego zabezpieczenia interesów stron.

1. W trakcie mediacji mediator nie wchodzi w rolę innego specjalisty, nawet mimo posiadania wiedzy z danej dziedziny. Jeśli w trakcie mediacji mediator dostrzeże, że pojawiła się kwestia, która wykracza poza zakres jego kompetencji jako mediatora, powinien poinformować o tym strony i zaproponować skorzystanie z pomocy odpowiedniego specjalisty. Decyzja o skorzystaniu z usług specjalisty pozostaje w rękach stron.
2. Mediator dba o to, aby specjaliści, z którymi współpracuje, znali zasady, reguły i cele mediacji, w tym zwłaszcza dba o to, aby rozumieli regułę poufności postępowania mediacyjnego.
3. Na czas uzyskiwania przez strony pomocy od innych specjalistów mediator powinien rozważyć zasadność zawieszenia postępowania mediacyjnego.

Standard X Przerwanie lub zakończenie postępowania mediacyjnego
1. Mediacja może zostać przerwana zarówno przez strony, jak i przez mediatora.
2. Mediator informuje strony o ich prawie do wycofania się z mediacji w dowolnym momencie i z jakichkolwiek powodów.
3. Mediator przerywa lub kończy postępowanie mediacyjne przed zawarciem porozumienia, kiedy uzna, że:
   – co najmniej jedna strona postępowania z powodu swego stanu fizycznego lub psychicznego nie jest zdolna do efektywnego uczestniczenia w mediacji;
   – strony nie chcą w autentyczny, zaangażowany sposób uczestniczyć w procesie mediacji;
   – strony chcą zawrzeć porozumienie, którego skutków nie są świadome;
   – strony używają mediacji dla osiągnięcia nieuczciwych korzyści;
   – nie jest możliwe osiągnięcie rozsądnego i realistycznego porozumienia;
   – uczestnicy mediacji osiągnęli impas nie do pokonania; mediator nie powinien przedłużać nieproduktywnej dyskusji, gdyż naraziłoby to strony na niepotrzebne koszty emocjonalne i finansowe.
4. Mediator przerywa lub kończy postępowanie mediacyjne przed zawarciem porozumienia, gdy nabiera przekonania, że traci bezstronność.
5. Jeśli inicjatywa przerwania mediacji wychodzi ze strony mediatora, powinien on zachęcić strony do szukania profesjonalnej pomocy właściwej dla danego przypadku.
6. Mediacja może zakończyć się zawarciem porozumienia we wszystkich konfliktowych sprawach lub zawarciem porozumienia obejmującego część negocjowanych problemów. W przypadku zawarcia pełnego porozumienia zadaniem mediatora jest przedyskutowanie procesu formalizacji i wprowadzenia porozumienia w życie. W przypadku porozumienia częściowego mediator może zaproponować przedyskutowanie dostępnych procedur umożliwiających rozwiązanie pozostałych kwestii przy pomocy innych specjalistów.

Standard XI Mediator rodzinny zapewnia stronom odpowiednie miejsce do prowadzenia postępowania mediacyjnego.
1. Miejsce prowadzenia mediacji powinno gwarantować stronom i mediatorowi poczucie bezpieczeństwa.
2. Miejsce, w którym prowadzi się praktykę mediacyjną, powinno posiadać co najmniej dwa pomieszczenia, gwarantujące zachowanie prywatności stronom i poufności postępowania mediacyjnego. Powinno także zapewniać możliwość korzystania z podstawowych wygód.

Standard XII Mediator rodzinny rzetelnie informuje o swoich usługach.
1. Mediator może informować o procesie mediacji, o korzyściach, kosztach i własnych kwalifikacjach. Wszelka taka informacja powinna być rzetelna i wyczerpująca. Mediator jest odpowiedzialny za przestrzeganie tej zasady przez wszystkich reklamujących jego usługi i działających w jego imieniu.
2. Mediator nie obiecuje ani nie gwarantuje osiągnięcia określonych wyników postępowania mediacyjnego. Reklamując swoje usługi nie powinien także posługiwać się danymi statystycznymi mówiącymi o odsetku zawieranych porozumień.
3. Mediator rzetelnie informuje o swoich kwalifikacjach. Mediator może powoływać się na stopnie, certyfikaty lub inne formy przyznawanych kwalifikacji tylko wtedy, jeśli

organizacja przyznająca owe kwalifikacje ma na to specjalną procedurę i mediator spełnił wszystkie jej wymagania.[437]

Mediator w sposób wyczerpujący powinien udzielać stronom informacji na temat procedury mediacji tj. jej zasad, przebiegu i kosztach. Ponadto mediator powinien w sposób rzetelny informować o swoich kwalifikacjach, stopniach naukowych czy przynależności do organizacji, np. dających rękojmie należytego wykonywania obowiązków przez mediatora.

Profesjonalizm mediatora według M. Bobrowicza jest ściśle związany z posiadaną wiedzą przez mediatora oraz komunikacją społeczną[438]. Zasada profesjonalizmu, wymaga od mediatorów nieustannego doskonalenia zawodowego, a także podejmowania się tych spraw, w których posiadają oni niezbędne do ich prowadzenia predyspozycje. Mediator - profesjonalista powinien dbać nie tylko o bezpieczne i komfortowe warunki prowadzenia mediacji dla stron. Dotyczy to również sposobu prowadzenia mediacji, jej tempa oraz poszczególnych etapów, które należy dostosować do każdej ze stron tak, aby odpowiadały ich możliwościom i życzeniom.[439].

Niezwykle ważną kwestią, o której wspominają strony w procesie mediacyjnym to komunikacja niewerbalna, która „obejmuje wszystkie zachowania, cechy i obiekty – inne niż słowa – które komunikują wiadomości i mają wspólne społeczne znaczenie".[440] Ten rodzaj komunikacji towarzyszy w sposób nierozłączny komunikacji werbalnej. Jest bardzo często niedocenianym źródłem udanego dialogu. W jej trakcie używane są gesty i mimika, które są potwierdzane werbalnymi przekazami kodu językowego stosowanego w danej kulturze. Komunikaty niewerbalne charakteryzujące danego mediatora, mogą mieć wpływ na polepszenie kontaktu z mediatorem, a tym samym ze stroną pozostająca w konflikcie, do nich zaliczamy min. kontakt wzrokowy, mimikę twarzy, gestykulację, intonację głosu, pozycję ciała (stojąca, siedząca), uścisk dłoni.

Mimika twarzy jest jedną z ważniejszych metod komunikacji niewerbalnej, gdyż odzwierciedla rzeczywiste stany emocjonalne, ale przede wszystkim sygnały społeczne, których celem jest po części przekazywanie tych stanów i wpływanie za ich pośrednictwem na innych. Sposób, w jaki mówimy, poruszając ustami, podczas rozmowy, ułożenie ust i brwi, grymas na twarzy, wyraz naszych oczu – wszystko to wskazuje na nasz stan emocjonalny.

Kontakt wzrokowy jest kluczowy zarówno dla nawiązania jak i przebiegu rozmowy między uczestnikami. To dzięki niemu możemy okazywać zaangażowanie, troskę, szacunek i przywiązanie.

Gestykulacja dotyczy zarówno drobnych jak i dużych ruchów naszego ciała, między innymi ruchu rąk czy dłoni oraz korpusu. Użycie ich może poprawić klimat stosunków interpersonalnych, na przykład dzięki otwartym dłoniom oznaczającym szczerość zamiarów czy też potakiwanie, które oznacza gest życzliwości.

Dotyk, czy też kontakt fizyczny można wiązać się z pewną zażyłością z partnerem rozmowy. Zależy on również od wieku płci czy też pozycji władzy. Może mieć charakter pozytywny lub negatywny. Wyróżnia się następujące funkcje dotyku: wspierająca (pocieszania), władzy, afiliacyjna.

Pozycja ciała to sposób w jaki siedzimy chodzimy lub stoimy, który dotyczy napięcia rozluźnienia czy drżenia kończyn.

Niewerbalne aspekty mowy takie jak intonacja głosu, tempo mówienia, wypowiadanie słów,

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[437] https://smr.org.pl/standardy/standardy-prowadzenia-mediacji/ [29.08.2022]

[438] M. Bobrowicz, Mediacja .Jestem za Warszawa, 2008, s 29

[439] Polskie Centrum Mediacji, Kodeks… op. cit., s. 4–6

[440] S.P. Morreale, B.H. Spitzberg , J.K. Barge, Komunikacja między ludźmi. Motywacja, wiedza, umiejętności, PWN, Warszawa 2012, s. 124

czyli sposób mówienia są równie ważne w komunikacji niewerbalnej w procesie mediacyjnycm. To dzięki nim często ujawniamy nasze intencje, czy też staramy się oddziaływać na rozmówcę.

Metodyka prowadzenia badań

W celu realizacji badań odnośnie wizerunku współczesnego mediatora rodzinnego posłużono się metodą sondażu diagnostycznego. Narzędziem wykorzystanym do badań był kwestionariusz ankiety, który obejmował metryczkę i pytania problemowe półotwarte. Po nadaniu odpowiednich kodów odpowiedziom na pytania zawarte w kwestionariuszu ankiety przystąpiono do tworzenia bazy danych, które zestawiono w arkuszu kalkulacyjnym Excel, a następnie opracowano i zwizualizowano wyniki.

Postawione zostały następujące problemy badawcze:

1. Jaki profil wykształcenia powinien posiadać mediator rodzinny?
2. Jakie cechy powinien posiadać mediator rodzinny ?
3. Jakie umiejętności i zdolności powinien posiadać mediator rodzinny?
4. Jaką rolę pełni mediator rodziny?
5. Na co zwrócono by uwagę przy pierwszym spotkaniu z mediatorem rodzinnym?
6. Które z komunikatów niewerbalnych wpływają na polepszenie kontaktu z mediatorem?

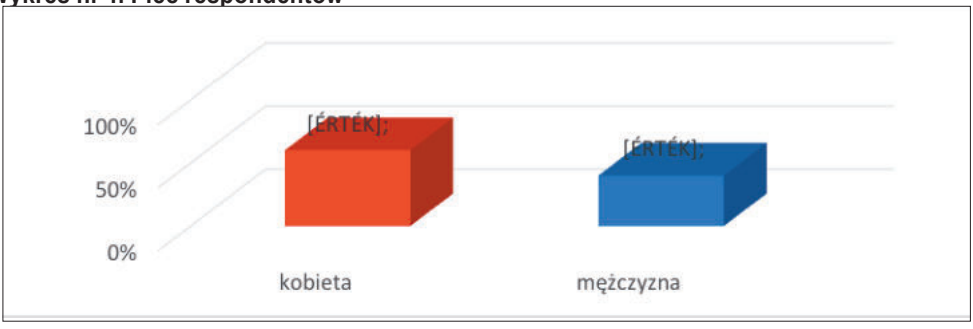
Do postawionych problemów badawczych sformułowano **następujące hipotezy szczegółowe:**

1. Profil wykształcenia jaki powinien posiadać mediator rodzinny to wykształcenie psychologiczne i prawne.
2. Mediator rodzinny powinien posiadać następujące cechy; cierpliwość , i komunikatywność
3. Mediator rodzinny powinien posiadać umiejętności rozwiazywania konfliktów.
4. Mediator rodziny dąży do uzyskania obopólnej zgody stron w sprawie stanowiącej przedmiot sporu mimo wstępnych niesprzyjających warunków.
5. Przy pierwszym spotkaniu z mediatorem rodzinnym zwrócono by uwagę na jego postawę i osobowość mediatora.
6. Na polepszenie kontaktu z mediatorem rodzinnym wpływa pozycja ciała mediatora

Charakterystyka respondentów

W badaniach wzięło 100 osób z terenu całej Polski w przedziale wiekowym od 18 do 70 rż

Wykres nr 1. Płeć respondentów

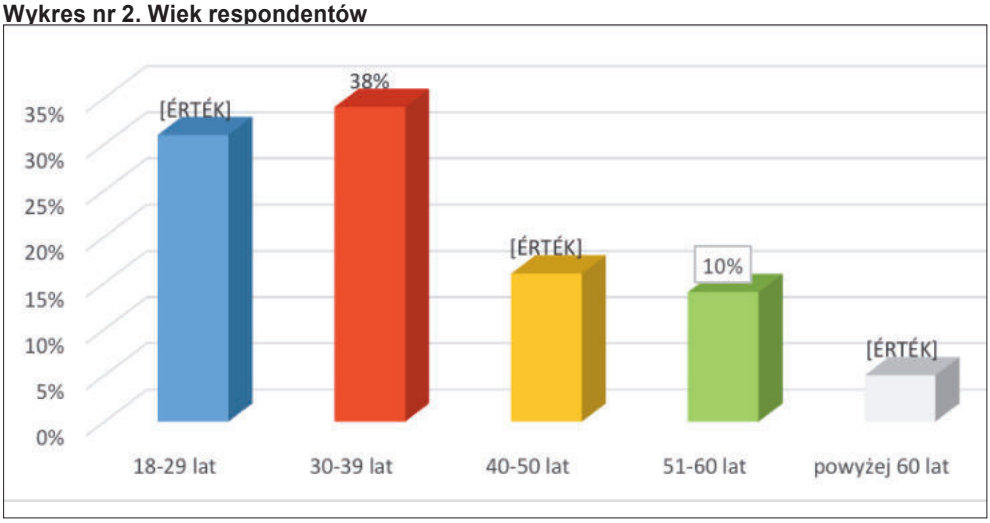


Źródło: opracowanie własne.

Badana grupa liczyła 100 osób, których udział procentowy w badanej zbiorowości był następujący

kobiety stanowiły 60% grupy, a mężczyźni 40%.

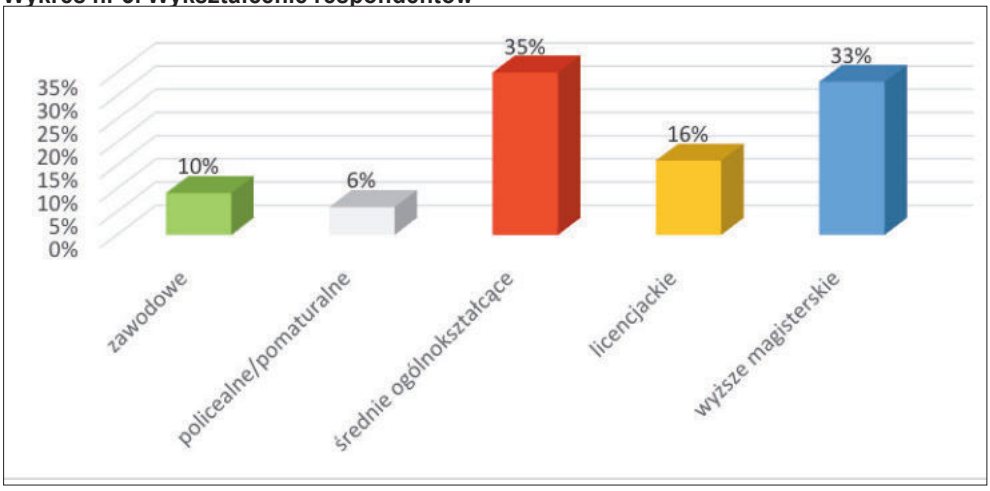
Wykres nr 2. Wiek respondentów



Źródło: opracowanie własne.

Przedział wiekowy osób badanych wyglądał następująco; 18-29 lat 31% badanych , 16 % to osoby w przedziale miedzy 40 a 50 rokiem życia , osoby między 51 a 60 rokiem to 10 % najmniej liczebną grupę stanowiły osoby po 60 roku życia to jest 5% , a największą osoby w przedziale między 30 a 39 rokiem 38%.

Wykres nr 3. Wykształcenie respondentów

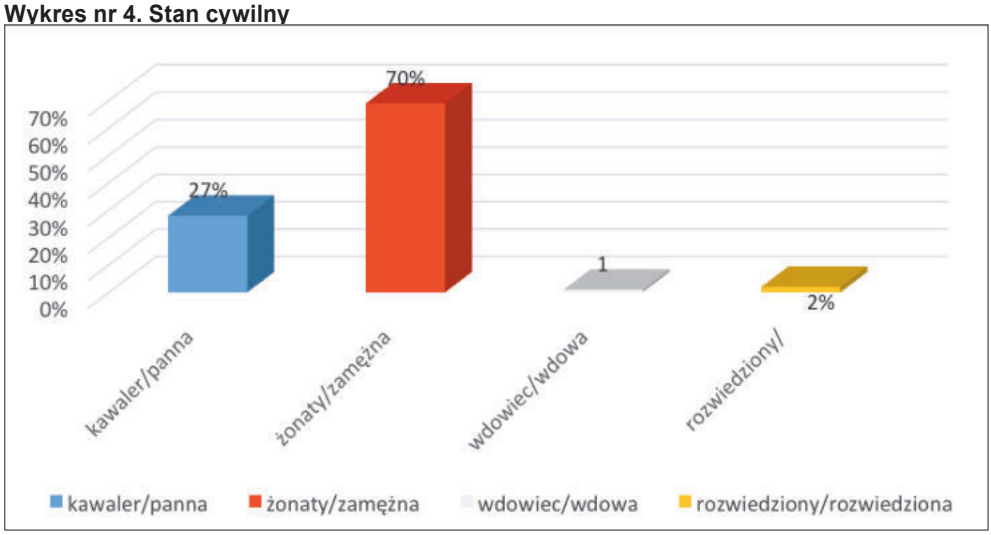


Źródło: opracowanie własne.

35% osób badanych poosiadało wykształcenie średnie ogólnokształcące, 33% wyższe magisterskie 16 % to osoby posiadające wykształcenie licencjackie, 10% legitymowało się wykształceniem

zawodowym a 6% policealnym lub pomaturalnym.

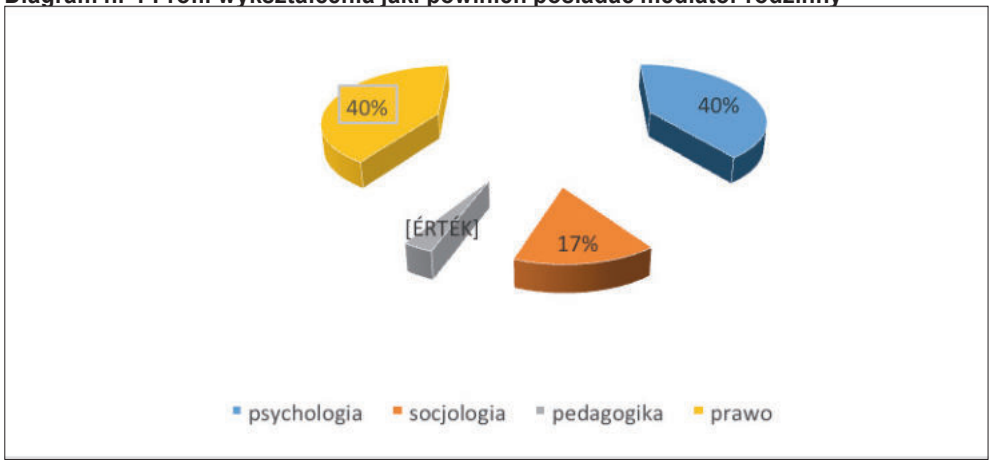
Wykres nr 4. Stan cywilny



Źródło: opracowanie własne.

W badaniach udział wzięło 70% osób zamężnych/żonatych, 27% kawalerów /panien, 1 % wdowców i 2% rozwiedzionych

Diagram nr 1 Profil wykształcenia jaki powinien posiadać mediator rodzinny

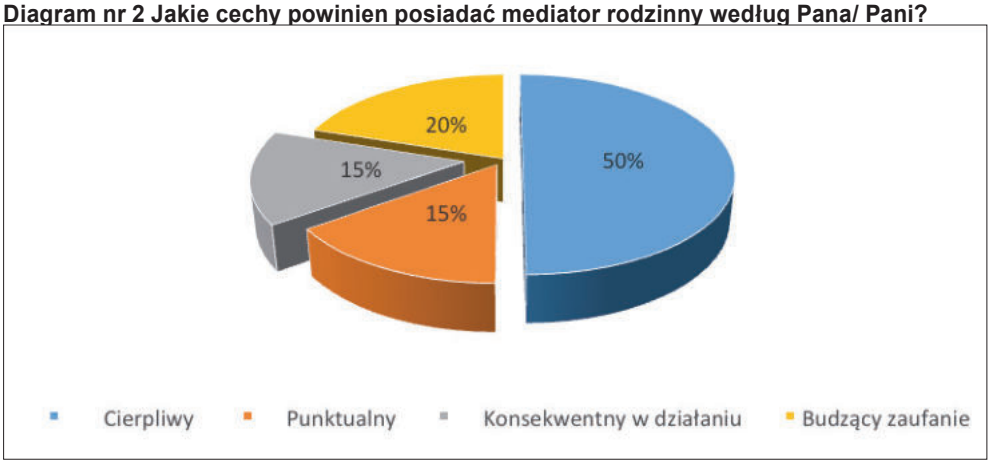


Źródło: opracowanie własne.

Według badanych osób, profil wykształcenia jaki powinien posiadać mediator rodzinny to wykształcenie prawnicze lub psychologiczne według 40% respondentów, 17% uważa, że mediatorzy powinni posiadać wykształcenie socjologiczne, a 3% preferuje wykształcenie pedagogiczne u

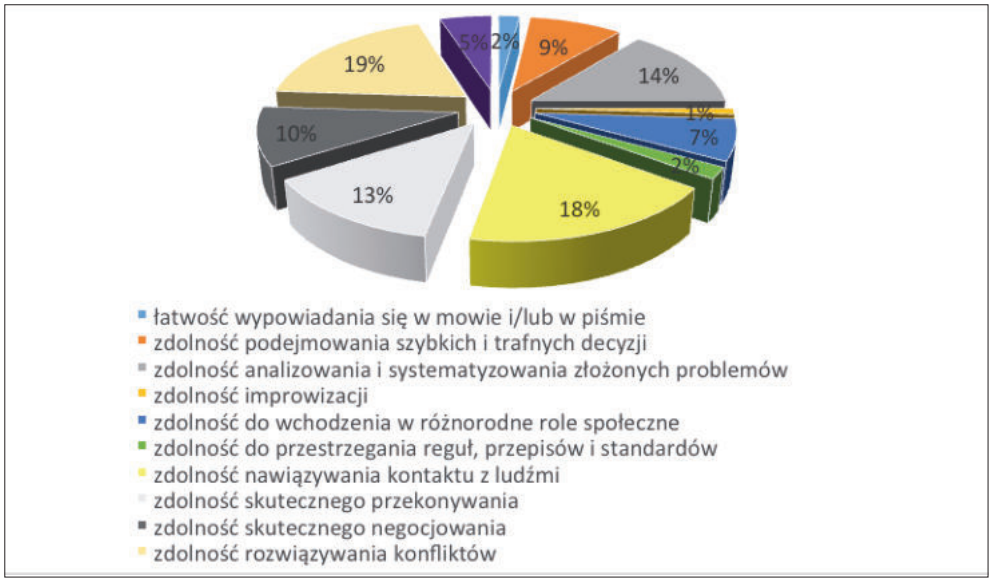
mediatora rodzinnego.

Diagram nr 2 Jakie cechy powinien posiadać mediator rodzinny według Pana/ Pani?



Według ankietowanych najbardziej pożądana cecha jaką powinien posiadać mediator jest cierpliwość według 50% osób, następnie punktualność zdaniem 20 % badanych oraz konsekwencja w działaniu i budzący zaufanie po 15 %

Diagram nr 3 Umiejętności i zdolności jakie powinien posiadać mediator rodzinny



Źródło: opracowanie własne.

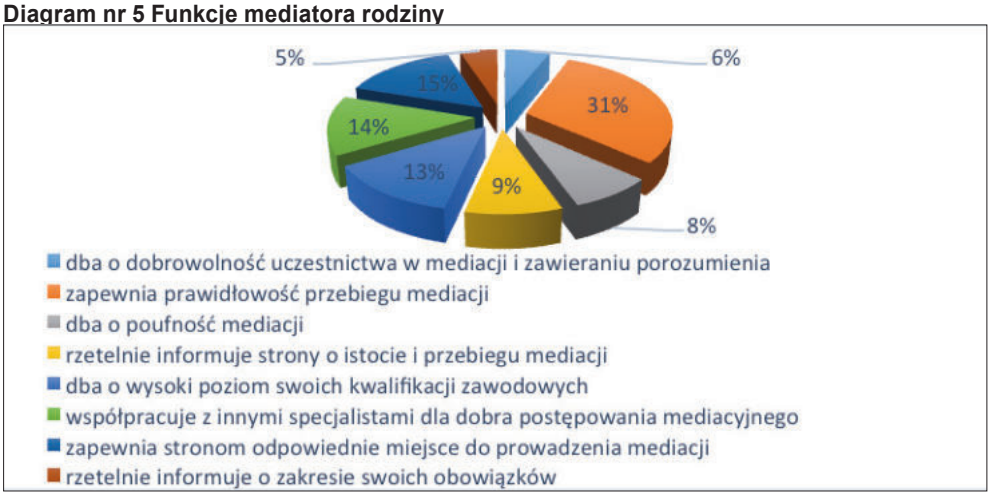
Według respondentów do najbardziej istotnych umiejętności i zdolności zawodowych mediatora rodzinnego należy zdolność nawiązywania kontaktu z ludźmi 18%, zdolność rozwiązywania konfliktów 19% oraz zdolność analizowania i systematyzowania złożonych problemów 14%. Wśród badanych tylko 1 % wskazał na (zdolność improwizacji.

Diagram nr 4. Role jakie pełni mediator rodziny

Źródło: opracowanie własne.

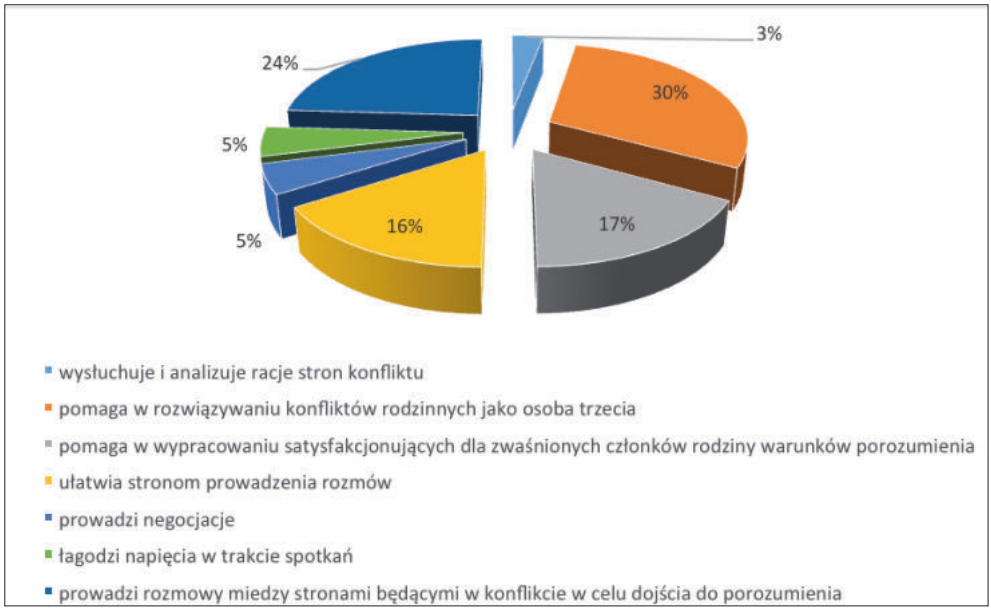
44% badanych uważa, że mediator rodziny dąży do uzyskania obopólnej zgody stron w sprawie stanowiącej przedmiot sporu mimo wstępnych niesprzyjających warunków, 32 % badanych uważa że mediator ma towarzyszyć stronom sporu i ułatwiać proces porozumienia poprzez redukcję konfliktu, usprawnianie komunikacji. Część badanych wskazała, że mediator dąży do przeprowadzenia zmian w świadomości czy zachowaniu klientów rozwiązujących ich osobiste, czy relacyjne problemy 14%

Diagram nr 5 Funkcje mediatora rodziny



Badani wskazywali najczęściej taką funkcję mediatora jak zapewnianie prawidłowości przebiegu mediacji 31%. Część respondentów wskazała, że zapewnianie stronom odpowiedniego miejsca do prowadzenia mediacji 15 %, 14% zaznaczyła współpracę mediatora z innymi specjalistami.

Diagram nr 6 Zadania mediatora rodziny



Źródło: opracowanie własne.

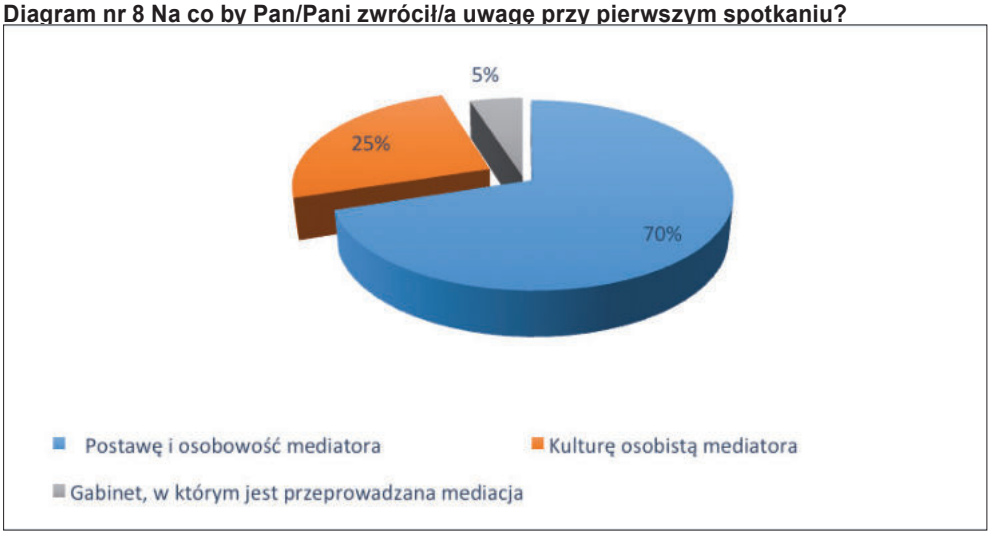
Zdaniem respondentów 30% osób zadania mediatora rodzinnego to pomoc w rozwiązywaniu konfliktów rodzinnych jako osoba trzecia, 24%, twierdzi, że mediator prowadzi rozmowy między stronami będącymi w konflikcie w celu dojścia do porozumienia 17% uważa, że łagodzi napięcia w trakcie spotkań, 16 % badanych jest zdania, że ułatwia stornom prowadzenie rozmów.

Diagram nr 7 Na pierwszym spotkaniu, czego by Pan/Pani oczekiwał/a od mediatora rodzinnego?

85% badanych osób oczekiwała by od mediator rodzinnego na pierwszym spotkaniu wysłuchania , kolejno 10% oczekuje od mediatora rozmowy a 5% wyjaśnienia wytłumaczenia na czym polega

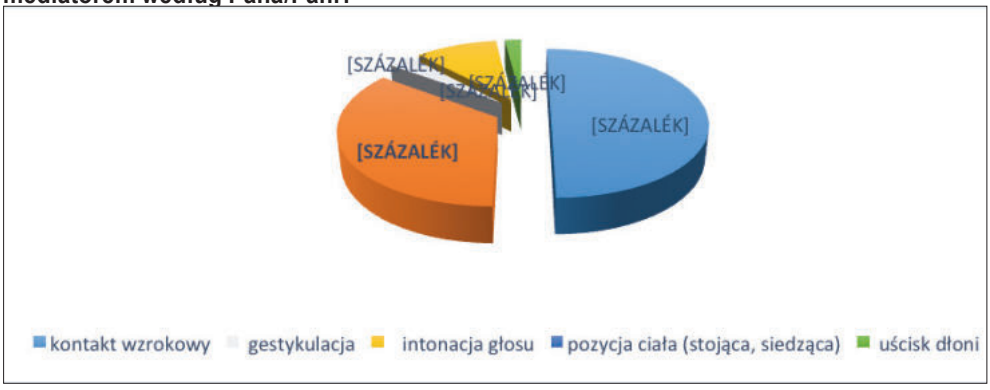
postępowanie mediacyjne.

Diagram nr 8 Na co by Pan/Pani zwrócił/a uwagę przy pierwszym spotkaniu?



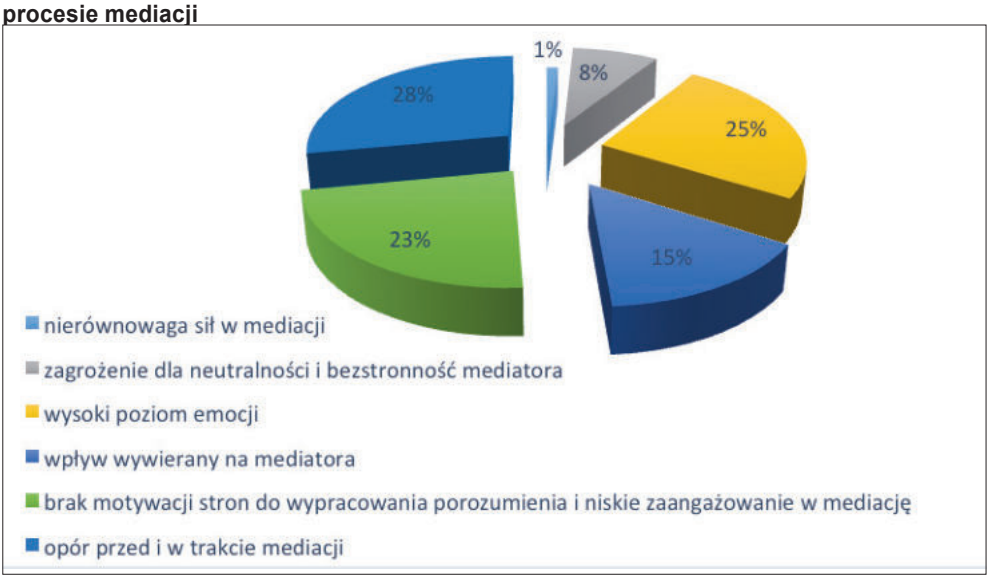
Przy pierwszym spotkaniu 70% badanych osób zwróciły by uwagę na postawę i osobowość mediatora, 25% na kulturę osobistą mediatora 5% na gabinet, w którym jest prowadzona mediacja.

Diagram nr 9 Które z komunikatów niewerbalnych wpływają na polepszenie kontaktu z mediatorem według Pana/Pani?



Na polepszenie kontaktu z mediatorem według 50% respondentów najbardziej wpływa pozycja ciała mediatora w dalszej kolejności badani zwracają uwagę na intonację głosu 35%, według badanych osób uścisk dłoni ma najmniejszy wpływ na polepszenie kontaktu z mediatorem rodzinnym.

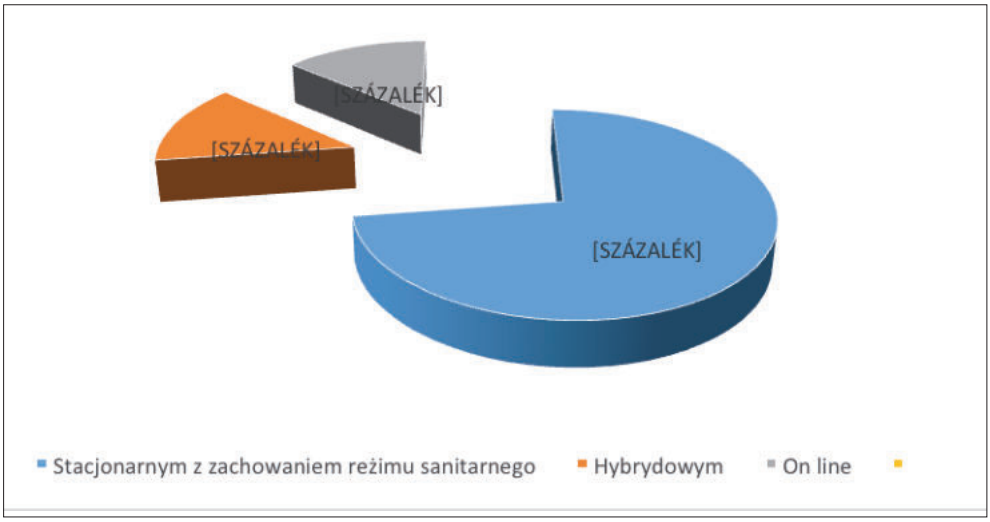
Diagram nr 10 Trudności i sytuacje szczególne, przed którymi stoi mediator rodzinny w procesie mediacji



Źródło: opracowanie własne.

Trudności i sytuacje szczególne, przed którymi stoi mediator rodzinny w procesie mediacji według 28% badanych to nierównowaga sił w mediacji, zdaniem 25 % osób wysoki poziom emocji, 23% uważa że brak motywacji stron do wypracowani porozumienia i niskie zaangażowanie w mediację to trudności i sytuacje szczególne

Diagram nr 11 W dobie pandemii preferowałby Pan/Pani spotkania mediacyjnej w trybie



W dobie pandemii preferowali by badani spotkania mediacyjne w trybie stacjonarnym z zachowaniem reżimu sanitarnego 73%, 14 % osbó uważa że najlepszą formą spotkań to

on line a 13 % respondentów preferuje hybrydowy system spotkań.

Podsumowanie

Mediacja traktowana jest przez Unię Europejską jako istotny sposób rozwiązywania konfliktów pomiędzy stronami. Od wielu lat jej problematyką zainteresowane są różne instytucje międzynarodowe, które zachęcają państwa członkowskie do importowania w zakresie swojego ustawodawstwa idei sprawiedliwości naprawczej[441].Obecność mediatora w konflikcie stron jest niezbędna, min. ze względu na pełniące prze z niego role: katalizatora czy regulatora interakcji, moderatora oraz świadka (osoby trzeciej) danych sytuacji skonfliktowanych stron. W związku z wagą roli mediatora w postępowaniu mediacyjnym absolutnie konieczne jest, aby mediatorem była osoba, która poprzez swój wizerunek zapewni stronom komfort psychiczny oraz satysfakcję merytoryczną, proceduralną, ale również psychologiczną.

Z przeprowadzonych badań wynika, że według respondentów:

1. Profil wykształcenia jaki powinien posiadać mediator rodzinny to wyksztalcenie psychologiczne i prawne postawiona hipoteza się potwierdziła się .
2. Mediator rodzinny powinien posiadać następujące cechy; cierpliwość , komunikatywność. Zdaniem badanych mediator powinien być cierpliwy według 50% osób, i punktualny zdaniem 20 % badanych, hipoteza potwierdziła się częściowo.
3. Mediator rodzinny powinien posiadać umiejętności rozwiazywania konfliktów, hipoteza potwierdziła się.
4. Mediator rodziny dąży do uzyskania obopólnej zgody stron w sprawie stanowiącej przedmiot sporu mimo wstępnych niesprzyjających warunków, hipoteza potwierdziła się.
5. Przy pierwszym spotkaniu z mediatorem rodzinnym zwrócono by uwagę na jego postawę i osobowość mediatora, hipoteza potwierdziła się.

[441] A. Rękas, Mediacja w polskim prawie karnym, Ministerstwo Sprawiedliwości, Warszawa 2011, s. 5–6.

6. Na polepszenie kontaktu z mediatorem rodzinnym wpływa pozycja ciała mediatora, hipoteza potwierdziła się.

Rozpoczęte badania będą kontynuowane.

BIBLIOGRAPHY

Bobrowicz M., Mediacja. Jestem za Warszawa, 2008

Grudziewska E. Lewicka Zelent A, *Kompetencje mediacyjne w profesji pracownika socjalnego,* Difin Warszawa 2015

Kalisz A, Zienkiewicz A , Mediacja sądowa i pozasądowa. Zarys wykładu, Warszawa 2009

Kodeks Etyki mediatora PCM, Warszawa 2003

Kodeks karny z dnia 6 czerwca 1997 roku (Dz.U. 1997, Nr 88, poz. 553 z późn. zm.).

Moore Ch. W., Mediacje praktyczne strategie rozwiązywania konfliktów, Wolter Kluwer business, Warszawa 2003.

Morreale S.P., Spitzberg B.H., Barge J.K., Komunikacja między ludźmi. Motywacja, wiedza, umiejętności, PWN, Warszawa 2012

Standardy prowadzenia mediacji i postępowania mediatora uchwalone przez Społeczną Radę do spraw Alternatywnych Metod Rozwiązywania Konfliktów i Sporów przy Ministrze Sprawiedliwości, Warszawa 2006

Rękas A., *Mediacja w polskim prawie karnym, Ministerstwo Sprawiedliwości, Warszawa 2011*

Tabernacka M, *Negocjacje i mediacje w sferze publiczne,j* Wolters Kluwer business 2009

Ustawa z dnia 17 listopada 1964 r. - Kodeks postępowania cywilnego (t.j. Dz.U. z 2019 r. poz. 1460)

Waszkiewicz, *A*., *Wizerunek organizacji*. *Teoria i praktyka badania wizerunku uczelni,* Warszawa 2011

NETOGRAPHIA

https://bip.warszawa.so.gov.pl/artykul/240/87/mediacja[20.08.22]

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International guarantees of the right to freedom of conscience and religion and the religious security of Christians in Nigeria

Międzynarodowe gwarancje prawa do wolności sumienia i religii, a bezpieczeństwo religijne chrześcijan w Nigerii

Abstract
Human rights issues occupy a significant place in contemporary international law. Officially, human rights are respected in almost all world's countries according to international standards. However, in many countries, including Nigeria, Christians suffer because of their faith in Jesus Christ and their right to freedom of conscience and religion is not respected. Christians in Nigeria are murdered because of their faith. Sharia law is applicable in some states. Public transport, classrooms at schools and health facilities are organised on the basis of strict gender division. Sentences such as the amputation of limbs or death penalty by stoning are carried out. Moreover, the country is being ravaged by corruption and mafia which infiltrates all levels of government structures and executes journalists and human rights activists. Christians in Nigeria are often victims of exclusion from society and constantly experience discrimination, in areas of life such as justice, education and basic social assistance. Analysing the guarantees of the right to freedom of conscience and religion included in universal international agreements and following the situation of Christians and the cases involving the rampant violations of religious security in Nigeria, the conclusion is that the provisions specified in the aforementioned documents are dead.

Streszczenie
We współczesnym prawie międzynarodowym, znaczące miejsce zajmują kwestie praw człowieka. Oficjalnie prawa człowieka są przestrzegane w niemal wszystkich krajach świata zgodnie z międzynarodowymi standardami. Jednak w wielu krajach, w tym w Nigerii chrześcijanie cierpią z powodu wiary w Pana Jezusa Chrystusa, zaś ich prawo do wolności sumienia i religii nie jest respektowane. Chrześcijanie w Nigerii są mordowani z powodu wyznawanej wiary. W niektórych stanach stosuje się prawo szariatu. Publiczne środki transportu, klasy w szkołach oraz placówki zdrowia, zorganizowane są w oparciu o surowy podział płci. Wykonywane są wyroki przewidujące amputację kończyn lub karę śmierci przez ukamienowanie. Ponadto kraj jest niszczony przez korupcję i mafię, która przenika wszystkie szczeble struktur rządowych i dokonuje egzekucji na dziennikarzach i działaczach pracujących na rzecz praw człowieka.

[442] Doktor nauk prawnych, Wyższa Szkoła Gospodarki Euroregionalnej im. Alcide De Gasperi w Józefowie, porucznik.debinski@gmail.com

Chrześcijanie w Nigerii często stają się ofiarami wykluczenia ze społeczeństwa oraz stale doświadczają dyskryminacji, w takich dziedzinach życia jak sprawiedliwość, edukacja i podstawowa pomoc społeczna. Analizując gwarancje prawa do wolności sumienia i religii zawarte w umowach międzynarodowych o charakterze powszechnym oraz śledząc sytuację chrześcijan i przypadki związane z nagminnym łamaniem zasad bezpieczeństwa religijnego w Nigerii, nasuwa się wniosek, że zapisy dokonane w wyżej wymienionych dokumentach są martwe.

Keywords: Every human, human rights, religious freedom, right to freedom of conscience and religion, religious security, international law;

Słowa kluczowe: każdy człowiek, prawa człowieka, wolność religijna, prawo do wolności sumienia i religii, bezpieczeństwo religijne, prawo międzynarodowe;

Wstęp

W XX w. około 45 milionów chrześcijan oddało życie za wiarę. W pierwszej dekadzie XXI w. zaś, co roku ginęło ich 100 tysięcy[443]. W świecie cywilizowanym, w którym obowiązują umowy międzynarodowe gwarantujące ochronę praw człowieka, w tym prawo do wolności sumienia i religii przysługujące każdej osobie, dokonuje się prześladowanie i mordowanie chrześcijan. Brak adekwatnej reakcji świata na ogrom tragedii, jakiej doświadczają chrześcijanie prowadzi do pewności siebie i rozzuchwalenia prześladowców. Niepokoi obojętność na krzywdę ludzką. Brak międzynarodowej reakcji oraz cisza autorytetów naukowych, politycznych i społecznych. Z cichym przyzwoleniem społeczności międzynarodowej dokonuje się eksterminacja chrześcijan. W wielu miejscach świata, chrześcijanie zostali pozostawieni sami sobie, bez możliwości obrony.

Nigeria państwo leżące w Afryce Zachodniej nad Zatoką Gwinejską. Najbardziej zaludnione na kontynencie afrykańskim. Specyfiką Nigerii, z jednej strony jest duży wzrost ekonomiczny, a z drugiej strony wielkie natężenie przemocy, z którą władze nie potrafią sobie poradzić. To afrykańskie państwo jest podzielone na muzułmańską Północ i chrześcijańskie Południe kontrolujące zasadniczą część złóż energetycznych. W Nigerii żyje ok. 46,4% chrześcijan, zaś 43,3% stanowią muzułmanie[444]. Sytuacja pomiędzy dwiema społecznościami jest bardzo napięta. Obie społeczności ścierają się na płaszczyźnie religijnej. Chodzi o nawrócenie lub wyeliminowanie przeciwnika. Z tego powodu na terenie kraju doszło do powstania terrorystycznych organizacji, takich jak Boko Haram.

Prawo do wolności religijnej zawarte w umowach międzynarodowych o charakterze powszechnym

Szczególne miejsce w prawie międzynarodowym zajmują kwestie związane z prawami człowieka. Rozwój regulacji związanych z ochroną tych praw nastąpił w momencie powstania Organizacji Narodów Zjednoczonych w 1945 r. Dramat II wojny światowej sprawił, że społeczność międzynarodowa zjednoczyła siły w celu zagwarantowania każdemu człowiekowi jego praw, a co za tym idzie uniknięcia w przyszłości tragedii i cierpień ludzkich. Społeczność

[443] Zob. Czarna księga prześladowań chrześcijan w świecie, Jean-Michel di Falco, Timothy Radcliffe, Andrea Riccardi (red.), Poznań 2015, s. 13.

[444] https://www.opendoors.pl/przesladowania-chrzescijan/swiatowy-indeks-przesladowan/opisy-krajow- przesladowan/nigeria [dostęp: 4.07.2022].

międzynarodowa zmieniła podejście do praw człowieka. Stanowione prawo międzynarodowe zaczęło stopniowo wprowadzać nowe regulacje i zajmować się ochroną grup ludzkich oraz podstawowych praw przysługujących każdemu człowiekowi[445]. Dawniej traktowanie przez państwo własnych obywateli należało jedynie do kompetencji każdego państwa z osobna. Prawo do wolności sumienia i religii zagwarantowane zostało w dokumentach międzynarodowych o zasięgu uniwersalnym. Spośród umów stanowiących o prawie do wolności religijnej należy w sposób szczególny wskazać:

Powszechna Deklaracja Praw Człowieka (10 grudnia 1948 r, Paryż);

Międzynarodowy Pakt Praw Obywatelskich i Politycznych (18 grudnia 1966 r, Nowy Jork);

Deklaracja w sprawie Wyeliminowania Wszelkich Form Nietolerancji i Dyskryminacji opartych na religii lub przekonaniach (25 listopada 1981 r, Nowy Jork);

Deklaracja w sprawie Praw Osób Należących do Mniejszości Narodowych lub Etnicznych, Religijnych i Językowych (18 grudnia 1992 r, Nowy Jork).

Powszechna Deklaracja Praw Człowieka

Powszechna Deklaracja Praw Człowieka została uchwalona przez Zgromadzenie Ogólne Narodów Zjednoczonych dn. 10 grudnia 1948 r. w Paryżu. Przyjęli ją przedstawiciele państw reprezentujących ludzi różnych ras, języków, narodowości, kultur i religii, co spowodowało, że pewnym sformułowaniom nadano charakter kompromisowy. Stała się podstawowym dokumentem wyznaczającym standardy ochrony praw człowieka, w tym gwarantującym prawo do wolności sumienia i religii każdej osobie.

Deklaracja zakreśla pożądany przez ludzkość kierunek rozwoju oparty na poszanowaniu ludzkich praw, że każdy człowiek rodzi się wolnym i równym w swojej godności. Wolność, równość, godność stanowią fundamenty praw człowieka, które składają się na współczesną awangardę prawa międzynarodowego o charakterze norm bezwzględnie wiążących i obowiązujących wszystkich[446].

Powszechna Deklaracja Praw Człowieka rozpoczyna się słowami: „uznanie przyrodzonej godności oraz równych i niezbywalnych praw wszystkich członków rodziny ludzkiej stanowi podstawę wolności, sprawiedliwości i pokoju na świecie"[447]. Ponadto we wstępie do Powszechnej Deklaracji Praw Człowieka zostało między innymi stwierdzone, że konieczną rzeczą jest, aby wszystkie prawa człowieka były chronione przez normy prawa międzynarodowego i krajowego w celu uniknięcia wojny jako ostatecznej formy buntu przeciwko tyranii i uciskowi.

Artykuł 1 stwierdza, że „Wszystkie istoty ludzkie rodzą się wolne i równe w godności i prawach. Są one obdarzone rozumem i sumieniem oraz powinny postępować w stosunku do siebie wzajemnie w duchu braterstwa"[448]. Postanowienia zawarte w Powszechnej Deklaracji Praw Człowieka dążą do ochrony osoby ludzkiej, obrony jej tożsamości fizycznej i duchowej, jej istnienia, wolności i intymności, życia religijnego, etycznego i kulturalnego. Fundamentem tych praw człowieka wpisanych do Deklaracji jest natura ludzka[449].

Artykuł 2 stanowi, że „Każda osoba jest uprawniona do korzystania ze wszystkich praw

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[445] Por. W. Góralczyk, S. Sawicki, Prawo międzynarodowe publiczne w zarysie, Warszawa 2015, s. 247.

[446] Por. D. Bieńkowska, Powszechna Deklaracja Praw Człowieka jako inspiracja dla współczesnych reżimów praw człowieka, w: Prawa człowieka i ludzkie bezpieczeństwo. Osiągnięcia i wyzwania. W 70 rocznicę ogłoszenia Powszechnej Deklaracji Prawa Człowieka, D. Bieńkowska, R. Kozłowski (red.), Warszawa 2019, s. 19.

[447] Zob. Powszechna Deklaracja Praw Człowieka, Wstęp.

[448] Tamże, art. 1.

[449] Por. J. Krukowski, Kościół i Państwo. Podstawy relacji prawnych, Lublin 2000, s. 210.

i wolności ogłoszonych w niniejszej Deklaracji bez jakiejkolwiek różnicy, zwłaszcza ze względu na rasę, kolor skóry, płeć, język, religię, poglądy polityczne lub jakiekolwiek inne, pochodzenie narodowe lub społeczne, majątek, urodzenie lub jakąkolwiek inną sytuację"[450]. Istotne jest dla omawianej problematyki, uznanie podmiotowości prawnej każdego człowieka bez względu na jego przekonania religijne.

Ważne postanowienie zostało zapisane w artykule 7: „Wszyscy są równi wobec prawa i są uprawnieni bez jakiejkolwiek dyskryminacji do równej ochrony prawnej. Wszyscy są uprawnieni do równej ochrony przed jakąkolwiek dyskryminacją sprzeczną z niniejszą Deklaracją oraz przed jakimkolwiek podżeganiem do takiej dyskryminacji"[451].

Bezpośrednio zagwarantowania prawa do wolności sumienia i religii dotyczy artykuł 18: „Każda osoba ma prawo do wolności myśli, sumienia i religii; prawo to obejmuje wolność zmiany swej religii lub przekonań, jak również wolność manifestowania swej religii lub przekonań, indywidualnie lub wspólnie z innymi, publicznie lub prywatnie, poprzez nauczanie, praktyki religijne, sprawowanie kultu i rytuałów"[452]. Prawo do wolności religijnej ujęte zostało w aspekcie pozytywnym. Prawo to, dotyczy każdego człowieka bez jakiegokolwiek wyjątku i obejmuje wolność myśli, sumienia, religii oraz wolność do manifestowania swej religii lub przekonań, indywidualnie lub wspólnie z innymi, publicznie lub prywatnie, poprzez nauczanie, spełnianie aktów kultu i innych praktyk religijnych oraz przestrzegania rytuałów.

Międzynarodowy Pakt Praw Obywatelskich i Politycznych

Międzynarodowy Pakt Praw Obywatelskich i Politycznych uchwalony 18 grudnia 1966 r. gwarantuje każdemu człowiekowi:

„1. Każdy ma prawo do wolności myśli, sumienia i wyznania. Prawo to obejmuje wolność posiadania lub przyjmowania wyznania lub przekonań według własnego wyboru oraz do uzewnętrzniania indywidualnie czy wspólnie z innymi, publicznie lub prywatnie, swej religii lub przekonań przez uprawianie kultu, uczestniczenie w obrzędach, praktykowanie i nauczanie.

2. Nikt nie może podlegać przymusowi, który stanowiłby zamach na jego wolność posiadania lub przyjmowania wyznania albo przekonań według własnego wyboru.

3. Wolność uzewnętrzniania wyznania lub przekonań może podlegać jedynie takim ograniczeniom, które są przewidziane przez ustawę i są konieczne dla ochrony bezpieczeństwa publicznego, porządku, zdrowia lub moralności publicznej albo podstawowych praw i wolności innych osób.

4. Państwa Strony niniejszego Paktu zobowiązują się do poszanowania wolności rodziców lub, w odpowiednich przypadkach, opiekunów prawnych do zapewnienia swym dzieciom wychowania religijnego i moralnego zgodnie z własnymi przekonaniami"[453].

W artykule 26 zaś, Międzynarodowy Pakt Praw Obywatelskich i Politycznych gwarantuje:

„Wszyscy są równi wobec prawa i są uprawnieni bez żadnej dyskryminacji do jednakowej ochrony prawnej. Jakakolwiek dyskryminacja w tym zakresie powinna być ustawowo zakazana oraz powinna być zagwarantowana przez ustawę równa dla wszystkich i skuteczna ochrona przed dyskryminacją z takich względów, jak: rasa, kolor skóry, płeć język, religia, poglądy polityczne lub inne, pochodzenie narodowe lub społeczne, sytuacja majątkowa, urodzenie lub jakiekolwiek inne okoliczności"[454]. Wspomniany artykuł 26 przywiązuje wielką wagę do

[450] Zob. Powszechna…, dz. cyt., art. 2.

[451] Tamże, art. 7.

[452] Tamże, art. 18.

[453] Zob. Międzynarodowy Pakt Praw Obywatelskich i Politycznych, art. 18.

[454] Tamże, art. 26.

zasady równego traktowania wszystkich ludzi bez względu na religię w zakresie korzystania z ochrony prawnej. Każdy człowiek powinien mieć prawo i możliwość, bez żadnej dyskryminacji z powodu religii, do uczestniczenia w kierowaniu sprawami publicznymi bezpośrednio lub za pośrednictwem swobodnie wybranych przedstawicieli, do korzystania z czynnego i biernego prawa wyborczego w rzetelnych, okresowo przeprowadzanych powszechnych, równych i tajnych wyborach[455].

Artykuł 27 Międzynarodowego Paktu Praw Obywatelskich i Politycznych stanowi: „W Państwach, w których istnieją mniejszości etniczne, religijne lub językowe, osoby należące do tych mniejszości nie mogą być pozbawione prawa do własnego życia kulturalnego, wyznawania i praktykowania własnej religii oraz posługiwania się własnym językiem wraz z innymi członkami danej grupy"[456].

Międzynarodowy Pakt Praw Obywatelskich i Politycznych jest pierwszym dokumentem międzynarodowym mówiącym o prawach osób należących do mniejszości i zobowiązującym państwa do ich przestrzegania. Powszechna Deklaracja Praw Człowieka nie wspomina o prawach mniejszości. Wspomniany artykuł 27 stwierdza, że w państwach, w których istnieją mniejszości religijne, osoby należące do takich mniejszości mają prawo do korzystania z własnej kultury oraz do wyznawania i praktykowania własnej religii, czy używania własnego języka[457]. Międzynarodowy Pakt Praw Obywatelskich i Politycznych bierze w obronę mniejszości etniczne, religijne lub językowe, zabraniając pozbawiania osób należących do tych mniejszości prawa do posiadania razem z członkami swojej grupy, własnego życia kulturalnego, prawa do wyznawania i praktykowania własnej religii oraz do posługiwania się własnym językiem[458].

Deklaracja w sprawie Wyeliminowania Wszelkich Form Nietolerancji i Dyskryminacji opartych na religii lub przekonaniach

Deklaracja w sprawie Wyeliminowania Wszelkich Form Nietolerancji i Dyskryminacji opartych na religii lub przekonaniach uchwalona 25 listopada 1981 r., w artykule 1 stanowi:

„1. Każda osoba będzie miała prawo do wolności myśli, sumienia i religii. Prawo to będzie obejmowało wolność wyznawania religii bądź jakichkolwiek przekonań według własnego wyboru, jak również wolność manifestowania swojej religii lub przekonań - indywidualnie lub we wspólnocie z innymi, publicznie lub prywatnie - w modlitwie, obrzędach, praktykach i nauczaniu.

2. Nikt nie będzie podlegać przymusowi, który naruszałby jego wolność wyznawania religii lub przekonań według własnego wyboru.

3. Wolność manifestowania czyjejś religii lub przekonań może podlegać jedynie takim ograniczeniom, jakie są przewidziane prawem i konieczne w demokratycznym społeczeństwie dla ochrony bezpieczeństwa, porządku, zdrowia lub moralności publicznej, albo podstawowych praw i wolności innych osób"[459].

Deklaracja w sprawie Wyeliminowania Wszelkich Form Nietolerancji i Dyskryminacji opartych na religii lub przekonaniach w artykule 2 ust. 1 stanowi:

„Nikt nie będzie podlegać dyskryminacji ze strony jakiegokolwiek Państwa, instytucji, grupy

[455] Por. R. Bierzanek, J. Symonides, Prawo międzynarodowe publiczne, Warszawa 2000, s. 276.

[456] Por. Międzynarodowy…, dz. cyt., art. 27.

[457] Por. R. Bierzanek, J. Symonides…, dz. cyt., s. 283.

[458] Por. J. Krukowski…, dz. cyt., s. 213.

[459] Zob. Deklaracja w sprawie Wyeliminowania Wszelkich Form Nietolerancji i Dyskryminacji opartych na religii lub przekonaniach, art. 1.

osób albo osoby na podstawie religii lub innych przekonań"[460]. W ust. 2 zaś, wspomniany artykuł podaje definicję nietolerancji i dyskryminacji: „Dla celów niniejszej Deklaracji, wyrażenie „nietolerancja i dyskryminacja na podstawie religii lub przekonań" oznacza jakiekolwiek wyróżnienie, wykluczenie, restrykcje lub uprzywilejowanie oparte na religii lub przekonaniach i mające za swój cel albo za swój skutek zniesienie lub naruszenie uznania, korzystania lub urzeczywistniania praw człowieka i podstawowych wolności na zasadzie równości"[461].

Ponadto Deklaracja w artykule 3 stanowi: „Dyskryminacja pomiędzy istotami ludzkimi na podstawie religii lub przekonań stanowi obrazę godności ludzkiej oraz zaparcie się zasad Karty Narodów Zjednoczonych, i winna być potępiona jako naruszenie praw człowieka i podstawowych wolności proklamowanych w Powszechnej Deklaracji Praw Człowieka, a szczegółowo ogłoszonych w Międzynarodowych Paktach Praw Człowieka, a także jako przeszkoda dla przyjaznych i pokojowych stosunków między narodami"[462].

Deklaracja w sprawie Praw Osób Należących do Mniejszości Narodowych lub Etnicznych, Religijnych i Językowych

Deklaracja w sprawie Praw Osób Należących do Mniejszości Narodowych lub Etnicznych, Religijnych i Językowych została uchwalona przez Zgromadzenie Ogólne ONZ 18 grudnia 1992 r. Jako rezolucja Zgromadzenia Narodowego NZ nie stanowi traktatu międzynarodowego i nie rodzi prawnie wiążących zobowiązań dla państw. Jednak rodzi zobowiązania natury moralno-politycznej, a jej znaczenie dla kształtowania praktyki państw jest znaczące[463].

Deklaracja w sprawie Praw Osób Należących do Mniejszości Narodowych lub Etnicznych, Religijnych i Językowych w artykule 2 stanowi:

„1. Osoby należące do mniejszości narodowych lub etnicznych, religijnych i językowych, (zwane osobami należącymi do mniejszości) mają prawo do korzystania ze swej własnej kultury, do wyznawania i praktykowania swej własnej religii oraz do używania swego własnego języka, publicznie i prywatnie, swobodnie i bez ingerencji lub jakiejkolwiek formy dyskryminacji.

2. Osoby należące do mniejszości mają prawo do skutecznego uczestnictwa w życiu kulturalnym, religijnym, społecznym, gospodarczym i publicznym.

3. Osoby należące do mniejszości mają prawo do skutecznego uczestnictwa na szczeblu narodowym, a gdy to właściwe, na szczeblu regionalnym, w decyzjach dotyczących mniejszości, do których one należą albo regionów, w których one się znajdują, w sposób nie kłócący się z ustawodawstwem narodowym.

4. Osoby należące do mniejszości mają prawo do zakładania i utrzymywania swych własnych stowarzyszeń.

5. Osoby należące do mniejszości mają prawo do ustanawiania i utrzymywania, bez jakiejkolwiek dyskryminacji, swobodnych i pokojowych kontaktów z innymi członkami ich grupy oraz z osobami należącymi do innych mniejszości, jak również kontaktów poprzez granice z obywatelami innych Państw, z którymi łączą je więzi narodowe albo etniczne, religijne lub językowe"[464].

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[460] Tamże, art. 2 ust. 1.

[461] Tamże, art. 2 ust. 2.

[462] Tamże, art. 3.

[463] Por. Prawa Człowieka, Dokumenty międzynarodowe, B. Gronowska, T. Jasudowicz i C. Mik (red.), Toruń 1996, s. 118.

[464] Zob. Deklaracja w sprawie Praw Osób Należących do Mniejszości Narodowych lub Etnicznych, Religijnych i Językowych, art.2.

Zakaz dyskryminacji został również zawarty w artykule 3 ust. 1: „Osoby należące do mniejszości mogą realizować swoje prawa, włączając prawa ustalone w niniejszej Deklaracji, indywidualnie, jak również we wspólnocie z innymi członkami swej grupy, bez jakiejkolwiek dyskryminacji”[465]. Artykuł 4 ust. 1 Deklaracji w sprawie Praw Osób Należących do Mniejszości Narodowych lub Etnicznych, Religijnych i Językowych dopowiada: „Tam, gdzie jest to pożądane, państwa powinny podjąć środki dla zapewnienia, by osoby należące do mniejszości mogły w pełni i skutecznie wykonywać wszystkie swoje prawa człowieka i podstawowe wolności, bez jakiejkolwiek dyskryminacji oraz na zasadzie pełnej równości wobec prawa”[466].

Prawa religijne sformułowane w Deklaracji w sprawie Praw Osób Należących do Mniejszości Narodowych lub Etnicznych, Religijnych i Językowych wchodzą w skład podstawowych praw i wolności, do których poszanowania w stosunku do osób należących do mniejszości zobowiązali się jej sygnatariusze. Są to prawa: prawo do wyznawania i prawo do praktykowania swojej własnej religii. Prawa te mają charakter uniwersalny czyli znajdują zastosowanie do wszystkich osób, niezależnie od tego, czy należą one do mniejszości narodowych, czy też nie. Odpowiadają one bowiem postanowieniom zawartym w Powszechnej Deklaracji Praw Człowieka oraz Międzynarodowym Pakcie Praw Obywatelskich i Politycznych.

Prawo do wolności sumienia i religii w Nigerii

Nigeria jest najliczniej zaludnionym państwem Afryki. Ludność kraju w 2021 r. liczyła około 220 mln[467]. W całej Nigerii występuje ok. 250 różnych grup etnicznych o znacznym zróżnicowaniu. To sprawia, że dochodzi do dramatycznych napięć. Ludność Nigerii jest niemal w równych proporcjach podzielona na muzułmanów i chrześcijan. Jedynie 10 procent stanowią wyznawcy tradycyjnych wierzeń afrykańskich. Chrześcijanie stanowią większość na południu, muzułmanie zaś, na północy kraju[468].

W ciągu ostatnich dziesięcioleci Nigeria rozdzierana jest walkami pomiędzy muzułmanami, a chrześcijanami. W wyniku czego życie straciło tysiące ludzi. Relacje jeszcze bardziej pogorszyły wpływy radykalnego islamu. Co przejawia się wprowadzaniem islamskiego prawa w całym kraju. Sytuacja jest bardzo napięta. Obecnie można mówić, że ma miejsce konflikt wyłącznie na tle religijnym. Chodzi o nawrócenie lub zgładzenie innowiercy. Chociaż konstytucja Nigerii uznaje wolność religijną, wolność manifestowania, głoszenia własnej wiary, wolność dotyczącą przyjmowania innej religii. To w rzeczywistości próbuje się narzucić zasady szariatu, czyli prawa koranicznego wszystkim obywatelom niezależnie od przekonań religijnych[469].

W 1999 r. gubernator stanu Zamfara, Alhaji Ahmed Sani, wprowadził drakońską wersję prawa szariatu. Za jego przykładem poszło 11 z 36 stanów w Nigerii. Skutki tego prawa odczuwają w sposób dotkliwy także muzułmanie, szczególnie kobiety. Jednak przede wszystkim, to chrześcijanie są najbardziej poszkodowani. Na polecenie lokalnych władz zamknięto setki kościołów. Z podatków chrześcijan np. utrzymywani są islamscy kaznodzieje[470]. Konflikt związany z szariatem doprowadził również do zamieszek, które pochłonęły bardzo dużą liczbę

[465] Tamże, art. 3 ust. 1.

[466] Tamże, art. 4 ust. 1.

[467] https://pl.wikipedia.org/wiki/Nigeria [dostęp: 23.07.2022].

[468] Zob. P. Marshall, L. Gilbert, N. Shea, Prześladowani, Przemoc wobec chrześcijan, Poznań 2014, s. 277.

[469] Por. Prześladowani i zapomniani. Raport dotyczący chrześcijan prześladowanych za wiarę w latach 2007- 2008, W. Cisło (red.), Warszawa 2008, s. 121.

[470] Por. P. Marshall, L. Gilbert, N. Shea, Prześladowani…, dz. cyt., s. 277.

ofiar śmiertelnych. Władze praktycznie nie potrafią skutecznie zapobiec atakom, które głównie są wywoływane przez muzułmanów. Jednak niekiedy inicjowane są też przez chrześcijan[471].

W 2002 r. pojawiła się w Nigerii organizacja, a raczej sekta Boko Haram. Nazwa bywa interpretowana jako „Książki to grzech", „Zakazać zachodniej oświaty", „Nowoczesne wychowanie to grzech" albo „Zwodzenie przez przytaczanie fałszywych faktów to grzech"[472]. Założyciel Mohamed Yusuf twierdził, że islam jest skażony przez przyjmowanie wzorców kultury krajów cywilizacji zachodniej i przez powszechną ich akceptację, czyli okcydentalizację oraz przez wszystko, co z niej wynika, szczególnie chodzi o edukację i chrześcijaństwo. Dlatego odrzucał legalność państwa i tradycyjnych muzułmańskich przywódców. Organizacja dąży zatem do obalenia federalnego rządu Nigerii i stworzenia państwa, w którym będzie obowiązywał szariat oraz restrykcyjne zasady ustalone przez samego Mohameda Yusufa. Ugrupowanie to porównuje siebie z afgańskimi talibami. Traktuje jako niewiernych wszystkich, zarówno chrześcijan, jak i muzułmanów, którzy nie zgadzają się z ich poglądami[473]. Od czasu jego powstania, tysiące ludzi stały się ofiarami religijnych pogromów. Boko Haram wpisana jest na listę organizacji terrorystycznych Departamentu Stanu USA[474].

W świetle nigeryjskiej konstytucji, nauczanie religii w szkołach państwowych nie jest obowiązkowe. Uczniowie innej religii mają prawo żądać nauczania religii odpowiadającej ich własnej wierze. Jednak często w szkołach na północy kraju nie ma nauczycieli religii chrześcijańskiej obawiających się o swoje bezpieczeństwo. Ponadto chrześcijańskie uczennice szkół publicznych zmuszane są do noszenia muzułmańskiego ubioru - hidżabu[475]. Powszechne też jest utrudnianie kandydatom chrześcijańskim wstępowania do szkół publicznych i na wyższe uczelnie.

Najbardziej rozpowszechnione akty nietolerancji i dyskryminacji religijnej obejmują fałszywe oskarżenia o bluźnierstwo wobec islamu. Co skutkuje tym, że chrześcijańscy wykładowcy i studenci zmuszeni są do opuszczenia swojej uczelni. Brak zezwoleń na budowę chrześcijańskich świątyń oraz cmentarzy. Wyburzanie kościołów uznanych za bezprawnie zbudowane. Porwania i nawracanie siłą, szczególnie dziewcząt, co kończy się przymusowym małżeństwem z muzułmaninem. Dyskryminowanie chrześcijan w urzędach. Osoby wywodzące się z kręgów chrześcijańskich nie są powoływane na publiczne stanowiska. Często odmawia się im awansu w pracy. Wytaczanie chrześcijanom procesów w oparciu o prawo szariatu[476].

Osobom, które przejdą na inną religię niż islam, grozi się śmiercią. Muzułmanom zaś, którzy nawrócą się na chrześcijaństwo grozi kara śmierci. Podobny los czeka tych, którzy zostaną oskarżeni o bluźnierstwo[477].

Przykłady łamania prawa do wolności sumienia i religii w Nigerii

28 września 2007 r. na północy Nigerii w Tudun Wada Dankadai, stan Kano, doszło do ataków fanatycznych muzułmanów. Zginęło 20 chrześcijan, 60 było rannych, a 500 wypędzono z domów. Dodatkowo muzułmanie spalili 10 kościołów, 36 domów i 147 sklepów. Jednego księdza

[471] Tamże, s.278.
[472] https://pl.wikipedia.org/wiki/Boko_Haram [dostęp: 27.07.2022].
[473] Por. P. Marshall, L. Gilbert, N. Shea, Prześladowani…, dz. cyt., s. 279.
[474] https://pl.wikipedia.org/wiki/Boko_Haram [dostęp: 27.07.2022].
[475] Por. Prześladowani…, dz. cyt., s. 122.
[476] Tamże, s. 123.
[477] Por. P. Marshall, L. Gilbert, N. Shea, Prześladowani…, dz. cyt., s. 278.

poddano brutalnym torturom, maczetą ucięto mu palce prawej ręki[478] 29 września 2007 r. chrześcijański nauczyciel miał rzekomo rozesłać po klasie obraźliwe karykatury proroka Mahometa, to doprowadziło do śmierci 9 osób w wynikłej bójce pomiędzy muzułmańską, a chrześcijańską młodzieżą[479].

5 października 2007 r., w reakcji na komiks, który miał jakoby zniesławić Mahometa, zginęło 9 chrześcijan. Podpalono również kościoły, domy i sklepy[480].

W lipcu 2009 r. Boko Haram przeprowadziło skoordynowane ataki w stanach Bauczi, Yobe, Kano i Borno, które pociągnęły za sobą śmierć co najmniej 1000 osób[481].

W latach 2010 i 2011 Boko Haram dokonało ataków bombowych na pięć kościołów, w których wierni obchodzili Boże Narodzenie[482].

15 lutego 2014 r. co najmniej 121 osób zginęło, a wiele odniosło rany, kiedy uzbrojeni członkowie Boko Haram skandując „Allah akbar" zaatakowali wioskę Izghe w obszarze administracyjnym Gwoza w stanie Borno, w większości zamieszkałą przez chrześcijan[483].

14 marca 2014 r. w ataku przeprowadzonym na trzy chrześcijańskie wioski w stanie Kaduna, zginęło ponad 150 osób. Wsie zostały zrównane z ziemią, spalono setki domów i kościoły[484].

W maju 2021 r. podała organizacja Intersociety, że w ciągu pierwszych czterech miesięcy tego roku zabito w Nigerii 1470 chrześcijan. Ponad 2,2 tys. zostało porwanych, z czego 200 uznaje się za zabitych[485].

W marcu 2022 r. w stanie Kaduna brutalnie zamordowano 50 chrześcijan, a dużą grupę uprowadzono bez wieści. Napady, porwania i gwałty są tam na porządku dziennym. Lokalne władze poinformowały o śmierci ks. Josepha Aketeha Bako, który został uprowadzony na początku marca. Serce schorowanego kapłana nie wytrzymało tego, jak na jego oczach islamiści zabili jego rodzonego brata, który wraz z nim został porwany[486].

W maju 2022 r. najprawdopodobniej fundamentaliści związani z ugrupowaniem Boko Haram w stanie Borno podcięli gardła dwudziestu chrześcijanom, którym w czasie egzekucji kazali klęczeć ze związanymi z tyłu rękami. Jak poinformowali, był to gest zemsty za zabicie jednego z ich przywódców działających w Syrii. Oprawcy zapowiedzieli dalszy odwet na chrześcijanach Bliskiego Wschodu i całego świata[487].

5 czerwca 2022 r. nieznani uzbrojeni mężczyźni zaatakowali kościół katolicki św. Franciszka w mieście Owo w stanie Ondo w południowo-zachodniej Nigerii. Chrześcijanie odprawiali nabożeństwo na pamiątkę zesłania Ducha Świętego. Według doniesień mediów napastnicy zabili około 50 osób, uprowadzili starszego księdza i nieznaną liczbę wiernych[488].

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[478] Por. Prześladowani…, dz. cyt., s. 126.

[479] Tamże, s. 278.

[480] Tamże.

[481] Por. Czarna księga…, dz. cyt., s. 478.

[482] Por. P. Marshall, L. Gilbert, N. Shea, Prześladowani…, dz. cyt., s. 280.

[483] Por. Czarna księga…, dz. cyt., s. 484.

[484] Tamże, s. 488.

[485] https://www.vaticannews.va/pl/kosciol/news/2021-05/nigeria-eskalacja-przesladowan-chrzescijanie-szturmuja-niebo.html [dostęp: 28.07.2022].

[486] https://www.ekai.pl/dzihadysci-zamordowali-dwudziestu-chrzescijan/ [dostęp: 28.07.2022].

[487] Tamże.

[488] https://www.opendoors.pl/wiadomosci/najnowsze-informacje/krwawy-zamach-na-kosciol-nie-zyje-okolo-50-chrzescijan [dostęp: 28.07.2022].

Podsumowanie

Powszechna Deklaracja Praw Człowieka przyjęta w 1948 r. przez Organizację Narodów Zjednoczonych, w art. 18 stanowi: „Każda osoba ma prawo do wolności myśli, sumienia i religii; prawo to obejmuje wolność zmiany swej religii lub przekonań, jak również wolność manifestowania swej religii lub przekonań, indywidualnie lub wspólnie z innymi, publicznie lub prywatnie, poprzez nauczanie, praktyki religijne, sprawowanie kultu i rytuałów".

Prawo do wolności religijnej jest adresowane do wszystkich państw członkowskich ONZ, a tym samym stanowi międzynarodowy standard. Pomimo tego, prawo do wyboru i praktykowania własnej religii jest jednym z najczęściej naruszanych praw na świecie. Przykładem jest Nigeria, która zajmuje 7 miejsce wśród krajów włączonych do Światowego Indeksu Prześladowań[489].

Większość aktów przemocy wobec ludności cywilnej, zwłaszcza chrześcijan, ma miejsce na północy kraju, w tym w Pasie Środkowym i jest dokonywana przez grupy terrorystyczne takie jak Boko Haram, Państwo Islamskie Prowincji Afryki Zachodniej, pasterzy Fulani oraz uzbrojonych „bandytów". Przemoc obejmuje: zabijanie, tortury, gwałty i inne formy przemocy seksualnej, a także odbieranie własności i niszczenie pól uprawnych. W ostatnich latach znacznie wzrosła liczba uprowadzeń dla okupu. Chrześcijanie siłą pozbawiani są ziemi i środków do życia. Wiele osób staje się wewnętrznymi przesiedleńcami lub uchodźcami. Chrześcijanie w północnej Nigerii, zwłaszcza w stanach objętych szariatem, spotykają się z dyskryminacją i wykluczeniem jako obywatele drugiej kategorii. Nawróceni z islamu zaś, spotykają się z odrzuceniem ze strony własnych rodzin, presją, by porzucili chrześcijaństwo, często z przemocą fizyczną, a nawet śmiercią. W ostatnich latach przemoc nasiliła się i rozprzestrzeniła na południowe stany, co potęguje poczucie braku bezpieczeństwa i poziom bezkarności. Prezydent Muhammadu Buhari coraz częściej obsadza muzułmanów na najważniejszych stanowiskach w rządzie. Praktyka ta utrudnia chrześcijanom, którzy ucierpieli z powodu łamania praw człowieka, publiczne wypowiadanie się i dochodzenie swoich praw. Pod rządami prezydenta Buhari, podczas ataków, społeczność chrześcijańska pozbawiona jest pomocy sił bezpieczeństwa, które podlegają dowództwu federalnemu. Choć zgodnie z konstytucją Nigeria jest państwem świeckim, to przez dziesięciolecia elita rządząca dyskryminowała chrześcijan na rzecz muzułmanów. Od 1999 r. w 12 północnych stanach ustanowiono prawo szariatu. Co sprawiło, że prawo do wolności sumienia i religii zostało w tych stanach poważnie ograniczone.

Wspomniane praktyki mają miejsce w XXI w. i dokonują się za przyzwoleniem społeczności międzynarodowej. Choć prawo do wolności religijnej zagwarantowane zostało każdemu człowiekowi w umowach międzynarodowych. Jego przestrzeganie zaś, jest monitorowane przez Komitet Praw Człowieka. Jednak odnosi się wrażenie, że gwarancje zawarte w dokumentach o zasięgu uniwersalnym nie funkcjonują, są martwym zapisem. Według Światowego Indeksu Prześladowań, Nigeria w 2021 r. zajmowała miejsce 9, zaś w 2022 r. już miejsce 7. Nagminnie w tym państwie łamane jest prawo do wolności sumienia i religii, a tym samym nie można mówić o bezpieczeństwie religijnym chrześcijan tam żyjących. Społeczność międzynarodowa zaś, patrzy i milczy. Postawa taka świadczy o braku wrażliwości, obojętności oraz braku międzynarodowej solidarności wśród państw, które stanęłyby na straży respektowania praw człowieka, w tym prawa do wolności sumienia i religii przysługującego każdemu człowiekowi. Brak sprzeciwu społeczności międzynarodowej oraz zdecydowanych działań sprawia, że prześladowcy czują się bezkarni, pewni siebie i jeszcze bardziej zachęceni do popełniania zbrodniczych czynów. Społeczność międzynarodowa nie może

[489] https://www.opendoors.pl/przesladowania-chrzescijan/przesladowania-mapa [dostęp: 29.07.2022].

być obojętna, kiedy człowiekowi dzieje się krzywda, gdy giną niewinni ludzie. Konieczne jest podjęcie zdecydowanych działań, aby zakończyć zbrodniczy precedens. Brak działań ze strony ONZ jest przejawem bezsilności, a także w jakiś sposób przejawem akceptacji istniejącej sytuacji.

BIBLIOGRAPHY

Bieńkowska D., Powszechna Deklaracja Praw Człowieka jako inspiracja dla współczesnych reżimów praw człowieka, w: Prawa człowieka i ludzkie bezpieczeństwo.
Osiągnięcia i wyzwania. W 70 rocznicę ogłoszenia Powszechnej Deklaracji Prawa Człowieka, D. Bieńkowska, R. Kozłowski (red.), Warszawa 2019, s. 13-23.
Bierzanek R., Symonides J., Prawo międzynarodowe publiczne, Warszawa 2000.
Czarna księga prześladowań chrześcijan w świecie, Jean-Michel di Falco, Timothy Radcliffe, Andrea Riccardi (red.), Poznań 2015.
Góralczyk W., Sawicki S., Prawo międzynarodowe public*zne w zarysie*, Warszawa 2015.
Krukowski J., Kościół i Państwo. Podstawy relacji prawnych, Lublin 2000.
Marshall P., Gilbert L., Shea N., Prześladowani, Przemoc wobec chrześcijan, Poznań 2014.
Prześladowani i zapomniani. Raport dotyczący chrześcijan prześladowanych za wiarę *w latach 2007- 2008, W. Cisło (red.), Warszawa 2008.*
Prześladowani i zapomniani. Raport dotyczący chrześcijan prześladowanych za wiarę w latach 2015- 2017, W. Cisło, A. Paś, M. Boguszewski (red.), Warszawa 2018.

Ustawodawstwo

Deklaracja w sprawie Praw Osób Należących do Mniejszości Narodowych lub Etnicznych, Religijnych i Językowych (Nowy Jork, 18 grudnia 1992), w: K. Warchałowski (red.), Prawo wyznaniowe, Wybór źródeł, Warszawa 2000, s. 55-60.
Deklaracja w sprawie Wyeliminowania Wszelkich Form Nietolerancji i Dyskryminacji opartych na religii lub przekonaniach (Nowy Jork, 25 listopada 1981), w: K. Warchałowski (red.), Prawo wyznaniowe, Wybór źródeł, Warszawa 2000, s. 46-51.
Międzynarodowy Pakt Praw Obywatelskich i Politycznych (Nowy Jork, 16 grudnia 1966), Dz. U. 1977 nr 38 poz. 167.
Powszechna Deklaracja Praw Człowieka (Paryż, 10 grudnia 1948), w: B. Gronowska, T. Jasudowicz i C. Mik (red.), Prawa Człowieka, Dokumenty międzynarodowe, Toruń 1996, s. 15-20.

Źródła internetowe

https://www.opendoors.pl/przesladowania-chrzescijan/swiatowy-indeks-przesladowan/opisy-krajow- przesladowan/nigeria [dostęp: 4.07.2022].
https://pl.wikipedia.org/wiki/Nigeria [dostęp: 23.07.2022].
https://pl.wikipedia.org/wiki/Boko_Haram [dostęp: 27.07.2022].
https://pl.wikipedia.org/wiki/Boko_Haram [dostęp: 27.07.2022].
https://www.vaticannews.va/pl/kosciol/news/2021-05/nigeria-eskalacja-przesladowan-chrzescijanie-szturmuja-niebo.html [dostęp: 28.07.2022].
https://www.ekai.pl/dzihadysci-zamordowali-dwudziestu-chrzescijan/ [dostęp: 28.07.2022].
https://www.opendoors.pl/wiadomosci/najnowsze-informacje/krwawy-zamach-na-kosciol-nie-zyje-okolo-50-chrzescijan [dostęp: 28.07.2022].
https://www.opendoors.pl/przesladowania-chrzescijan/przesladowania-mapa [dostęp: 29.07.2022].

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ERSPEKTYWY ROZWOJU ZAWODOWEGO KOBIET A DZIAŁANIA CSR W ŚWIETLE DYREKTYWY WORK-LIFE-BALANCE

Women's professional development prospects and CSR activities about work-life-balance directive

Abstract
Corporate social responsibility is a concept that defines the relationship between an entrepreneur and his environment, both near and far. Employees of the company are the most valuable resource of the company, but also the group most sensitive to the policy and strategy of the enterprise. This article is an attempt to analyze the impact of the work-life-balance directive standards on the activities of socially responsible enterprises.

Streszczenie
Społeczna odpowiedzialność przedsiębiorstw to koncepcja, która określa relację między przedsiębiorcą a jego otoczeniem, zarówno tym bliskim jak i dalekim. Pracownicy przedsiębiorstwa to najcenniejszy zasób przedsiębiorstwa, ale również grupa najbardziej wrażliwa na politykę i strategię przedsiębiorstwa. Niniejszy artykuł jest próbą analizy wpływu norm dyrektywy *work-life-balance* na działania przedsiębiorstw społecznie odpowiedzialnych.

Keywords: CSR, corporate social responsibility, women·s professional development, work-life-balance directive

Slowakluczonwe: CSR, społeczna odpowiedzialność biznesu, rozwój zawodowy kobiet, dyrektywa work-life-balance

Celem niniejszego artykułu jest teoretyczna analiza roli i znaczenia społecznej odpowiedzialności biznesu oraz wpływu implementacji dyrektywy *work-life-balance* do prawa polskiego w kreowaniu perspektyw rozwoju zawodowego współczesnych kobiet. Wiodącą metodą badawczą zastosowaną w pracy jest tak zwana triangulacja źródeł danych, czyli porównywanie informacji na temat sytuacji kobiet na rynku pracy w różnych okresach czasu, jak również do sytuacji mężczyzn czy kobiet w innych państwach europejskich. Zebrane dane poddane zostały analizie z perspektywy koncepcji CSR.

Społeczna odpowiedzialność przedsiębiorstw to koncepcja, która wymusza odpowiedzialność przedsiębiorstwa za swój wpływ na społeczeństwo[490]. Pośrednio społeczna odpowiedzialność biznesu jest jednym ze sposobów implementacji praw człowieka do działalności przedsiębiorców[491]. Cechą charakterystyczną przedsiębiorstw odpowiedzialnych społecznie jest ich gotowość do przyjęcia i ponoszenia odpowiedzialności za swoje działania oraz podejmowane decyzje. Ta gotowość dotyczy wszystkich grup interesariuszy, w którymi przedsiębiorstwo wchodzi w relacje. Jedną z takich grup są pracownicy przedsiębiorstwa[492]. Jest to szczególnie ważna grupa, z jednej strony, bo dotyczy najbliższego otoczenia, zasobu przedsiębiorstwa jakim jest kapitał ludzki, a z drugiej strony grupa najbardziej wrażliwa na politykę i strategię przedsiębiorstwa.

Społecznie odpowiedzialni przedsiębiorcy traktują działania na rzecz swoich pracowników jako ważną inwestycję, a nie jako koszt[493]. Taka inwestycja wpływa m.in. na zwiększenie motywacji, zaangażowania i zaufania pracowników, ograniczenia niedyspozycji i nieobecności pracowników, zmniejszenie rotacji pracowniczych oraz poprawę oceny przedsiębiorstwa wśród pracowników.

Przedsiębiorstwa to organizmy zmieniające się wraz ze zmieniającym się otoczeniem, podążające za trendami, za wymaganiami prawnymi, aby w walce o swoją pozycję na rynku nie przegrać z konkurencją. Każdy kolejny rok przynosi nowe szanse, wyzwania czy obowiązki. Do wyzwań etycznych wypływających z uwarunkowań społecznych w obecnym czasie należy m.in. zapewnienie sprawiedliwej pozycji kobiety na rynku pracy. Zgodnie z analizą grupy roboczej ds. etyki i standardów odpowiedzialnego prowadzenia biznesu[494] jest to jeden z ważniejszych problemów w obszarze pracowniczym. Charakteryzując polski rynek pracy w postpandemicznej rzeczywistości należy zwrócić szczególną uwagę na wzrost obciążenia kobiet. Z badania dotyczącego wpływu pandemii na kobiety w biznesie[495] przestawionego w końcu 2021 roku wynika, że wzrost obciążenia pracą dotyczy ponad 70% kobiet w Polsce, podczas gdy średnio w skali światowej odczuły to 30% kobiet. Dodatkowo należy zauważyć również, większe obciążenie obowiązkami związanymi z prowadzeniem gospodarstwa domowego niż w przypadku mężczyzn. Wzrost obowiązków w tym obszarze zgłosiło 68% badanych kobiet.

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[490] Rok. B., Społeczna odpowiedzialność biznesu, w:Gasparski W. (red) Biznes, Etyka, odpowiedzialność, PWN 2013, s.424

[491] Bernat M. Społeczna odpowiedzialność biznesu. Wymiar konstytucyjny i międzynarodowy, Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, Warszawa 2009, s.38

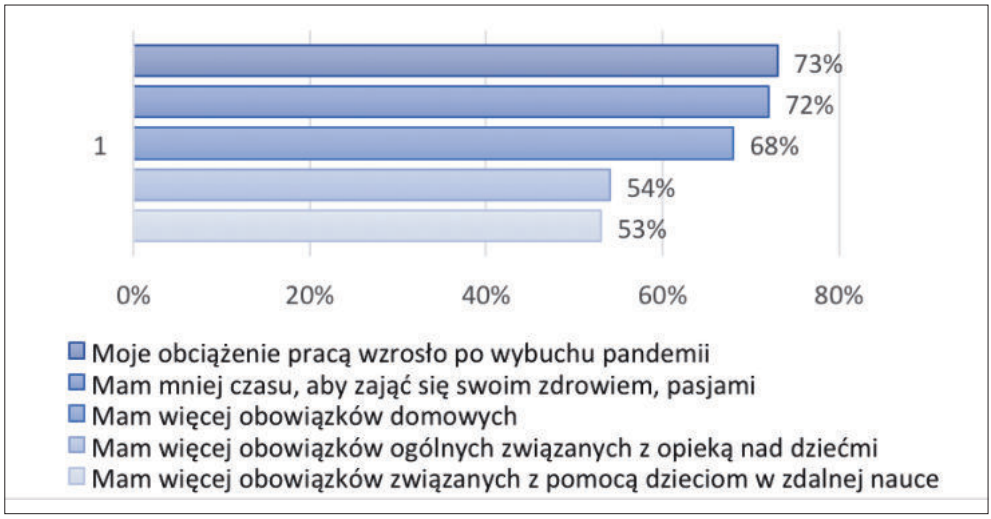
[492] Szejniuk A., Etyka menadżerska w zarządzaniu zasobami ludzkimi, Journal of Modern Science, vol.28/1, 2016, s. 89-104

[493] Piasecki R., Gudowski J., Theoratical and practical aspects of CSR. Implementation by foregin investors,InnovatioPress, Lublin 2022

[494] Sroka R., Etyka biznesu – wokół kluczowych zagadnień, Ministerstwo Inwestycji i Rozwoju, s.7

[495] Raport- wpływ pandemii na kobiety w biznesie, Deloitte 2021; http://www2.delloite.com/

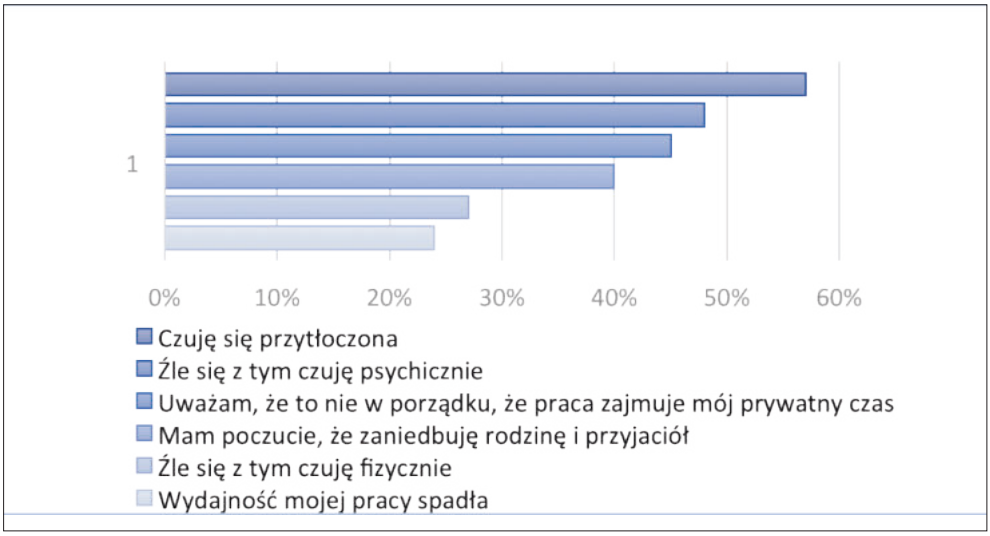
Wykres1. Jak zmieniły się obciążenia dotyczące życia zawodowego/prywatnego i codziennych obowiązków po wybuchu pandemii



Źródło: opracowanie własne na podstawie danych Raport- wpływ pandemii na kobiety w biznesie, Deloitte 2021; http://www2.delloite.com/

Wspomniany raport uwypukla także ogromną rolę pracodawcy w kształtowaniu środowiska pracy przyjaznego kobiecie, wspierającego jej aspiracje zawodowe. Połowa badanych kobiet odpowiedziała, że a poczucie, że musi być obecnie non stop dyspozycyjna. Praca zdalna z domu z jednej strony dała możliwość pracy w czasie pandemii, z drugiej zaś wywarła negatywne skutki na psychikę wielu pracowników, zacierała się granica między tym co prywatne, a tym co służbowe.

Wykres 2. Jaki wpływ wywiera oczekiwanie bycia zawsze dyspozycyjną?



Źródło: opracowanie własne na podstawie danych Raport- wpływ pandemii na kobiety w biznesie, Deloitte 2021; http://www2.delloite.com/

Zmiany zachodzące w kulturze organizacyjnej przedsiębiorstw związane czy to z wybuchem pandemii czy wynikające z coraz nowszych rozwiązań technologicznych czy zmieniającej się sytuacji na świecie są nieuniknione. Ważne jest jednak, aby wybierać rozwiązania, które będą spełniać oczekiwania pracowników, będą etyczne, prawnie dozwolone. Działania zgodne z koncepcją społecznej odpowiedzialności biznesu pomagają wybrać dobrą praktykę dla danego przedsiębiorstwa. Problemowi zachwiania podziału na życie rodzinne, prywatne a pracę, obowiązki służbowe poświęcona jest m.in. dyrektywa work-life-balance Parlamentu Europejskiego uchwalona w kwietniu 2019 roku[496]. Celem dyrektywy jest osiągnięcie równości kobiet i mężczyzn pod względem szans na rynku pracy i równego traktowania w miejscu pracy przez ułatwienie pracownikom i pracownicom będącym rodzicami lub opiekunami godzenia życia zawodowego z rodzinnym[497]. Polska, jako kraj członkowski Unii Europejskiej zobowiązana jest wdrożyć dyrektywę do 2 sierpnia 2022r. Projekt zmian kodeksu pracy obejmuje m.in. wydłużenie urlopu rodzicielskiego dla ojców, bez możliwości przekazania go matce dziecka. Rekomendacją do takiego rozwiązania była chęć zwiększenia zaangażowania mężczyzn w sprawowanie opieki nad dzieckiem, ale także mała liczba miejsc w żłobkach, przekonanie, że urlop macierzyński to wyłączne prawo kobiety, a przede wszystkim ułatwienie powrotu kobietom do aktywności zawodowej. Transpozycja dyrektywy w Polsce umożliwi skorzystanie z pięciu dni wolnych od pracy na sprawowanie opieki nad wstępnymi lub rodzeństwem, nad osobowi dorosłymi. Częściej to kobiety poświęcają swój czas lub też rezygnują z pracy, aby sprawować opiekę nad bliskimi członkami rodziny, wspomniana dyrektywa ma ułatwić kobietom pogodzić obowiązki rodzinne z zawodowymi, poprzez zwiększenie ilości dni wolnych od pracy. Ważne jest to również, w kontekście zmian demograficznych, w tym starzenia się społeczeństwa i związanego z tym zapotrzebowania na opiekę nieformalną. Osoby powyżej 60-go roku życia

[496] Dyrektywa Parlamentu Europejskiego i Rady (Unii Europejskiej) 2019/1158 z dn.20 czerwca 2019r, zwana dyrektywą work-life-balance

[497] Strzelczak M., Adrian Karolina., Dyrektywa work-life-balance – co możę zmienić w Polsce?; w: Raport odpowiedzialny biznes w Polsce 2021

stanowią 25% społeczeństwa, a osób starszych niż 80 lat jest około 1,8 miliona[498].

Pewne zalecenia wynikające z dyrektywy, w Polsce obowiązują już od dawna, są nawet korzystniejsze niż wytyczne unijne, stąd brak konieczności uchwalania zmian. Wdrożenie dyrektywy work-life-balance do polskiego porządku prawnego to niewielkie zmiany w przepisach, ale stanowiące ogromną zmianę kulturowo-społeczną. Bowiem nie tylko od rozwiązań prawnych zależy powodzenie wdrożenia dyrektywy, to przede wszystkim zmiana w postrzeganiu kapitału ludzkiego, jako najważniejszego czynnika w przedsiębiorstwach. Należy upowszechniać wiedzę wśród osób zarządzających pracą innych do odpowiadania na potrzeby pracowników, często te związane ze sferą życia prywatnego, to m.in. zachęcanie do elastycznego, zadaniowego modelu pracy.

Istnieje wiele przykładów firm, które chcąc działać w sposób społecznie odpowiedzialny, stosować dobre praktyki CSR już dziś wybiera rozwiązania ułatwiające kobietom aktywność zawodową. Przykładowymi praktykami biznesowymi, które maja na celu wprowadzanie równowagi pomiędzy pracą a życiem osobisty oraz promującymi przyjazny stosunek firmy do posiadania rodziny są: wprowadzanie elementów polityki godzenia życia zawodowego z pozazawodowym, elastyczny czas pracy, ograniczanie godzin nadliczbowych, ograniczanie kontaktów służbowych do godzin pracy, budowanie kultury organizacyjnej wspierającej życie prywatne pracownika, przyzwolenia na przerwę w karierze (możliwości korzystania z urlopów bezpłatnych, dostosowywanie terminów urlopów do potrzeb pracowniczych dofinansowywanie szkoleń pracowniczych, dofinansowywanie opieki nad dziećmi i pomoc w niej.

W ramach podsumowania, chciałabym zaprezentować rekomendacje dla pracodawców, które wesprą kobiety na rynku pracy. Przede wszystkim przedsiębiorcy powinni wykazywać się indywidualnym podejściem, chęcią zapoznania się z konkretnymi potrzebami pracowniczymi:

- Elastyczny model pracy – elastyczne godziny pracy nie muszą oznaczać wyłącznie pracy w domu, mogę przybrać formę np. wydłużonych godzin pracy przy skróconym tygodniu pracy czy dzielenie stanowiska pomiędzy dwóch pracowników ;
- Przedsiębiorstwo społeczne – to przedsiębiorstwo oparte na zaufaniu, budowaniu kultury organizacyjnej opartej o dialog kadry kierowniczej z zespołem, dostrzeganiu potrzeb każdego pracownika z osobna;
- Szkolenia i dopasowanie możliwości kształcenia do rozkładu dnia – wsparcie rozwoju kariery pracowników przez organizację lub współuczestnictwo w szkoleniach, mentoringu, np. poprzez organizację spotkań z kobietami postrzeganymi jako *role models*)
- Eliminacja uprzedzeń w procesie wynagradzania, awansu
- Kultura organizacyjna oparta na różnorodności i poszanowaniu innych – to powinny być elementy kultury organizacyjnej każdego przedsiębiorstwa, okazywane poprzez zwalczanie wszelkich form wykluczenia czy agresji, także podczas pracy zdalnej.

Zachodzące zmiany społeczne powodują nowe wyzwania etyczne w biznesie[499]. Organy państwowe, czy unijne odpowiedzialne za wprowadzanie regulacji prawnych widząc potrzeby rynku pracy, potrzeby kobiet, dostosowują obecne przepisy. Jednak to dobre praktyki realizowane w przedsiębiorstwach budują pewien standard postępowania, pewien obyczaj. A, jak mówił Monteskiusz: „Prawo nie ma władzy nad obyczajem", dlatego tak ważne są wszelkie inwestycje w obyczaj, praktykę.

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[498] www.gus.gov.pl

[499] Rotengruber P., Gospodarka przyjazna społeczeństwu. Od teorii etycznej do standardów postępowania, w: Etyka biznesu – wokół kluczowych zagadnień, Sroka R. (red), Ministerstwo Inwestycji i Rozwoju, 2021

BIBLIOGRAFIA:

Bernat M.,(2009) Społeczna odpowiedzialność biznesu. Wymiar konstytucyjny i międzynarodowy, Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, Warszawa

Piasecki R., Gudowski J.,(2022), Theoratical and practical aspects of CSR. Implementation by foregin investors,InnovatioPress, Lublin

Rok. B., (2013),Społeczna odpowiedzialność biznesu, w:Gasparski W. (red) Biznes, Etyka, odpowiedzialność, PWN

Rotengruber P.,(2021), Gospodarka przyjazna społeczeństwu. Od teorii etycznej do standardów postępowania, w: Etyka biznesu – wokół kluczowych zagadnień, Sroka R. (red), Ministerstwo Inwestycji i Rozwoju

Sroka R.,(2021), Etyka biznesu – wokół kluczowych zagadnień, Ministerstwo Inwestycji i Rozwoju

Strzelczak M., Adrian Karolina.,(2021), Dyrektywa work-life-balance – co możę zmienić w Polsce?; w: Raport odpowiedzialny biznes w Polsce 2021

Szejniuk A.,(2016), Etyka menadżerska w zarządzaniu zasobami ludzkimi, Journal of Modern Science, vol.28/1

Raport- wpływ pandemii na kobiety w biznesie, (2021),Deloitte ; http://www2.delloite.com/

Dyrektywa Parlamentu Europejskiego i Rady (Unii Europejskiej) 2019/1158 z dn.20 czerwca 2019r, zwana dyrektywą work-life-balance

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Reklama adwokacka i radcowska w XXI wiekua prawo unijne

Advocate and attorney-at-law advertising in the 21st century and EU law

1. Wstęp

Problematyka reklamowania się zawodów prawniczych, w szczególności radców prawnych oraz adwokatów należy do zagadnień, które budzi wiele emocji wśród przedstawicieli tych zawodów. Kwestie te w adwokaturze były przedmiotem dyskusji środowiskowej praktycznie od XIX wieku. Wydaje się, że punktem zwrotnym w tej dyskusji było opublikowanie "Kwestionariusza" do Etyki Obrończej, który został zamieszczony w nr 14 "Gazety Sądowej Warszawskiej" z 1886

r.[500]. Kwestionariusz dotyczył nie tylko problematyki reklamowania się adwokatów ale także innych zagadnień związanych z wykonywaniem tego zawodu. Został on podzielony na pięć obszarów problemów zawierających odpowiednie pytania, których łącznie było 101. Pierwszy obszar odnosił się do obowiązków ogólnych (pkt A), drugi do obowiązków obrońcy względem klientów (pkt B), trzeci do obowiązków względem sądu (pkt C), czwarty do obowiązków względem kolegów (pkt D), zaś piąty do obowiązków względem dependentów (pkt E). Pytania dotyczące promowania się adwokatów oraz pozyskiwania klientów zawarte były w pkt A w pytaniach od 5 do 7. Miały one następujące brzmienie: „Czy reklamowanie się ze strony obrońcy jest godziwem? a w szczególności, czy reklamy w gazetach, tablice szyldowe na domach, rozdawanie kart z nazwiskiem, opisywanie spraw swoich w gazetach i tym podobne sposoby wyróżniania się w gronie kolegów są zgodne ze stanowiskiem obrońcy?" (pyt. 5), „Czy godziwem jest dla obrońcy wyszukiwanie spraw samemu?" (pyt. 6), „Czy przystoi obrońcy poszukiwanie spraw przez pośrednictwo osób trzecich, na przykład urzędników więzień, niższych oficyalistów sądowych, ajentów, pokątnych doradców itp?" (pyt. 7). Należy nadmienić, że od początku korporacja adwokacka była sceptycznie ustosunkowana do możliwości reklamowania się adwokatów. Znalazło to wyraz w kolejnych zbiorach zasad etyki zawodowej adwokatów uchwalanymi w latach 1961-1998. Zbiory te ustalały zakaz reklamy adwokackiej. Przed uchwaleniem pierwszego zbioru z 1961 r. zakaz reklamy znajdował swój wyraz zarówno w pomniejszych uchwałach podejmowanych przez organy samorządu adwokackiego, jak i orzecznictwie dyscyplinarnym[501]. Zakaz ten, jak również zakaz pozyskiwania klientów w

[500] S. Bełza, J. Benzef, A. Preis, A. Suligowski, *Kwestionariusz,* "Gazeta Sądowa Warszawska" 1886/14, s. 221 i n.

[501] zob. np: orzeczenie Wyższej Komisji Dyscyplinarnej z 12.07.1958 r., WKD 40/58, Pal. 1958/12; orzeczenie Wyższej Komisji Dyscyplinarnej z 21.09.1963 r., WKD 146/63, Pal. 1964/3; orzeczenie Wyższej Komisji Dyscyplinarnej z 23.01.1965 r., WKD 166/04, Pal. 1966/10; orzeczenie Wyższej Komisji Dyscyplinarnej z 11.06.1966 r., WKD 71/66, Pal. 1966/11; orzeczenie Sądu Dyscyplinarnego w Warszawie z 10.09.1988 r., SD 13/88, Pal. 1990/4–5; orzeczenie Wyższego Sądu Dyscyplinarnego z 17.11.1988 r., WSD 30/88 [w:] Odpowiedzialność dyscyplinarna oraz etyka zawodowa adwokatów i radców prawnych. orzecznictwo, oprac. W. Marchwicki, M. Niedużak, Warszawa 2016; Orzeczenie Wyższego Sądu Dyscyplinarnego z 17.12.1988 r., WSD 32/88, Pal. 1990/6–7; Orzeczenie Wyższego Sądu Dyscyplinarnego z 11.06.2011 r., WSD 142/10, Legalis 152215;Orzeczenie Wyższego Sądu Dyscyplinarnego z 8.04.2017 r., WSD 63/16, http://www.wsd.adwokatura.pl/orzecznictwo/orzeczenia-i-postanowienia-wyzszego-sadu-dyscyplinarego?pid=55&sid=611:orzeczenie-wsd-z-dnia-8-kwietnia-2017-r. (dostęp: 14.06.2021 r.); orzeczenie Wyższego Sądu Dyscyplinarnego z 6.04.2019 r., WSD 7/19, http://www.wsd.adwokatura.pl/orzecznictwo/orzeczenia-i-postanowienia-wyzszego-sadu-dyscyplinarego?pid=55&sid=787:orzeczenie-wsd-z-dnia-6- kwietnia-2019-r (dostęp: 14.06.2021 r.); orzeczenie Wyższego Sądu Dyscyplinarnego z 6.04.2019 r., WSD 151/18, http://www.wsd.adwokatura.pl/orzecznictwo/orzeczenia-i-postanowienia-wyzszego-sadu-dyscyplinarego?pid=55&sid=774:orzeczenie-wsd-z-dnia-6- kwietnia-2019-r (dostęp: 14.06.2021 r.); orzeczenie Wyższego Sądu Dyscyplinarnego z 23.02.2019 r., WSD 141/19, http://www.wsd.adwokatura.pl/orzecznictwo/orzeczenia-i-postanowienia-wyzszego-sadu-dyscyplinarnego?pid=55&sid=771:orzeczenie-wsd-z-dnia- 23-lutego-2019-r (dostęp: 14.06.2021 r.); postanowienie Wyższej Komisji Dyscyplinarnej z 1.09.1962 r., WKD 122/62, Pal. 1962/12; postanowienie Wyższego Sądu Dyscyplinarnego z 26.04.2014 r., WSD 17/14, https://sip.legalis.pl/document-full.seam?documentId=mrswglrtgy3dinbygq4dq#tabs-keywords (dostęp: 14.04.2021 r.); orzeczenie Sądu Dyscyplinarnego Odwoławczego z 20.09.1936 r., 103/36 [w:] J. Basseches, I. Korkin, Ustrój adwokatury oraz zasady etyki adwokackiej, Lwów 1938; wyroki Sądu Dyscyplinarnego Rady Adwokackiej w Warszawie, D. 7/29, D. 29/29, D. 114/33, D. 104/35 [w:] J. Ruff, Dyscyplina adwokatury, Warszawa 1939 Wyroki Sądu Dyscyplinarnego Rady Adwokackiej w Warszawie, D. 49/29, D. 129/35, D. 107/35 [w:] J. Ruff, Dyscyplina adwokatury, Warszawa 1939 Wyrok Sądu Dyscyplinarnego Rady Adwokackiej w Warszawie, D. 98/31 [w:] J. Ruff, Dyscyplina adwokatury, Warszawa 1939; wyrok Sądu Dyscyplinarnego Rady Adwokackiej w Warszawie, D. 11/28 [w:] J. Ruff, Dyscyplina adwokatury, Warszawa 1939.

sposób sprzeczny z godnością zawodu oraz współpracy z podmiotami pozyskującymi klientów z naruszeniem prawa lub zasad współżycia społecznego obowiązuje do dziś i ma swój wyraz w § 23 Zbioru Zasad Etyki Adwokackiej i Godności Zawodu (Kodeks Etyki Adwokackiej)[502] (dalej: "KEA"). KEA w pewnym zakresie dopuszcza posługiwanie się tzw. "informacją" (§ 23a) oraz proponowanie usług potencjalnym klientom jeśli wyrazili oni na to zgodę (§ 23b).

W 1987 r. II Krajowy Zjazd Radców Prawnych uchwalił Zasady Etyki Zawodowej Radcy Prawnego (dalej: "KERP")[503]. Zasady te nie zawierały regulacji dotyczących reklamy. Należy uznać, że uchwalone zasady były dostosowane do roli radców prawnych, jaką pełnili oni pod koniec lat 80 tj. obsługi prawnej instytucji państwowych i jednostek gospodarki uspołecznionej[504]. Zmiana zasad, która miała miejsce w roku 1991 r. W roku tym wprowadzono zakaz reklamy. Natomiast uchwałą Nr 6/95 V Krajowego Zjazdu Radców Prawnych z dnia 9 listopada 1995 r. doprecyzowaną kolejną uchwałą z 1999 r.[505] rozszerzono regulację dotyczącą zakazem reklamy i pozyskiwania klientów w sposób sprzeczny z godnością zawodu oraz ograniczonym informowaniem o działalności zawodowej. Liberalizacja zasad w nastąpiła w roku 2007[506] i 2014[507]. Ostatnia wspomniana zmiana doprecyzowała uprawnienia radców prawnych do informowania o wykonywaniu zawodu oraz działalności z nim związanej i pozyskiwania klientów, rozszerzając uprawnienia na posługiwanie się środkami komunikacji elektronicznej.

Z powyższych rozważań wynika, że KEA zakazując reklamy w pewnym zakresie dopuszczają posługiwanie się informacją, zaś KERP nie odnosząc się do reklamy dopuszcza posługiwanie się informacją. Mając to na względnie należy przyjrzeć się problematyce reklamy tych zawodów z perspektywy prawa unijnego. Rozważenia wymaga precyzyjne określenie tego, czy prawo unijne definiuje reklamę zawodów prawniczych, czy w jakimś zakresie dopuszcza posługiwanie się tą, jak i innymi formami promocji, oraz jaki podmiot jest uprawniony i na jakich zasadach do regulacji tego zagadnienia.

2. Definicja reklamy adwokackiej i radcowskiej w prawie unijnym

Regulację odnoszącą się do promowania usług zawodu adwokata oraz radcy prawnego zawiera dyrektywa 2000/31/WE Parlamentu Europejskiego i Rady z dnia 8 czerwca 2000 r. w sprawie niektórych aspektów prawnych usług społeczeństwa informacyjnego, w szczególności handlu elektronicznego w ramach rynku wewnętrznego (dyrektywa o handlu elektronicznym) (dalej:

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[502] Zbiór Zasad Etyki Adwokackiej i Godności Zawodu (Kodeksu Etyki Adwokackiej) uchwalony przez Naczelną Radę Adwokacką 10 października 1998 r. (uchwała nr 2/XVIII/98) ze zmianami wprowadzonymi uchwałą Naczelnej Rady Adwokackiej nr 32/2005 z 19 listopada 2005 r., uchwałami Naczelnej Rady Adwokackiej nr 33/2011 - 54/2011 z dnia 19 listopada 2011 r., uchwałą nr 64/2016 Naczelnej Rady Adwokackiej z dnia 25 czerwca 2016 r. oraz uchwałą nr 66/2019 Naczelnej Rady Adwokackiej z dnia 21 września 2019 roku.

[503] Uchwała nr 3 II KZRP z 20.09.1987 r. w sprawie „Zasad etyki zawodowej radcy prawnego".

[504] P. Łabieniec, Podmiotowość, odpowiedzialność, historyczność profesji i profesjonalisty na przykładzie zawodu radcy prawnego, "ARCHIWUM FILOZOFII PRAWA I FILOZOFII SPOŁECZNEJ" 2018/1, s. 38

[505] Uchwałą Nr 8/99 VI Krajowego Zjazdu Radców Prawnych z dnia 6 listopada 1999 r. zmieniona Uchwałą VII Krajowego Zjazdu Radców Prawnych Nr 10/2003 z dnia 10 listopada 2003 r.

[506] Uchwała VIII Krajowego Zjazdu Radców Prawnych Nr 5/2007 z dnia 10 listopada 2007 r., zmieniona uchwałą IX Krajowego Zjazdu Radców Prawnych Nr 9/2010 z dnia 6 listopada 2010 r.

[507] Załącznik do Uchwały Nr 3/2014 Nadzwyczajnego Krajowego Zjazdu Radców Prawnych z dnia 22 listopada 2014 r.

dyrektywa 2000/31/WE[508] oraz dyrektywa 2006/123/WE Parlamentu Europejskiego i Rady z dnia 12 grudnia 2006 r. dotycząca usług na rynku wewnętrznym[509] (dalej: dyrektywa 2006/123/WE). Te dwa akty prawa unijnego nie zawierają definicji reklamy lecz posługują się pojęciem informacji handlowej. Na wstępie należy zaznaczyć, że posłużeniem się w polskiej wersji językowej terminem "informacja" skutkowało błędną wykładnią pojęcia "informacja handlowa". Jako przykład należy tu wskazać pogląd J. Naumanna, który wskazuje, że "wokół zakazu reklamowania się przez adwokatów narosło wiele nieporozumień. Stan ten wynika z szerzenia bałamutnych argumentów niemających żadnego pokrycia w rzeczywistości. Do tej narracji należy na przykład twierdzenie, że zakaz reklamy sprzeczny jest z prawem Unii Europejskiej. Prawo to, w pełni rozumiejąc specyfikę zawodów regulowanych, znosi bariery wyłącznie w zakresie zniesienia zakazu informowania, nie zaś – reklamowania się"[510]. Należy więc rozważyć, czy przeciwna argumentacja do prezentowanej w cytowanym komentarzu jest rzeczywiście bałamutna wykładając to pojęcie w opierając się na innych wersjach językowych dyrektywy 2000/31/WE oraz 2006/126/WE.

Wersje angielska, francuska oraz niemiecka, posługują się innymi terminami. W wersji angielskiej występuje pojęcie "*commercial communication*", francuskiej "*communication commerciale*", niemieckiej *"kommerzielle Kommunikation"*. Te obcojęzyczne terminy należałoby tłumaczyć nie jako "informację handlową" lecz jako "komunikację handlową". Jest to o tyle istotne, że już samo posłużenie w polskiej wersji językowej pojęciem "informacji" może wprowadzać w błąd co do intencji prawodawcy unijnego. Wydaje się to z wynikać z faktu, że w poglądach Sądu Najwyższego wyrażanych m.in. na gruncie ustawy z dn. 16.04.1993 r. o zwalczaniu nieuczciwej konkurencji[511], nieuczciwe przekazy reklamowe przeciwstawiane są bezstronnej, obiektywnej informacji o produkcie lub usłudze[512].

Nieprecyzyjność w zakresie dokonanego tłumaczenia znajduje także swój wyraz w samej treści definicji "informacji handlowej". Definicja tego pojęcia znajduje się w art. 2 pkt f) dyrektywy 2000/31/WE oraz w art. 4 pkt 12) dyrektywy 2006/123/WE. Zgodnie z pierwszą wspomnianą dyrektywą "informacja handlowa" to każda forma informacji przeznaczona do promowania, bezpośrednio lub pośrednio, towarów, usług lub wizerunku przedsiębiorstwa, organizacji lub osoby prowadzącej działalność handlową, gospodarczą, rzemieślniczą lub wykonującą zawód regulowany[513]. Zgodnie natomiast z drugą "informacja handlowa" oznacza każdą formę informacji mającej na celu promowanie, bezpośrednio lub pośrednio, towarów, usług lub wizerunku przedsiębiorstwa, organizacji lub osoby prowadzącej działalność handlową, przemysłową lub rzemieślniczą albo osoby wykonującej zawód regulowany. Definicje te nieznacznie się różnią, jednak i w tym przypadku jest to kwestia tłumaczenia.

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[508] Dyrektywa 2000/31/WE Parlamentu Europejskiego i Rady z dnia 8 czerwca 2000 r. w sprawie niektórych aspektów prawnych usług społeczeństwa informacyjnego, w szczególności handlu elektronicznego w ramach rynku wewnętrznego (dyrektywa o handlu elektronicznym) (Dz. U. UE. L. z 2000 r. Nr 178, str. 1).

[509] Dyrektywa 2006/123/WE Parlamentu Europejskiego i Rady z dnia 12 grudnia 2006 r. dotycząca usług na rynku wewnętrznym (Dz. U. UE. L. z 2006 r. Nr 376, str. 36).

[510] J. Naumann, Zbiór Zasad Etyki Adwokackiej i Godności Zawodu. Komentarz do § 23, Warszawa 2020; https://sip.legalis.pl/document-view.seam?documentId=mjxw62zogi3damruhaztemboobqxalrugizdambxgu2a#tabs-metrical-info (dostęp: 01.02.2022 r.)

[511] t.j. Dz. U. z 2020 r. poz. 1913 z późn. zm.

[512] Wyrok SN z 6.12.2007 r., III SK 20/07, OSNP 2009, nr 3-4, poz. 55.

[513] Zawód adwokata oraz radcy prawnego jest zawodem regulowanym w rozumieniu przepisów prawa unijnego, zob. listę zawofów regulowanych w Polsce: https://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=regprofs&id_country=23&quid=1&mode=asc&maxRows=* (dostęp: 03.02.2022).

Przechodząc do interpretacji tych definicji należy wskazać, że wersje angielskie są ze sobą zbieżne i definiują one to pojęcie jako "*any form of communication designed to promote, directly or indirectly, the goods, services or image of an undertaking, organisation or person engaged in commercial, industrial or craft activity or practising a regulated profession"*. W angielskim brzmieniu definicji, jak i francuskim i niemieckim ponownie posłużono się terminem "komunikacji" a nie "informacji". Komunikacji przeznaczonej do promocji (ang. "*communication designed to promote*"). Orzecznictwo Trybunału Sprawiedliwości (dalej: TS) dostarcza wskazówek jak rozumieć taką komunikację promocyjną, czy też jak to zostało przetłumaczone w polskiej wersji językowej "informację mającą na celu promowanie" (art. 4 pkt 12 dyrektywy 2006/123/WE). W wyroku z dn. 4.05.2011 r. TS wskazał, że "pojęcie informacji handlowej, takie jak zdefiniowane w art. 4 pkt 12 dyrektywy 2006/123 dotyczącej usług na rynku wewnętrznym obejmuje nie tylko klasyczną reklamę, lecz **także inne formy reklamy oraz przekazu informacji mające na celu pozyskanie nowych klientów**"[514]. Do informacji handlowych TS zaliczył więc nie tylko klasyczną reklamę ale także inne rodzaje promocji. W uzasadnieniu TS wskazał, że pojęcie informacji handlowa obejmuje swoim zakresem takie działania promocyjne jak: akwizycja, marketing bezpośredni lub sponsorowanie[515]. Niewątpliwie są to przejawy działalności promocyjnej w rozumieniu nauki o marketingu. W konsekwencji należy postawić tezę, że **pojęcie "informacji handlowej" jest zbieżne z pojęciem "promocji" w rozumieniu nauki o marketingu lub używając nowocześniejszej siatki pojęciowej z pojęciem "komunikacji marketingowej"**.

W nauce o marketingu występuje wiele definicji promocji. Jednak na potrzeby niniejszych rozważań można przyjąć, że przez promocję należy "zespół środków, za pomocą których przedsiębiorstwo informuje o firmie i cechach produktu oraz przekonuje nabywców do jego zakupu. Właściwa promocja umożliwia dostarczenie nabywcy informacji o produkcie, cenie, sposobach zakupu (np. reklama telewizyjna, ogłoszenie w prasie"[516]. Do promocji zalicza się: reklamę, sprzedaż osobistą, *public relations*, promocję sprzedaży oraz sponsoring[517]. Powyższą tezę o zbieżności pojęcia "informacji handlowej" z "promocją" lub "komunikacją handlową", wspiera także treść dokumentów unijnych, tj. Zielonych ksiąg Komisji Europejskiej. Nie pozostawiają one wątpliwości co do zakresu pojęcia informacji handlowej. W anglojęzycznych wersjach oraz w polskich tłumaczeniach dokumentów informacja handlowa utożsamiana jest m.in. z promocją sprzedaży, reklamą, marketingiem bezpośrednim lub sponsorowaniem[518]. Dodatkowo należy zaznaczyć, że w rozumieniu definicji art. 4 pkt 12 dyrektywy 2006/123/WE mogą mieć zarówno charakter pośredni (np. reklama), jak i bezpośredni (np. sprzedaż

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[514] Wyrok TS z 5.04.2011 r., C-119/09, Société Fiduciaire Nationale D'expertise Comptable V. Ministre Du Budget, Des Comptes Publics Et De La Fonction Publique, ZOTSiS 2011/4, poz. I-2551.

[515] Wyrok TS z 5.04.2011 r., C-119/09, Société Fiduciaire Nationale D'expertise Comptable V. Ministre Du Budget, Des Comptes Publics Et De La Fonction Publique, ZOTSiS 2011/4, poz. I-2551.

[516] R. Nowacki, Reklama: podręcznik, Warszawa 2009, s. 14

[517] R. Nowacki, Reklama: podręcznik, Warszawa 2009, s. 14

[518] Zielona Księga w sprawie gier hazardowych oferowanych w Internecie w obrębie rynku wewnętrznego SEK (2011) 321 wersja ostateczna, s. 3, http://www.europarl. europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0128_/com_co- m(2011)0128_pl.pdf (dostęp: 14.04.2021 r.); Commercial Communications in the Internal Market. Green Paper from the Commission, COM (96) 192 final, 8 April 1996, https://europa.eu/documents/comm/green_papers/pdf/com96_192_1_en.pdf (dostęp: 14.04.2021 r.), a także Press Release details, https://europa.eu/rapid/press- release_IP-96-396_en.html, gdzie wskazano, że pojęcie *Commercial Communications* zawiera w sobie „advertising, direct marketing, sponsorship, sales promotion and public relations" (dostęp: 6.09.2019 r.).

osobista) lub służyć promocji wizerunku (np. *public relations*)[519].

Dokonując podsumowania powyższych rozważań należy wskazać, że dyrektywa 2000/31/WE oraz dyrektywy 2006/123/WE nie definiują pojęcia reklamy. Jednak reklama, jak i inne rodzaje komunikatów promocyjnych stanowią informację handlową w rozumieniu wspomnianych aktów prawa unijnego. W konsekwencj "informacja handlowa" w rozumieniu wspomnianych to nic innego jak "promocja" lub "komunikacja marketingowa" w rozumieniu nauki o marketingu. Posługiwanie się w przepisach regulacyjnych tj. w zasadach etyki zawodowej pojęciem "informacji" może wprowadzać w błąd. Jest to także niezgodne z definicją "informacji" wynikającą z art. 4 pkt 12 a) i b) dyrektywy 2006/123/WE. Zgodnie z literalnym brzmieniem tych podpunktów następujące informacje same w sobie nie stanowią informacji handlowych: a) informacje umożliwiające bezpośredni dostęp do działalności przedsiębiorstwa, organizacji lub osoby, w szczególności nazwa domeny internetowej lub adres poczty elektronicznej; b) informacje odnoszące się do towarów, usług lub wizerunku przedsiębiorstwa, organizacji lub osoby, opracowywane w sposób niezależny, w szczególności jeżeli są one udzielane bez wynagrodzenia. Należałoby odejść od przyjętej w zbiorach zasad terminologii

3. Zniesienie wszelkich całkowitych zakazów dotyczących informacji handlowych dostarczanych przez zawody regulowane.

Kwestie możliwości posługiwania się informacjami handlowymi przez radców prawnych oraz adwokatów reguluje 8 dyrektywy 2000/31/WE oraz art. 24 dyrektywy 2006/123/WE. W myśl art. 8 ust. 1 dyrektywy 2000/31/WE "Państwa Członkowskie zapewniają, żeby używanie informacji handlowych, które są częścią lub stanowią usługę społeczeństwa informacyjnego świadczoną przez przedstawiciela zawodu regulowanego, było dozwolone pod warunkiem zgodności z zasadami wykonywania zawodu, dotyczącymi w szczególności niezależności, godności i prestiżu zawodu, tajemnicy zawodowej i rzetelności wobec klientów i innych przedstawicieli zawodu". Regulacja zawarta w art. 24 ust 1 dyrektywy 2006/123/WE, jako późniejsza jest szersza. Zgodnie z ust. 1 tego przepisu "Państwa członkowskie znoszą wszelkie całkowite zakazy dotyczące informacji handlowych dostarczanych przez zawody regulowane. Natomiast w myśl 2 cytowanego przepisu "Państwa członkowskie zapewniają zgodność informacji handlowych dostarczanych przez zawody regulowane, odnoszących się, w szczególności, do niezależności, godności i uczciwości zawodowej, a także do tajemnicy zawodowej z zasadami dotyczącymi wykonywania zawodu, zgodnie z prawem wspólnotowym, w sposób odpowiadający szczególnemu charakterowi każdego zawodu. Zasady dotyczące wykonywania zawodu odnoszące się do informacji handlowych muszą być niedyskryminacyjne, uzasadnione nadrzędnym interesem publicznym i proporcjonalne".

Z art. 24 ust. 1 dyrektywy 2006/123/WE oraz art. 8 ust. 1 dyrektywy 2000/31/WE bezpośrednio wynika, że w zakresie posługiwania się przez zawody regulowane w tym adwokatów i radców prawnych informacjami handlowymi, prawo unijne znosi wszelkie całkowite zakazy. Powstaje jednak pytanie jak rozumieć zakres obowiązku zniesienia wszelkich całkowitych zakazów.

[519] zob. szerzej: S. Kaczmarczyk, *Podstawowa klasyfikacja komunikacji marketingowej*, „Zeszyty Naukowe Uniwersytetu Szczecińskiego. Problemy Zarządzania, Finansów i Marketingu" 2015/39, s. 33

Zgodnie z poglądem wyrażonym w Opinii Rzecznika Generalnego do sprawy C-119/09 istnieją dwa możliwe podejścia[520]. Według pierwszego "obowiązek zniesienia wszelkich całkowitych zakazów dotyczy wszelkich całkowitych zakazów przekazywania jakiejkolwiek formy informacji handlowej"[521]. Natomiast według drugiego "wspomniany obowiązek dotyczy jedynie całkowitego zakazu każdej informacji handlowej, co oznaczałoby, że państwa członkowskie zachowałyby możliwość utrzymania całkowitych zakazów dotyczących niektórych form informacji handlowej"[522]. Z cytowanego uzasadnienia wyroku z dn. 5.04.2011 wynika, że TS opowiedział się za pierwszym podejściem. Trybunał uznała, że "zarówno z celu art. 24, jak i z kontekstu, w jaki się on wpisuje, wynika, że zamiarem prawodawcy unijnego było nie tylko zniesienie stosowania całkowitych zakazów dotyczących informacji handlowych dla członków zawodów regulowanych w jakiejkolwiek formie, lecz również zniesienie zakazu wykorzystywania jednej lub kilku form informacji handlowej w rozumieniu art. 4 pkt 12 dyrektywy 2006/123, w szczególności takich jak reklama, marketing bezpośredni lub sponsorowanie. Ze względu na przykłady zawarte w motywie 100 wskazanej dyrektywy za całkowite zakazy wykluczone przez art. 24 ust. 1 owej dyrektywy należy również uważać zasady dotyczące wykonywania zawodu zakazujące dostarczania **w jednym lub kilku środkach przekazu** informacji dotyczących usługodawcy lub jego działalności"[523]. W konsekwencji przepisy prawa krajowego zakazujące choćby jednej formy informacji handlowej (np. sprzedaż osobista, reklama, *public relations*) lub rozpowszechniania informacji handlowych w jakichkolwiek środkach społecznego przekazu (np. radio, telewizja, billboardy itp.) wchodzą w zakres stosowania art. 24 ust. 1 dyrektywy 2006/123/WE. Takie uregulowania są niezgodne z dyrektywą i nie mogą być uzasadnione na mocy art. 24 ust. 2 dyrektywy 2006/123/WE, nawet jeśli byłyby one niedyskryminacyjne, oparte na nadrzędnym względzie interesu ogólnego i proporcjonalne[524]. Należy także dodać, że z interpretacji treści art. 24 ust. 1 dyrektywy 2006/123/WE i motywu 100 dyrektywy 2006/123/WE wynika, w jaki sposób można dokonać ograniczenia treści informacji handlowych. W uzasadnionej opinii odnoszącej się regulacji dostarczania przez irlandzkie korporacje prawnicze informacji handlowych, Komisja Europejska uznała, że **nie jest dozwolone określenie zamkniętego katalogu treści**, które mogą być zawarte w przekazach promocyjnych. Wywiedziono, że przepis ustanawiający, co enumeratywnie może znaleźć się w informacji handlowej, może w konsekwencji ograniczać możliwość posługiwania się konkretnymi rodzajami informacji handlowych. Wynika to z faktu, że niektóre działania promocyjne wymuszają posługiwanie się szczególnymi treściami[525]. Powyższe nie oznacza, że nie art. 24 ust 1 dyrektywy 2006/123/WE zakazuje ustalania w regulacjach krajowych

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[520] Opinia Rzecznika Generalnego J. Mazáka przedstawiona 18.05.2010 r., C-119/09, Société fi duciaire nationale d'expertise comptable przeciwko Ministre du budget, des comptes publics et de la fonction publique, https://curia.europa.eu/juris/ liste.jsf?language=en&num=C-119/09

[521] Opinia Rzecznika Generalnego J. Mazáka przedstawiona 18.05.2010 r., C-119/09, Société fi duciaire nationale d'expertise comptable przeciwko Ministre du budget, des comptes publics et de la fonction publique, https://curia.europa.eu/juris/ liste.jsf?language=en&num=C-119/09

[522] Opinia Rzecznika Generalnego J. Mazáka przedstawiona 18.05.2010 r., C-119/09, Société fi duciaire nationale d'expertise comptable przeciwko Ministre du budget, des comptes publics et de la fonction publique, https://curia.europa.eu/juris/ liste.jsf?language=en&num=C-119/09

[523] Wyrok TS z 5.04.2011 r., C-119/09, Société Fiduciaire Nationale D'expertise Comptable V. Ministre Du Budget, Des Comptes Publics Et De La Fonction Publique, ZOTSiS 2011/4, poz. I-2551.

[524] Wyrok TS z 5.04.2011 r., C-119/09, Société Fiduciaire Nationale D'expertise Comptable V. Ministre Du Budget, Des Comptes Publics Et De La Fonction Publique, ZOTSiS 2011/4, poz. I-2551.

[525] European Commission, Reasoned Opinion – Infringement No 2013/2192, Brussels, 24.01.2019, niepubl.

odpowiednich kryteriów, które muszą spełniać treści zawarte w informacjach handlowych.

4. Niedyskryminacja, uzasadniony nadrzędny interes publiczny oraz zasada proporcjonalności, a regulacje dotyczące informacji handlowych.

Zgodnie z art. 24 ust. 2 *in fine* zasady dotyczące wykonywania zawodu odnoszące się do informacji handlowych muszą być niedyskryminacyjne, uzasadnione nadrzędnym interesem publicznym i proporcjonalne. W prawie unijnym kwestie te reguluje dyrektywa Parlamentu Europejskiego i Rady (UE) 2018/958 z dnia 28 czerwca 2018 r. w sprawie analizy proporcjonalności przed przyjęciem nowych regulacji dotyczących zawodów[526]. Dyrektywa ta została implementowana do polskiego porządku krajowego ustawą z dn. 19.11.2020 r. o zmianie ustawy o zasadach uznawania kwalifikacji zawodowych nabytych w państwach członkowskich Unii Europejskiej[527].

Na mocy wspomnianej nowelizacji w ustawie z 22.12..2015 r. o zasadach uznawania kwalifikacji zawodowych nabytych w państwach członkowskich Unii Europejskiej[528] (dalej: u.z.u.k.z.p.c.U.E.). dodatnio rozdział 6a o tytule "Zapewnienie proporcjonalności, uzasadnionego i niedyskryminującego charakteru przepisów regulacyjnych i wymogów dotyczących świadczenia usług transgranicznych". Przepisy ustawy ustanawiają wymóg zapewnienia zgodności przepisów regulacyjnych z zasadami proporcjonalności, uzasadnionego i niedyskryminującego charakteru (art. 50a u.z.u.k.z.p.c.U.E.). Natomiast przepisami regulacyjnymi są m.in. przepisy warunki wykonywania zawodów regulowanych, a także podejmowania lub wykonywania działalności regulowanych. W kontekście rozwiązań przyjętych w dyrektywie 2018/958 oraz w art. 2 ust. 3 u.z.u.k.z.p.c.U.E., jak i art. 3 ust. 1 pkt. 5 ustawy z dn. 26.05.1982 r. Prawo o adwokaturze[529] oraz art. 3 ustawy z dn. 6.07.1982 r. o radcach prawnych[530], pojęcie przepisów odnoszących się do warunków wykonywania zawodów regulowanych niewątpliwie należy odnieść zarówno do KEA, jak i KERP[531]. Na marginesie wypada wskazać także zwrócić, że zgodnie z art. 50g u.z.u.k.z.p.c.U.E. przepisów rozdziału 6a nie stosuje się do projektowanych przepisów regulacyjnych, które wdrażają lub wykonują przepisy prawa Unii Europejskiej niepozostawiające wyboru co do wskazanych w nich wymogów. Nie ulega wątpliwości, że przepisy dyrektywy 2000/31/WE oraz dyrektywy 2006/123/WE pozostawiają wybór, krajom członkowskim, jak uregulować kwestie posługiwania się informacjami handlowymi tak aby odpowiadały one szczególnemu charakterowi zawodu adwokata i radcy prawnego. Nie ulega więc wątpliwości, że przepisy rozdziału 6a ustawy z 22.12.2015 r. o zasadach uznawania kwalifikacji zawodowych nabytych w państwach członkowskich Unii Europejskiej będą miały zastosowanie do przepisów regulacyjnych dotyczących informacji handlowych.

4.1. Niedyskryminacyjny charakter przepisów regulacyjnych

Odnosząc się do wymogu niedyskryminacyjnego charakteru przepisów regulacyjnych

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[526] Dz. U. UE. L. z 2018 r. Nr 173, str. 25

[527] Dz. U. z 2021 r. poz. 78

[528] t.j. Dz. U. z 2021 r. poz. 1646

[529] t.j. Dz. U. z 2020 r. poz. 1651 z późn. zm.

[530] t.j. Dz. U. z 2020 r. poz. 75 z późn. zm.

[531] W myśl art. 3 ust. 1 pkt 5 pr. adw. Zadaniem samorządu zawodowego adwokatury jest m.in. ustalanie i krzewienie zasad etyki zawodowej oraz dbałość o ich przestrzeganie, zaś zgodnie z art. 3 ust. 2 r.p., radca prawny wykonuje zawód ze starannością wynikającą z wiedzy prawniczej oraz zasad etyki radcy prawnego. Co oczywista za nieprzestrzeganie zasad etyki obie korporacje podlegają odpowiedzialności dyscyplinarnej.

należy zauważyć, że zgodnie art. 50d u.z.u.k.z.p.c.U.E., wymóg zgodności projektowanych przepisów regulacyjnych z zasadą niedyskryminującego charakteru, uznaje się za spełniony, jeżeli w wyniku ich oceny ustalono, że przepisy te nie są bezpośrednio albo pośrednio dyskryminujące ze względu na przynależność państwową lub miejsce zamieszkania. Problem niedyskryminacyjnego charakteru przepisów regulacyjnych dotyczących dostarczania przez zawody regulowane informacji handlowych została już uregulowana na poziomie ustawowy tj. w ustawie z dn. 6.03.2018 r. o zasadach uczestnictwa przedsiębiorców zagranicznych i innych osób zagranicznych w obrocie gospodarczym na terytorium Rzeczypospolitej Polskiej[532]. Ustawa ta reguluje podejmowanie i wykonywanie działalności gospodarczej przez osoby zagraniczne na terytorium Rzeczypospolitej Polskiej, czasowe oferowanie lub świadczenie usług na terytorium Rzeczypospolitej Polskiej przez osoby zagraniczne będące przedsiębiorcami oraz określa zasady tworzenia przez osoby zagraniczne będące przedsiębiorcami oddziałów i przedstawicielstw w Rzeczypospolitej Polskiej (art. 1). W zakresie swojej regulacji ustawa wdraża więc ona dyrektywę 2006/123/WE.

Zgodnie z art. 9 ust. 1 cytowanej ustawy usługodawca z państwa członkowskiego wykonujący zawód regulowany może rozpowszechniać informacje o świadczonej usłudze mające na celu promowanie towarów, usług lub wizerunku, jeżeli informacje te są zgodne z zasadami wykonywania tego zawodu. W myśl natomiast ust. 2 wprowadzanie ograniczeń w zakresie rozpowszechniania informacji, o których mowa w ust. 1, jest dopuszczalne tylko w przypadku, gdy ograniczenia te nie prowadzą do dyskryminacji, są proporcjonalne i uzasadnione nadrzędnym interesem publicznym. Z powyższej regulacji należy wniosek, że pojęcie "informacji" użyte w art 9 ust. 1 i 2 tego przepisu jest zbieżne z pojęciem informacji handlowej. Świadczy o tym fakt, że rozpowszechnianie tych "informacji" podobnie jak informacji handlowych ma na celu promowanie towarów, usług lub wizerunku zawodu regulowanego. W zakresie swojej regulacji art. 9 stanowi więc implementację art. 24 dyrektywy 2006/123/WE. Oznacza to, że przepis art. 9 ust. 1 i 2 tej ustawy bezpośrednio wyłącza możliwość zastosowania przepisów zasad etyki zawodowej zakazujących posługiwania się informacjami handlowymi w sposób sprzeczny z art. 24 dyrektywy 2006/123/WE w przypadku adwokata z innego państwa członkowskiego wykonującego zawód na terenie Polski. Dodatkowo w przypadku uregulowania problematyki informacji handlowej art. 9 ust. 1 i 2 stanowi gwarancję, że podmioty z innych państw członkowskich nie będą taktowane w naruszeniem zasady niedyskryminacji.

4.2. Nadrzędny interes publiczny

Przepisy regulacyjne mogą ograniczać możliwość korzystania przez adwokatów oraz radców prawnych z informacji jedynie, jeśli takie ograniczenie jest uzasadnione celami służącymi interesowi publicznemu (art. 50c ust. 1 u.z.u.k.z.p.c.U.E.). W myśl art. 50c ust. 1 u.z.u.k.z.p.c.U.E. cele służące interesowi publicznemu to w szczególności względy porządku publicznego, bezpieczeństwa publicznego lub zdrowia publicznego lub uzasadniony nadrzędny interes publiczny, o którym mowa w art. 3 pkt 3 ustawy z dn. 6.03.2018 r. o zasadach uczestnictwa przedsiębiorców zagranicznych i innych osób zagranicznych w obrocie gospodarczym na terytorium Rzeczypospolitej Polskiej. Zgodnie ze wspomnianym art. 3 pkt. 3 nadrzędny interes publiczny to wartość podlegającą ochronie, w szczególności porządek publiczny, bezpieczeństwo publiczne, bezpieczeństwo państwa, zdrowie publiczne, utrzymanie równowagi finansowej systemu zabezpieczenia społecznego, ochrona konsumentów, usługobiorców i pracowników,

[532] t.j. Dz. U. z 2021 r. poz. 994 z późn. zm.

uczciwość w transakcjach handlowych, zwalczanie nadużyć, ochrona środowiska naturalnego i miejskiego, zdrowie zwierząt, własność intelektualna, cele polityki społecznej i kulturalnej oraz ochrona narodowego dziedzictwa historycznego i artystycznego. Definicja ta odpowiada pojęciu nadrzędnego interesu publicznego, o której mowa w dyrektywie 2018/958. Zgodnie z motywem 17 oraz art. 6 ust. 2 dyrektywy 2018/958 do "nadrzędnych względów interesu publicznego uznanych przez Trybunał Sprawiedliwości należą między innymi: utrzymanie równowagi finansowej systemu zabezpieczenia społecznego; ochrona konsumentów, usługobiorców - w tym poprzez zagwarantowanie jakości rzemiosła - i pracowników; zabezpieczenie rzetelnego wymiaru sprawiedliwości; zagwarantowanie uczciwości transakcji handlowych; walka z nadużyciami finansowymi i zapobieganie uchylaniu się od opodatkowania i unikaniu opodatkowania oraz skuteczność nadzoru podatkowego; bezpieczeństwo transportu; ochrona środowiska i terenów miejskich; zdrowie zwierząt; własność intelektualna; zabezpieczenie i ochrona narodowego dziedzictwa historycznego i artystycznego; celów polityki społecznej; oraz celów polityki kulturowej". Względy czysto ekonomiczne obejmujące sprzyjanie gospodarce krajowej ze szkodą dla podstawowych wolności, a także względy czysto administracyjne, takie jak przeprowadzanie kontroli lub zbieranie danych statystycznych, nie mogą stanowić nadrzędnych względów interesu publicznego (motyw 17 dyrektywy 2018/958).

Dokonując podsumowania powyższych rozważań należy stwierdzić, że nadrzędny interes publiczny lub nadrzędne względy interesu publicznego to wartości, które mogą uzasadnić ustanowienie przepisów regulacyjnych ograniczających dostarczanie przez radców prawnych oraz adwokatów informacji handlowych. W konsekwencji korporacje te muszą określić jakim wartościom służą takie ograniczenia. Nie ulega wątpliwości, że samorządy zawodowe znając specyfikę wykonywania zawodu mogą precyzyjnie identyfikować cele interesu publicznego, jednak identyfikacja tych celów nie może służyć ich interesom ekonomicznym, jak i działać na niekorzyść podmiotów (np. nowych radców prawnych lub adwokatów), którzy dopiero wchodzą na rynek (motyw 14 i 17 oraz art. 6 ust. 3 dyrektywy 2018/958 oraz art. 50c ust. 2 u.z.u.k.z.p.c.U.E.).

4.3. Zgodność przepisów regulacyjnych z zasadą proporcjonalności.

Kompleksowe omówienie zasady proporcjonalności wychodzi poza zakres określony tematem rozważań. Należy jednak wskazać, że zgodnie z motywem 3 dyrektywy 2018/958 zasada proporcjonalności jest jedną z ogólnych zasad prawa Unii. Z orzecznictwa[533] wynika, że przepisy krajowe, które mogą ograniczać lub czynić mniej atrakcyjnym korzystanie z podstawowych wolności zagwarantowanych TFUE, powinny spełniać cztery przesłanki, a mianowicie powinny one być: stosowane w sposób niedyskryminujący; uzasadnione celami leżącymi w interesie publicznym; odpowiednie dla zapewnienia osiągnięcia wyznaczonego celu; oraz nie wykraczać poza to, co jest konieczne do osiągnięcia tego celu (motyw 3 dyrektywy 2018/958). Dyrektywa 2018/958 ustanowiła zasady przeprowadzania przez państwa członkowskie ocen proporcjonalności przed wprowadzeniem nowych lub zmianą istniejących przepisów regulujących zawody, aby zapewnić właściwe funkcjonowanie rynku wewnętrznego, gwarantując jednocześnie przejrzystość oraz wysoki poziom ochrony konsumentów. Zasady te zostały zaimplementowane do polskiego porządku prawnego w wyniku wspomnianej nowelizacji ustawy z 22.12.2015 r. o zasadach uznawania kwalifikacji zawodowych nabytych w państwach

[533] Wyrok TS z 30.11.1995 r., C-55/94, REINHARD GEBHARD v. CONSIGLIO DELL'ORDINE DEGLI AVVOCATI E PROCURATORI DI MILANO, ECR 1995, nr 11, poz. I-4165. https://sip.lex.pl/#/jurisprudence/520210227?cm=DOCUMENT (dostęp: 2022-02-03 15:04)

członkowskich Unii Europejskiej.

Zgodnie z art. 50b ust 1 u.z.u.k.z.p.c.U.E. przepisy regulacyjne będą spełniać wymóg proporcjonalności jeżeli będą odpowiednie do osiągnięcia założonego celu (pierwsze kryterium) i nie wykraczają poza to, co jest konieczne dla osiągnięcia tego celu (drugie kryterium). Pierwsze kryterium określane jest jako kryterium stosowności (odpowiedniości), zaś drugie jako kryterium niezbędności (konieczności). Należy oczywiście przyjąć, że celem, o którym mowa we wspomnianym przepisie jest omawiany powyżej "nadrzędny interes publiczny".

Kryterium stosowności (odpowiedniości) będzie spełnione jeżeli zastosowany środek nadaje się do osiągnięcia uprzednio wyznaczonego celu. Przepisy regulacyjne powinny więc rzeczywiście (realnie) przyczyniać się do ochrony nadrzędnego interesu publicznego wskazanego przez korporacje prawnicze. Jednak zarówno środek, jak i cel, które zmierzałyby osiągnąć korporacje prawnicze, muszą pozostawać w tzw. rozsądnym (ang. *reasonable*) związku[534]. Z kolei badanie spełnienia drugiego kryterium sprowadza się do ustalenia czy istnieje alternatywny środek prawny, który w taki sam skuteczny sposób chroniłby uzasadniony interes, lecz w mniejszym stopniu ograniczałby swobody ustanowione w traktacie. Badanie niezbędności zmierza więc do analizy tego, czy ten sam rezultat w zakresie ochrony uzasadnionego interesu można uzyskać przy mniejszych stratach lub kosztach dla swobód ustanowionych w traktatach. W konsekwencji, jeżeli osiągnięcie danego celu jest możliwe przy użyciu środków mniej ograniczających daną swobodę, należy uznać, że regulacja taka nie spełnia kryterium konieczności[535]. Należy przy tym nadmienić, że w rozumieniu dyrektyw posługiwanie się informacjami handlowymi przez zawody regulowane traktowane jest jako rodzaj usługi świadczonej przez przedstawicieli tych zawodów na rzecz konsumentów lub potencjalnych konsumentów. Oznacza to, że ograniczenie na mocy przepisów regulacyjnych możliwości dostarczania konsumentom informacji handlowych stanowi ograniczenie swobód traktatowych tj. swobody przedsiębiorczości lub świadczenia usług. Omawiana regulacja ustawowa w art. 50b ust. 3-6 zawiera kryteria szczegółowe w stosunku do wskazanych kryteriów stosowności (odpowiedniości) i niezbędności (konieczności). Stanowią one ich rozwinięcie. Na zakończenie rozważań należy dodać, że zgodnie z art. 50f ust. 1 *in fine* zgodność z zasadą proporcjonalności i zasadą uzasadnionego winny potwierdzać w szczególności dane jakościowe, a w miarę możliwości także dane ilościowe. Jeśli więc korporacje zawodowe nie będą dysponowały takimi danymi powinny je pozyskać poprzez wykonanie odpowiednich badań.

5. Regulacja informacji handlowej a zasady wykonywania zawodu

Ostatnią problematyką, którą należy poruszyć jest ta odnosząca się do kryteriów w oparciu, o które korporacje prawnicze są uprawnione do ograniczania treści, jakie mogą zawierać informacje handlowe. Należy podkreślić, że prawodawca unijny pozostawia zawodom regulowanym możliwość dookreślenia tych kryteriów wskazując, że państwa członkowskie zobowiązane są do zapewnienia zgodności informacji handlowych dostarczanych przez zawody regulowane z zasadami wykonywania danego zawodu oraz ich szczególnego charakteru (art. 24 ust. 2 zd. 1 in fine dyrektywy 2006/123/WE). Jednocześnie w art. 24 ust. 2 dyrektywy 2006/123/WE wskazano przykładowe kryteria, które zawody te powinny uwzględnić ograniczając

[534] Wyrok TS z 7.04.1981 r., 132/80, NV United Foods and PVBA Aug. Van den Abeele przeciwko Belgian State, https://eur-lex.europa.eu/legal-content/EN/TXT/?u- ri=CELEX%3A61980CJ0132 (dostęp: 3.04.2022 r.).

[535] A. Frąckowiak-Adamska, Zasada proporcjonalności jako gwarancja swobód rynku wewnętrznego Wspólnoty Europejskiej, Warszawa 2009, s. 278

możliwość dostarczania przez zawody regulowane informacji handlowych. Zaliczono do nich w szczególności: niezależność, godność i uczciwość zawodową oraz tajemnicę zawodową. W powyższym zakresie dyrektywa 2006/123/WE pozostaje w zgodności z Kodeksem Etyki Prawników Europejskich[536] (dalej: Kodeks CCBE), który został przyjęty zarówno przez korporację radcowską[537], jak i adwokacką[538]. Problematyka promowania się adwokatów uregulowana została w pkt 2.6. zatytułowanym "Reklama osobista". Zgodnie z memorandum wyjaśniającym do Kodeksu CCBE, termin „reklama osobista" oznacza reklamę kancelarii prawnych, jak i indywidualnych prawników, w przeciwieństwie do reklamy grup zawodowych organizowanych przez adwokatury i stowarzyszenia prawnicze dla wszystkich swoich członków[539]. Punkt 2.6.1. Kodeksu CCBE stanowi, że "prawnik jest upoważniony do informowania społeczeństwa o swojej działalności pod warunkiem, że informacja jest dokładna i nie wprowadza w błąd oraz jest udzielana z zachowaniem obowiązku poufności i pozostałych wartości zawodowych". Natomiast w myśl, pkt 2.6.2. "reklama osobista prawnika w jakiejkolwiek formie medialnej, takiej jak prasa, radio, telewizja, komercyjne komunikaty elektroniczne lub w innej formie jest dopuszczalna w takim zakresie, w jakim spełnia wymogi art. 2.6.1.". Z powyższej regulacji należy wyprowadzić wniosek, że pkt 2.6.2. dopuszcza posługiwanie się reklamą zawodową, o ile przekazy takie będą dokładne, nie wprowadzające w błąd oraz udzielane z zachowaniem obowiązku poufności i pozostałych wartości zawodowych. Podobnie jak dyrektywa 2006/123/WE, Kodeks CCBE wskazuje przykładowe kryteria, jakie powinny spełniać przekazy promocyjne, dając jednak możliwość ich dookreślenia przez korporacje zawodowe, tak aby czyniły zadość innym "wartościom zawodowym". Dodatkowo z memorandum wyjaśniającego Kodeksu CCBE wynika także, że "artykuł 2.6 jednoznacznie stwierdza, że **nie istnieje żaden nadrzędny zakaz reklamy osobistej** w zakresie działalności transgranicznej. Prawnicy są natomiast zobowiązani do przestrzegania zakazów i ograniczeń nałożonych przez właściwe krajowe standardy branżowe; ponadto prawnicy muszą przestrzegać zakazów i ograniczeń nałożonych przez przyjmujące Państwo Członkowskie, gdy one obowiązują ich zgodnie z dyrektywą o usługach prawnych oraz dyrektywą o stałym wykonywaniu zawodu prawnika"[540]. Uzasadnia to wyżej przedstawiona tezę o zniesieniu w prawie unijnym wszelkich całkowitych zakazów dotyczące informacji handlowych dostarczanych przez zawody regulowane.

6. Podsumowanie

[536] Kodeks Etyki Prawników Europejskich został pierwotnie przyjęty na Sesji Plenarnej CCBE w dniu 28 października 1988 r. Zmiany w treści dokumentu wprowadzano na Sesjach Plenarnych CCBE w dniach 28 listopada 1998 r., 6 grudnia 2002 r. oraz 19 maja 2006 r. Kodeks obejmuje Memorandum Wyjaśniające, które zostało zaktualizowane na Sesji Plenarnej CCBE w dniu 19 maja 2006 r., https://www.brrp.pl/pdf/Kodeks_Etyki_Prawnik%C3%B3w_Europejskich.pdf (dostęp: 4.02.2022 r.)

[537] Kodeks Etyki Prawników Europejskich stanowiący załącznik do uchwała Nr 8/2010 IX Krajowego Zjazdu Radców Prawnych z dnia 6 listopada 2010 r. w sprawie przyjęcia Kodeksu Etyki Prawników Europejskich, https://biblioteka.kirp.pl/files/show/508, (dostęp: 4.02.2022 r.)

[538] Karta Podstawowych Zasad Wykonywania Zawodu Prawnika w Europie oraz Kodeks Postępowania Prawników Europejskich – załącznik do uchwały nr 20/2014 NRA z 22.11.2014 r., http://www.nra.pl/admin/wgrane_dokumenty/Zalacznik_do_uchwaly_20-2014_(kodeks_europejski).pdf (dostęp: 4.02.2022 r.)

[539] Kodeks Etyki Prawników Europejskich, s. 21, https://www.brrp.pl/pdf/Kodeks_Etyki_Prawnik%C3%B3w_Europejskich.pdf (dostęp: 4.02.2022 r.)

[540] Kodeks Etyki Prawników Europejskich, s. 21, https://www.brrp.pl/pdf/Kodeks_Etyki_Prawnik%C3%B3w_Europejskich.pdf (dostęp: 4.02.2022 r.)

Dokonując podsumowania powyższych rozważań należy zauważyć, że na korporacjach zawodowych ciąży ciężar dostosowania zasad etyki do wymogów prawa unijnego. Należy zaznaczyć, że zgodnie z motywem 15 dyrektywy 2018/958 proporcjonalność nowych lub zmienionych przepisów ograniczających dostęp do zawodów regulowanych lub ich wykonywanie należy monitorować po ich przyjęciu. Przegląd proporcjonalności restrykcyjnego środka krajowego dotyczącego zawodów regulowanych powinien opierać się nie tylko na celowości tego środka krajowego w czasie jego wprowadzania, ale także na jego skutkach ocenionych po jego wprowadzeniu. Ocena proporcjonalności środka krajowego powinna opierać się na zmianach zaistniałych w obszarze danego zawodu regulowanego od momentu przyjęcia środka. Ocena zgodności rozwiązań odnoszących się do możliwości dostarczania przez korporacje prawnicze powinna być przeprowadzana przez te korporacje nie tylko w przypadku oceny projektowanych przepisów regulacyjnych (art. 50a ust. 2 u.z.u.k.z.p.c.U.E.). Korporacje zobowiązane do monitorowania zgodności, projektowanych przepisów regulacyjnych dotyczących informacji handlowych na bieżąco. Służyć ma to badaniu czy przyjęte regulacje nie mogą być ewentualnie zastąpione innymi mniej ingerującymi w swobody traktatowe.

BIBLIOGRAFIA:

Literatura

1. Bełza, S., Benzef, J., Preis, A., Suligowski, A., Kwestionariusz, "Gazeta Sądowa Warszawska" 1886/14
2. Frąckowiak-Adamska, A., Zasada proporcjonalności jako gwarancja swobód rynku wewnętrznego Wspólnoty Europejskiej, Warszawa 2009
3. Kaczmarczyk, S., Podstawowa klasyfikacja komunikacji marketingowej, „Zeszyty Naukowe Uniwersytetu Szczecińskiego. Problemy Zarządzania, Finansów i Marketingu" 2015/39
4. Łabieniec, P., Podmiotowość, odpowiedzialność, historyczność profesji i profesjonalisty na przykładzie zawodu radcy prawnego, "ARCHIWUM FILOZOFII PRAWA I FILOZOFII SPOŁECZNEJ" 2018/1
5. Naumann, J., Zbiór Zasad Etyki Adwokackiej i Godności Zawodu. Komentarz do § 23, Warszawa 2020; https://sip.legalis.pl/document-view.seam?documentId=mjxw62zogi3damruhaztemboobqxalrugizdambxgu2a#tabs-metrical-info (dostęp: 01.02.2022 r.)
6. Nowacki, R., Reklama: podręcznik, Warszawa 2009

Orzecznictwo

7. Wyrok TS z 7.04.1981 r., 132/80, NV United Foods and PVBA Aug. Van den Abeele przeciwko Belgian State, https://eur-lex.europa.eu/legal-content/EN/TXT/?u- ri=CELEX%3A61980CJ0132 (dostęp: 3.04.2022 r.).
8. Wyrok TS z 5.04.2011 r., C-119/09, Société Fiduciaire Nationale D'expertise Comptable V. Ministre Du Budget, Des Comptes Publics Et De La Fonction Publique, ZOTSiS 2011/4, poz. I-2551.
9. Wyrok TS z 30.11.1995 r., C-55/94, REINHARD GEBHARD v. CONSIGLIO DELL'ORDINE DEGLI AVVOCATI E PROCURATORI DI MILANO, ECR 1995, nr 11, poz. I-4165. https://sip.lex.pl/#/jurisprudence/520210227?cm=DOCUMENT (dostęp: 2022-02-03 15:04)
10. Wyrok SN z 6.12.2007 r., III SK 20/07, OSNP 2009, nr 3-4, poz. 55.
11. Wyrok Sądu Dyscyplinarnego Rady Adwokackiej w Warszawie, D. 98/31 [w:] J. Ruff, Dyscyplina adwokatury, Warszawa 1939;

12. Wyrok Sądu Dyscyplinarnego Rady Adwokackiej w Warszawie, D. 7/29, [w:] J. Ruff, Dyscyplina adwokatury, Warszawa 1939
13. Wyrok Sądu Dyscyplinarnego Rady Adwokackiej w Warszawie, D. 49/29, [w:] J. Ruff, Dyscyplina adwokatury, Warszawa 1939
14. wyrok Sądu Dyscyplinarnego Rady Adwokackiej w Warszawie, D. 29/29, [w:] J. Ruff, Dyscyplina adwokatury, Warszawa 1939
15. Wyrok Sądu Dyscyplinarnego Rady Adwokackiej w Warszawie, D. 129/35, [w:] J. Ruff, Dyscyplina adwokatury, Warszawa 1939
16. Wyrok Sądu Dyscyplinarnego Rady Adwokackiej w Warszawie, D. 114/33, [w:] J. Ruff, Dyscyplina adwokatury, Warszawa 1939
17. Wyrok Sądu Dyscyplinarnego Rady Adwokackiej w Warszawie, D. 11/28 [w:] J. Ruff, Dyscyplina adwokatury, Warszawa 1939.
18. Wyrok Sądu Dyscyplinarnego Rady Adwokackiej w Warszawie, D. 107/35 [w:] J. Ruff, Dyscyplina adwokatury, Warszawa 1939
19. Wyrok Sądu Dyscyplinarnego Rady Adwokackiej w Warszawie, D. 104/35, [w:] J. Ruff, Dyscyplina adwokatury, Warszawa 1939
20. Postanowienie Wyższej Komisji Dyscyplinarnej z 1.09.1962 r., WKD 122/62, Palestra 1962/12;
21. Postanowienie Wyższego Sądu Dyscyplinarnego z 26.04.2014 r., WSD 17/14, https://sip.legalis.pl/document-full.seam?documentId=mrswglrtgy3dinbygq4dq#tabs-keywords (dostęp: 14.04.2021 r.);
22. Orzeczenie Wyższej Komisji Dyscyplinarnej z 23.01.1965 r., WKD 166/04, Palestra 1966/10;
23. Orzeczenie Wyższej Komisji Dyscyplinarnej z 21.09.1963 r., WKD 146/63, Palestra 1964/3;
24. Orzeczenie Wyższej Komisji Dyscyplinarnej z 12.07.1958 r., WKD 40/58, Palestra 1958/12;
25. Orzeczenie Wyższej Komisji Dyscyplinarnej z 11.06.1966 r., WKD 71/66, Palestra 1966/11;
26. Orzeczenie Wyższego Sądu Dyscyplinarnego z 8.04.2017 r., WSD 63/16, http://www.wsd.adwokatura.pl/orzecznictwo/orzeczenia-i-postanowienia-wyzszego-sadu-dyscyplinarego?pid=55&sid=611:orzeczenie-wsd-z-dnia-8-kwietnia-2017-r. (dostęp: 14.06.2021 r.);
27. Orzeczenie Wyższego Sądu Dyscyplinarnego z 6.04.2019 r., WSD 7/19, http://www.wsd.adwokatura.pl/orzecznictwo/orzeczenia-i-postanowienia-wyzszego-sadu-dyscyplinarego?pid=55&sid=787:orzeczenie-wsd-z-dnia-6- kwietnia-2019-r (dostęp: 14.06.2021 r.);
28. Orzeczenie Wyższego Sądu Dyscyplinarnego z 6.04.2019 r., WSD 151/18, http://www.wsd.adwokatura.pl/orzecznictwo/orzeczenia-i-postanowienia-wyzszego-sadu-dyscyplinarego?pid=55&sid=774:orzeczenie-wsd-z-dnia-6- kwietnia-2019-r (dostęp: 14.06.2021 r.);
29. Orzeczenie Wyższego Sądu Dyscyplinarnego z 23.02.2019 r., WSD 141/19, http://www.wsd.adwokatura.pl/orzecznictwo/orzeczenia-i-postanowienia-wyzszego-sadu-dyscyplinarnego?pid=55&sid=771:orzeczenie-wsd-z-dnia- 23-lutego-2019-r (dostęp: 14.06.2021 r.);
30. Orzeczenie Wyższego Sądu Dyscyplinarnego z 17.12.1988 r., WSD 32/88, Palestra 1990/6–7;
31. Orzeczenie Wyższego Sądu Dyscyplinarnego z 17.11.1988 r., WSD 30/88 [w:] Odpowiedzialność dyscyplinarna oraz etyka zawodowa adwokatów i radców prawnych. orzecznictwo, oprac. W. Marchwicki, M. Niedużak, Warszawa 2016;
32. Orzeczenie Wyższego Sądu Dyscyplinarnego z 11.06.2011 r., WSD 142/10, Legalis 152215;
33. Orzeczenie Sądu Dyscyplinarnego w Warszawie z 10.09.1988 r., SD 13/88, Palestra 1990/4–5;
34. Orzeczenie Sądu Dyscyplinarnego Odwoławczego z 20.09.1936 r., 103/36 [w:] J. Basseches, I. Korkin, Ustrój adwokatury oraz zasady etyki adwokackiej, Lwów 1938;

Dokumenty
35. Commercial Communications in the Internal Market. Green Paper from the Commission, COM (96) 192 final, 8 April 1996, https://europa.eu/documents/comm/green_papers/pdf/com96_192_1_en.pdf (dostęp: 14.04.2021 r.),
36. European Commission, Reasoned Opinion – Infringement No 2013/2192, Brussels, 24.01.2019, niepubl.
37. Karta Podstawowych Zasad Wykonywania Zawodu Prawnika w Europie oraz Kodeks Postępowania Prawników Europejskich – załącznik do uchwały nr 20/2014 NRA z 22.11.2014 r., http://www.nra.pl/admin/wgrane_dokumenty/Zalacznik_do_uchwaly_20-2014_(kodeks_europejski).pdf (dostęp: 4.02.2022 r.)
38. Kodeks Etyki Prawników Europejskich, https://www.brrp.pl/pdf/Kodeks_Etyki_Prawnik%C3%B3w_Europejskich.pdf (dostęp: 4.02.2022 r.)
39. Opinia Rzecznika Generalnego J. Mazáka przedstawiona 18.05.2010 r., C-119/09, Société fi duciaire nationale d'expertise comptable przeciwko Ministre du budget, des comptes publics et de la fonction publique, https://curia.europa.eu/juris/ liste.jsf?language=en&num=C-119/09
40. Press Release details, https://europa.eu/rapid/press- release_IP-96-396_en.html, (dostęp: 6.09.2019 r.).
41. Uchwała nr 3 II KZRP z 20.09.1987 r. w sprawie „Zasad etyki zawodowej radcy prawnego".
42. Uchwała VIII Krajowego Zjazdu Radców Prawnych Nr 5/2007 z dnia 10 listopada 2007 r., zmieniona uchwałą IX Krajowego Zjazdu Radców Prawnych Nr 9/2010 z dnia 6 listopada 2010 r.
43. Uchwałą Nr 8/99 VI Krajowego Zjazdu Radców Prawnych z dnia 6 listopada 1999 r. zmieniona Uchwałą VII Krajowego Zjazdu Radców Prawnych Nr 10/2003 z dnia 10 listopada 2003 r.
44. Załącznik do Uchwały Nr 3/2014 Nadzwyczajnego Krajowego Zjazdu Radców Prawnych z dnia 22 listopada 2014 r.
45. Lista zawodów regulowanych w Polsce, https://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=regprofs&id_country=23&quid=1&mode=asc&maxRows=* (dostęp: 03.02.2022).
46. Zbiór Zasad Etyki Adwokackiej i Godności Zawodu (Kodeksu Etyki Adwokackiej) uchwalony przez Naczelną Radę Adwokacką 10 października 1998 r. (uchwała nr 2/XVIII/98) ze zmianami wprowadzonymi uchwałą Naczelnej Rady Adwokackiej nr 32/2005 z 19 listopada 2005 r., uchwałami Naczelnej Rady Adwokackiej nr 33/2011 - 54/2011 z dnia 19 listopada 2011 r., uchwałą nr 64/2016 Naczelnej Rady Adwokackiej z dnia 25 czerwca 2016 r. oraz uchwałą nr 66/2019 Naczelnej Rady Adwokackiej z dnia 21 września 2019 roku.
47. Zielona Księga w sprawie gier hazardowych oferowanych w Internecie w obrębie rynku wewnętrznego SEK (2011) 321 wersja ostateczna, http://www.europarl. europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0128_/com_co- m(2011)0128_pl.pdf (dostęp: 14.04.2021 r.);