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- The influence of moral responsibility on legal responsibility and definition of causation

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Comparative Constitutional Law: Analysis of President's Veto under the USA and Nigerian Constitutions

Sunusi Musa Esq.¹

Abstract

This paper is a comparative analysis of the presidential veto power as exercised under sections 58 and 59 of the Constitution of the Federal Republic of Nigeria 1999 (CFRN) and Article 2 of the United States Constitution (US Constitution). It investigates whether or not the presidential veto power can be overridden by a decision/resolution of the National Assembly (NA) or the Congress. The paper traces the historical background of veto power back to 509 BC and discusses how it is exercised both in the UK and the US.

I. DEFINITION OF VETO

The word "Veto" is a Latin word derived from the word *vatare*, which means to forbid or to prohibit. Thus, veto means "I forbid".² It is a power used by an officer of the state to stop an official action especially the enactment of legislation. A veto power can either be absolute such as the veto power of five permanent members of the United Nations Security Council,³ or limited such as that of NA to override the power of the President to withhold assent to a piece of legislation.⁴

The need to check arbitrary use of power brought about the idea of veto power in running the affairs of the state and the fear of grounding the running of the government through veto, made it necessary to device a system under democracy which is less prone to stalling the affairs of the state.

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² RICHARD A. WATSON, *Origins and Early Development of Veto Power* (1987) 17(2) PSQ 401

³ China, France, Russia, United Kingdom, United States of America

⁴ Section 58(5) of the Constitution of the Federal Republic of Nigeria 1999

A. Historical background

The institution of veto, known as *intercessio*, was adopted by the Romans under the Republican Constitution of 509 BC. That was the time when the Roman Monarchy was overthrown by the upper class families known as patricians.⁵ The Constitution replaced the Monarch with two officials known as consuls or magistrates and each was conferred with the power to veto the acts of the other.⁶ This system was introduced to curb the arbitrariness that prevailed under the monarchy. But be that as it may, it also brings about the possibility of stalemate in running the affairs of the state. This is because either of the two consuls could stop the execution of any official directive issued by the other. In order to avoid paralysing the running of government, each of the two consuls alternated with each other when running the affairs of the state on a monthly basis⁷ and when both were away on a battle field, they took command on alternate days.⁸ The position of the Consuls and that of being a member of the Senate was initially an exclusive affair of the patricians.⁹

Subsequently, a position of “the Plebeian Tribune” was introduced for the plebeians.¹⁰ The tribunes were given the power to veto decisions of the consuls. They were sacrosanct to the extent that it was an offence punishable with death to interfere with the veto of the tribunes over any action of the state. The tribunes were given a veto power in order to check the arbitrariness of the consuls. The tribune veto power posed the same problem associated with the veto power of the consuls. That is the possibility of stalling the running of the government.

⁵ Watson, *Origins and Early Development of Veto Power* (n 1) 401

⁶ Consuls were elected by the Comitia Centuriata (Century Assembly)

⁷ ERIC A. POSNER, (2010) *The Constitution of the Roman Republic: A Political Economy Perspective*, Public Law and Legal Theory Working Paper No. 325 < <http://www.law.uchicago.edu/files/file/540-327-eap-rome.pdf> > accessed 13 June 2015

⁸ WATSON, *Origins and Early Development of Veto Power* (n 1) 402

⁹ *ibid*

¹⁰ This happened in 494 BC when the plebs refused to take up arms against the enemy. A truce was reached giving the plebs the power to elect their representatives with certain powers to exert in the state

B. Veto power in England

Considering that Nigeria and the United States inherited a common law legal system, which is reflected in its democratic practice, from England, it is appropriate to examine the historical development of the veto power in England in this paper. In England, the veto power of the king came into being as a result of the waning power of the king who was the sole ruler who both made the law and implemented it. Prior to the mid-14th century, law making was generally within the exclusive powers of the Crown, although the king normally acted on advice of the *Curia Regis*, or the Royal Council.¹¹ This was because, prior to the third quarter of the 14th Century, the work of the Parliament was more that of a court where petitions of not only the Commons but even that of the king were decided.¹² It was during the reign of King Edward III that legislation began to emanate from the parliament.¹³

However as times progressed, the Parliament began to draw petitions requesting the king to make legislation on the petition and the king sometimes acceded to the request as contained in therein.¹⁴ But he still reserved the right to make legislation contrary to what was contained in the petition from the parliament. The institution of the Parliament in England became fully established during the reign of King Edward III.¹⁵ That was the time when it became established that for a law to be valid, it had to be passed by the parliament. But the Crown was given the power to either assent to any legislation passed by the parliament or withhold this assent. No bill passed by the Parliament would have the force of law unless it was assented to by the Crown.¹⁶ Since then, British Monarch has used veto power to stall implementation of a number of pieces of legislation. However, the frequency of using veto differs from one monarch to another. For instance, in the year 1597, Queen Elizabeth rejected more bills than she accepted. But in 1606, her successor King James I, accepted all bills passed by the parliament.¹⁷

¹¹ This is a form of an advisory council which comprises all important magnates in the society including bishops. It was this body that metamorphosed into a modern parliament in England

¹² A. F. POLLARD, *The Evolution of Parliament*. (New York: Longmans, Green and Co., 1920. P. 42)

¹³ WATSON, *Origins and Early Development of Veto Power* (n 1) 403

¹⁴ *ibid*

¹⁵ *ibid*

¹⁶ *ibid*

¹⁷ *ibid*

The use of royal veto by the monarchs was said to have caused a lot of friction between the monarch and the parliament. It is argued that, the refusal of King Charles to assent to many important legislation passed by the parliament was one of the major causes of the 1643 Revolution.¹⁸ After the revolution of 1688, the Parliament began to seriously question the use of Royal Veto against its decisions. Not a long time ago, the royal veto becomes stale in domestic affairs of England.¹⁹ The last time it was ever used was 1707 when Queen Anne withheld assent to Scottish Militia Bill.²⁰

Unlike in Rome, where principles of veto were developed to check arbitrariness in running of the government, it can safely be argued that in England, it was introduced to appease the Crown whose legislative powers had been taken away. Like that of Rome, the veto power of the Crown was absolute. The Parliament had no power to override the veto of the King. In fact, some argued that it was because of the absoluteness of the veto power of the king, that it later became stale over time.²¹ Another sharp difference between the veto power of Rome and that of England was that while the latter was aimed at protecting one class of citizens from the arbitrariness of the other, the former was purely a struggle of power between two arms of the Government. In Rome, the 'Tribunes' veto power was to protect the interest of the common people. But in England the King's veto power was just to balance the power between the Executive and the Legislature.

C. The veto power in the American colonies

In the American colonies, veto power was used in the respective colonies by the colonial masters. The veto power in the American colonies was divided into two stages.²² At the first stage, the colonial Governors were given the power to veto decisions of the colonial legislature in order to protect the interest of the mother colony. At the second stage, the Crown had the power to veto the decision of the colonial

¹⁸ *ibid*

¹⁹ *ibid*

²⁰ *ibid*

²¹ *ibid*

²² *ibid* 404

legislature on any legislation which the colonial Governor had assented to. It is on record that between 1696 and 1765, the King had vetoed nearly 400 pieces of legislation passed by the colonial parliaments.²³ The arbitrary use of the veto power was one of the reasons contained in the petition against the king in the Declaration of Independence.²⁴

Thus, the veto power in British colonies of America differs very much with that of the Rome and England both in its form and purpose. In Rome, it was a struggle between the patricians and the plebs and, in England, it was a struggle between the executive and the legislature. But in the colonies of America, it was a struggle between the colonisers and the colonised. Be as it may, the veto power used by colonial Governors and the British monarch in America shaped the role vetoes came to play in some of the subsequent new state governments of the colonies and eventually, the United States of America.

It was at the Philadelphia Constitutional Convention that the presidential veto power was incorporated into the United States Federal Constitution.²⁵ Prior to the conference, there was no national executive body under the Articles of Confederation for the United States of America. It was at the conference that the delegates agreed that there was a need for not only an executive body, but also the president to be endowed with some veto powers against the decision of the legislature.²⁶ The major argument proffered in support of providing the veto power was that the executive needed some protection against encroachment by the legislature. According to James Madison,²⁷ the executive veto power would help to serve as "additional check against a pursuit of those unwise and unjust measures which constituted so great portion of our calamities".²⁸

²³ *ibid*

²⁴ *ibid*

²⁵ *ibid* 406

²⁶ *ibid*

²⁷ Madison who represented Virginia at the 1787 Constitutional Convention, is referred to as the father of the US Constitution. This is because it was his 'Virginia Plan' that served as the basis upon which the convention came up with a new Constitution for the USA. He was also reputed to have written 29 out of 85 essays written to mobilise support for the adoption of the new constitution. He was the one who introduced the first amendment to the US Constitution as a member of the Congress in 1789. That amendment is known as the Bill of Rights

²⁸ RICHARD J. ELLIS (ed), 'Founding the American Presidency' (RLP 1999)

To some extent, Madison's prophecy came to pass, when the first veto power was exercised by George Washington in 1792 to veto the Apportionment Bill.²⁹ The Apportionment Bill was a law that sought to introduce a formula for apportioning seats in the Congress. It had sharply divided the congress along the regional line while passing it.³⁰ The northern States used their numerical strength to pass the legislation that could have given the North more seats in the Congress. The passage of the bill was a clear case of what Madison described as "popular or factitious injustice" when canvassing argument in favour of a provision for the veto power. In fact, when President Washington was to take a decision as to whether or not to veto the bill, being from Virginia, he was deeply concerned that some might view his decision as an act of taking the side of his fellow southerners.³¹

In any case, the majority of the delegates at the Philadelphia Constitutional Convention were not averse to granting the veto power to the executive branch in the Constitution, but there was a division of opinion, as to how it should be exercised. As pointed out earlier, there were only two states that had a veto power provision in their respective constitutions. These were New York and Massachusetts.³² The veto power provided in the New York Constitution 1777 was conferred on the council of revision which consist of the Governor, the Chancellor and the Justices of the State Supreme Court.³³ The 1780 Massachusetts Constitution, on the other hand, conferred the power to veto any legislation passed on the Governor alone, if he found it objectionable. However, such legislation can become law if passed again by a two-third majority of the members of each of the two houses of the legislative body.³⁴

²⁹ 'Washington Exercises First Presidential Veto' (This day in History 2005) <http://www.history.com/this-day-in-history/washington-exercises-first-presidential-veto> accessed 13 June, 2015

³⁰ *ibid*

³¹ *ibid*

³² WATSON *Origins and Early development of veto power* (n 1) 405

³³ *Constitution of the State of New York* (The Nation at the Cross Roads) https://www.nyhistory.org/web/crossroads/gallery/all/constitution_ny_p31.html accessed 13 June, 2015

³⁴ Massachusetts Constitution 1780 Ch. 1, S. 1 Article 2

Two proposals were made to the convention. One by Charles Pinckney³⁵ of South Carolina, which favoured vesting the power in the President alone, and the other by Edmund Randolph³⁶ of Virginia which favoured the veto power exercised by a council of revision. Initially, the debate on the issue was tilted towards adopting Randolph's proposal, but eventually, Pinckney's was accepted. Thus, the delegates adopted the Massachusetts model of veto power.³⁷

II. VETO POWER UNDER THE UNITED STATES CONSTITUTION

It is important to note that the United States Constitution did not use the word "veto" in giving the President the power to veto any legislation passed by the legislature. The US Constitution, under Article 1 Section 7 Paragraph 2 provides that

*Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approves he shall sign it, **but if not he shall return it, with his objections** [emphasis is mine] to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law."*

³⁵ He was the 37th Governor of South Carolina and prior to that, he was a member of the Continental Congress and was the youngest member there. Pinckney is regarded as one of the founding fathers of the United States of America for his role in the Philadelphia Convention where many of his proposals were incorporated into the Federal Constitution of the US

³⁶ Randolph was the youngest member of the Constitutional Convention. He presented the Virginia plan to the convention advocating for a strong union government and the use of force against any state to enforce the federal constitution. He advocated for a council composed of three members to serve as Council of Revision for his fear of misuse of power if gathered in one hand

³⁷ Watson *Origins and Early development of veto power* (n 2)406

From the above provision, two types of vetoes were provided for the President. These are a 'regular' or 'return' veto and a 'pocket' veto.³⁸ A regular or return veto is a process whereby the President writes back to the Congress his objection for not signing the bill into law. So far, a total of 1500 regular veto powers have been exercised by all the 44 American Presidents.³⁹ A pocket veto, on the other hand, occurs when the Congress adjourn its session before the expiration of ten days after sending the bill to the President. In such situation, if the President has an objection to the law, he does not need to write it and send it to the Congress. All that he has to do is to 'pocket' his pen and, after the expiration of 10 days, such a bill does not become a law and the Congress cannot override the veto. As at today, there are a total of 1066 pocket vetoes exercised by US Presidents.⁴⁰

The veto power under the US constitution can be further divided into an absolute and qualified veto. This is because while the regular veto may be overridden by the Congress, the pocket veto, once exercised, is not subject to override power of the Congress.⁴¹ The reason for making the pocket veto absolute cannot be far-fetched. This is because the wording of the clause indicates that it was not by the intentional doing of the President that the bill could not be returned to the Congress with his objection. Rather, it is because by the action of the Congress to adjourn before 10 days have passed, the Congress has made it impossible for the President to return the bill within the stipulated time required by the Constitution.

The framers of the US constitution were therefore not oblivious of the possibility of the Congress intentionally adjourning sitting before the expiration of ten days after it has sent a bill to the President for assent. This may be done with the sole aim of preventing the President from complying with constitutional provision of returning the bill within ten days if he has any objection to same. That could have defea-

³⁸ Meghan M Stuessy, *Regular Vetoes and Pocket Vetoes: in Brief* (2015), Congressional Research Service <http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0DP%2BP%2C_3%20P%20%20%0A> accessed 13 June 2015

³⁹ United States Senate < <http://www.senate.gov/reference/Legislation/Vetoes/vetoCounts.htm>> accessed 13 June, 2015

⁴⁰ *ibid*

⁴¹ Presidential Veto (History, Art & Archives) <<http://history.house.gov/Institution/Presidential-Vetoes/Presidential-Vetoes/>> accessed on 13 June 2015

ted the intendment of the framers of the Constitution hence the proviso in the in US Constitution ‘...unless the Congress by their adjournment prevent its return...’.

There seem to be no conflict with regard to the exercise of the regular presidential veto power pursuant to the US Constitution. But in the case of the ‘pocket veto’ a conflict have arisen about its application, and there are two conflicting decisions of the US Supreme Court on whether adjournment could prevent the President from sending his objection to the house from which the bill originates. In the earlier **pocket veto case**,⁴² the Supreme Court held that the adjournment referred to in the Constitution means any form of adjournment that will prevent the return of the bill with the President’s objection on the last day of the ten-day period. It went further to discountenance the argument of the petitioners that adjournment means final adjournment and not any other one, and that in the case of any other adjournment, other than final adjournment, the President can return the bill to an official of the house from where the bill originates pending the resumption of the house from a recess. But in the case of *Wright v. United States*⁴³ the Supreme Court held that where the Senate was on a three days’ adjournment, the President’s return of the bill to the secretary of the Senate was within the contemplation of Article 1 Section 7 of the Constitution. The court held that where only one house has adjourned and the other is in session, the Congress cannot be said to have adjourned as per the contemplation of the section in question.

A. Line Item Veto Power

The history of a line item veto could be traced back to the Confederate States Constitution of the USA which conferred on the President the power to approve a part of an appropriation bill and to veto another part, which the President finds objectionable, and to return them to the Congress for consideration and possible override of the veto.⁴⁴ Presently, 44 States Governors in the USA have a line veto power given to them by their respective constitutions.⁴⁵ From *Ulysses S. Grant* -the 18th US

⁴² (1929) 279 U.S. 655

⁴³(1938) 302 U.S. 583

⁴⁴Constitution of Confederates States 1861 Article 1, S. 7 (2)

⁴⁵*Understanding the line item veto with a twist*, <http://www.nolabels.org/understanding-the-line-item-veto-with-a-twist/> accessed on 12 June, 2015

President to Bill Clinton, all US Presidents have expressed their desire to be granted the line veto power by the Congress, but it was only Clinton that succeeded in 1996.⁴⁶ However, it was short lived, as it was declared unconstitutional by the US Supreme Court in 1998.⁴⁷

From the wording of the US Constitution, it is clear that it does not provide for what is called a 'line item veto power'. A line item veto is a special veto power which will enable a chief executive to prevent a particular provision in legislation from becoming law instead of the entire piece of legislation.

As stated earlier, under the US Constitution, the Congress has the power to override the regular veto of the President. This is done if both houses, after considering the objection sent by the President still feel the necessity to pass the bill again by a two thirds majority of each house. The question here is what really constitutes two thirds of each of the houses? The United States House of Representatives consists of 435 members, but under Section 5 of the US Constitution, a majority of that number can form a quorum to transact business of the house. The issue here is whether it means that for the House of Representatives to override a presidential veto, 290 of the members must vote to uphold the bill as it was passed earlier? Or is it that it only requires two thirds of those present when the objection from the President is tabled to the house? As at today, the practice of the Congress is that the intendment of the framers of the constitution was the two thirds of members present. This position was affirmed in *Missouri Pac. Ry. Co. v. State Of Kansas*⁴⁸, where the court held that the provision leaves no doubt as it refers to the two houses dully constituted to exert legislative powers.

⁴⁶*The Line Item Veto*, <http://usgovinfo.about.com/od/thepresidentandcabinet/a/The-Line-item-Veto.htm> accessed 13 June, 2015

⁴⁷*Clinton v. New York City* (1998) (97-1374)

⁴⁸ (1919) 248 U.S. 276

III. VETO POWER IN NIGERIA

A. The Colonial Era

The veto power in the law making process in Nigeria can be traced back to 1914 when Nigeria was amalgamated. When the Country was amalgamated, a legislative council was established and the Council was empowered to legislate either for the colony alone, or for the colony and the protectorates that made up the Nigerian colony.⁴⁹ The Governor, on the other hand, was vested with the power to enact ordinances that affected the protectorate only.⁵⁰ Just like in the case of the American Colonies,⁵¹ two types of veto power were created by the Authentication and Recording of Ordinances Ordinance 1914.

The Legislative Council was empowered by the provision of section 2 of the Authentication Ordinance 1914 to enact ordinances with respect to matters in respect of the colony only. But such Ordinance could not become effective, unless the Governor gave his assent to it.⁵² This also applied to any ordinance enacted by the Legislative Council pursuant to the provision of section 7 of the Authentication Ordinance 1914 on any matters that affected the colony and the protectorates.⁵³

Both ordinances enacted either by the Legislative Council or by the Governor, were subject to another line veto provided for under section 13 of the Authentication Ordinance. Under section 9 of the Authentication Ordinance, the Governor was obliged to send two copies of any ordinance the Governor assented to or enacted, to the Secretary of State. Upon receipt of such copies, the Secretary had to notify His Majesty of the Ordinance who in turn, was either to approve or reject it with endorsement of non-disallowance or disallowance. His Majesty's endorsement of non-disallowance or disallowance of an Ordinance had to be published in the Gazette.⁵⁴ Where the endorsement by His Majesty was for disallowance, it meant that the

⁴⁹ Sections 2 & 7 Authentication Ordinance 1914 Vol. 1 CAP 1 TLN 1923

⁵⁰ Ibid Section 6

⁵¹ See page 4 above

⁵² Section 4 Authentication Ordinance 1914 Vol. 1 CAP 1 TLN 1923

⁵³ *ibid* sec. 9

⁵⁴ *Ibid* section 13

Crown had vetoed such Ordinance and as of the day of the publication, it seized to be legislation.

The above system of law making remained in force until 1960 when the Independence Constitution came into force. Under the 1960 Constitution, Nigeria retained Her Majesty as a titular Head of State who was bestowed with the power of appointing the Governor General who was to serve as Head of State and Commander in Chief, as well as the representative of Her Majesty.⁵⁵

B. Veto Power under the 1960 Constitution

The veto power provided under the 1960 Constitution was conferred on Her Majesty to be exercised on her behalf by the Governor General.⁵⁶ The Constitution provides thus:

The power of Parliament to make laws shall be exercised by bills passed by both Houses (or in the cases mentioned in section 59 of this Constitution the House of Representatives) and assented to by the Governor-General on behalf of Her Majesty.

Section 57 (4) mandated the Governor General to notify the Parliament of his assent or withholding of his assent to the bill. And Subsection (5) thereof clearly states that no bill shall become a law unless it is duly passed and assented to by the governor.

Unlike under the previous arrangement, where the governor could assent to an Ordinance and his assent could be reversed by the Crown, under the 1960 Constitution, once the Governor General assented to a bill, even if he had done so without the consent of Her Majesty on whose behalf he was acting, Her Majesty had no power to reverse such assent. Unlike the American Constitution, the Section does not specify the time within which the Governor General is expected to signify or withhold his assent to a bill. There is also no provision as to what the legislators will do if the Governor General withholds his assent. In other words, there is no provision for overriding the veto of the Governor General. It can thus be described as an

⁵⁵ Section 33 of the Constitution of Nigeria 1960

⁵⁶ Ibid Sec. 57(1)

absolute veto power, as in the case of the pocket veto under the American Constitution.

The 1960 Constitution conferred on the House of Representatives a veto power over the Senate on money bills. Pursuant to the provisions of Section 7(1), (4) & (5) of the 1960 Constitution, no bill shall become a law unless it is passed by both the Senate and House of Representatives and the Governor give his assent to it. But the provision does not apply to money bills.⁵⁷ As provided by section 57 (2) of the 1960 Constitution, all money bills are to originate from the House of Representatives and where any money bill is passed by the House of Representative and the House passes it to the Senate for concurrence, the Senate is expected to pass the bill, as it is or with amendments within one month. And where the Senate failed to do so, the House of Representatives is empowered to veto the legislative powers of the Senate by sending the bill to the Governor for his assent. Here we can say that, unlike in the case of the United States, a qualified veto power was given to the House of Representatives by the Constitution against the Senate.

C. Veto Power under the 1963 Constitution

The provision of Sections 62 and 64 of the 1963 Constitution of Nigeria with regard to the mode of exercising the legislative powers of the parliament, as well as the limited veto power conferred on the House of Representatives with regard to money bills is in *pari materia* with the provision of Sections 57 and 59 of the 1960 Constitution. The only difference being now that the power to assent or withhold assent to a bill is conferred on the President of the country as the position of the Governor General had been abolished and replaced with an elected President.⁵⁸

D. Veto Power under the 1979 Constitution

After the 1966 coup and the return to constitutional democracy in 1979, the country's system of governance was changed from a parliamentary system to a presidential system. Unlike before, where each of the federating units had its different

⁵⁷ibid Sec. 59

⁵⁸Sections 34 & 5 of the 1960 Nigerian Constitution

Constitution under which the mode of exercising legislative powers of the regional legislature was laid down,⁵⁹ the 1979 Constitution made a provision for the mode of exercising the legislative powers of both the federal legislature and the respective federating units.

The 1979 Constitution provided for two types of veto power for the president and both of them could be overridden by the National Assembly. The mode of exercising the veto power of the President with regard to bills other than money bills were very distinct and, in fact, made the process of overriding the presidential veto with regard to money bills straight forward and less cumbersome. It will not be out of place to reproduce the relevant part of the two sections for purpose of clarity here.

54-(1) The power of the National Assembly to make laws shall be exercised by bills passed by both the Senate and the House of Representatives and, except as otherwise provided by subsection (5) of this section, assented to by the President.

(2)...

(3)...

(4) Where a bill is presented to the President for assent, he shall within 30 days thereof signify that he assents or that he withholds assent.

(5) Where the President withholds his assent and the bill is again passed by each house by two-third majority, the bill shall become law and the assent of the President shall not be required.”

55-(1) The Provision of this section shall apply to-

(a) an appropriation bill or a supplementary appropriation bill including any other bill for the payment, issue or withdrawal from the consolidated Revenue fund or any other public fund of the federation of any money charged thereon or any alteration in the amount of such a payment, issue or withdrawal; and

(b) a bill for the imposition of or increase in any tax, duty or fee or any reduction, withdrawal or cancelation thereof.

⁵⁹Itse Sagay, *Nigeria: Federalism, The Constitution and Resource Control*(Urhobo Historical Society) <<http://www.waado.org/nigerdelta/essays/resourcecontrol/sagay.html>> accessed 13 June, 2015

(2) ...

(3)...

(4) *where the President within 30 days after the presentation of the bill to him fails to signify his assent or where he withhold assent, then the bill shall again be presented to the National Assembly meeting at a joint meeting and if passed by two-third majority members of both houses at such joint meeting, the bill shall become law and the assent of the President shall not be required.*

E. Veto Power under the 1999 Constitution

The provisions of Sections 54 and 55 of the 1979 Constitution quoted above are *impari materia* with the provisions of Sections 58 and 59 of the CFRN 1999 (as amended), the above will therefore be used herein for the purpose of making an analysis in this paper.

The difference in the way the president was to exercise his veto power on money bills and other bills is very apparent. Section 58 (4) of CFRN 1999, mandates the President to signify whether he assents or withholds assent to any bill presented to him. In other words, the subsection only makes provision for what in American parlance is referred to as a ‘regular or return veto’. It does not make any provision for a pocket veto.

There appears to be a serious loophole created by the drafters of the Constitution. This is because the section did not make any provision for a situation where the President neither signifies his assent nor withholds his assent. That is, where the President decided to pocket his pen without communicating it to the legislature. Because under the provision of Subsection (5) thereof, the National Assembly can only exercise the power to override the veto of the President, if the President signifies to the legislature that he withholds his assent. In other words, where the President refused to communicate his withholding of assent to a bill, as long as that bill is not a money bill, the National Assembly could not override such refusal and such bill shall not see the light of the day. This is in contrast to the American Constitution which clearly states that where the President of the United States failed to either sign or return the

bill within ten days as of its presentation to him, for signing, the bill shall become law, as if it was signed by him.

The question here is, where the President did not assent to a bill and neither did he signify that he withholds his assent, can the National Assembly go ahead and pass the bill again and make it a law? Yes, the National Assembly can go ahead and override the veto power of the President, as long as the bill is on any issue mentioned in Section 59(1) (a) & (b) of the CFRN 1999. But where the bill is a bill under Section 58, the wording of subsection (4), which says “... *he shall... signify that he assents or that he withholds assent*”, is that as long as the President does not communicate to National Assembly that he withholds his assent, the National Assembly cannot pass such bill again and make it a law.

The point to understand here is that communication from the President to the National Assembly that he withholds his assent to a bill, is a condition precedent which must be fulfilled before the exercise of the National Assembly's power under Section 58(5) to override the President's veto. The Supreme Court in *Inakoju v. Adeleke*⁶⁰ said:

Where the Constitution or a statute provides for a pre-condition for doing of a thing or for the attainment of particular situation, the pre-condition must be fulfilled or satisfied before the particular situation will be said to have been attained or reached.

A statute should be given in ordinary grammatical meaning, unless an absurdity will result therefrom. The provisions of Sections 58 (4) and 59 (4) are very clear and unambiguously provided to cater for two different scenarios. Perhaps, because of the importance of money in the running of government and the resultant difficulty, where the President refuses to signify assent or signify withholding of assent, the drafters of the Constitution conferred on the legislature the power to pass the bill again and make it a law without waiting for a communication from the President.

Another thing to consider is how the President is to signify that he assents or withholds his assent to a bill. Unlike the United States Constitution, which clearly states that the President should write back to the congress with his objection, the

⁶⁰ (2007) 4 NWLR Part 1025 at p. 478

Nigerian Constitution is silent on what should be contained in the communication to the National Assembly when the President signifies that he withholds assent. This was a subject of intense debate in the 7th Senate, sometime in 2013, when the President signified his withhold of assent to the State of the Nation Address bill dully passed by the National Assembly. The President, in compliance with the provision of Section 58(4) of the Constitution, wrote to the two chambers of the National Assembly, proposing some amendments to the bill. Many Senators, including the Senate President, were of the opinion that it is against the letter of the Constitution for the President to propose an amendment to a bill sent to him for assent.⁶¹ The Senators were of the opinion that where a bill is passed and sent to the President for his assent, the only option open to him was to either assent or withhold his assent but he had no right to propose any amendment to the bill. This is despite the provision of Order 88 of the Senate Standing Orders which provides for the same.

With all respect to the Senate, their position on the amendment proposed by the President was never correct. Perhaps, had the President of the Senate read the decision of the Supreme Court in *National Assembly v. President*,⁶² he and the entire Senate could not have made the assertion that the President has no power to make suggestion for amendments while signifying his refusal for assent to a bill. In that case, the Supreme Court stated that the rationale behind the provision of Section 58(5) of the Constitution was to give the legislature an opportunity to consider the amendment proposed by the President for withholding his assent to the bill. It is therefore wrong to assume that the President, in signifying that he withholds assent to a bill, is precluded from proposing an amendment to the bill. In fact, the President, in withholding his assent, must state a reason for doing so. The provision was not made just to massage the ego of the President so that whenever he feels like it, he will withhold his assent to a bill passed by the National Assembly.

In *A.S.H.A v. Tijani*⁶³ the Nigerian Court of Appeal, in interpreting the provision of Section 100 (5) of the 1999 Constitution (it deals with overriding of a veto of a Governor of a State) which is in *pari materia* with the provision of Section 58 (5) of

⁶¹ <<http://www.nassnig.org/nass/news.php?id=467> > accessed 23 November, 2013

⁶² (2003) 9 NWLR Part 824 at p. 147

⁶³ (2012) All FWLR Part 615 at 330

the Constitution, stated that the Governor in withholding his assent to a bill passed by the House of Assembly of a state is expected to adduce his reason for doing so. And the House of Assembly while passing the bill again shall consider the reasons given. If after such consideration the bill is again passed, without any amendment due to the reasons provided by the Governor, then the bill shall become law and it does not require the signature of the Governor.

If the President is expected just to send the bill back to the National Assembly without stating the reason why he is withholding assent to it, it will amount to just questioning the sense of judgment of all the members of the National Assembly without giving any reason. That could not have been the intendment of the framers of the Constitution.

In his contribution to the debate on the letter sent by the President, Senator Ita S. Enang,⁶⁴ argued that Order 88 of the Senate Standing Orders was unconstitutional because it was not in conformity with section 58(5) of the Constitution.⁶⁵ Order 88 of the Senate Standing Orders makes provision on how the Senate is to deal with a bill return to it by the President without his assent. It provides:

“88-(a) when a bill has been passed by the Senate and House of Representatives, without amendment or with such amendments as may have agreed by both houses, a clean copy certified by clerk of National Assembly shall as soon as possible be presented to the President of the Federal Republic of Nigeria for his assent.

(b) where the President either withhold his assent to a Bill or does not communicate his assent or otherwise within 30 days from the date the Bill was sent to him for assent, the Senate shall again deliberate on the Bill.

(c) if the conference committee accepts the President's amendment to the Senate and House of Representative and the amendment is adopted by the Senate and House of Representatives, then the bill shall be sent to the President for assent.

(d) if the conference committee reject the President's amendment and recommend the application of the two-thirds rule and the same report is accepted by the Senate and House of Represen-

⁶⁴ He was the chairman Senate Committee on rules and business.

⁶⁵ Senate Hansard of 3rd July 2013

tatives, then the bill becomes law without the President's assent if it is passed by two third majority of the Senate and the House of Representative."

The House of Representatives Standing Orders made a similar provision under Order XII Rule 12. The differences with the two provisions are the reference made to conference committee by the Senate Standing Orders. In other words, while Order 88 of the Senate Standing Orders is made of 4 subsections, the House Standing Orders are made of 3 subsections. The House Standing Orders do not contain the phrase 'or otherwise' as contained in Order 88 (a) of the Senate Standing Orders.

It is clear that the provisions of the Senate and House of Representatives Standing Orders, particularly Order 88 (b), (c) and (d) as well as Order XII Rule 12 (b) &(c) respectively, are not in conformity with Sections 58 (4) and (5), as well as Sections 59 (4) and (5) of the 1999 Constitution, as amended.

However, even though the provisions are unconstitutional, the submission of Sen Enang on the unconstitutionality of same was very wrong. This is because, his assertion is on the notion that by envisaging that the President can make suggestion for amendment to a bill sent to him for assent, the provisions are unconstitutional as the CFRN 1999 has never envisages such proposal for amendment. It is respectfully submitted that, that part of the standing Order was not in any way contrary to the Constitution. Indeed, the Constitution confers on the President the power to propose an amendment to any bill while signifying his withhold of assent. That was the decision of the Court of Appeal in *A.S.H.A. v. Tijjani (supra)*. And even Sen. Enang in his submission alluded to that fact.⁶⁶

The unconstitutionality of the provisions emanates from the fact that they provided for an entirely different procedure for making legislation contrary to what Section 58 of the Constitution provides for. Order 88 (b) provides that where the President withholds his assent or does not communicate his assent or otherwise, within the 30 days allowed by the Constitution, "**the Senate shall again deliberate on the Bill.**" This is indeed not what the Constitution envisages the Senate should do. A careful look at Order 88(b) will reveal 3 situations under which all the Senate is expected to do is one thing. These are (i) where the President withholds assent, (ii)

⁶⁶ *ibid*, 13

where he refuses to communicate his assent and (ii) in any other situation. These are the circumstances where he does not communicate his withholding of assent or where he proposes an amendment without saying he withholds assent.

Now, in the first situation, once the President signifies that he withholds his assent as envisaged by Section 58(4) of the Constitution, the President must go further to advance a reason for doing so pursuant to the decision of the Court in *A.S.H.A v. Tijjani (supra)*. Where that happened, what the Senate and the House of Representatives are expected to do is to pass the bill again, as provided by Section 58(5) of the CFRN 1999. Passing the bill again means following the same procedure the National Assembly followed to pass the bill before sending it to the President for assent. In other words, what the Senate and the House of Representatives are expected to do is not just to 'deliberate' on the bill again, but to pass it again by following the procedure laid down in chapter XI of the Senate Standing Orders and Order XII Rule (1) – (11) of the House Standing Orders respectively. See *National Assembly v. President (supra)*.

In the second situation, where the President refused to communicate his assent, depending on the type of the bill, there are two options open to the Senate and the House of Representatives. If it is a bill passed under Section 59 of the Constitution, then under Section 59(4), the two chambers of the National Assembly can go ahead and pass the bill again under Section 59(5) of the Constitution. This is because Section 59(4) unlike section 58 (4) envisages such a situation where the President refuses to communicate his assent or refusal of such. That is why it says that "*where the President within 30 days after the presentation of the bill to him fails to signify his assent or where he withhold assent...*" Here again, the Senate is not to deliberate on the bill but to pass it again.

But where the bill is a money bill, that is, if it is a bill under Section 58 of the Constitution, the National Assembly has no constitutional power to do anything on the bill. In other words, where the President uses a pocket veto, as far as the 1999 Constitution is concerned, the National Assembly cannot do anything to make the bill an Act.

Then what is the National Assembly expected to do in such a situation? I think getting an answer to above question requires one to place the refusal of the President to communicate to the National Assembly within 30 days in its proper place and see what it amounts to. Section 58 (4) provides that “*where a bill is presented to the President for assent, he shall within 30 days thereof signify that he assents or that he withholds assent.*” The operative word is ‘**shall**’ which has been interpreted in a plethora of cases to be mandatory once it is used in a statute. This means that where the President refuses to communicate to the National Assembly within 30 days whether he assents to or withholds assent to a bill after it has been sent to him, it amounts to refusal to perform one of his functions as stipulated in the Constitution. In *Inakoju v. Adeleke (supra)*, the Supreme held that ‘**refusal to perform constitutional function**’ is a gross misconduct which can lead to impeachment. This means that whenever the President refuses to communicate to the National Assembly on whether he assents or withholds assent within 30 days after a bill other than money bill has been sent to him for assent, the only option open to the National Assembly is to invoke the provision of Section 143 of the Constitution.

In the third situation, which is another situation other than the two mentioned above, it all depends on what the President did in a particular situation. For instance, where the President refuses to communicate his withhold of assent that amounts to gross misconduct. But where he sent a letter proposing some amendment to the bill without saying he withholds assent, it is, according to Senator Solomon, “a diplomatic way of refusing assent to the bill.”⁶⁷ This means the National Assembly should subject the bill to law making process again and if they pass it, without inserting the amendment proposed, it becomes law and it does not require assent. But if they amend it, the bill will now be sent to the President for assent.

One can therefore safely conclude that based on the decision in the two cases mentioned above, Order 88 (b), (c) and (d) of the Senate and Order XII Rule 12 (b) & (c) of the House of Representatives Standing Orders respectively, are void for their inconsistency with the provision of the Constitution. Sections 58 and 59 of the Constitution expressly state, how the National Assembly can override the veto of the

⁶⁷ *ibid*, 21

President, and any Standing Rule or Order made by the Senate or the House of Representatives pursuant to Section 60 of the Constitution shall not be contrary to what the Constitution explicitly provides for.

IV. CONCLUSION

An attempt was made to analyse the origin of the veto power and how it was practiced at different times by different authorities. And it is apparent that while some countries made provision for the veto power in their constitutions in order to check the tyranny of a particular person or group of persons (as in Rome), some nations provide veto as an appeasement to whittling down powers of otherwise all-powerful rulers (as in the case of the British).

The paper analyses the veto power under the US Constitution and how it was carefully couched to checkmate any possible abuse of the veto power by the President or by the legislature. This is really one thing that is lacking in the veto provision of the Nigeria's Constitution. Under the US Constitution, the President must either assent or return the bill to the Congress within ten days, or otherwise the bill becomes law, as if it were assented to by the President. The Constitution also clearly states that where the President refuses to sign a bill, he shall return it with his objection, thereby foreclosing any speculation as to whether the President can propose an amendment to a bill or not.

These are some issues that are missing in the Nigerian Constitution. The debate in the Senate, as to whether the President is entitled to propose an amendment to a bill sent to him for assent or not, could have been averted if the framers of the Constitution copied it from the US Constitution.

The failure to state clearly what will happen in the event of a failure of the President to signify his assent or withhold of assent under Section 58 is another lacuna which needs to be rectified. So also the requirement for the bill to be passed again by a two-third majority under Section 59 in the event of a failure of the President to signify assent or signify withhold of assent is very unnecessary. I am of the view that

there is a need to alter the provisions of Sections 58, 59 and 100 of the CFRN to take care of a situation, where the President or Governor fails to signify his assent or withhold of assent to a bill. There is a need for clear-cut provision to make any bill dully passed by the legislature a law once the president or Governor refused to either signify assent or withhold of assent within 30 days as of its passage. It seems the President has been taking advantage of this lacuna to 'pocket veto' many bills passed by the National Assembly. About 36 bills were 'pocket vetoed' by the former Nigerian President Goodluck Jonathan and most of them were passed by the 6th Assembly. Any bill that a President or Governor has no objection to, must be signed into law, or otherwise, the constitution makes provision for dispensing with the assent. There is no need to subject a bill dully passed to another passage by the legislature if the President or Governor has no any objection to it.

A provision should also be made in the CFRN to checkmate the possibility of the legislature preventing the President or the Governor from returning a bill to the legislature with his objection. Here, Nigeria also needs to copy from the US Constitution which provides that where the legislature adjourned before the expiration of ten days, the bill will not become a law even if the President refuses to sign it within ten days. This is because by adjourning a session before the expiration of ten days, the Congress by its act is denying the President the opportunity to return the bill with his objection.

Five Shades of Income Splitting. Marriage Taxation in Poland and Germany

Jan Sarnowski*

Abstract

*This article presents five theories used to explain the rationale behind the institutions of income splitting in the personal income tax. Contrary to popular belief, Polish income splitting does not aim to reflect the significance of a marriage as an ability-to-pay factor. It is also not a tax incentive developed to fight the population drop by increasing the fertility rate. The study shows that Polish income splitting is, in fact, a politically-motivated tax deduction with no particular goal other than “supporting marriage and family life”. The German alternatives to the presented mechanism implement the ability to pay principle, seeing the tax significance of marriage in typical day-to-day relationships in the average family or on the private law regulations, respectively generalising on a basis of the *ius dispositivum* regulations or creating a universal institute solely in accordance with the *ius cogens* norms.*

I. INTRODUCTION

Income splitting is a taxation mechanism of fictionally attributing the earned income of one spouse to the other for the purposes of assessing personal income tax. It results in “splitting” away the income of the greater earner, preferably reducing the tax rates paid by the spouse who earns more, which might be the case in those jurisdictions where income tax rates display a progressive structure. The characteristic result of the “marriage bonus” lies in the fact that the income tax sum does not depend on the division of the total income between spouses, which might reflect the practice of pooling the couples’ finances in a “common pot”.

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Even though the splitting regulation has been present in Polish Personal Income Tax since the early '90s, research on its role is inconclusive. In both tax literature and judicial decisions no clear consensus exists on whether income splitting is, in fact, a socially-oriented marriage subsidy; a measure to provide financial incentives for childbirth, dealing with the decreasing fertility rate; or a tool implementing the principle of vertical equity, reflecting the significance of marriage as an ability to pay factor. Even though the influence of marriage on the couples' ability to pay has frequently been noted, its rationale remains, at least in Polish tax law, an unexplored territory. The solution to that problem might be found in the German legal system, from which the institution in question has been "borrowed".

The aim of this article is to present five theories that might be used in order to explain the meaning behind the mechanism of income splitting, including its backstory as a politically-motivated tax deduction, its possible role as a demographic stimulus, and three German equity-oriented concepts. This paper proceeds as follows: Section II describes the history of income splitting and compares its Polish and German regulations. Section III provides the information on the constitutional provisions of marriage taxation in both jurisdictions. Section IV analyses the five theories that might be used to explain the income splitting. Section V presents conclusions.

II. INCOME SPLITTING REGULATION

A. Historical Background

The mechanism of income splitting originates from the US-American legal system. The Revenue Act of 1913¹ gave married couples the right to choose between separate taxation and joint taxation, with a personal allowance increased by 1/3 (section 7 letter c). The regulation was changed after the decision of the United States Supreme Court in the case *Poe v. Seaborn*² holding that an income earned by one

¹ Revenue Act of 1913, P.L. 63-16 (1913)

² *Poe v. Seaborn*, 282 U.S. 101 (1930)

spouse belongs economically to the married couple. Therefore, it should be divided between spouses for tax purposes. The decision has led to the introduction of the mandatory use of the income splitting by couples in the matrimonial regime of community of property.³ In 1948, the regulation was used nationwide after being integrated in the Revenue Act of 1948. After two decades, income splitting faced a wave of criticism, concentrating on its high costs, which led to an increase of income-tax rates.⁴ In 1969,⁵ the divisor was reduced below 2, which led to the phenomenon known as the “marriage penalty”: a situation in which higher taxes are required from some married couples that would not be required from two otherwise identical single people with exactly the same incomes.⁶ Even though income splitting outlived its usefulness in its country of origin, it did manage to attract the attention of the German Federal Constitutional Court struggling to reform the domestic regulation of marriage taxation.

The very first nationwide German income tax statute from 24.06.1891⁷ introduced the mandatory taxation on the cumulated family income (§11). The regulation from 19.06.1906⁸ limited pooling to spouses and their children, and was repeated in the West-German statute from 10.08.1949.⁹ The rapid increase of income tax rates and the introduction of progressive taxation led the German Federal Constitutional Court to rule the sheer pooling of the family income as unconstitutional (17.01.1957). The regulation was defined as a demographically-oriented surtax, aimed at discouraging women from seeking employment.¹⁰ Emphasising both the constitutionally guaranteed gender equality in employment and the autonomy of marriage, the Court prohibited any and all statutory incentives encouraging the renunciation of the professional career in favor of parenthood.¹¹ As an alternative method of marriage taxation, the Federal Constitutional Court suggested the income splitting,¹² which was intro-

³ Angela Langlotz, ‘Tying the Knot: The Tax Consequences of Marriage’ (2001) 54 *The Lawyer* 329

⁴ *ibid* 332

⁵ Tax Reform Act of 1969, P.L. 91-172 (1969)

⁶ Hayley Fisher, *Marriage Penalties, Marriage, and Cohabitation* (Sidney 2011) 4

⁷ Prussian Collection of Laws 1891, 193

⁸ Prussian Collection of Laws 1906, 241

⁹ Law Gazette of the Administration of the United Economic Area (WiGBL) 1949, 266

¹⁰ Decisions of the Federal Constitutional Court (BVerfGE) 6,55 (82)

¹¹ *ibid* 85

¹² *ibid* 37, 43, 84

duced in Germany on 1.01.1958. The role of the mechanism was defined in the ruling from 3.11.1982 as a regulation serving the tax equity based on the ability-to-pay principle.¹³ It reflects the day-to-day relationships in the average family and the household's sustenance,¹⁴ and harmonises with the regulations of the family, inheritance, and insurance law.¹⁵ In the ruling from **7.03.2013**, the Court emphasised its **harmony with the very essence of marriage, which was defined as a relationship built on mutual trust, without indissoluble connection to any specific statutory regulation.**¹⁶

The ruling from 3.11.1982 and its backlash in the German scientific literature had some impact on the Polish plans to introduce the modern income taxation. The Polish jurisprudence advocated a system based on the ability-to-pay principle, protecting the subsistence, and guaranteeing a socially-reasonable level of personal allowance.¹⁷ The new Polish income tax was introduced in the statute from 26.08.1991.¹⁸ According to its substantiation, one of rare regulations designed to protect the ability to pay was the newly introduced income splitting.¹⁹ This theory was changed by the statute from 6.03.1993,²⁰ which defined income splitting as a socially-oriented marriage subsidy. In the ruling from 11.04.1994,²¹ the Polish Constitutional Court repeated that definition, only to change it back in the ruling from 4.05.2004,²² reintroducing the equity-oriented interpretation of the original regulation. The very concept of marriage taxation introduced in 1991 was based on the wrong assumption that the Polish income tax could partially introduce the ability to pay principle. Abandoning that idea was scientifically correct, even though it is debatable whether

¹³ Decisions of the Federal Constitutional Court (BVerfGE) 61, 319 (84)

¹⁴ *ibid* 83, 84

¹⁵ *ibid*

¹⁶ Judgment of the Federal Constitutional Court of 7 May 2013 (2 BvR 1981/06, 72, 95)

¹⁷ Hanna Litwińska, 'Opodatkowanie rodziny' (Warszawa 1989) 18, 30

¹⁸ Personal Income Tax Act of 26 July 1991, Journal of Laws (Dz.U.) 1991 no. 80, item 350, amended

¹⁹ Sejm Rzeczypospolitej Polskiej, paper no. 561 (Warszawa 1991) 7, 10; Sejm Rzeczypospolitej Polskiej, Record of the 66th session of the Sejm of the Tenth Cadence of 5 July 1991 (Warszawa 1991) 103

²⁰ The Tax Reform and Other Legislation Amendment Act 1993, Journal of Laws (Dz.U.) 1993 no. 28, item 127; Record of the 39th session of the Sejm of the First Cadence of 5 March 1993 (Warszawa 1991) 103 (paper no. 770 and 789)

²¹ Judgment of the Polish Constitutional Tribunal of 11 April 1994 (K 10/93)

²² Judgment of the Polish Constitutional Tribunal of 4 May 2004 (K 8/03)

income splitting should not have been removed, or at least, redefined as a marriage stimulus. The ruling from 4.05.2004, ignoring both the *ratio legis* of the regulation and the Court's own jurisprudence, claiming full compliance of the Polish income tax with the ability to pay principle, and failing to define its sphere and means of constitutional protection was obviously flawed and did not have any further continuation.

B. Polish and German Income Splitting

Under current Polish and German legislation (Article 6 uPIT,²³ §26 - §26b EStG²⁴), the income tax of a married couple is calculated by applying the tax function to half of the sum of taxable incomes of the spouses. The resulting amount is then doubled to determine the tax liability of the couple. Even though the splitting mechanism is identical in both countries, there are some differences concerning the conditions of its use and the possible effectiveness of the regulation.

In Germany, income splitting is the automatic method of marriage taxation. In order to benefit from it, a German spouses have to be married for at least one day during the fiscal year (§26(3) EStG) and live with each other in a common household (§26 (1) EStG²⁵). A Polish taxpayer has to make a formal request in his or her annual tax declaration, be married for the entire duration of the fiscal year, and choose the matrimonial regime of community of property. Actual cohabitation is not required.

Given the progressiveness of income tax, this system leads to a lower tax burden compared to individual taxation if household income is unequally distributed between spouses. Its effectiveness depends on the difference between the consecutive tax rates and the difference between the income of each spouse. With the relatively diverse tax rates (14-45% to Polish 18% and 32%) and sizable personal exemption (8472 Euro to Polish 3091 zł), the German "splitting advantage" has much bigger relief potential than its Polish counterpart (Article 27 (1) uPIT and §32a (1) EStG). That conclusion is strengthened by the fact that no more than 2.14% of Polish tax-

²³ Personal Income Tax Act of 26 July 1991, Journal of Laws (Dz.U.) 1991 no. 80, item 350, amended

²⁴ *German Income Tax Law, Federal Law Gazette* (BGBl.) 1, pages 3366, 3862

²⁵ Judgment of the Federal Fiscal Court (Germany) of 15 June 1973 (VI R 150/69BStBl. II 1973, 640, 641)

payers are charged with the second tax rate²⁶ and that more than 1.6% of Polish taxpayers,²⁷ who take advantage of the flat-rate income taxation, are prohibited from using either the income splitting or the personal exemption.²⁸

III. CONSTITUTIONAL PROVISIONS OF MARRIAGE TAXATION

There are two ways in which the rules of social justice (Article 2 KRP,²⁹ Article 20 GG)³⁰ can be implemented in the personal income tax.³¹ The first of them are the legal norms introducing taxation consistent with one's ability to pay (tax equity³²). The second are regulations on the tax credit, which give an economic bonus for certain types of behavior deemed favorable by the government.³³

A. Tax Equity

The principle of tax equity pleads for taxation that would be consistent with the taxpayers' economical and personal situation. The idea of *horizontal equity* is based on the constitutional principle that equals should be treated equally (Article 32 KRP,

²⁶http://wynagrodzenia.pl/payroll/artukul.php/typ.1/kategoria_glowna.504/wpis.2791 accessed 14 October 2015

²⁷<http://www.krytykapolityczna.pl/artykuly/opinie/20150619/bugaj-polska-raj-podatkowy-dla-krezusow> accessed 14 October 2015

²⁸ *Act on Flat-Rate Income Tax on Selected Incomes Earned by Individuals* of 20 November 1998, Journal of Laws (Dz.U.) 1998 no. 144, item 930, amended

²⁹ *Constitution of Poland* of 2 April 1997, Journal of Laws (Dz.U.) 1997 no. 78, item 483

³⁰ Basic Law for the Federal Republic of Germany of 23 May 1949, Federal Law Gazette (BGBl.), page 1

³¹ Judgment of the Polish Constitutional Tribunal of 30 November 1988 (K. 1/88); Judgment of the Polish Constitutional Tribunal of 29 October 1996 (U. 4/96)

³² Adam Krzywoń, 'Podatki i inne daniny publiczne w Konstytucji RP' (Warszawa 2010) 109; Jerzy Oniszczyk, 'Podatki i inne daniny w orzecznictwie Trybunału Konstytucyjnego' (Warszawa 2001) 143

³³ Aleksander Gomułowicz, 'Polityka podatkowa w Polsce i przesłanki jej kształtowania' (1996) 5 Monitor Podatkowy <<http://czasopisma.beck.pl/monitor-podatkowy/artukul/polityka-podatkowa-w-polsce-i-przeslanki-jej-ksztaltowania/>>access 14 October 2015; Ministerstwo Finansów, 'Strategia Podatkowa 2003 Materiały do dyskusji' (Warszawa 2003) 11; Ministerstwo Finansów, 'Preferencje Podatkowe w Polsce' (Warszawa 2010) 9

Article 3 Abs.1 GG, Article 134 WRV³⁴), which means that individuals with the same levels of income and resources should be taxed at the same rate.³⁵ The taxpayer's ability to pay is determined according to the amount of income less expenses (an objective net principle, followed in Poland and Germany³⁶), and less the inevitable expenses accruing for private reasons, in particular covering the taxpayer's and his or her family members' subsistence expenses (a subjective net principle, followed in Germany³⁷).

The tools for implementing the subjective net principle consist of one general regulation (personal exemption) and a range of mechanisms grouping individuals together based on their equal access to resources, wealth, age, family, and marital status (e.g. income splitting, children's and disability allowance³⁸). The Polish Constitutional Court does not deem the subjective net principle constitutionally prescribed and refuses to enforce its implementation.³⁹ On the other hand, the German Constitutional Court has, up to this day, refused the direct confirmation of the inseparable connection between the constitutional equality principle and the concept of horizontal equity. Instead, the Court based the protection of horizontal equity on various other constitutional provisions, such as family protection (child benefits, §32 Abs.6 EStG⁴⁰), the social state principle (blanket allowances for special expenses, §§10-10c, 33-33b EStG⁴¹), and the inviolability of human dignity (personal exemption, §32a Abs.1 EStG⁴²).

³⁴ The Constitution of the German Reich of 11 August 1919, Directory of Legislation in Force (FSN) 401-2

³⁵ Aleksander Gomułowicz, *Zasada sprawiedliwości ci podatkowej* (Warszawa 2001) 14; Decisions of the Federal Constitutional Court (BVerfGE) 82, 60 (89); Decisions of the Federal Constitutional Court (BVerfGE) 93, 121 (134); Dieter Birk, *Das Leistungsfähigkeitsprinzip* (Köln 1983) 165, 170; Bodo Pieth, Bernhard Schlink (ed), *Grundrechte.Staatsrecht II* (Heidelberg 2010) n 464

³⁶ Dieter Birk (ed), *Steuerrecht* (Köln 2010), n 189; Elżbieta Chojna-Duch, Hanna Litwińczuk (ed), *Prawo Finansowe* (Warszawa 2011) 377; Wanda Wójtowicz and Paweł Smolewski, *Podatek dochodowy od osób fizycznych prorodzinny czy neutralny?* (Warszawa 1999) 12

³⁷ Birk (n 35) 615; Heinrich Weber-Grellet, *Steuern im modernen Verfassungsstaat* (Köln 2001) 176; Włodzimierz Nykiel, *Ułgi i zwolnienia w konstrukcji prawnej podatku* (Warszawa 2002) 76; Wójtowicz and Smolewski (n 36) 11

³⁸ Marian Weralski (ed), *System instytucji prawno-finansowych PRL* (Wrocław 1985) 43; Wójtowicz and Smolewski (n 36) 105

³⁹ Judgment of the Polish Constitutional Tribunal of 11 April 1994 (K 10/93)

⁴⁰ Decisions of the Federal Constitutional Court (BVerfGE) 43, 108 (124)

⁴¹ Hans H. Götz, *Die personale Zurechnung von Sonderausgaben und außergewöhnlichen Belastungen im Hinblick auf die subjektive Leistungsfähigkeit* (Tübingen 2005) 19; Heinz J. Pezzer, *Verfassungsrechtliche Perspektiven der Familienbesteuerung* (Berlin 1987) 766; Klaus Tipke, 'Hütet das Nettoprinzip!' Paul Kirchhof and

B. Tax Incentives and Social Tax Deductions

The implementation of social justice by the public finance is concentrated on two spheres of activity: 1) efficient allocation of resources and (2) distribution of income. The role of income taxation is typically limited to ensuring the socially and economically efficient collection of tax revenue. This is no longer the case when the government, instead of directly subsidising the chosen field of human activity, decides to reach the same goal by using the tools specific to tax law. While both Polish and German governments use a wide range of methods such as tax credit, tax deductions, and tax exemptions to serve as tax incentives to encourage a certain behavior,⁴³ there is also a category of norms that, specifically in Poland, have no other purpose than to reduce the tax burden on specific categories of taxpayers.⁴⁴

The constitutionality of Polish and German tax incentives depends on the indication of a fundamental law (constitutional value) that should be protected or stipulated by the regulation. The mechanism should also pass the proportionality assessment test, proving its suitability, necessity and appropriateness. First, the measure must be suitable for the achievement of the pursued aim. Secondly, the measure should be considered when no other milder means would have been possible to achieve that aim. Finally, the benefit must outweigh the injury caused by the otherwise inevitable violation of the horizontal equity based on the objective net principle (Poland⁴⁵), or the constitutional equality reinforced by the subjective net principle (Germany⁴⁶).

Karsten Schmidt and Wolfgang Schön and Klaus Vogel (eds) *Festschrift für Arndt Raupach zum 70. Geburtstag: Steuer- und Gesellschaftsrecht zwischen Unternehmerfreiheit und Gemeinwohl* (Köln 2006) 193

⁴² Decisions of the Federal Constitutional Court (BVerfGE) 82, 60 (85); Decisions of the Federal Constitutional Court (BVerfGE) 87, 153 (169); see also Birk (n 36) 137; Pezzer (n 42) 764

⁴³ Birk (n 35) 205

⁴⁴ Nykiel (n 37) 23

⁴⁵ Judgment of the Polish Constitutional Tribunal of 3 September 1996 (K 10/96)

⁴⁶ DIETER BIRK, 'VERFASSUNGSFRAGEN IM STEUERRECHT – EINE ZWISCHENBILANZ NACH DEN JÜNGSTEN ENTSCHEIDUNGEN DES BFH UND DES BVERFG' (2009) DEUTSCHES STEUERRECHT 877; DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (BVERFGE) 23, 133 (137); DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (BVERFGE) 93, 121 (147), DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT 99, 280 (296); DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (BVERFGE) 116, 164, (191); DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (BVERFGE) 122, 201 (232)

A Polish mechanism of social tax deductions (an equivalent of socially-motivated subsidies) is not designed as a tax stimulus. On the contrary, it is a politically-motivated measure, aimed only to privilege a certain category of taxpayers. Due to the lack of any other verifiable goal, the only indicator of the deduction's "effectiveness" is its popularity among the target group. The ambiguous nature of the social tax deduction results in proving its constitutionality problematic, restricting it solely to the identification of a fundamental law motivating its existence. The Constitutional Court's tolerance toward this practice shows a potential of motivating the government to the repeated use of this very tool instead of tax incentives, which are strictly controlled by the proportionality assessment.

The theory of social tax deductions, which have been developed in Polish scientific literature as a reaction to the string of tax reliefs with no discernable stimulatory reason, has yet to become an object of the judicial interpretation.⁴⁷ German jurisprudence does not recognise the solely politically-motivated deductions as constitutional measures, and demands from the government both an information about the specific aim of the stipulated deduction and the proof of passing the proportionality assessment as early as during the legislative process.

⁴⁷ Witold Modzelewski and Jerzy Bielawny (eds), *Materialne prawo podatkowe* (Warszawa 2005) 89; Witold Modzelewski and Jerzy Pyssa (eds), *Wstępn do nauki prawa podatkowego* (Warszawa 2005) 159; Wojciech Morawski, *Ułgi i zwolnienia w prawie podatkowym* (Gdańsk 2003) 86; Nykiel (n 37) 44

IV. FIVE THEORIES BEHIND INCOME SPLITTING

A. Tax Incentive

According to many Polish scientists and the analysis issued by the Polish Supreme Court, income splitting is a tax incentive aimed at tackling the declining fertility rate.⁴⁸ Even though this opinion contradicts both the *ratio legis* of the regulation and the subsequent rulings of the Polish Constitutional Court, it stays in fact scientifically reasonable. Considering the possible unconstitutionality of the social deduction concept and the fact that Polish income tax system does not fully protect the taxpayer's ability to pay, it is, in practice, the only logical interpretation of the regulation. Although incorrect it leads to the question of whether the current regulation of the income splitting could be considered as an optimal demographic stimulus.

It has been scientifically confirmed that the sheer income splitting has a potential to increase both marriage and fertility rate.⁴⁹ On the other hand its effectiveness is rather low, as it is a marriage incentive alone, with no direct mechanisms connecting the scope of the relief with the fertility of the spouses.⁵⁰ The conditions of using the current Polish regulation, such as the mandatory choice in favor of the matrimonial regime of community of property and an obligation to be married during the whole fiscal year additionally thwart its family-friendly potential.

⁴⁸ Biuro Studiów i Analiz Sądu Najwyższego, 'Opinia o poselskich projektach ustaw „O związkach partnerskich” oraz „Przepisy wprowadzające ustawy o związkach partnerskich’ (Warszawa 2012) 7; Jerzy Kochanowski, 'Przesłanki tworzenia strategii polityki rodzinnej w Polsce' Komitet Redakcyjny Biuletynów RPO (ed) *Polityka rodzinna w krajach Unii Europejskiej – wnioski dla Polski* (Warszawa 2009) 12; Wanda Wójtowicz, 'Kontrowersje wobec „prorodzinności” podatku dochodowego od osób fizycznych, cz.2'(1999) 2 Monitor podatkowy < <http://czasopisma.beck.pl/monitor-podatkowy/artikul/kontrowersje-wokol-prorodzinności-podatku-dochodowego-od-osob-fizycznych-cz-ii/>>access 13 October 2015

⁴⁹ James Alm and Leslie Whittington, 'Income Taxes and Marriage Decision' (1995) *Applied Economics* 1995 25; James Alm and Leslie Whittington, 'Does the Income Tax affect marital decisions?' (1995) *National Tax Journal* 1995 565; James Alm and Elisabeth H. Peters and Leslie Whittington, 'Fertility and the Personal Exemption: Implicit Pronatalist Policy in the United States' (1990) *The American Economic Review* 545; Hayley Fisher, 'Marriage Penalties, Marriage, and Cohabitation' (Sidney 2011) 2, 18; Alexander M. Gerald, 'The influence of tax law changes on the timing of marriages: a two country analysis' (1996) *National Tax Journal* 17

⁵⁰ Wójtowicz (n 48); Wójtowicz and Smoleń (n 36) 61

It should be noted that following the German regulation, individuals who get married even at the end of the year receive all the tax benefits of being married any time in that year. Taxpayers marrying late in the tax year obtain the full marital deduction what is considered to be an attractive marriage incentive.⁵¹ The condition of mandatory cohabitation provides the German splitting with a potential fertility incentive that is unknown in the Polish mechanism. With this in mind, it is obvious that the German mechanism of income splitting could be a much more effective marriage incentive than its strictly limited Polish counterpart. On the other hand this very interpretation of the German regulation was deemed unconstitutional by the German Constitutional Court as a threat to the constitutionally protected autonomy of marriage.⁵²

B. Social Deduction

After redefining the income splitting by the Polish Constitutional Court in the ruling from 4.05.2004, there has been much confusion about both the aim of the income splitting and verdict's consequences in general, including the thesis about the constitutional need of implementing the measures protecting one's ability to pay⁵³ and resulting in the introduction of the children allowance in 2006.⁵⁴ The scientific literature pointed out the fact that the ruling ignored the *ratio legis* of the regulation and Court's own jurisprudence, and considered the verdict as obviously flawed and inconsequential. On the contrary, they developed the theory of social deduction and

⁵¹ Geraldi (n 50) 25

⁵² Decisions of the Federal Constitutional Court (BVerfGE) 107, 27 (53); Decisions of the Federal Constitutional Court (BVerfGE) 42, 64 (77); see also Lars H. Haverkamp, 'Familienbesteuerung aus verfassungsrechtlicher und rechtsvergleichender Sicht' (Hamburg 2010) 206; Bernhard Klose, 'Neugestaltung des Ehegattensplittings contra Freiheit der Familiengestaltung?' 2003 Zeitschrift für Rechtspolitik 128; Klaus Stern and Florian Becker (ed), 'Grundrechte-Kommentar' (Köln 2010) Article 6, n 26

⁵³ Leszek Bosek, 'Neutralny czy prorodzinny system podatkowy?' Jolanta Krynicka and Julita Rudzka (eds) *Sytuacja rodzin wielodzietnych w Polsce a polityka Rodzinna* (Warszawa 2006) 32; Leszek Bosek, 'O potrzebie opodatkowania rodziny' <<https://sites.google.com/a/academiaiuris.pl/www/opodalkowanie-rodziny>>access 14 October 2015

⁵⁴ The Personal Income Tax Reform and *Other Legislation Amendment Act 2006*, Journal of Laws (Dz.U.) 2006 no. 217, item 1588

confirming its constitutionality,⁵⁵ even despite the impossibility of controlling its regulation via proportionality assessment.⁵⁶

This point of view was shared by the Polish Ministry of Finance which, in its yearly reports on tax relief, repeatedly confirmed its aim as unconditionally “supporting marriage and family life”.⁵⁷ On the other hand, the Ministry repeatedly fails to define the regulation as a social deduction.⁵⁸ Despite the obvious ineffectiveness, questionable constitutionality and straightforward inconsistency with the ruling from 4.05.2004, the concept of social deduction is a theory accurately reflecting the *ratio legis* of the current Polish income splitting regulation and is considered by both the majority of literature and the tax administration as the basis for its interpretation.

C. The Equity-Oriented Concepts

The constitutional protection of the subjective net principle and following tax deduction of the inevitable private expenses of the taxpayer, does not automatically determine one specific method of the marriage taxation. The introduction of a form of income pooling depends on the very influence of being married on the individual’s ability to pay which is far from obvious. While some of the scientists see marriage as a long-term union with common goals and consensual division of responsibilities, others emphasise its negative influence on one’s career development and unavoidable imbalance and specialisation that backfire in case of a divorce.⁵⁹ For the purposes of

⁵⁵ Witold Modzelewski, Jerzy Bielawny (ed), *Komentarz do ustawy o podatku dochodowym od osób fizycznych* (6th edn, Warszawa 2009) art. 6, 6a; Jacek Kulicki, *Polityka fiskalna w Polsce w latach 1920-2005 w zakresie opodatkowania dochodów rodziny* (Warszawa 2006) 8

⁵⁶ Jacek Kulicki, *Systemy opodatkowania dochodów rodziny w Polsce w latach 1918-2011* (Warszawa 2011) 14; Krystyna Nizio, *Prawne aspekty polityki podatkowej* (Warszawa 2007) 106

⁵⁷ Ministerstwo Finansów, *Preferencje Podatkowe w Polsce, nr 1* (Warszawa 2010) 6; Ministerstwo Finansów, *Preferencje Podatkowe w Polsce nr 3* (Warszawa 2012) 7

⁵⁸ Sejm Rzeczypospolitej Polskiej, **Parliamentary Question no. 13499 to the Polish Minister of Finance of 14 January 2013**, <<http://www.sejm.gov.pl/sejm7.nsf/InterpelacjaTresc.xsp?key=2CF0EAD6>>access 14 October 2013; Written Reply to Parliamentary Question no. 13499, <<http://www.sejm.gov.pl/sejm7.nsf/InterpelacjaTresc.xsp?key=2CF0EAD6>>access 14 October 2014

⁵⁹ Miriam Beblo, ‘Die Wirkungsweise des Ehegattensplittings bei kollektiver Entscheidungsfindung im Haushalt’ Barbara Seel (ed) *Ehegattensplitting und Familienpolitik* (Wiesbaden 2007) 290; Nicola E. Hülskamp, *Ursachen niedriger Fertilität in hoch entwickelten Staaten* (Köln 2005) 137, 153f; Christine Maurer, *Verfassungsrechtliche Anforderungen an die Besteuerung von Ehegatten und Familien. Eine Prüfung der Familienförderungsgesetzgebung und ihrer Konsequenzen* (Frankfurt 2004) 60f; Ulrike Spangenberg, ‘Ehe-interne

this paper, the topic of which are the theories justifying the mechanism of the income splitting, the analysis will be limited to only those theories which deem the regulation both desired constitutional, but derive its significance from various sources.

Even though the introduction of the income splitting has been stipulated in Poland since the early '80s, the reasoning behind it was limited to the mere repetition of the broad argumentation from the ruling of the German Constitutional Court (3.11.1982), including both the day-to-day relationships in the average family and a wide range of institutions of the family, inheritance and insurance law.⁶⁰ The publications from early '90s, following the introduction of the new Polish income tax, very much took the income splitting for granted, considering it natural and self-explanatory and failing to develop a theory explaining the impact of marital decisions on the ability to pay.⁶¹ In Germany, on the other hand, the ruling from 1982 has been an object of intensive analysis, leading to the development of three theories justifying the income splitting: 1) Conservative, 2) Universal and 3) Generalising.

The conservative marriage taxation theory sees the tax value of the marriage solely in the day-to-day relationships in the average family. It defines the marriage as a lifelong union, a "corporation" oriented on the collective earning and consumption.⁶² Its social consequences stretch, through the children, far over the lifespan of the couple. It is characterised by long-term planning and strict specialisation.⁶³ Being a

Verteilung von Einkommen: Recht und Realität' Barbara Seel (ed) *Ehegattensplitting und Familienpolitik* (Wiesbaden 2007) 58; Jessica Vollmer, *Das Ehegattensplitting* (Baden-Baden 1998) 130, 155; Lena Foli-janty, Ulrike Lembke (ed) *Feministische Rechtswissenschaft* (Baden-Baden 2012) par 8 n 28

⁶⁰ Litwińczuk (n 17) 18, 30

⁶¹ Adam Bartosiewicz, Ryszard Kubacki (ed) *PIT komentarz* (2nd edn, Warszawa 2010) Article 6 n 2; Bosek (n 53) 32

⁶² Cay Folkers, *Steuerliche Gerechtigkeit, Leistungsfähigkeit und Ehegattensplitting* (Bochum 2002) 22; Cay Folkers, 'Ehegattensplitting und Leistungsfähigkeitsprinzip' (2003) *Perspektiven der Wirtschaftspolitik* 413; Stefan Homburg 'Das einkommensteuerliche Ehegattensplitting' (2000) *Steuer und Wirtschaft* 268; Wolfgang Scherf, 'Das Ehegattensplitting aus finanzwissenschaftlicher Sicht' (2000) *Steuer und Wirtschaft* 273; Rudolf Wendt, 'Familienbesteuerung und Grundgesetz' Joachim Lang (ed) *Die Steuerrechtsordnung in der Diskussion, Festschrift für Klaus Tipke zum 70. Geburtstag* (Köln 1995) 59; Rudolf Wendt, Grundfragen der Familienbesteuerung <<http://www.uni-saarland.de/campus/fakultaeten/professuren/rechts-und-wirtschaftswissenschaft/rechtswissenschaften-fr-11/professuren-fr-11-rechtswissenschaften/prof-dr-rudolf-wendt/personen/prof-dr-rudolf-wendt/vortraege.html>>access 14 October 2015

⁶³ Homburg (n 62) 264; Scherf (n 62) 273; Christian Seiler, 'Leitlinien einer familiengerechten Besteuerung' (2010) *Finanz-Rundschau* 113; Christian Seiler, 'Verfassungs- und Systemgerechte Besteuerung

unique economical entity, family should be taxed through the mechanism of income splitting, the only regulation reflecting its economically indivisible nature.⁶⁴ The only acceptable reform of the marriage taxation is extension of the income splitting on children raised by the couple. The *Familien splitting* would attribute earned income of the couple to every single family member deeming a reduction of the divisor unacceptable.⁶⁵

The universal marriage theory finds its core in those regulations of family law that are binding for every single marriage (*ius cogens*), including especially the maintenance obligations and the practice of covering the household expenses on a daily basis.⁶⁶ The theory takes into consideration the mandatory minimal economic relation between spouses.⁶⁷ The Universal Marriage Theory stipulates the introduction of

von Ehe und Familie- Bestandsaufnahme und Reformervägungen' Barbara Seel (ed) *Ehegattensplitting und Familienpolitik* (Wiesbaden 2007) 7

⁶⁴ Paul Kirchhof, 'Die Einkommensbesteuerung von Ehegatten während des Zusammenlebens und im Falle von Trennung und Scheidung' (2003) *Familie, Partnerschaft, Recht* 387; Paul Kirchhof, 'Ehe- und familiengerechte Gestaltung der Einkommensteuer' (2000) *Neue Juristische Wochenschrift* 2792; Paul Kirchhof (ed), **Karlsruher Entwurf zur Reform des Einkommensteuergesetzes** (Heidelberg 2001) 7, 46; Wendt (n 62) 59

⁶⁵ Hans Wolfgang Arndt and Andreas Schumacher, 'Einkommensbesteuerung und Grundrechte. Zum Einfluss grundrechtlicher Entscheidungen des Bundesverfassungsgerichts auf die Entwicklung der Einkommensbesteuerung in der Bundesrepublik Deutschland' (1993) *Archiv für Öffentliches Recht* 515; Udo Di Fabio, 'Der Schutz von Ehe und Familie: Verfassungsentscheidung für die vitale Gesellschaft' (2003) *Neue Juristische Wochenschrift* 993; Folkers (n 62) 23, 25; Franz Klein 'Ehe und Familie im Steuerrecht als Verfassungsrechtliches Problem' Wolfgang Zeidler and Walther Fürst and Roman Herzog and Dieter C. Umbach (eds) *Festschrift für Wolfgang Zeidler* (Berlin 1987) 798; Kerstin Löhr and Reihard Serwe, *Das Ehegattensplitting auf dem Prüfstand* (München 2011) 79; Albrecht Merkt, 'Leitsätze für eine freiheits- und gleichheitsgerechte Einkommensteuer bei Ehe und Familie' (2009) *Deutsches Steuerrecht* 2221; Wilhelm Oepen, *Zur Einkommensbesteuerung von Ehegatten – Entstehung, Kritik und Änderungsvorschläge* (Bonn 1999) 55f; Wilhelm Oepen, *Familienbesteuerung und Familienförderung in einer Zeit gesellschaftlichen und demographischen Wandels* (Bonn 2003) 119; Scherf (n 62) 276; Seiler (n 63) 119; Seiler (n 63) 31; Christian Seiler, 'Leitlinien einer familiengerechten Besteuerung' (2010) *Finanz-Rundschau* 113; Ernst E. Stöcker, 'Die Kappung des Ehegattensplitting ist verfassungswidrig' (1999) *Betriebs-Berater* 234; Klaus Vogel, 'Besteuerung von Eheleuten und Verfassungsrecht' (1999) *Steuer und Wirtschaft* 201; Wendt (n 62) 62

⁶⁶ Hans Joachim Kanzler, 'Die Zukunft der Familienbesteuerung – Familienbesteuerung der Zukunft' (2001) *Finanz-Rundschau* 921; Hans Joachim Kanzler, 'Sind andere europäische Modelle der Eheförderung auf Deutschland übertragbar? – Verfassungsrechtliche und steuersystematische Rahmenbedingungen für eine Veränderung der Ehegattenbesteuerung' (2002) *Finanz-Rundschau* 760; Joachim Lang, *Die Bemessungsgrundlage der Einkommensteuer* (Köln 1981) 546; Joachim Lang, 'Familienbesteuerung, Zur Tendenzwende der Verfassungsrechtsprechung durch das Urteil des Bundesverfassungsgerichts vom 3.11.1982 und zur Reform der Familienbesteuerung' (1983) *Steuer und Wirtschaft* 103

⁶⁷ Nina Dethloff, 'Die Eingetragene Lebenspartnerschaft – Ein neues familienrechtliches Institut'

the *Realsplitting* limiting the deductible transfers between the spouses to their actual scope, but not higher than the level of typical reasonable maintenance that would be paid to the spouse in case of a divorce (*Düsseldorfer Tabelle*).⁶⁸ Similar rules can be applied to the children maintenance payments thus integrating them into the system called *Familienrealsplitting*.⁶⁹ Many representatives of the universal marriage theory have developed their own models of the “real splitting”, changing the fiscally relevant transfer amount (*Vollsplitting* / *Teilsplitting*) and allowing higher transfers under condition of presenting suitable evidence (*klassisches* / *pauschaliertes Realsplitting*).⁷⁰ The current regulation of the marriage taxation is referred to as a form of *volles pauschaliertes Realsplitting* and is considered to be a rough but acceptable typification.⁷¹

The generalising marriage theory sees the fiscal value in the institutions that, forming the semi-binding regulations (*ius dispositivum*), have been chosen by the his-

(2001) Neue Juristische Wochenschrift 2598; Dagmar Felix, ‘Das Ehegattensplitting und die Einheit der Rechtsordnung’ Barbara Seel (ed) *Ehegattensplitting und Familienpolitik* (Wiesbaden 2007) 83; Maria Heider and Christine Scheel, ‘Die Grüne und das Geld, Das Steuersystem für ein neues Jahrtausend’ (Eichborn Verlag 1997) 70; Monika Jachmann, ‘Reformbedarf bei der Familienbesteuerung?’ (2008) Betriebs-Berater 591; Monika Jachmann and Klaus Liebl, ‘Wesentliche Aspekte zur Familienbesteuerung’ (2010) Deutsches Steuerrecht 2009; Lang (n 66) 117; Joachim Lang, ‘Familiensteuergerechtigkeit’ Jörg Ennuschat and Jörg Geerlings and Thomas Mann and Johann-Christian Pielow (eds) *Wirtschaft und Gesellschaft im Staat der Gegenwart: Gedächtnisschrift für Peter J. Tettinger* (Heymanns Verlag 2007) 563; Hans Jürgen Papier, ‘Ehe und Familie in der neueren Rechtsprechung des BVerfG’ (2002) Neue Juristische Wochenschrift 2129; Hans Jürgen Papier, ‘Steuerrecht im Wandel – verfassungsrechtliche Grenzen der Steuerpolitik’ (2007) Deutsches Steuerrecht 973; Isabel Rauch, ‘Splittingverfahren für eingetragene Lebenspartnerschaften’ (2006) Deutsches Steuerrecht 1823; Isabel Rauch ‘*Lebensformenneutralität in der niederländischen Familienbesteuerung – Modell für Deutschland?*’ (Aachen 2006) 68; Michael Wosnitza, ‘Die Besteuerung von Ehegatten und Familien. Zur ökonomischen Rechtfertigung eines Realsplittings’ (1996) Steuer und Wirtschaft 1996 123

⁶⁸ Rauch (n 67) 69; Sabine Thiede, ‘Die verfassungsrechtliche und steuersystematische Untersuchung der Ehegattenbesteuerung und ihrer Alternativmodelle’ (Münster 1999) 167

⁶⁹ Arndt Schumacher (n 65) 1993; Jachmann (n 67) 593; Monika Jachmann, ‘Berücksichtigung von Kindern im Focus der Gesetzgebung’ (2010) Finanz-Rundschau 123; Kanzler (n 66) 940; Joachim Lang and Klaus Tipke, ‘Zur Reform der Familienbesteuerung’ (1984) Steuer und Wirtschaft 127; Lang (n 68) 650; Papier (n 66) 2131, 2133; Papier (n 67) 978; Bernhard Seidel and Dieter Teichmann, ‘Zur geplanten Einkommensteuerreform 2002: Nachbesserungen notwendig’ <http://www.diw.de/deutsch/98_47_1/30383.html>access 14 October 2015; Wendt (n 62); Wosnitza (n 67) 136

⁷⁰ Thiede (n 68) 138

⁷¹ HOMBURG (n 62) 63; JACHMANN (n 67) 591; JACHMANN LIEBL (n 67) 2010; LANG (n 66) 125; ROMAN SEER, ‘DAS EHEGATTENSPLITTING ALS TYPISIERTES REALSPLITTING’ WALTER DRENECK AND ROMAN SEER (EDS) *FESTSCHRIFT FÜR HEINRICH WILHELM KRUSE ZUM 70. GEBURTSTAG* (KÖLN 2001) 368; HARMUT SÖHN, ‘EHEGATTENSPLITTING UND VERFASSUNGSRECHT’ REINAR LÜDEKE AND WOLFGANG SCHERF AND WERNER STEDEN (EDS) *WIRTSCHAFTSWISSENSCHAFT IM DIENSTE DER VERTEILUNGS-, GELD- UND FINANZPOLITIK FESTSCHRIFT FÜR ALOIS OBERHAUSER ZUM 70. GEBURTSTAG* (BERLIN 2000) 433; HARMUT SÖHN, ‘KAPPUNG DES EHEGATTENSPLITTING?’ KIRCHHOF, PAUL (ED), *STAATEN UND STEUERN, FESTSCHRIFT FÜR KLAUS VOGEL ZUM 70. GEBURTSTAG* (HEIDELBERG 2000) 639

torical legislator as basis for the generalisation.⁷² The marriage taxation should especially depend on the chosen marital property regime, with the current regulation of the income splitting limited to matrimonial regimes of community of property and community of surplus.⁷³ People who chose a separate property regime should be taxed via *Realsplitting*.⁷⁴

V. CONCLUSION

Contrary to popular belief, Polish income splitting does not aim to reflect the significance of a marriage as an ability to pay factor. It is also not a tax incentive developed to fight the population drop by increasing the fertility rate. The study showed that Polish income splitting is, in fact, a politically-motivated tax deduction with no particular goal, other than “supporting marriage and family life”. Such deductions are constitutional as long as they privilege the groups that enjoy special protection of the state under the Polish Constitution.

The analysis of Polish and German legislation shows that an identical regulation can be interpreted in an utmost different way. The very mechanism is a scarce and faulty indicator of its purpose. On the other hand, the wide range of interpretations gives the legislator an opportunity to choose the one most suiting for his desirable model of the tax system.

Facing both the interpretation chaos and new problems, such as the stipulated increase of the personal allowance and tax recognition of the institutionalised same-sex unions, the Polish government should decisively answer two questions. First, concerning the introduction of a subjective net principle and second, about introducing marriage-friendly tax subsidies. A decision in favor of the full implementation of the ability to pay principle would lead to the question about the tax significance of

⁷²Birk (n 35) 639; Weber-Grellet (n 37) 298; Cristoph Winhard, ‘Das Ehegattensplitting – Ein Dauerbrenner in der steuerpolitischen Diskussion’ (2006) *Deutsches Steuerrecht* 1729

⁷³Haverkamp (n 52) 221, 224; Andreas Richter and Jens Steinmüller, ‘Ehegattenbesteuerung und Grundgesetz’ (2002) *Finanz-Rundschau* 812; Vogel (n 65) 22; Scherf (n 62) 276; Lang and Tipke (n 69) 127

⁷⁴Haverkamp (n 52) 215; Vogel (n 65) 208

marriage, which can be answered basing on German jurisprudence. The Polish government would have to choose an interpretation concentrated on the typical day-to-day relationships in the average family or on the private law regulations, respectively generalising on the basis of the *ius dispositivum* regulations or creating a universal institution in accordance with the *ius cogens* norms. Each of those solutions would include a form of the income splitting, which could gain on complexity, taking into consideration the actual transfers between spouses or chosen marital property regime. Considering the questionable constitutionality and sheer faultiness of the mechanism of social deduction, the possible marriage subsidy should be realised in form of a result-oriented tax incentive. The “marriage bonus” of the income splitting lies in the fact that the income tax sum does not depend on the division of the total income between spouses, what makes that regulation a highly praised tax equity tool, but deems it to be a highly ineffective marriage stimulus. The hypothetical income tax marriage subsidy should avoid “borrowing” mechanisms from the tax equality measures and develop its own institutions, taking shape of a tax deduction or tax credit.

Separability Presumption in International Commercial Arbitration

*Anano Kuperadze**

Abstract

The paper intends to show how the separability presumption developed in international commercial arbitration and what is the rationale to it. Why is this presumption so important and how it is used nowadays in the world of arbitration. The purpose of this paper is to show the inconsistency and the problems that exist.

I. INTRODUCTION

The arbitration agreements as a “*sui generis*” type of agreement involve commitment of the parties to resolve their future disputes.¹ It is said that “*arbitration is a creature that owes its existence to the will of parties alone.*”² Nowadays, people are more willing to give up the right to settle their dispute privately. Therefore, by concluding the arbitration agreement, they have an opportunity to establish the process for resolving their dispute by arbitration.

When there is an issue of applicability, almost every national arbitration statute or international arbitration convention raises the question: what aggregates an “arbitration agreement”? Normally, the legal regimes will be applicable if parties presumptively made an agreement to arbitrate. Expert determination, mediation, conciliation or other possible forms of alternative dispute resolution or court litigation constitute arbitration, of course within the meaning of the New York Convention or national arbitration legislation.³

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¹ Gary B. Born, *International Commercial Arbitration*, 2nd ed., Volume I (2014) 236

² *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, 52 (Canadian S. Ct)

³ Connerty, *The Role of ADR in the Resolution on International Disputes*, 12 *Arb. Int'l* 47 (1996); see also J. Kendall, *Expert determination* 4th ed. 2008

International arbitration conventions provide a wide range of definitions of the term *Arbitration agreement*. Thus, all these definitions are quite broad. In the view of most scholars, the New York Convention is the appropriate regime for the uniform international definition. Under Article II(1) of the New York Convention, an agreement to arbitrate is “*an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not.*”⁴ The European Convention states that “*an arbitration agreement shall mean either an arbitral clause in a contract or an arbitration agreement.*”⁵ On the one hand, these definitions help more or less to ascertain what arbitration is. In principle, they show that an arbitration agreement is a contractual relationship between the parties, that deals with future or existing disputes and that the agreement can be either in the form of an arbitration clause or a separate contract. In contrast, there is no fundamental definition of what arbitration is. National courts, scholars and arbitral tribunals are left to define what the “arbitration agreement” or “arbitration is.”⁶

As for national arbitration statutes, the definitions in them are mostly similar to the definitions given by international arbitration conventions. Article 7(1) of the UNCITRAL model law provides: “*Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*”⁷ Although the Federal Arbitration Act refers to “*a written provision . . . to settle by arbitration a controversy thereafter arising out of a contract or transaction, or . . . an agreement to submit to arbitration an existing controversy*”, US courts acknowledged that this definition provides

⁴ NYC article II(1)

⁵ European Convention, Article I(2)(a)

⁶ A. Samuel, *Jurisdiction problems in International Commercial Arbitration* (1989) – “for over two hundred and fifty years, jurists in Western Europe and the United States have attempted to describe and define the concept of arbitration”

⁷ UNCITRAL Model law Art. 7(1)

limited guidance.⁸ However, for example, Switzerland,⁹ Belgium,¹⁰ etc. do not define the arbitration agreement at all.

The lack of a statutory definition of the term 'arbitration' has no practical effect in many cases. Normally, nearly all arbitration agreements contain the term 'arbitration' and give the right to the parties to clearly provide for arbitration.¹¹ Parties are allowed to call arbitration agreement an expert determination or a forum selection clause, but this will not turn it into an arbitration agreement.¹²

In particular, there should be a binding agreement. In their arbitration agreement, the parties can choose the rules that shall govern the arbitration procedure, the language, the location, the law, and the independent decision makers that have reasonable experience in the subject matter of the dispute. In addition, and what is the most important, the arbitration agreement gives the arbitrators the power to decide the dispute arisen between the parties. To be more specific, the parties are able to create their own confidential system of justice.

International arbitration agreements provoke questions about contract formation, which on its own requires application of the separability presumption, rules of substantive contractual validity, choice of law principles, issues of evidentiary proof, standards of proof and applicability of competence-competence doctrine.

In general, an arbitration agreement is usually contained in the underlying contract and already stipulates what kind of disputes shall be submitted to arbitration. However, the submission agreement can be used as well to cover the existing disputes that arise between the parties if there is no arbitration clause in the contract(s). However, signing an agreement after the dispute has arisen can be a little bit problematic for the parties, as after the dispute, they usually tend not to agree on the

⁸ *Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F. 3d 684, 693 (6th Cir. 2012); *Liberty Mut. Group, Inc. v. Wright*, 2012 WL 718857 (D. Md.)

⁹ Swiss Law on Private International Law, Arts 176-178 does not provide any definition to arbitration agreements; see also *Judgment of 8 July 2003*, DFT 129 III 675, 679 (Swiss Federal Tribunal) – “The statute does not define the minimal content of an arbitration agreement”

¹⁰ Judicial Code of Belgium Article 1676-1678 sets out certain requirements for a valid arbitration agreement, but does not provide a definition of “arbitration” or “arbitration agreement”

¹¹ G. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (4th ed. 2013)

¹² *Judgment of 15 December 2010*, *Societe Generale Motors France v. Societe Champs de Mars Automobile (CMA)*, 2011 Rev. arb. 435, 436 (French court de Cassation); see also *Judgment of 26 November 1991*, DFT 117 IA 365, 367-68 (Swiss Federal tribunal)

issues. On the one hand, arbitration agreements can be very long dealing with every possible procedural issue. Besides, it can be limited to a few sentences.

Usually, not all national arbitration legislation or international arbitration conventions apply to arbitration agreements. The applicability of the regimes depends, to a large extent, on the requirements that are to be satisfied.¹³

Apart from the essential rights that follow the arbitration, agreement validity is crucial. As it has already been mentioned, arbitration as a creature of consent should be freely structured.¹⁴ In order to establish, whether the parties actually consented, many domestic laws, as well as the New York Convention, require arbitration agreements to be in writing.¹⁵ The New York Convention has been described as “*the single most important pillar on which the edifice of international arbitration rests*”¹⁶, and one which “*perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law.*”¹⁷

Some national laws impose a variety of requirements, such as the location of type or font, or the size in which the arbitration agreement should be presented.¹⁸ It is important to differentiate between the two types of requirements – validity of an arbitration agreement and jurisdictional conditions that should be satisfied in order for international arbitration conventions or national arbitration statutes to apply. A failure to follow the rules that are part of the validity of the agreement results in the nullity of it, whilst non-conformity with the second requirement can nearly preclude

¹³ A. Samuel, *Jurisdictional Problems in International Commercial Arbitration* (1989). See also *JSC Surgutneftegaz v. President & Fellows of Harvard College*, 2005 WL 1863676, at *2 (S.D.N.Y.) (“For the New York Convention to apply to this dispute, there must be a written arbitration agreement that provides for arbitration in the territory of a signatory to the Convention, the subject matter of the relationship must be commercial and the dispute cannot be entirely domestic in scope.”); *Mangin v. Murphy Oil USA, Inc.*, 2005 U.S. Dist. LEXIS 8338, at *3 (E.D. La.)

¹⁴ *Volt Information Sciences, Inc. v. Stanford*, 489 U.S. 468, 479 (1989) – “Arbitration under the act is a matter of consent, nor coercion, and parties are generally free to structure their arbitration agreement as they see fit”

¹⁵ See New York Convention, art. II (in addition art. II(2) requires agreement to be signed by the parties), Uncitral Model Law, Article 1, Swiss PILA, Article 178(1), English Arbitration Act, para. 5

¹⁶ Wetter, “The Present Status of the International Court of Arbitration of the ICC: An Appraisal” (1990) 1 *American Review of International Arbitration* 91, at 93

¹⁷ Michael Lord Mustill, *Arbitration: History and Background*, *Journal of International Arbitration*; *Kluwer Law International* 1989, (Volume 6 Issue 2) 43 - 56

¹⁸ *Ibid* A. Samuel, footnote 3

applicability of the legislation that is designed to assist in arbitration.¹⁹ But an arbitration agreement can still be valid under either common law principles or other statutory instruments.²⁰

The rationale for adopting the written requirements in the New York Convention or other legal legislation is not only to provide a uniform international standard form, but to have self-evidence, meaning that a national court's jurisdiction is excluded if a valid arbitration agreement exists. Therefore, any disputes between the parties will be resolved with a private method - arbitration.

Under article II (1), the New York Convention limits the scope of the convention only to agreements in writing that specifically applies only to arbitration agreements.²¹ It can be said that the written form requirements of the Convention are demanding than those of other arbitration legislation. Based on this demanding character of the New York Convention, the United Nations Commission on International Trade Law adopted the "2006 Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention."²² The aim of this recommendation was to provide with more flexible way to interpret the strict form requirements contained in Article II paragraph 2 of the NYC and Article VII, paragraph 1 of the New York Convention.

Article II, paragraph 2 of NYC states that "*the term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams*". This provision interprets the term '*agreement in writing*' narrowly, which made the interpretation by State Courts difficult. Specifically, the matters that are different and sometimes raise conflicting interpretations are the questions: What is implied by the expression '*signature*'?. Does it apply to both the

¹⁹ Ibid; e.g. under Uncitral Model Law or in Switzerland noncompliance with the written requirement impacts the validity of arbitration agreement; Uncitral Model Law Article 7(1), Swiss Law on Private International Law Article 178(1), Italian Code of Civil Procedure Article 178(1) – "The submission to arbitration shall, no pain of nullity, be made in writing"

²⁰ R. Merkin, *Arbitration Law* (1991 & update August 2013)

²¹ *Comandate Marine Corp. v. Pan Australia Shipping Pty Ltd*, [2006] FCAFC 192 (Australian Fed. Ct)

²² "Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session"

arbitration agreement and the arbitration clause? And what is meant by the phrase 'exchange of letters or telegrams

Through a long deliberation between the viewers of the working group some suggested to interpret the Article II, paragraph 2 by including the wording contained in Article 7 of UNCITRAL Model Law on International Commercial Arbitration. However, this view was rejected due to the fact that the revised wording of Article 7 was significantly different from that of Article II, paragraph 2 of NYC. For instance, under Article II, paragraph 2 of NYC, an oral agreement that refers to written arbitration terms and conditions would not be regarded as lawful.

The rationale that the working group found was the possibility to interpret the Article II, paragraph 2 on NYC in the context of the most favorable law provision of Article VII, paragraph 1 of NYC. The following states that a State is allowed to depart from the form requirements of Article II, paragraph 2 of New York Convention if there is more favorable national law. The advantage of application of article VII, paragraph 1 is that it allows the State to avoid the application of Article II, paragraph 2 which in its way may lead to the development of rules favoring the validity of arbitration agreements in a more extensive variety of circumstances.²³

As it was said, the UNCITRAL Model law also provides for written requirements, especially the new 2006 revised version of it. The new revision adopted two ways: the second option is more concise and simple. It states that "*arbitration agreement is an agreement to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*"²⁴ As for the first one, it's lengthier and retains the requirement that "*arbitration agreement shall be in writing*" and continuous with the definition of writing.²⁵ However, there are national laws that abolished the written form requirement, such as Scotland, Sweden, New Zealand,²⁶ Hong Kong and Singapore.

²³ *ibid*

²⁴ Uncitral Model Law, 2006 revisions, Article 7 (option II)

²⁵ Uncitral Model Law, 2006 revisions, Article 7(2)(3) (option I)

²⁶ New Zealand Arbitration Act, Schedule 1, Article 7(1) – "an arbitration agreement may be made orally or in writing"

Preliminary, it is vital to differentiate between consent - whether party assented to an arbitration agreement or not - and the form requirements, which was briefly discussed above. It is possible for the parties to consent to the arbitration agreement, e.g. u an oral agreement that is undisputed, but the arbitration agreement can be invalid because it does not satisfy formal requirements. In order to have a valid arbitration agreement, both the consent and the formal requirements need to be followed.

Furthermore, the capacity to conclude international arbitration agreements is one of the requirements for the validity of the arbitration agreement under national arbitration statutes and international arbitration conventions. None of the instruments provide for a detailed choice of law rules that govern the capacity of the parties to sign an arbitration agreement. The only rule that the New York Convention provides for is “*law applicable to them.*”²⁷ Usually, the law that is applied is the law governing the arbitration agreement or the law of the state where a party is domiciled, but the modern approach is the law that has the closest connection to the issue in question.

Although the New York Convention does not mention specifically that it deals with the enforcement of arbitration agreements, it refers to it in article II. According to Article II, contracting states to the New York Convention are obliged to recognize agreements in writing. If the issue is under the subject matter of the arbitration agreement and the case has been brought before a court, the court has the obligation, by staying the proceedings, to refer the parties to the arbitration for further settlement of dispute.²⁸

Furthermore, by signing an arbitration agreement, it is important for the parties to explicitly cover the subject matter of the intent to start the proceeding in the arbitration agreement. “All disputes arising out of or in connection with the agreement” have become a broad model of the arbitration agreement. Even though parties can agree on a narrower scope, they should state specifically what is excluded

²⁷ New York Convention, Article V(1)(a), Uncitral Model Law, Artc. 34(2)(a)(i), 36(1)(a)(i)

²⁸ Albert Van Jan den Berg, *The New York arbitration Convention of 1958*, at 129 (1981); See also Domenico Di Pietro & Martin Platte, *Enforcement of International Arbitration Awards*, 66 (2001) – “refer the parties to arbitration” Article II (3) of the New York Convention “means that the Court becomes incompetent to entertain the case and must stay the proceedings”

from arbitration under the contract, e.g. payment in delivery shall be submitted to the court rather than to arbitration.

It should be pointed out that, the majority of disputes arise regarding the interpretation of arbitration agreements, meaning what kind of claims or disputes are agreed to be resolved by arbitration. Such matters relate to the arbitrability issue and may lead to court litigation. Courts meaning of arbitrability in determining what falls under the arbitration agreement. Despite the broad interpretation, it is interpreted in the context of the subject matters of arbitration agreements²⁹. The US Supreme Court stated that “*questions of Arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration and any doubts concerning the scope of arbitration issues should be resolved in favor of arbitration.*”³⁰

Apart from the conditions for the enforceability of arbitration agreements – the written form and arbitrability, the New York Convention provides for certain measures to defense enforcement of an arbitration agreement, namely NYC art. II (3) states that “the court of contracting state . . . refer parties to arbitration, unless it finds that the said agreement is *null and void, inoperative and incapable of being performed*”. Even though one can assume that these terms are similar or may overlap each other, courts and scholars tend to separate them.³¹

One of the cornerstone principles of international arbitration is the separability presumption which is an essential part of an arbitration agreement. Under this presumption, arbitration agreement is presumptively a separate and autonomous agreement³² and the invalidity of the main contract or the arbitration agreement does not mean that either of them shall be invalid. One of the consequences of the separability presumption is that the law governing the main contract is not necessarily the

²⁹ K. Tweeddale and A. Tweeddale, *A Practical Approach to Arbitration Law* (1999) 52

³⁰ *Moses H. Cone Memorial Hospital v. Mercury Construction Corp* (1989) 460 U. S. 1, 460 U. S. 24-25

³¹ *ibid* footnote 6; See also *Bautista v. Start Cruises*, 396 F. 3d. 1289, 1301-02 (IIth Cir 2005)

³² *Final award in ICC Case #8938, XXIVa Y.B. Comm. Arb. 174, 176 (1999)*

same as the law governing the arbitration agreement.³³ The separability presumption is expressed in various arbitration rules and laws³⁴.

II. THE CONCEPT OF SEPARABILITY

The Separability presumption, as it has already been mentioned, is one of the important features of international arbitration. The principle of separability is widely recognized in many countries, such as France,³⁵ Switzerland,³⁶ Germany,³⁷ etc. This doctrine – the separability of an arbitration agreement is also called 'severability' in the United States and 'autonomous', 'independent' in France and Germany. Its main principle is based on the fact that "the arbitral clause is autonomous and juridically independent from the main contract in which it is contained."³⁸

On the one hand, according to the House of Lords decision in *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp. Ltd*", "the arbitration clause constitutes a self-contained contract collateral or ancillary to the underlying contract."³⁹ Historically, in some legal systems, arbitration agreements were considered as a part of the underlying contract. In the words of a U.S court, "the arbitration clause here is an integral part of the charter party."⁴⁰ However, this view did not survive the fast development of international arbitration and nowadays, in all developed jurisdictions, it is separate from the main contract.⁴¹

The international arbitration system created a general legitimate standard that supports the principle of separability, meaning that invalidity, nullification or termination of the underlying contract does not, in principle, mean that the arbitration

³³ However, this specific feature will be discussed in chapter III

³⁴ Uncitral Model Law, art. 16, English Arbitration Act paragraph 30, Uncitral Rules, art. 23(1), LCIA Rules, article 23(1)

³⁵ Judgment of 7 May 1963, *Ets Raymond Gosset v. Carapelli*, JCP G 1963, II, 13, (French court de cassation civ. 1 e)

³⁶ Judgment of 2 September 1993, *Nat'L Power Corp. v. Westinghouse*, DFT 119 II 380, 384 (Swiss Federal Tribunal)

³⁷ Judgment of 11 January 1912, 13 Sachsische Archiv 148, 149 (1912) (Oberlandesgericht Dresden)

³⁸ *Final Award in ICC Case #8938*, XXIVa Y.B. Comm. Arb. 174, 176 (1999); There are no sources in the current document

³⁹ *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp. Ltd* [1981] A.C. 909, 980; See also *Robert Laurence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 411 (2nd Cir. 1959)

⁴⁰ *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2^d Cir. 1942); See also *Brown v. Gilligan, Will & Co.*, 287 F.Supp. 766, 769 (S. D. N.Y 1968)

⁴¹ Gary B. Born *International Commercial Arbitration Volume I* (2009) 316

clause contained in either a commercial contract or an investment agreement, is the end of the matter. But what if the contract is concluded, for example, as result of a fraud? Does this mean that the arbitration clause shall be terminated? Well, it can be argued, that although there is a common presumption that the clause shall still maintain its existence that if the main/underlying contract is null and void, therefore the arbitration clause would not survive either. The basic principle is that if there is no subject of dispute then there is no need to arbitrate. However, based on the competence-competence principle, that is, that arbitrators can decide on their own jurisdiction, there is still hope that the arbitration clause will survive. Few people support the opinion that by eliminating the contract, the arbitration agreement ceases to exist.⁴² However, in my opinion, when the parties conclude the contract by incorporating the arbitration clause they intend the dispute to be resolved in arbitration and they do not intend to be involved in numerous court hearings. Therefore, by providing for a possibility to terminate the arbitration clause by a claim of a breach of the contract is a self-defeating method. The main principle for the separability doctrine is to be kind of a bar for those who first signed for arbitration and, after they breached the contract, subvert the clause by questioning the validity or the existence of the arbitration clause in courts. *“It survives for the purpose of measuring the claims arising out of the breach and the arbitration clause survives for determining the mode for their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract.”*⁴³

According to one of the famous Judges of the International Court of Justice – Stephen M. Schwebel, the theory of the doctrine of the separability of an arbitration agreement has four bases:

The first rationale is that, when the parties conclude an arbitration agreement by providing for “any disputes arising out of or relating to this agreement”, the parties intend that their future disputes, including the validity of the arbitration agree-

⁴² Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. Rev. 819 (2003) at 827; See also: Alan Scott Rau, *Everything You Really Need to Know About “Separability” in Seventeen Simple Questions* (2003) 14 Am Rev Int'l Arb 1, 1-120

⁴³ *Heyman v. Darwins Ltd* [1942] A.C. 356

ment, shall be settled by arbitration. What if the parties were asked during the drafting of the agreement what was their intent? Did they mean that the part of their dispute or the entire dispute shall be decided by arbitration? Surely, the answer would be that they did so. Contracts are almost always concluded by copy pasting some clauses from another contract that are suitable for parties and they never look beyond it. Simply put, the intent of the parties should be taken into account.

Second, if the party was able to deny that it never entered into the contract with the arbitration clause in it and it lacked validity and, with such denial, it could deprive the arbitral tribunal to from ruling on its competence upon that allegation, than it would be always easy for the party to invoke the nullity or invalidity of the agreement and vitiate its obligation. In this way, the decision on the validity or invalidity of the arbitration agreement would be taken by the national court, which would prejudice the key elements of arbitration – speed, time and money.

The third element is that in the law it is provided that the parties, by signing a contract that has the arbitration clause in it, conclude two different contracts: one is the substantive one which sets forth the main subject and the obligations, and the other, additional contract which provides for the dispute settlement mechanism. Therefore, if the main contract is null, void, or incapable to be performed anyway, the second contract continues to be binding, as it is separable and gives the chance/authority to the tribunal to decide on its own jurisdiction. Subsequently, the parties conclude “*the arbitral twin of which survives any birth defect or acquired disability of the principle agreement.*”⁴⁴

The fourth and the last is that courts usually scrutiny only the awards and not the merits of the case. However, it can be the case that, if we did not accept the doctrine of separability, that means that courts would be forced to review the arbitral awards too.⁴⁵

Nowadays, the separability presumption is not expressly provided by international arbitration conventions and rules, thus, they help to establish the doctrine of separability.⁴⁶ Therefore, the New York Convention on Enforcement and Recogni-

⁴⁴Stephen M. Schwebel, International Arbitration: Three Salient problems, (1987) 3-7

⁴⁵ ibid

⁴⁶ Ibid footnote 41, p. 13

tion of Arbitral Awards is not an exception either; although it does not contain explicit provisions regarding the separability of arbitration clause,⁴⁷ it implicitly deals with separability - Article V(1)(a) provides with the rules that can help to determine which law is applicable to the arbitration agreement.⁴⁸ Accordingly, this arises from the view that the arbitration agreement can be governed by the law that is different from the law governing the formation of the contract⁴⁹. Moreover, the Rules of Arbitration and Conciliation for the Settlement of International Disputes of the Permanent Court of Arbitration (PCA Rules) deal with the issues arisen between two parties, out of which one is a state, but like the NYC, do not explicitly deal with separability. It only emphasises that the judge who has its own competence, has the power to “*interpret the instruments on which that competence is based.*”⁵⁰

Unlike the laws mentioned above, the arbitration rules of the Convention on the Settlement of International Investment Disputes (ICSID), in Article 46(1), provide that an arbitral tribunal has right to rule on its competence, and consequently, “*an agreement for arbitration under the additional facility shall be separable from the other terms of the contract in which it may have been included.*”⁵¹

When parties conclude a contract that contains an arbitration clause, it is considered that the parties have drafted two agreements in the way that the future existence of those contracts does not depend on each other.⁵² The contrast that results from the difference in both the object and the nature of the two agreements exists despite the fact whether there is one or there are two separate contracts. It is possible for the arbitration clause to be valid if the main contract is null, terminated or repudiated.⁵³ In principle, it can be said that it has an accessory nature that entails

⁴⁷ Compare, for example, with Article 18(2) of the European Uniform Law of 1996 that states that “a ruling that the contract is invalid shall not entail *ipso jure* the nullity of the arbitration agreement contained in it”

⁴⁸ Albert Jan Van Der Berg, *The New York Convention of 1958*, (1981) 146

⁴⁹ G.Delaume, *Transnational Contracts. Applicable law and Settlement of Disputes* (Dobbs Ferry 1978-1980) Sect. 1. 03

⁵⁰ PCA rules, article 4

⁵¹ The ICSID rules article 46(1)

⁵² *ibid* footnote 8

⁵³ Fouchard Gaillard Goldman on International Commercial Arbitration, Kluwer Law International (1999), paragraph 410 and the case law cited, notably Cas., Minoteries Lochoises, Rev. arb. 1969, p.

that it will be transferred with the main contract in case the latter is assigned.⁵⁴ However, it might happen that there is a common defect in the contract or the arbitration clause which results in the nullity of both of them, for example, a defect in consent, or a lack of a power of attorney, but these can also invalidate one of them but not both of them.

The separability doctrine not only relates to the validity of the main agreement, but also to the existence/non-existence of the main agreement. In this view, the main agreement could also be an investment treaty. Therefore, questions regarding the existence or non-existence of the treaty can easily come up if the treaty has not yet come into force / had not yet come into force at the time the investment was made.⁵⁵

The separability doctrine has analytical, as well as practical importance and relates to a number of consequences regarding the choice of law, competence-competence and contractual validity. Particularly, there are four issues: *(a) invalidity and/or nullification of the underlining contract does not necessarily means the invalidity and/or nullification of arbitration agreement; (b) invalidity and/or nullification of the arbitration agreement does not necessarily means the invalidity and/or nullification of underlining contract; (c) the law applicable to the underlining contract may not be the same as the law applicable to the arbitration agreement; (d) different form requirements may apply to both underling contract and arbitration agreement.* The first two issues are the most important elements to ensure the efficiency of the arbitration process.

Therefore, in the disputes that arise out of a contractual relationship, the parties may assert the invalidity, non-existence or termination of underlining contract. But, if the arbitration clause was considered simply as a part of the contract then these claims would have an effect on the jurisdiction of the arbitral tribunal, meaning that justification of the allegation would lead to the result where the tribunal would no longer have a jurisdiction. Consequently, without “competence-competence” tribunal would not decide on whether the merits and the case should be referred to state courts. However, the result would be contrary to the arbitration agreement con-

59: the clause survived the termination of the contract due to the failure of the seller to fulfill his obligation

⁵⁴ Jean-Francois Poudret, Sebastien Besson, *Comparative Law of International Arbitration*, (2007) 133

⁵⁵ However, investment part regarding the separability shall only be briefly discussed

cluded by the parties. When the contract states that any or all disputes arising out of a contractual relationship should be referred to arbitration, the parties assume that disputes related to the validity, termination or existence of the contract are covered as well. The separability doctrine extends the effect of the arbitration clause not only to cover the ensuing end of the underlining contract but it claims that the underlining contract will never come into existence or is void.

III. THE SEPARABILITY PRESUMPTION AND “COMPE- TENCE DE LA COMPETENCE”

One of the essential powers of the arbitral tribunal is the power to decide on its own jurisdiction. The doctrine also known as the 'competence competence' doctrine empowers the tribunal to consider and decide disputes that are related to their jurisdiction. Mostly, all national legal systems accept the doctrine. However, despite its broad recognition, there is almost the same uncertainty and disagreement regarding the application of the competence-competence doctrine.

There are some doubts, whether the competence-competence and separability doctrines should be linked with each other. A lot of institutional rules or arbitration statutes coincide with the opinions of many scholars that these two doctrines are closely tied with each other.

Particularly, Article 16(1) of UNCITRAL Model law states: “*the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or the validity of the arbitration agreement*”; at the same time the article continues: “*for that purpose, an arbitration clause, which forms a part of the contract shall be treated as an agreement independent of the other terms of the contract*”. This can lead us to assume, at least implicitly, that Article 16 suggests that the reason why the tribunal has the power to decide on its own jurisdiction is because of the separability doctrine.⁵⁶ Moreover, according to

⁵⁶ H. Holtzmann & J. Neuhaus, *A guide to the UNCITRAL Model Law On International Commercial Arbitration : Legislation History and Commentary*, 480 (1989)

the Final Report⁵⁷ “*competence-competence doctrine derives from the separability of the arbitration agreement.*”⁵⁸

In general, it can be argued that it is a wrong assumption to illustrate the competence-competence doctrine on the bases of separability. It should be noted that separability alludes to the validity and the substantive existence of the arbitration agreement, whereas the competence-competence role is to decide jurisdictional matters related to the validity, existence or the scope of the arbitration agreement. Based on the competence-competence doctrine, the tribunal can have authority, regardless of the fact that the main contract or the arbitration agreement itself is disputed. Rather, in the light of the distinguishableness regulation, there is just no test of either the arbitration agreement or the arbitrators’ capability to be considered. Since the arbitration agreement is not impugned in these circumstances, and in the light of the fact that the arbitrators are just asked to consider cases with respect to the parties’ main contract, no issues of the arbitrators’ jurisdiction or competence emerge. Rather, there is basically an unchallenged consent to arbitrate a question about the main contract, with that issue plainly being subject to arbitrate.

Simply stating competence-competence cannot be the consequence of an arbitration agreement because when the agreement is challenged on matters of the existence and the validity, then there is no contractual basis for competence doctrine. There is a claim that such a contractual premise exists yet there is a similarly substantial rejection of any such premise, and until there is a settling maintaining that claim, there is no ‘agreement’ on which to evidence arbitrators’ competence. According to Gary Born, contractual bases to deal with the arbitrators’ competence can only apply when there is a challenge to something else, i.e. a dispute regarding the scope of the arbitration agreement,⁵⁹ but not the existence or the validity of the arbitration agreement.

The bases for competence doctrine are the laws of the country where the arbitration is held and not the arbitration agreement.⁶⁰ Those rules give the power to

⁵⁷ Committee on International Commercial Arbitration, ILC, *Final Report on Lis Pendens and Arbitration* 4.11 (2006)

⁵⁸ *ibid*

⁵⁹ *ibid* footnote 39 1074

⁶⁰ *ibid* footnote 50, *Fouchard Gaillard Goldman*

the tribunal to decide on disputes related to their jurisdiction. Almost in all national legal systems, the arbitral tribunal is authorized to decide on its own jurisdiction even when the validity or the existence of the agreement itself is disputed; therefore the result is that this kind of authority continues even after the tribunal decides that it has no jurisdiction. “*Separability and competence-competence intersect only in the sense that arbitrators who rule on their own jurisdiction will look to the arbitration clause alone, not to the entirety of the contract.*”⁶¹

The main reason why international arbitral conventions and national arbitration statutes give such wide authority to the tribunal is because there is a need of that basic arbitral process. With this process, the tribunal can decide on its own jurisdiction and the disputes related to the jurisdiction must be recognized and enforced. One of the authors states that because of this competence “*arbitration flourished so greatly over the past decades*”⁶².

Dr. J. Gillis Wetter points out the relationship between the two doctrines – Separability and competence-competence. In his opinion, Separability “contains a large element of legal fiction” however “it is – what still is – very difficult to explain how an arbitral tribunal whose jurisdiction derives from an instrument alleged to be invalid on that ground can be the sole judge of its own competence in such a situation. While most developed jurisdictions have come to accept the thesis as an axiom, failing it the arbitral process would be ineffective, the doctrine militates against strict reason, assuming the existence of an alternative remedy.”⁶³ He also points out that if the competence-competence doctrine is constrained in stricter way than the tribunal which lacks the competence to decide on the dispute that is challenged, then it cannot be the judge that resolves the issue. But as it was and will be underlined below,

⁶¹ Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 9 Arb. Disp. Res. L.J. 19, 27-28 (2000)

⁶² P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3d ed. 2009)

⁶³ J. Gillis Wetter, “Salient Features of Swedish Arbitration Clauses,” address to the International Commercial Arbitration Symposium, Stockholm, 5 March 1982, published in *Yearbook of the Arbitration Institute of the Stockholm Chamber of Commerce*, 1983, at pp. 33.35

competence-competence is a well-accepted axiom in practice, theory, in fact and in the law, as well.

It is said that the competence-competence doctrine has *positive* and *negative* effects. The positive effect is that the arbitral tribunal has the authority to rule on and decide jurisdictional objections raised by the parties; the negative effect is that court has no right to rule on jurisdictional issues, at least until the tribunal makes its award on jurisdiction.⁶⁴ In one of the decisions, the court stated that “*the principle of competence-competence allows arbitral tribunals to rule on its own jurisdiction, [with the doctrine having] two sides, a positive side, that translates in the power of the arbitral tribunal to rule on its own jurisdiction, and a negative side, according to which national courts should refrain from reviewing in parallel and with the same degree of detail, the validity, efficacy or enforceability [of the arbitration agreement] as the arbitral tribunal.*”⁶⁵

Although there are some doubts regarding the negative effect of competence-competence doctrine, nowadays it can be said that this effect somewhat moves towards the recognition in the field of arbitration.⁶⁶

To be more precise, the Swiss Federal Tribunal in *Fondation M. v. Banque X* found out the great use of negative competence by preventing courts from interfering with the competence of tribunals to rule on their jurisdiction and by postponing courts’ review unless the arbitral tribunal reached its decision. The Federal Tribunal held that a court can only find that an agreement is null and void, inoperative or incapable of being performed “*where this appears obvious, without it being necessary to analyse the question in detail, since in any event, in the absence of such evidence, the arbitral tribunal will be empowered to decide, if necessary, on its own jurisdiction in accordance with Article 186 of the Private International Law Act, in any event where the arbitral tribunal has its seat in Switzerland*”. The Tribunal supported the rule that “*if the State court is seized of a request to decline jurisdiction in favour of an arbitral tribunal and if the arbitral tribunal has its seat in Switzerland, the court shall decline jurisdiction if a summary examination of the arbitration agreement does not*

⁶⁴ Kaufmann-Kohler, *Howto Handle Parallel Proceedings: A Practical Approach to Issues Such as CompetenceCompetence and Anti-Suit Injunctions*, 2 *Disp. Res. Int'l* 110 (2008); Susler, *The Jurisdiction of the Arbitral Tribunal: A Transnational Analysis of the Negative Effect of Competence*, 6 *Maquarie J. Bus. L.* 119 (2009)

⁶⁵ Judgment of 3 November 2010, Alfredo De Jesus O., Astivenca Astilleros de Venezuela CA v. Oceanlink Offshore III AS, Case No. 1067 (Venezuelan Tribunal Supremo de Justicia)

⁶⁶ There are some decisions rendered in France, India, England, Switzerland and Canada

*allow it to find that the agreement is null and void, inoperative or incapable of being performed.”*⁶⁷

The only thing that is not clear is whether the negative competence-competence shall be recognized by the courts of Switzerland if the seat of the arbitration is not in Switzerland.

The case is a little bit different, when the issue concerns French courts. They unconditionally accepted the negative effect of the competence doctrine disregarding the seat of arbitration. In “*American Bureau of Shipping v. Copropriété Maritime Jules Ver*” court held that:

*“[T]he principle of the validity of the international arbitration agreement and the principle according to which it is for the arbitrator to rule on his own jurisdiction are substantive rules of French international arbitration law which establish, on the one hand, the validity of the arbitration clause irrespective of any reference to a national law, and on the other hand, the efficiency of arbitration by permitting the arbitrator faced with a challenge to his jurisdiction to have priority to decide the challenge. The combination of the principles of validity and competence-competence prohibit, as a consequence, the French judge from carrying out a substantive and thorough review of the arbitration agreement, irrespective of where the arbitral tribunal has its seat. The only limit to the judge's examination of the arbitration clause, before being asked to review its existence or validity in the context of an action brought against the award, is whether that clause is manifestly null or inapplicable.”*⁶⁸

Considering both of its features the competence-competence doctrine can be characterized as the principle where arbitrators must have the first chance to hear

⁶⁷ Swiss Federal Tribunal, 29 April 1996, *Fondation M. v. Banque X.*, ATF 122 m 139, 1996(3) ASA Bull. 527

⁶⁸ CA Paris, 4 December 2002, *American Bureau of Shipping v. Copropriété Maritime Jules Verne*, 2003(4) Rev. arb. 1286, with note by E. Gaillard at 1290, 18(12) Int'l Arb. Rep. D-1 (2003), XXIX Y.B. Com. Arb. 657 (2004). Cited from “Negative Effect of Competence-Competence: The Rule of Priority in Favor of the Arbitrators” in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (E. Gaillard, D. Di Pietro, Editors) Cameron May, 257 (2008)

disputes regarding their jurisdiction. In my opinion, rules are to guarantee that a party can't succeed in postponing the arbitral processes by claiming that the arbitration agreement lacks validity or does not exist. Such postponement is avoided with the principle of competence-competence that permits the arbitrators to rule on their jurisdictional issues themselves, subject to ensuing survey by the courts, and by inviting the courts not to intervene until the award has been made. It's the arbitrators who should have the power to decide whether the issue on stake is to be decided by them or not. However, a tribunal having the authority to rule on the issue of jurisdiction does not necessarily mean that there is any connection with the separability doctrine. The idea that I try to argue is that these two doctrines are linked with each other but they do not derive from each other. As I have already mentioned, separability deals with invalidity or non-existence of the arbitration agreement, while the competence-competence doctrine resolves jurisdiction issues that the disputed agreement gives rise to.

IV. THE SEPARABILITY PRESUMPTION IN ARBITRATION CONVENTIONS, RULES AND INTERNATIONAL CASES

Historically, in some legal systems, arbitration agreements were seen nearly as the part of the main contracts in which it were contained. In order to demonstrate the development of the doctrine of separability in this section, I am going to analyse, within the scope of some conventions, rules and cases that I believe show the development of separability since its existence.

A. Arbitration Conventions

The Geneva protocol, the so-called first modern international Arbitration Convention, stated in Article IV(1) that courts of the contracting states “on being seized of a dispute regarding a contract. . . including an arbitration agreement . . . which is valid . . . and capable of being carried into effect”, shall refer the parties to arbitration. The same article mentioned the contract and the arbitration agreement

separately by establishing the substantive rules of enforceability and validity with regard to enforcement. It drew a kind of substantive and formal distinction between the contract and arbitration agreements.⁶⁹

The Hague 1899 and 1907 Conventions do not specifically address the doctrine of separability but they do support this doctrine. For example, Article 73 of 1907 Hague Convention provides that “the tribunal is authorised to declare its competence in interpreting the compromise, as well as the other papers and documents which may be invoked, and in applying the principle of law.”⁷⁰

In contrast to the ICSID rules, the ICSID Convention does not explicitly embrace separability. In Article 41, it stated that “*the tribunal shall be the judge of its own competence.*”⁷¹

As for the New York Convention, it does not contain any explicit provisions regarding the doctrine of separability. It is proposed that the convention implies the separability doctrine in light of the fact that Article V (1) states the conflict of law rules for deciding the law applicable to the arbitration agreement. As this may have an impact that the arbitration agreement is governed by a law which is not quite the same as the law governing the main contract, the convention would certainly support the self-governing status of the arbitral clause. The courts have not yet had an opportunity to express the opinion on the separability in cases emerging under the convention. But three laws can be stated as possible candidates: the law of main contract, the law of the arbitration agreement or the law of the court before which the issue is brought.

B. International Rules

The separability doctrine is supported in many international or institutional rules. The UNCITRAL Rules is not the exception as well: “. . . *For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void*

⁶⁹ Geneva Protocol

⁷⁰ J. Gillis Witter, *The International Arbitral Process, Public and Private* (1979), Vol. V. 218

⁷¹ Witter, Vol. IV 445

*shall not entail ipso jure the invalidity of the arbitration clause.*⁷² Similar provisions are contained in LCIA rules,⁷³ ICDR⁷⁴ or other leading institutional rules, such as CEPANI Rules – “*Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of the nullity of or non-existence of the contract, provided that the arbitral tribunal upholds the validity of the arbitration agreement,*”⁷⁵ Swiss International arbitration Rules,⁷⁶ ICC rules.⁷⁷ Although all these rules contain similar provisions that expressly recognise the separability doctrine, emphasizing that an arbitration clause can survive even after the main contract is null or void; they do not say what happens when the invalidity of the main contract affects or does not affect the arbitration clause.

The separability doctrine approach was expanded in §7 of the 1996 Arbitration Act. According to §7, “*unless otherwise agreed, an arbitration agreement which forms . . . part of another agreement . . . shall not be regarded as invalid, non-existent, or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement*”⁷⁸. It can be noted that the Section §7 makes reference to the substantive validity of the arbitration agreement by stating that arbitration clause “*shall for that purpose be treated as a distinct agreement*”. The parallel can be stressed with Article 16 of the Model Law, which takes into account separability only in the relation to the competence-competence doctrine⁷⁹. But, likewise the Model Law, §7 of the act provides that arbitration act is not invalid because of the invalidity on the main contract.

C. Cases

The French *court de Cassation* interpreted the separability doctrine in broader terms: “*in international arbitration whether concluded separately or included in the contract to which it relates, is always save in exceptional circumstances . . . completely autonomous in law, which*

⁷² UNCITRAL Rules Article 21(2)

⁷³ LCIA Arbitration Rules, Article 23.1

⁷⁴ Article 23(1) Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract”

⁷⁵ CEPANI Rules, Art. 19(4)

⁷⁶ Article 21(2)

⁷⁷ Article 6(4)

⁷⁸ English Arbitration act, 1996, §7

⁷⁹ “*The Arbitral tribunal may rule on its own jurisdiction . . . For that purpose . . .*”

*excludes the possible invalidity of the main contract.*⁸⁰ However, as in the U.S. and the UK, in cases where a dispute is concerned, the fact that there is no underlining contract, French courts held that this kind of allegation will likely affect the existence of the arbitration agreement. “*The scenario in which an arbitration clause most clearly would not be severed, and hence would be invalid, is where the assent of one of the parties is lacking. If the person to whom the offer is made does not accept it, than no contract has been formed, and the arbitration clause contained in the offer has not been agreed to any more than any of the other clause.*”⁸¹ Even if there is an allegation that the arbitration agreement is manifestly void, French courts will not stay the proceedings.⁸²

In contrast to French courts, the separability doctrine is recognized in early decisions of English courts, but is not applied in a broad view, instead they held that initial voidness, illegality or invalidity of the main contract affected the arbitration clause. English court of appeal in *Smith, Coney & Barrett v. Becker, Gray & Co.* stated that “*the plaintiffs in this action sought a declaration that the contract which I have just read was illegal by reason of the war. Of course, if it was illegal, then any question of arbitration under the contract would fall with it*”⁸³. After some time, English courts welcomed separability more warmly, stating that an arbitration clause is separate from the main contract and therefore initial illegality of the main contract does not necessarily affect the arbitration clause contained in it.⁸⁴ At some point, English courts took an opinion that if the main contract was concluded in fraud than “*it can indicate that the arbitration clause was induced in fraud.*”⁸⁵ Thus, in their later decision in *Fiona Trust*, the view changed. The

⁸⁰ *Judgment of 7 May 1963, Ets Raymond Gosset v. Carapelli*, JCP G 1963, II, 13 (French Cour de Cassation civ. 1 e)

⁸¹ Mayer, *The limits of Severability of the Arbitration Clause*, in A. van den Berg (ed.), *Improving the efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention 261, 264* (ICCA Congress Series #. 9 1999)

⁸² Gaillard “The Negative effect if competence-competence”, *International Arbitration Report*, #1, January 1, 2002

⁸³ *Smith, Coney & Barrett v. Becker, Gray & Co.* [1916] 2 Ch 86 (English Court of Appeal); See also *Dalmia Dairy Indus. Ltd v. Nat'l Bank of Pakistan* [1978] 2 Lloyd's Rep. 223, 292 (English Court of Appeal)

⁸⁴ *Harbour Assur. Co. (U.K.) Ltd v. Kansa Gen. Int'l Ins. Co. Ltd* [1992] 1 Lloyd's Rep. 81, 92-93 (Q.B.) (Steyn, J.), aff'd, [1993] Q.B. 701

⁸⁵ *Credit Suisse First Boston (Europe) Ltd v. Seagate Trading Co. Ltd* [1999] 1 Lloyd's Rep. 784, 796-98 (Q.B.); *Westacre Inv. Inc. v. Jugoinport-SPDR Holding Co, Ltd* [1998] 4 A11 E.R. 570, 583 *et seq.* (Q.B.)

House of Lords held that, unless the fraud is specifically directed at the arbitration agreement, the contract concluded by fraud does not affect the arbitration clause.⁸⁶

One of the first countries which recognized the separability doctrine was Switzerland. The Geneva court of Appeal stated that “[t]he principle of autonomy of the arbitration clause in relation to its validity is generally accepted in international arbitration. In fact, such a clause can validly be concluded, while the contract in which it is inserted lacks validity or the reverse.”⁸⁷ This position is now accepted and confirmed in Article 178 of the Swiss Law on Private International Law.⁸⁸ Swiss courts widely accept the separability presumption; however, they state that some defects in the main contract may affect the arbitration agreement, namely incapacity to conclude the contract, etc.

Asian countries are among of those countries which accepted the separability doctrine. The Japanese Supreme court adopted the doctrine and dismissed a case which stated that the distribution agreement was not validly incorporated and, therefore, the arbitration agreement contained in it was invalid as well.⁸⁹ The court held that “An arbitration agreement was concluded in conjunction with the principal contract, but its effect must be separated from the principal contract and judged independently. And, unless there is a special agreement between the parties, a defect in the formation of the principal contract does not affect the validity of the arbitration agreement.”⁹⁰ The new 2004 revised version of the Japanese Arbitration Act adopted the separability doctrine⁹¹ and similarly to the English 1996 Arbitration Act, and in contrast to UNCITRAL Model Law, the Japanese Act applies the separability doctrine in the sense of substantive validity of the arbitration agreement and does not emphasise the competence-competence doctrine. In one of the recent decisions, the Tokyo Court, based on the Japanese Arbitration Act, held

⁸⁶ *Fiona Trust & Holding Co. v. Privalov* [2007] UKHL 40 (House of Lords)

⁸⁷ Judgment of 14 April 1983, *Carbomin SA v. Ekton Corp.*, XII Y.B. *Comm. Arb.* 502, 504 (Geneva Cour de Justice) (1987)

⁸⁸ Swiss Law on Private International Law, Arts. 178(2), (3) (“As regards its substance, an arbitration agreement shall be valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law. The validity of an arbitration agreement cannot be contested on the grounds that the main contract may not be valid or that the arbitration agreement concerns disputes which have not yet arisen.”)

⁸⁹ Judgment of 15 July 1975, *Kokusan Kinzoku Kogyo K.K. v. Guard-Life Corp.*, IV Y.B. *Comm. Arb.* 115, 122 (*Japanese Saiko Saibansho*) (1979)

⁹⁰ *ibid*

⁹¹ Japanese Arbitration Law, Art. 13(6) (“Even if in a particular contract containing an arbitration agreement, any or all of the contractual provisions, excluding the arbitration agreement, are found to be null and void, cancelled or for other reasons invalid, the validity of the arbitration agreement shall not necessarily be affected.”)

that the arbitration agreement was valid despite the fact that one of the parties terminated the main contract⁹².

At the beginning, Chinese courts looked little bit hesitant about the separability doctrine.⁹³ However, this attitude started to change in the early 1990's. In 1995, the separability doctrine was reflected in the Chinese Arbitration Law and became an explicitly adopted doctrine: "*An arbitration agreement shall exist independently. The amendment, rescission, termination or invalidity of a contract shall not affect the validity of the arbitration agreement. The arbitration tribunal has the right to affirm the validity of a contract.*"⁹⁴ Thus, like other jurisdictions, there are some limitations to the separability doctrine under the Chinese law, namely the separability doctrine is only applicable to issues of contractual "amendment, rescission, termination or invalidity."⁹⁵

V. CONCLUSION

As it can be seen, separability doctrine had a long way till its recognition. Nonetheless, it serves a very significant part of the arbitral process. It permits the analysis of jurisdictional objections to be focused specifically – and properly – on the arbitration agreement itself, rather than the underlying contract.

The close relation between the Competence-competence and the separability presumption is the reason why they are often confused, even though they are two different principles. As I have pointed out, the separability presumption gives the power to the arbitral tribunal to rule on the nullity of the underlining contract, whereas Competence-Competence empowers the arbitral tribunal to rule on its own jurisdiction regarding the validity of the arbitration agreement and much more.

The logic behind the separability presumption is to provide the parties with the proper help to secure their rights by giving them an opportunity to settle a dis-

⁹² *Judgment of 26 February 2006, Taiyo Ink Mfg Ltd v. Tamura Kaken Ltd*, LEX/DB 28110611 (*Tokyo Koto Saibansho*)

⁹³ Weixia, *China's Search for Complete Separability of the Arbitral Agreement*, 3 *Asian Int'l Arb. J.* 163, 164-65 (2007)

⁹⁴ Chinese Arbitration Act, Article 19

⁹⁵ *ibid*

pute in the forum of their choice. Thus, though the fact is established, we should not forget that the separability presumption is still a presumption and nothing more. When discussing the issues of the separability presumption, it is hard to keep the thin line and not to shake the assumption that already excites the world of international commercial arbitration.

As for the choice of law and the consequences of the separability presumption, I can briefly state that, based on the *Sulamerica*⁹⁶ approach, the court held that the law governing the arbitration agreement was the law of the closest connection – the law of the seat – i.e. London. However, the problem in this case was the fact that under the Brazilian Law, an arbitration agreement was valid only if the parties explicitly consented to it, rather just mentioned it in the insurance policy that the dispute shall be resolved by arbitration. The components that the court relied upon to override the assumption for the best possible law were by no means convincing, and could even be said to build a contending assumption for the law under which the arbitration agreement is destined to be commonly enforceable to the exclusion of other factors.

Thus, it can be said that this kind of view is not very rare for an international context. For example, the Swedish Arbitration Act 1999, in section 48, states that in case the parties did not make an express choice of law in their arbitration agreement, the arbitration agreement shall be governed by the law of the seat. In addition, the Swiss Federal Statute of Private International Law provides that in order for an arbitration agreement to be valid it has to conform either “to the law chosen by the parties or to the law governing the subject matter or... the Swiss law...”. Basically the same approach, the Swiss approach is taken by the New Dutch Civil Code, which states that an arbitration agreement is valid, if it is valid under the law chosen by the parties, or under the law of the seat, or the law that applies to underline relationship, or under the Dutch law.

However, I believe that it is a little bit early to state that this new approach taken in *Sulamerica* case can be considered a fully adopted approach by English courts.

⁹⁶ *Sulamerica CIA Nacional De Seguros SA & Ors v. Enesa Engenharia SA & Ors* [2012] EWCA Civ 638 (16 May 2012)

In the *Sulamerica* case, the Court examined thoroughly the circumstances that were surrounding the case and the intentions of the parties. It remains to be clarified whether English courts will generally adopt the view that the law that governs the arbitration agreement is a question of the procedural rather than the substantive law.

The Validity of the Inquisitorial/Adversarial Division: a study of French, German and English Civil Procedure

*Adam Strobeyko**

Abstract

This paper reviews the validity of the classification of systems of civil procedure in accordance with their alleged inquisitorial or adversarial nature. In order to do so, it compares the procedural laws of France, Germany and England with the templates of what would constitute a 'perfect' inquisitorial or adversarial system. The question oscillates around the real balance between the adversarial principle and the judge's powers and whether they are compatible with the predefined normative models. The conclusion of this paper is that they are not: the parallel evolution of domestic laws meant that the national systems influenced each other, a tendency which only intensified in the times of European integration. The author proposes to use a scale where 'adversarial' and 'inquisitorial' stand for two opposite ends of a theoretical axis and where every comparison is relative in nature.

I. INTRODUCTION

Procedural law has been long understood as inseparably tied to the national system of substantive law.¹ Following this reasoning, every state had to have its own selection of procedural rules, guaranteeing the successful application of the substance of its law. Due to the following fragmentation, familial divisions arose. Nowadays, people tend to associate the inquisitorial model with civil law countries and the adversarial model is associated with the states employing common law.² In this context, the concept of the inquisitorial/adversarial division refers to the balance of functions

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1Rhee, C.H. van, 'Civil Procedure: A European Ius Commune?', *European Review of Private Law*, (2000) 590-591 & 594-595

2Parisi, F., 'Rent-seeking through litigation: adversarial and inquisitorial systems compared', *International Review of Law and Economics* 22 (2002) 195

accorded to the court and the parties in civil proceedings.³ The perfect adversarial or inquisitorial type of civil procedure may not exist in reality, yet the division stands for a scale on which the procedural systems are compared, with the two models located at the opposite ends of the theoretical axis.⁴

In the largely globalised world of today, in the view of continuous procedural convergence, it is worth asking if this division still holds its place as an accurate indicator. In this paper, special attention will be paid to the three systems traditionally acknowledged to be located on different points of the scale: the French, German and English civil procedure. The research question is: is it still valid to assume that the clear-cut division of civil procedure systems into adversarial and inquisitorial model exists judging by the balance between the adversarial principle and the judge's powers in French, German and English procedural law? To examine that, we begin by looking at the historical context and prevalent definitions of the inquisitorial and adversarial model of procedure. Then, we move to describe the balance between the rights of the parties and powers of the judge in the procedural systems of France, Germany and England and try to place it on the inquisitorial-adversarial scale to see if these fit into the classification. Special attention will be paid to the direction of recent reforms in these systems.

II. DEFINITIONS

The purely inquisitorial or adversarial systems do not exist.⁵ In practice, the procedural systems seek balance between the rights of the parties and powers of the judge.⁶ However, to understand the classification of the systems as more adversarial or more inquisitorial, we must examine the underlying concepts.

Under the purely inquisitorial model, the professional judge would preside over the trial and to do so, he or she would be vested with broad investigative rights.⁷

³Cane, P. & Conaghan, J., 'The New Oxford Companion to Law', *Oxford University Press* (2009)

⁴Jolowicz, J.A., 'Adversarial and Inquisitorial Models of Civil Procedure', *52 Int'l & Comp. L.Q.* (2003) 281

⁵Jolowicz, J.A., 'Adversarial and Inquisitorial Models of Civil Procedure', *52 Int'l & Comp. L.Q.* (2003) 281

⁶ibid 295

⁷Parisi, F., 'Rent-seeking through litigation: adversarial and inquisitorial systems compared', *International Review of Law and Economics* 22 (2002) 194

It would be his or her duty to discover the truth, and he or she could do that by administering the evidence, questioning the witnesses and consulting the experts. The judge is free to evaluate the evidence.⁸ The procedure would be largely defragmented, regarding the trial simply as one of the stages supervised by the judge, while the proceedings would be mainly conducted in writing. The rights of the parties should not prevent the court from efficient resolution of the conflict and the latter should not be stopped from acting *ex officio*. The utilitarian model of justice proposed by Franz Klein could be said to be spiritually close to the inquisitorial ideal, as it is followed by the premise that disputes are an error in the swift operation of the society and the procedure should be used to correctly establish the diagnosis (facts) and apply the medicine (substantive law) in order to efficiently resolve the dispute at stake.⁹ Therefore, the inquisitorial powers of the society represented by the public officials would take precedence over the individual rights of the parties, but would not prevent their application.

In the purely adversary process, the trial is seen as a legal duel brought before the court by the parties, with the winner designated by the judge.¹⁰ The judge does not have a duty to ascertain the truth, but his or her responsibility would be to listen to what the parties present to him or her and to pronounce the winner. Therefore, even the perfectly adversarial system would involve a measure, however limited, of judge's participation.¹¹ The latter should not contribute to the fact-finding process.¹² In order to further reduce the judge's discretion, lay judge and jury could be used. The trial is seen as a central and distinct part of the proceedings focused on guaranteeing the parties the fair hearing by means of oral contradictory debate. In order to do that, the equality of arms must be assured to a reasonable extent. The parties initi-

8Ibid 196

9Verkerk, R., *Fact Finding in Civil Litigation. A Comparative Perspective* (Intersentia, 2010), Chapter 7- The Austrian Model: A utilitarian approach to civil litigation 240-258

10Jolowicz, J.A., 'Adversarial and Inquisitorial Models of Civil Procedure', 52 *Int'l & Comp. L.Q.* (2003) 281-282

11In reality, not only in deciding on the measure at stake, but also in guaranteeing the party's presence, see: Caenegem, R.C. van, 'History of European Civil Procedure', in: Cappelletti M. (ed.), *International Encyclopedia of Comparative Law*, Volume XVI (Civil Procedure), (Tübingen: J.C.B. Mohr, 1973) 15

12Parisi, F., 'Rent-seeking through litigation: adversarial and inquisitorial systems compared', *International Review of Law and Economics* 22 (2002) 195-196

ate and control the dispute in order to naturally reach the highest emanation of truth.¹³ The dispute-resolution is largely dependent on the parties, the evidence and motions they present and the cross-examination they conduct.¹⁴ Even though he advocates for a different type of classification, the horizontal division of authority prescribed by Damaska can be seen as close to the adversarial ideal, as it is based on the premise of non-professional transitory officials organised into roughly equal echelons of authority, hearing the disputes on an *ad hoc* or temporary basis.¹⁵

III. HISTORICAL BACKGROUND

The prevalent approach is that domestic civil procedure should be taught as a system of cold formal rules crafted to regulate the application of the substance of national law.¹⁶ However, this perspective does not take into account the complexity of the area and the ever-changing spirit of procedural law. To understand it, we must look at its historical context as the foundation of ideological division, comparative positioning and direction of development.

It can be assumed that a type of rudimentary adversarial procedure could develop in the primitive societies, as the desire of justice in its primal sense tends to manifest itself as a form of vengeance.¹⁷ However, when the European tradition as we know it is of concern, it can be said that in the beginning there was chaos, and then the Romans came. The *Corpus Iuris Civilis* contained numerous rules scattered across the code relating to the different kinds of procedures.¹⁸ These became subject to scrutiny conducted by the continental medieval scholars upon the renewal of in-

13Chayes A., 'The role of the judge in public litigation', *Harvard Law Review* 89 (1976) 1281

14Parisi, F., 'Rent-seeking through litigation: adversarial and inquisitorial systems compared', *International Review of Law and Economics* 22 (2002) 194-195

15Damaska M., *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, (Yale University Press, 1975) 16-28

16Rhee, C.H. van, 'Civil Procedure: A European Ius Commune?', *European Review of Private Law*, (2000) 591

17Couture, E., 'The Nature of Judicial Process', *25 Tulane Law Review* (1950) 1, 7

18Rhee, C.H. van, 'Civil Procedure: A European Ius Commune?', *European Review of Private Law*, (2000) 592

terest in the Roman law. The largely creative interpretative efforts of the scholars gave birth to a new system of the Romano-canonical procedure.¹⁹ The previously applied law was largely outdated for the purposes of the society, e.g. by employing an irrational system of evidence by ordeals. The Romano-canonical procedure was first applied in ecclesiastic courts, but quickly became popular as breaching the contract also amounted to committing the sin of lying. Given this choice, the parties opted for the Romano-canonical procedure because of its comparative benefits. The canonical procedure included a sophisticated system of proof, professional judges, procedure in writing, followed party autonomy and set the burden of proof on the plaintiff and involved the absence of immediacy. By measure of these characteristics, it quickly found its way into the secular courts and became a dominant type of procedure in the continental Europe, being the foundation of a more inquisitorial type of procedure. This setting was influenced by the regional traditions and developments and the divisions were further reinforced by the raise of national law and the codification of civil procedure.²⁰

Meanwhile in England, the Norman conquest was followed by the raise and development of the common law.²¹ The 'moving' king established legal branches within the royal household and vested the King's Bench, Court of Common Pleas, Court of Exchequer and Justices in Eyre with the task of administering the law in his name in the country. The procedure applied involved the use of jury, focus on oral nature of the proceedings and their immediacy and can be deemed as more adversarial in nature.²² Further development took place with establishment of legal profession. The parties were responsible for discovering and presenting evidence, challenging the evidence of the opposition and choosing the applicable law (by means of a

19Caenegem, R.C. van, 'History of European Civil Procedure', in: Cappelletti M. (ed.), *International Encyclopedia of Comparative Law*, Volume XVI (Civil Procedure), (Tübingen: J.C.B. Mohr, 1973) 17-21

20Ibid 13-14 & 22 & Rhee, C.H. van, 'Civil Procedure: A European Ius Commune?', *European Review of Private Law*, (2000) 594

21Caenegem, R.C. van, 'History of European Civil Procedure', in: Cappelletti M. (ed.), *International Encyclopedia of Comparative Law*, Volume XVI (Civil Procedure), (Tübingen: J.C.B. Mohr, 1973) 23-30

22Rossner, M. & Tait, D., 'Contested Emotions: Adversarial Rituals in Non-Adversarial Justice Procedures' 37 *Monash U.L. Rev.* 241 (2011) 243-244

system of writs). The 'duellist' nature of trial has been said to show connection with the tradition of a trial by combat.²³ The Romano-canonical procedure had some influence, but it did not replace the existing system. The nineteenth century liberalism allowed the adversarial model to prevail by focusing on its dialectical nature.²⁴ The adversarial principle is still seen as intrinsically connected with the English definition of fair trial and dispute-resolution.²⁵

Despite the differences, the Romano-canonical and Common Law procedures shared some common grounds. The burden of proof in both cases was on the plaintiff, the system of rational legal proof was used, the parties enjoyed the discretion to initiate and control the proceedings and the dispute must have affected the interests of the parties.²⁶ Although the division into inquisitorial/adversarial models is sometimes taken as parallel with the division into civil and common law legal families, neither of the latter achieves the end of inquisitorial/adversarial scale.²⁷ Nowadays, the relatively recent phenomenon of European integration can be regarded as the engine of procedural convergence.²⁸

IV. FRANCE

France belongs to the civil law family, having its roots in the Romano-canonical procedure. Over the years, it has undergone a process of evolution.²⁹ The first codification of the French procedural law took place in 1806 in the form of the Napoleonic Code of Civil Procedure, which was rather liberal and far from the in-

23K. K. DeBarba: 'Maintaining the Adversarial System: The Practice of Allowing Jurors to Question Witnesses During Trial', *Vanderbilt Law Review* no. 5 (2002) 1524-1525

24M.R. Damaska, *Evidence law adrift*, (Yale University Press, 1997) 101

25Andrews, N., *English Civil Procedure. Fundamentals of the New Civil Justice System* (Oxford: Oxford University Press, 2003), p 34

26Caenegem, R.C. van, 'History of European Civil Procedure', in: Cappelletti M. (ed.), *International Encyclopedia of Comparative Law*, Volume XVI (Civil Procedure), (Tübingen: J.C.B. Mohr, 1973) 13-14, 31-32

27For more detailed argument see: Parisi (2002) and Jolowicz (2003)

28Rhee, C.H. van et al. (Ed.), *European Traditions in Civil Procedure* vol. 54, (Intersentia, 2005) 3-5

29Caenegem, R.C. van, 'History of European Civil Procedure', in: Cappelletti M. (ed.), *International Encyclopedia of Comparative Law*, Volume XVI (Civil Procedure), (Tübingen: J.C.B. Mohr, 1973) 54-55

quisitorial ideal.³⁰ In 1975, the New Code of Civil Procedure (NCPC) was enacted, which continues to rule the procedural law subject to reforms and continuous evolution.³¹

French civil procedure is governed by the series of *principes directeurs de l'instance*.³² The *principe dispositif* is one of these and occupies an important place in the French system. It is up to the parties to initiate the proceedings and to stop them freely (article 2 NCPC). They also decide on the content of the dispute.³³ However, where the parties are said to control the proceedings, it is the judge who controls the right course of the proceedings, as stipulated in article 3 NCPC. Where *ordre public* is concerned, the court can decide on a case *ex officio*. As provided by article 5 NCPC, The judge must decide on the claims presented by the parties and must not decide *ultra petita* or *infra petita*. Officially, the judge rules on the law and the parties control the facts.³⁴ However, the powers of the judge are *de facto* the most extensive under French law and can sometimes interfere with the rights of the parties. The *principe contradictoire* takes a special position in the French system, as it counterbalances the extensive investigative powers of the judge. Accordingly, the trial must be fair and parties to the dispute must be heard.³⁵ The parties must inform each other of the facts, relevant evidence and legal grounds in order to allow the proper preparation of defence.³⁶ The judge himself must also respect the adversarial principle by properly informing the parties and allowing them to dispute the point, whenever it is raised.³⁷ The principle of cooperation is central to French civil procedure. It divides the powers and obligations between the judge and the parties and forces them to co-operate efficiently in their

30Jolowicz, J.A., 'Adversarial and Inquisitorial Models of Civil Procedure', 52 Int'l & Comp. L.Q. (2003) 290 & Rhee, C.H. van et al. (2005), *European Traditions in Civil Procedure* vol. 54 25-40 for a detailed overview

31Ferrand, F., 'The Respective Role of the Judge and the Parties in the Preparation of the Case in France', in Trocker, N. and Varano, V. (eds), *The Reforms of Civil Procedure in Comparative Perspective*, (G. Giappichelli: Torino, 2005), 7-8

32ibid 9-10

33Layton, A. et. al. (eds), *European Civil Practice*, Volume 2, Chapter 51, 'France', (Thomson, Sweet & Maxwell, 2004) 160

34Jolowicz, J.A., 'Adversarial and Inquisitorial Models of Civil Procedure', 52 Int'l & Comp. L.Q. (2003) 292

35Article 14 NCPC

36Article 15 NCPC

37Article 16 NCPC

tasks. It also serves as the best example of inability to classify the French system as clearly adversarial or inquisitorial.

The course of proceedings before the French civil courts vary depending on the nature of the court.³⁸ Before the ordinary courts, the proceedings are initiated by the parties. There is no obligation upon them to produce evidence. The parties must be represented by lawyers and the judges are professionals trained in special schools.³⁹ The proceedings are mainly conducted in writing and the party's legal counsel is to provide the judge with the summary of the pleadings upon sanction. The conciliation efforts are mandatory and the first meeting takes form of the *conférence du président*, where the suitable track for the proceedings is selected by the President of the court division.⁴⁰ The long track envisages the supervision of the case by the *juge de la préparation*.⁴¹ The latter is given important case-management powers, overseeing the progress of the proceedings and exercising judicial powers by use of information and injunction powers.⁴² Moreover, he or she is given special rights design to embrace the proceedings with a desired rhythm and pressure the parties into compliance.⁴³ The orders made by the *juge de la préparation* must be reasoned and can only be appealed against together with the judgment on merits.⁴⁴

The French civil proceedings are based on the exchange of pleadings and disclosure of documents, where the judge cooperates with the parties in order to provide the highest quality of justice, as shown in article 11 NCPC. This often involves the so-called “procedural contract”, where the lawyers together with the judge decide on time schedule, temporal requirements and specific aspects of the procedure. The judge observes the time-limits and ensures that documents are exchanged

38Ferrand, F., 'The Respective Role of the Judge and the Parties in the Preparation of the Case in France', in Trocker, N. and Varano, V. (eds), *The Reforms of Civil Procedure in Comparative Perspective*, (G. Giappichelli: Torino, 2005) 13-14

39Layton, A. et. al. (eds), *European Civil Practice*, Volume 2, Chapter 51, 'France', (Thomson, Sweet & Maxwell, 2004) 150

40See articles 127-131 NCPC for conciliation and mediation

41Ferrand, F., 'The Respective Role of the Judge and the Parties in the Preparation of the Case in France', in Trocker, N. and Varano, V. (eds), *The Reforms of Civil Procedure in Comparative Perspective*, (G. Giappichelli: Torino, 2005) 16

42Articles 770-772 NCPC list the procedural powers transferred to the judge

43Ferrand, F., 'The Respective Role of the Judge and the Parties in the Preparation of the Case in France', in Trocker, N. and Varano, V. (eds), *The Reforms of Civil Procedure in Comparative Perspective*, (G. Giappichelli: Torino, 2005) 20

44Articles 773(2) & 776(2) NCPC

between the parties. When the case is ready for judgement or one of the parties has not respected the time-limit for submission of pleadings, the judge (either the President of the court division or the judge of the preparation) can declare, *sua sponte* or at the request of the other party, the *ordonnance de clôture* after which further submissions are not possible.⁴⁵ Such decision does not have to contain any reasons and cannot be reviewed nor appealed unless a *cause grave* can be demonstrated.⁴⁶ The evidence is mainly presented in writing and can be freely evaluated by the judge.⁴⁷ The *objet du litige* is designed by the parties to contain the substance of the dispute.⁴⁸ Burden of proof is on the parties and the facts that are not challenged are taken for granted.⁴⁹ Even though the parties must prove allegations, the *juge de la mise en état* can order fact-finding measures *ex officio*.⁵⁰ The pieces of evidence are usually produced voluntarily in their original form and must be followed by informing the other party. It is the judge's responsibility to make sure that the parties are informed and the adversary principle is met. It is also at his or her discretion to order the production of a document by a party or a third under a sanction.⁵¹ The specific procedure is described in Chapter I, II & III NCPC.⁵² Article 145 NCPC is interpreted to enable to secure the documents from a the opponent or a third party.⁵³ The judge can even intervene in proceedings by inviting the party's representation to answered grounds not covered in their pleadings, inviting a party to call a non-party in the event of necessity or consulting an expert on the issue at stake under condition of respecting the adversary principle.⁵⁴ The proceedings until the hearing are de facto conducted in writing.⁵⁵ The judge can decide *ex officio* or at a request of a party to conduct an inquiry, where the

45Articles 780, 781 & 783 NCPC

46Articles 782 & 784 NCPC

47Article 1341 Code civil

48Article 4 NCPC

49Article 9 NCPC

50Jolowicz, J.A., 'Adversarial and Inquisitorial Models of Civil Procedure', 52 Int'l & Comp. L.Q. (2003) 291 & article. 10 NCPC

51Articles 11(2) & 138 NCPC

52Articles 132-142 NCPC

53Chase, O. et al., *Civil Litigation in Comparative Context*, (St Paul: Thomson West, 2007) 9

54Articles 765 & 768(1) NCPC

55Ferrand, F., 'The Respective Role of the Judge and the Parties in the Preparation of the Case in France', in Trocker, N. and Varano, V. (eds), *The Reforms of Civil Procedure in Comparative Perspective*, (G. Giappichelli: Torino, 2005) 21

evidence is given in an adversary manner. However, the judge directs the investigation and the parties may only propose relevant questions. Most of the time, a system of hand-written testimony, *affidavits*, is used.⁵⁶ French procedural law envisages sanctions in relation to procedural abuses.⁵⁷ These involve pecuniary sanctions, as well as dismissal for lack of prosecution, closing order, inadmissibility of the submissions and dismissal of the case.⁵⁸ The judgement deemed to be given in adversary proceedings and default judgements in a narrow sense are possible.⁵⁹ The *juge de l'exécution* has exclusive jurisdiction in execution of judgments.⁶⁰ The appeal to the second instance is available as of a right.⁶¹

The procedures are different in special courts.⁶² Before the *Tribunal d'instance*, dealing with small claims, the proceedings are brought by the parties, they are oral, conciliation is optional and the parties do not have to be represented by lawyers. The judge still enjoys investigative powers, and when it is ready, the case is then decided in a single trial. The same is largely true for the *Tribunal de commerce*, where the preparatory stage can be directed by the *juge rapporteur*. However, the latter's powers do not extend as far as the ones of *juge de la préparation*.⁶³ The trend to use special proceedings is worth mentioning here. In the *Référé* proceedings, the President of the court can order conservation and restoration measures even in cases of contestation or urgent measures which cannot be contested. The preparation of the case takes place during the hearing, which can violate the adversarial principle. Moreover, the orders upon request can be ordered without one party knowing it in cases of necessity. Finally, *Injonction de payer* can be ordered to facilitate the payment of debts, where the defendant is not informed about the proceedings during the first stage, but can react in the second stage.

56Articles 200-202 NCPC

57Ferrand, F., 'The Respective Role of the Judge and the Parties in the Preparation of the Case in France', in Trocker, N. and Varano, V. (eds), *The Reforms of Civil Procedure in Comparative Perspective*, (G. Giappichelli: Torino, 2005) 12

58Arts. 780, 783 & 381 NCPC

59Layton, A. et. al. (eds), *European Civil Practice*, Volume 2, Chapter 51, 'France', (Thomson, Sweet & Maxwell, 2004) 158-159

60Ibid 148

61Ibid 149

62Ferrand, F., 'The Respective Role of the Judge and the Parties in the Preparation of the Case in France', in Trocker, N. and Varano, V. (eds), *The Reforms of Civil Procedure in Comparative Perspective*, (G. Giappichelli: Torino, 2005) 22-24

63Ibid 23

As can be seen, the French system of civil procedure is a mixture of adversarial and inquisitorial models.⁶⁴ The New Code of Civil Procedure is another step in the direction of increasing the powers of the judge, designed to ease the quest for approaching truth.⁶⁵ The control of the parties has been reduced, but the latter were not deprived of their basic rights. The pursuit of efficiency gave birth to trends towards the general simplification of the proceedings and increased use of special proceedings focused on a single oral hearing before a single judge. In comparative context, it can be said that the French system is closest to the inquisitorial model out of the three countries presented here.

V. GERMANY

Germany belongs to the civil law legal family. German procedural law stems from multiple sources, with the *Zivilprozessordnung* (hereinafter “ZPO”) in the centre, and must be in line with the federal constitution.⁶⁶ Officially, the German system is adversary (the exception being family law) and is based on a series of principles, such as that of party control, right to an adversary hearing, principle of orality, publicity, a speedy trial, immediacy and legal certainty.⁶⁷ The fundamental guarantees include the rights of the parties to be heard, to a legal recourse, not to be removed from the lawful judge, fair and effective trial, equality before the court, and the duty of the latter to respect the rule of law.⁶⁸

64Ferrand, F., 'The Respective Role of the Judge and the Parties in the Preparation of the Case in France', in Trocker, N. and Varano, V. (eds), *The Reforms of Civil Procedure in Comparative Perspective*, (G. Giappichelli: Torino, 2005) 10-11 & Layton, A. (2004) 155

65Jolowicz, J.A., 'Adversarial and Inquisitorial Models of Civil Procedure', 52 *Int'l & Comp. L.Q.* (2003) 291

66Koch, H. and Diedrich, F., *Germany*, in: Blanpain, R. (ed.), *International Encyclopedia of Laws*, (Hague: Kluwer Law International), Civil Procedure, Suppl. 36 (2006) 25

67ibid 27-28

68ibid 36-41

The right of party initiative (*Dispositionsmaxime*) plays a central role in German law.⁶⁹ Only the parties may start the proceedings upon demonstrating that their rights were violated. §308 ZPO provides for the party control of the subject matter (with an exception for actions for non-material damages). The judge must not rule *ultra petita* and go outside of the original claim. The parties are responsible for properly outlining the content of proceedings when filing a written statement of claim under §253 ZPO. The defendant must be notified of the claim and can acknowledge or waive it. However, under German law, the court is not bound to follow the plaintiff's legal qualifications. The judges are professionals, who are deemed to know the applicable law.⁷⁰ In accordance with *iura novit curia*, the court must apply the correct law *ex officio*.⁷¹ The parties are not only responsible for initiation, but also for the course of the proceedings. Under §278 ZPO the court's duty is to restore social peace. In matters such as agreeing on the hearing schedule, the court must respect the will of the parties. The extra-judicial settlement of the case is encouraged and the claimant may withdraw the claim at any stage of the proceedings.⁷² To counter the lack of proper investigatory measures, under §138(1) ZPO, the parties must allege every fact that is relevant to the dispute, even if these are unfavourable.⁷³ The exceptions include facts leading to criminal prosecution, placing the party in negative light or enabling the opposition to file a counter-claim. Although there are no sanctions prescribed by the law for failing to fulfil this obligation, this should be taken into consideration when evaluating the evidence. According to §139 ZPO, when the court discovers facts *ex officio*, or doubts the sufficient coverage of the relief or defence sought, it can advise the parties accordingly and in due time. In light of the adversary principle, the use of this duty must be moderate, specifically in cases where the party is represented by legal counsel.⁷⁴ Under §142, the parties and third-parties can be ordered to disclose the documents in their possession. In principle, the hearings before the court are oral

69Murray, P.L., Stürner, R., *German Civil Justice*, Durham, (NC, 2004) 11

70ibid 7-9

71Koch, H. and Diedrich, F., Germany, in: Blanpain, R. (ed.), *International Encyclopedia of Laws*, (Hague: Kluwer Law International), Civil Procedure, Suppl. 36 (2006) 26 & 29

72§269 ZPO

73Koch, H. and Diedrich, F., Germany, in: Blanpain, R. (ed.), *International Encyclopedia of Laws*, (Hague: Kluwer Law International), Civil Procedure, Suppl. 36 (2006) 30

74ibid 29.

(§128(1) ZPO), yet there are many procedural exceptions to this rule. If the court agrees, the parties may rely on the written statements and the former may order written proceedings in special cases upon parties' agreement.⁷⁵ Subject to exceptions, the judgement must be given by the same judges who attended the hearing, so they can base their decision on the overall impression of the case by attending it *in personam*.⁷⁶

On the other hand, the judge retains the responsibility to guide the course of proceedings and properly decide on the case.⁷⁷ The procedure should be suited to the different tracks and, if possible, focus on resolving the dispute in a single trial, in line with the principle of speedy trial.⁷⁸ The presiding judge may choose either for an early first hearing or written preliminary proceedings to be utilised.⁷⁹ In case of the latter, it is up to the parties to prepare through their written statements. It is at the court's discretion to accept late submissions, set time-limits for plaintiff's submissions and solve controversial issues.⁸⁰ The court has a duty of promoting the proceedings. According to §139 ZPO, it plays an important role in directing the substance by getting involved in dialogue with the parties and investigating the situation in order to prepare the case for the hearing.⁸¹ It may ask for clarification of the preliminary written statements and for personal attendance of the parties at the hearing. The court has the power to order the presentation of documents by the parties or ask the public authorities to provide it with information or documents (even ones that have not been referred to by the parties) under §273 ZPO. However, the witnesses can be only summoned if they were named by the parties. Moreover, the parties must cooperate in expediting the proceedings by bringing their submissions at an earliest time possible.⁸² Late submissions may be denied.⁸³ The evidence is subject to free evaluation and the examination of witnesses takes part with the judge's participation

75§137(3) & §128(2) ZPO

76§309 ZPO; §§361, 375(1), 349(1) & 524(2) ZPO for exceptions

77Murray, P.L., Stürner, R., *German Civil Justice*, Durham, (NC, 2004) 11

78§272(1) ZPO for *Konzentrationsmaxime*

79§272(2) ZPO

80§§296(1), 275(4) & 273(2) ZPO

81§§273 & 275 ZPO

82§282(1) ZPO

83§296(2) ZPO

.⁸⁴ The possibility to appeal, if admissible, is available to the defeated party.⁸⁵

In conclusion, the German system, naming itself adversarial, relies on a balance of rights and duties and interaction between the parties and the judge in ensuring the proper delivery of justice. The parties do have control of the facts, yet the evidence needed to establish these can be largely called for by the judge *ex officio* (with the exception of witness). The wider investigatory measures are a result of recent reforms aimed at judicial economy.⁸⁶ A move towards more efficient administration of justice can be seen considering the use of different procedural tracks and trying to resolve the dispute in a single trial.⁸⁷ Special proceedings and family law matters often see loosening the reins of *Dispositionsmaxime*⁸⁸. As a result, the German system takes an intermediary approach between the English and French systems of civil procedure.

VI. ENGLAND

England is a common law country. Traditionally, English procedural law has been seen as adversarial in nature.⁸⁹ The recent reforms and introduction of the Civil Procedure Rules in 1998 vested the judge with many case-management powers. However, the latter must be used in moderation and with respect to parties' rights. Under the new rules, the overriding principle of dealing with the cases justly by providing equality, efficiency and proportionality, takes a central part in all proceedings and is to be promoted both by the court and the parties themselves.⁹⁰

English law still puts a heavy emphasis on the principle of party control. The

84Murray, P.L. & Stürner, R., *German Civil Justice*, Durham, (NC, 2004) 14-15

85Koch, H. and Diedrich, F., Germany, in: Blanpain, R. (ed.), *International Encyclopedia of Laws*, (Hague: Kluwer Law International), Civil Procedure, Suppl. 36 (2006) 28

86Murray, P.L. & Stürner, R., *German Civil Justice*, Durham, (NC, 2004) 13

87Koch, H. and Diedrich, F., Germany, in: Blanpain, R. (ed.), *International Encyclopedia of Laws*, (Hague: Kluwer Law International), Civil Procedure, Suppl. 36 (2006) 33 for the reforms

88Murray, P.L. & Stürner, R., *German Civil Justice*, Durham, (NC, 2004) 18- 19

89Andrews, N., *English Civil Procedure. Fundamentals of the New Civil Justice System* (Oxford: Oxford University Press, 2003) 33-34

90Part I CPR & Andrews, N., *English Civil Procedure. Fundamentals of the New Civil Justice System* (Oxford: Oxford University Press, 2003) 36-39

parties control the litigation, especially in the factual sphere thereof.⁹¹ The parties are represented by lawyers, who owe duty both to the client and to the court.⁹² In line with the dispositive principle, the parties are free to define the core argument and the limits of their case.⁹³ Firstly, the parties must make use of the pre-action protocols to enable an extent of dialogue before entering litigation.⁹⁴ A claimant who wishes to litigate must then hand the defendant (and his or her insurer) the letter of claim, encompassing the basic facts of the dispute, to which the latter has 21 days to answer. The court has no real power before the commencement of the proceedings and cannot order an *ex officio* litigation. The parties are seemed to be independent in protecting their rights. The claim form, identifying the parties, nature of the claim and remedies sought, must be issued in the appropriate court and served upon the defendant. The statement of claim defines the subject-matter and the limits of the proceedings that the judge must respect. It must be extensive enough to prevent surprise at trial and must contain correct legal classification. The court can add to or remove parties from the proceedings.⁹⁵ The principle of party initiative is followed by the need to inform the affected parties of the proceedings. The defendant can then decide whether to admit the claim, to contest the jurisdiction or the claim or to do nothing and wait for the default judgement. The potential response must address the allegations by denying them and providing counter-arguments or admitting them. An allegation left unanswered is considered to be admitted.

The current regime sees the relative rule of the informed judge, who seeks to help parties achieve the closest approximation of justice.⁹⁶ The proceedings must be suited to the dispute at stake, which is achieved by allocating the case to one of the

91Parisi, F., 'Rent-seeking through litigation: adversarial and inquisitorial systems compared', *International Review of Law and Economics* 22 (2002) 5, 195

92Andrews, N., *English Civil Procedure. Fundamentals of the New Civil Justice System* (Oxford: Oxford University Press, 2003) 45

93Chase, O., 'Legal Processes and National Culture', *Cardozo Journal of International & Comparative Law* 5 (1997)289

94Chase, O. et al. (2007), *Civil Litigation in Comparative Context*, Chapter 1 16-18

95CPR 19.1

96Jolowicz, J.A., 'Adversarial and Inquisitorial Models of Civil Procedure', 52 *Int'l & Comp. L.Q.* (2003) 288

tree available tracks on the basis of the questionnaire filled in by the parties.⁹⁷ In the multi-track it is the responsibility of the court to ensure the proper preparation and exchange of information between the parties.⁹⁸ It also sets a timetable for the trial.⁹⁹ The court also enjoys a general power to control the evidence.¹⁰⁰ It can specify the issues on which evidence is needed, define its nature and the way of delivery. Even admissible evidence can be excluded and cross-examination may be limited. The court can restrict the number of witnesses employed by the parties in multi-track and fast-track proceedings.¹⁰¹ Under the new rules, parties are subject to disclosure, which replaced the previous system of discovery.¹⁰² It must be proportionate and serves as a means to facilitate the informed delivery of justice.¹⁰³ The parties have to submit the documents that can help or hamper their/other party's case and have direct relevance to the dispute and serve them to the other party.¹⁰⁴ Disclosure is compulsory, but can be subject to restrictions.¹⁰⁵ If a party wants to summon a witness, his or her evidence should be signed and presented to the other party in a written form. The rule against hearsay evidence largely lost its importance.¹⁰⁶ In order to cut down on battles between the parties' experts, CPR introduced the single joint expert. The expert reports often take a written form and it is the judge's responsibility to read these. Despite the very limited use of jury in civil cases, the trial still takes the special position in the proceedings, with cross-examination being the main check on witness' credibility.

By measure of the active case management, the court should help the parties to resolve the dispute.¹⁰⁷ The parties are free to withdraw the proceedings or resolve the matter extra-judicially at any stage. They can also make use of payments into the

97CPR 26.6

98Practice Direction (29) 4.3, 5.3

99CPR 29.8

100CPR 32.1

101CPR 28.3(1) & PD (28) 8.4

102CPR 31.6 & Andrews, N., *English Civil Procedure. Fundamentals of the New Civil Justice System* (Oxford: Oxford University Press, 2003) 43-44

103Andrews, N., *English Civil Procedure. Fundamentals of the New Civil Justice System* (Oxford: Oxford University Press, 2003) 597

104CPR 31.10

105CPR 31.5

106Jolowicz, J.A., 'Adversarial and Inquisitorial Models of Civil Procedure', 52 *Int'l & Comp. L.Q.* (2003) 287

107CPR 1.4(2)(f)

court, the mechanism designed to facilitate reaching the agreement between the parties without unnecessary further steps in the litigation. The CPR also introduced forms of pre-trial disposal of a case by means of Alternative Dispute Resolution. Part 24.2 CPR stipulates that the court can deliver a summary judgement against a party it does not see a prospect of succeeding of the claim at stake. Part 3.4 CPR provides for the court's power to strike out the statements that are not based on any reasonable grounds for bringing or defending the claim before the court, form the abuse of the court's process or fail to comply with a rule, practice direction or a court order. The possibility of appeal is diminished by the system of permissions from the court, but this is softened by the overall high quality of justice at the first instance and out-of-court possibilities.¹⁰⁸

As we can see, the reforms brought to English civil procedure have largely affected its adversary spirit. There can be seen a clear movement away from the *Air Canada* case, which previously defined the adversary understanding of the system.¹⁰⁹ However, it must be noted, that the subsequent reforms and introduction of the CPR in terms of case-management do not have to contradict the adversarial nature of the trial, as the parties retain their basic rights.¹¹⁰ A significant step towards continental jurisdictions was made, yet, in comparative context, English procedural law remains the closest to the adversarial model.

VII. CONCLUSION

In conclusion, the classification of systems of civil procedure according to adversarial and inquisitorial models is rather imperfect. The historical landscape has been affected by the process of legal evolution and the search for efficient administration of justice in a comparative context. The reforms enacted in the presented

108 Andrews, N., *English Civil Procedure. Fundamentals of the New Civil Justice System* (Oxford: Oxford University Press, 2003) 45

109 *Air Canada v Secretary for State for Trade* [1983] 2 AC 394, 434

110 Andrews, N., *English Civil Procedure. Fundamentals of the New Civil Justice System* (Oxford: Oxford University Press, 2003) 38

countries brought the systems closer in relation to each other, by seeking to balance the powers of the judge against the rights of the parties. It must be said that, nowadays, the adhesion of the domestic system to common law or civil law family is not reflected in the inquisitorial/adversarial nature of the system. However, the inquisitorial and adversarial models of civil procedure may indeed be utilised as end-points of the scale, on which different systems of civil procedure are compared. If this classification is used in the context of this paper, England would be the most adversarial and France most inquisitorial of the countries put under scrutiny, with Germany taking an intermediate position between the two. It is arguable that 'pure' adversarial or inquisitorial models are wanted or needed. In all certainty they must be searched for elsewhere.¹¹¹ It is equally possible, that, given the current comparative possibilities, the European and global procedure will further converge by adopting the best solutions from two models.¹¹²

111Nisbett, R.E., *The Geography of Thought: How Asians and Westerners Think Differently...and Why*, (Free Press, 2004), the author argues that East-Asian societies have a natural tendency to develop systems which would be more inquisitorial in nature by focusing on assuring the sense of harmony in the society

112Dodson, S., 'Global Civil Procedure Trends in the Twenty-First Century' 34 *Boston College International & Comparative Law Review* 1 (2011)

Human Trafficking in the Legal Systems of Poland and Germany

Julia Berg*

Abstract

For many years now, human trafficking has been an increasingly dangerous and growing phenomenon. It is a complex form of crime, conditioned by a variety of social and cultural factors, posing an ever increasing problem for the international community since the 1990s. In this brief analysis human trafficking is shown to be strongly rooted in gender discrimination, the crisis in migration policies, and the dire economic situation of developing countries. The main regulations governing trafficking in persons in place in the legal systems of Poland and Germany are reviewed, and the importance of international cooperation in combating this crime against the basic human rights and freedoms is emphasized.

I. INTRODUCTION

Trafficking in human beings is an international business, posing an ever greater threat to fundamental human rights and freedoms. Today there is already universal consensus that it has now become a supranational criminal activity, rooted in a wide variety of problems and issues around the world. According to the 2005 Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work,¹ studies of trafficking in forced laborers, which is just one form of human trafficking, show that in the studied period there were as many as 1,360,000 victims in Asia and the Pacific region, 270,000 in industrialized countries (including Western European countries, Australia and the United States), 250,000 in Latin America and the Caribbean, 230,000 in the Middle East and North Africa, 200,000 in transition countries (such as Poland, Romania and Slovakia) and 130,000 in Sub-Saharan Africa. These figures leave no room for doubt that modern-day slavery is a major problem, affecting most countries on our planet, and that this problem is get-

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¹ A Global Alliance Against Forced Labour, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and rights at Work 2005, International Labour Office, Geneva

ting more serious with each passing day.²

Human trafficking is enormously lucrative to criminal organizations. When the Palermo Protocol,³ one of the most important international documents dealing with prevention and suppression of human trafficking, was being adopted, it was estimated⁴ that this was a business worth anywhere between five and seven billion dollars per annum, and just a few years later this figure was thought to exceed ten billion dollars.

The rapid growth of this cruel form of crime is fueled by diverse social and cultural conditions around the world, its exceptionally complex structure⁵ and the legal situation the victims find themselves in, prompting some of their number not to disclose their predicament.⁶

Many authors⁷ emphasize that human trafficking is closely intertwined with sexual abuse of women, the vague stand taken by states to prostitution, and discrimination of women worldwide. In our day women are definitely the group most exposed to crimes of exploitation of a person's will, manipulation and violence⁸. Among the many forms of these crimes are trafficking in persons, rape and domestic violence which have a profound impact on the position of women in society and which must now be considered from the viewpoint of gender. As shown by recent studies carried out by international organizations,⁹ women are most often victims of

² According to UN data, trafficking in human beings is the third most profitable criminal activity in the world, after trafficking in arms and drugs; cf. M. Sobczyk, K. Przybyszewska, *Zjawisko handlu ludźmi w odniesieniu do cudzoziemców przebywających w Polsce* (Kraków 2013) 6

³ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children added to the UN Convention against Transnational Organized Crime, adopted by the United Nations General Assembly on 15 November 2000 (Journal of Laws of 2000, No. 18, item 160)

⁴ E. Pietrzak, "Walka z handlem kobietami w Unii Europejskiej" in: *Homo Politicus*, 2008, vol. 3 125

⁵ Many forms of human trafficking may be distinguished, including trafficking in persons for sexual exploitation and forced labor, trafficking in children and in human organs, tissues and cells

⁶ K. Karsznicki, "Cigania przestępstwa handlu ludźmi w Polsce", Ośrodek Badań Handlu Ludźmi Uniwersytet Warszawski (Warszawa 2010) 13

⁷ K. Kempadoo, "Trafficking and Prostitution Reconsidered *New Perspectives on Migration, Sex Work, and Human Rights*" 11; L. C. Ruchti, "The Influence of Gender on Human Trafficking" in: Mary C. Burke [ed.], *Human Trafficking. Interdisciplinary Perspectives* 94

⁸ Worthy of special notice in this context is *Trafficking in Human Beings*, a statistical working paper by Eurostat, the first statistical report of its kind published in the European Union, in 2015, presenting results of statistical analyses of human trafficking in the years 2010 – 2012, and the *Global Report on Trafficking in Persons*, United Nations Office on Drugs and Crime, NY 2014, a UN report on human trafficking around the world in 2010–2012

⁹ UNODC 2009, *Global Report on Trafficking in Persons*; UNODC Preliminary findings of the human trafficking database (2003)

sexual exploitation, this being due to the persisting inequalities between men and women and the still widespread feminization of poverty. It is important to note that actions to eliminate forms of crime in which gender is often the principal reason for victimization are bound to remain ineffective until economic and social equality of women becomes a reality. One of the causes of the rising tide of this adverse cultural phenomenon is the long history of patriarchal culture that has been creating a social image of women as submissive humans, weaker than men, destined exclusively to perform roles and chores that are not held in high esteem in society¹⁰ and subject to standards of freedom and sexual morality that had been imposed upon them over centuries.

Trafficking in persons is very much a consequence of organized crime activities, illegal migrations and the dire economic situation of developing countries. When the communist system collapsed in Central and Eastern Europe, a huge surge of interest in sex business occurred throughout the region, coinciding with a dynamic growth of organized criminal groups eager to quickly and easily cash in on the new trend. The economic plight of the former Eastern bloc countries created favorable conditions for the exploitation of people, many of whom lacked education worth mentioning or any opportunities or prospects for development.¹¹ The backwardness of the formerly totalitarian countries boosted an unprecedented escalation of trafficking in human beings. The open borders, influx of new goods and the stark differences between Eastern Europe and the Western world turned human trafficking for sexual exploitation and forced labor into a commercial venture on a scale never seen before.¹²

Citing the United Nations World Economic and Social Survey, M.C. Burke¹³ pointed to the enormous disproportions between rich countries and those which are

¹⁰ B. Balos, "The wrong way to equality: Privileging consent in the trafficking of women for sexual exploitation", *Harvard Women's Law Journal*, Vol. 27 138

¹¹ K. Karsznicki, *o ciganie przestępcstwa handlu ludźmi w Polsce*, Ośrodek Badań Handlu Ludźmi Uniwersytet Warszawski (Warszawa 2010) 13

¹² P. Mierecki, "Zwalczanie i zapobieganie handlowi ludźmi w Polsce – próba bilansu" in: *Handel ludźmi w Polsce Materiały do Raportu 6-7*; B. Namysłowska-Gabrysiak, "Funkcjonowanie wymiaru sprawiedliwości w latach 1999-2009 w świetle badań spraw karnych dotyczących handlu ludźmi" in: Z. Lasocik [ed.], *Eliminowanie handlu ludźmi w Polsce. Analiza systemu*, Ośrodek Badań Handlu Ludźmi Uniwersytet Warszawski 127

¹³ M. C. Burke, *Human Trafficking. Interdisciplinary perspectives* 77

still struggling economically. This UN study showed that nearly half the world's population, that is some three billion people, survive on less than two dollars a day, which makes them desperate to leave countries racked by poverty or volatile political situations and seek employment abroad. This is an ideal situation for recruiters smuggling people and offering them jobs which then turn out to involve sexual services or other forms of physical abuse.¹⁴ Publications abound¹⁵ describing how systemic transformations and economic stagnation in countries with weak international standing result in ever greater interest in exploitation people and forcing them into slave labor. This is seen not only in Europe – especially in countries which remained under totalitarian rule for decades or which ended up ravaged by years of war and conflict, such as the former Yugoslavia – but also in the United States and Asia,¹⁶ with the economy of many Asian countries being entirely reliant on what may be seen as slave labor.¹⁷

There are thus many factors relevant to human trafficking, including poverty and unemployment, migrations, gender discrimination in the broad sense of the term and the stereotypical perception of this crime, in most cases through the prism of prostitution or black-market work. M. Koss-Goryszewska¹⁸ noted a powerful correlation between the treatment of criminal offences involving sexual exploitation or forced labor and the actual effectiveness of the system of eliminating trafficking in human beings around the world. This is the result of, among other things, the vague stance adopted by international communities towards prostitution¹⁹ and the practice of shifting the blame for this crime to its victims who are not being treated with the concern and respect they deserve.

¹⁴ B. Andrees, *Praca przymusowa i handel ludźmi, Podręcznik dla Inspektorów Pracy*, Międzynarodowe Biuro Pracy 2010

¹⁵ S. Buchowska, “Czynniki sprzyjające handlowi ludźmi” in: Z. Lasocik [ed.], *Handel ludźmi – zapobieganie i ciganie* (Warszawa 2006) 331-332

¹⁶ V. Roth, *Defining Human Trafficking and Identifying Its Victims* (Boston 2012) 2

¹⁷ E. Pietrzak names Thailand as one of such countries; cf. E. Pietrzak, “Walka z handlem kobietami w Unii Europejskiej” in: *Homo Politicus*, 2008, vol. 3 125

¹⁸ M. Koss-Goryszewska, *Wizerunek handlu ludźmi i kobiety – ofiary w prasie polskiej na przykładzie Gazety Wyborczej*, Instytut Spraw Publicznych, 4

¹⁹ Four legislation typology/models on prostitution were distinguished in the Study on National Legislation on Prostitution and the Trafficking in Women and Children released by the European Parliament in 2005: classical abolitionism, new abolitionism, prohibitionism and regulationism

And then there is illegal migration²⁰ which often underpins human trafficking, particularly when this has to do with exploitation of forced labor or trade in human organs, tissues and cells. Illegal migrations is a problem of increasing magnitude, especially since the early 1990s when systemic transformation swept Eastern Europe and later when migration policies were relaxed and borders of the European Union thrown open. A major factor in this context are the difficult conditions in countries torn by war, domestic conflict or political repressions.²¹ The situation was aggravated still further by the huge migration crisis triggered by the civil war in Syria which forces masses of people to seek refuge in Europe. One consequence of this disaster is the expansion of criminal groups preying on people who found themselves in this tragic situation. Criminal organizations out to maximize profit at the expense of human suffering pose an ever greater threat to those fleeing war-torn territories and ending up in refugee camps or relocation centers.²²

Human trafficking is an extremely dangerous crime, destroying the basic human rights to self-determination, respect for privacy, physical integrity, and most countries of the world are committed to eliminating it. Quite a number of international documents devoted to the issue were adopted in the aftermath of the Second World War, to mention but the 1949 UN Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.²³ That said, regulations governing crimes of human trafficking □ and especially the legal situation of victims of this crime □ differ from country to country.²⁴

II. TRAFFICKING IN PERSONS IN POLAND'S LEGAL SYSTEM

²⁰ J. M. Turek, "Human Security and Development Issues" in: Mary C. Burke [ed.], *Human Trafficking Interdisciplinary perspectives* 83

²¹ J. M. Turek, *Op.cit.* 83-84

²² J. M. Turek, *Op.cit.* 83-84

²³ Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (Journal of Laws of 1952, No. 41, item 278)

²⁴ K. Karsznicki, □ *ciganie przest. pstwa handlu lud mi w Polsce*, O□ rodek Bada□ Handlu Lud□ mi Uniwersytet Warszawski (Warszawa 2010) 111

The penal regulations applicable to human trafficking in Poland were revised substantially on 20 May 2010 when several statutory laws were amended.²⁵ There was no definition of human trafficking in the law before the amendment of the Penal Code²⁶ and this led to widely divergent and inconsistent interpretations.²⁷ The problem was being signaled for years by legal commentators²⁸ who clearly saw just how vague the interpretations of the concept of “trafficking” can be and how great the controversies are over court rulings issued based on these interpretations. Without going into details, the issue at hand was regulated in three articles, only one of which specifically mentioned trafficking in persons. The extremely generally worded Article 253 of the Penal Code provided that whoever engages in trafficking in persons, even with their consent, shall be subject to imprisonment for a minimum term of three years. There is a vague connection between this Article and Article 204 §4 of the Penal Code which penalizes persons who entice or abduct another person with the aim of having him/her engage in prostitution abroad, and with Article 8 of the Act Implementing the Penal Code²⁹ which deals with slave trade. This confusing situation sometimes resulted in interpretations that were unfair to victims, and there were many cases when courts chose not to recognize acts of human trafficking as being just that.³⁰ The main difficulties were with the construal of the term “trafficking” when applied to transactions involving persons. Two opposing positions clashed: a narrow interpretation of the term³¹ restricting cases of trafficking to transactions under civil law agreements (such as sale and purchase agreements, rental or lending for

²⁵ Act of 20 May 2010 on Amendment of the Penal Code Act, the Police Act, the Act Implementing the Penal Code, and the Penal Proceedings Code Act (Journal of Laws of 2010, No. 89, item 626)

²⁶ Act of 6 June 1997 – The Penal Code (Journal of Laws of 1997, No. 8, item 553)

²⁷ B. Namysłowska-Gabrysiak, “Funkcjonowanie wymiaru sprawiedliwości w latach 1999-2009 w świetle badań spraw karnych dotyczących handlu ludźmi” in: Lasocik [ed.], *Eliminowanie handlu ludźmi w Polsce. Analiza systemu*, Ośrodek Badań Handlu Ludźmi Uniwersytet Warszawski 141

²⁸ M. J. Sokołowska-Walewska, “Definicja handlu ludźmi na tle prawa międzynarodowego”, *Prokuratura i Prawo* 2012, No. 5 90-92; B. Namysłowska-Gabrysiak, *Op.cit.*; E. Zielińska, “O potrzebie zmian kodeksu karnego w związku z ratyfikacją Protokołu o zapobieganiu oraz karaniu handlu ludźmi”, *Studia Iuridica* 2006, No. 46

²⁹ Act of 6 June 1997 – Regulations Implementing the Penal Code (Journal of Laws of 1997, No. 88, item 554)

³⁰ O. Sitarz, “Analiza przepisów prawnokarnych dotyczących zjawiska handlu ludźmi” in: Z. Lasocik [ed.], *Eliminowanie handlu ludźmi w Polsce. Analiza systemu*, Ośrodek Badań Handlu Ludźmi Uniwersytet Warszawski, (Warszawa 2011) 11-12

³¹ This construal was proposed by, among others, Z. Wiśniewski; cf. Z. Wiśniewski in: A. Zoll [ed.], *Kodeks karny. Część ogólna, Komentarz t. II*, (Kraków 2006) 1142-1143

use) and opposing voices³² arguing that a narrow interpretation of this kind is extremely detrimental to victims and fails to take into account other forms of trafficking in human beings.

A legal definition of “human trafficking” was introduced in the Penal Code as amended in 2010. Article 115 §22 of the Penal Code defines trafficking in persons as recruitment, transportation, delivery, handing over, keeping or receiving persons with the use of force or illegal duress, abduction, subterfuge, deception or while exploiting a person’s error or incapacity to properly assess the action being taken, abuse of a dependency/subjection relationship, exploitation of a person’s critical position or helplessness, or having granted or received a financial or personal benefit or a promise thereof to a person exercising guardianship or supervision over another person with the aim of exploiting the latter person, also with that person’s consent, by engaging that person in prostitution, pornography or other forms of sexual abuse, or in forms of forced labor or provision of services, beggary, slavery or other forms of exploitation that degrade human dignity, or in order to unlawfully obtain human cells, tissues or organs. The definition also mentions trafficking in minors which is a penal offence regardless of whether it was perpetrated using the methods and means referred to in the just cited regulation.

This definition was introduced in Polish law as a result of Poland having incurred a number of international obligations, such as by ratifying the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children³³ and under the Council Framework Decision 2002/629/JHA on combating trafficking in human beings.³⁴ While the definition continues to breed much controversy³⁵

³² Cf. M. Bojarski in: M. Bojarski [ed.], J. Giezek, Z. Sienkiewicz, *Prawo karne materialne. Część ogólna i ogólna*, (Warszawa 2004) 485; M. Kalitowski in: *Kodeks karny. Komentarz* (Warszawa 2005) 293

³³ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime adopted by the UN General Assembly on 15 November 2000 (Journal of Laws of 2000, No. 18, item 160)

³⁴ Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings (Official Journal of the of the European Union, accessed at: <http://eur-lex.europa.eu/legal-content/PL/TXT/?uri=URISERV%3A133137>; wording as at 1 May 2016)

³⁵ Cf. B. Namysłowska–Gabrysiak, “Funkcjonowanie wymiaru sprawiedliwości w latach 1999–2009 w świetle badań spraw karnych dotyczących handlu ludźmi” in: Z. Lasocik [ed.], *Eliminowanie handlu ludźmi w Polsce. Analiza systemu*; O. Sitarz, “Analiza przepisów prawnych dotyczących zjawiska handlu ludźmi” in: Z. Lasocik [ed.], *Eliminowanie handlu ludźmi w Polsce. Analiza systemu*; M. Sokołowski

due to the overly casuistic enumeration of the relevant felonious acts, the very fact that it was introduced must be seen as the right way forward in law. Worth recalling in this context is the open-ended definition proposed by E. Zielinska³⁶ which would bridge the existing gaps in the law and prevent the omissions of other actions missing the enumerated elements and thus not qualified as human trafficking.³⁷

The old Article 253 of the Penal Code is now replaced with Article 189a in the Penal Code chapter dealing with offences against freedom. Perpetrators of the crime of human trafficking now face a penalty of imprisonment for a minimum term of three years, while persons preparing to perpetrate this crime face anywhere between three months and five years in prison.

Although still a source of uncertainty and controversy,³⁸ the regulation currently in place is not inconsistent with the *nullum crimen sine lege certa* rule as it does describe behavior constituting the crime of human trafficking, as noted repeatedly in the literature,³⁹ and goes a long way to increasing the effectiveness of efforts to prevent it.

There is also other legislation in Poland playing a major role in combating human trafficking in this country,⁴⁰ most notably regulations designed to protect the interests of the victims of this crime. One of the most important regulations of this kind is to be found in the Act on Foreigners⁴¹ since it is foreigners who most often fall victim of trafficking in persons.

B. Namysłowska-Gabrysiak points to the reflection period as one of the basic guarantees offered to victims. This is a period granted to the victims for them to decide whether they want to cooperate with law enforcement authorities while remaining in the country they found themselves in.⁴² This is important because now

ska-Walewska, "Definicja handlu ludźmi na tle prawa międzynarodowego", *Prokuratura i prawo*, 2012, No. 5

³⁶ E. Zielinska, "O potrzebie zmian kodeksu karnego w związku z raryfikacją Protokołu u o zapobieganiu oraz karaniu handlu ludźmi?", *Studia Iuridica* 2006, No. 46

³⁷ B. Namysłowska-Gabrysiak, *Op.cit.* 143

³⁸ O. Sitarz, *Op.cit.*; B. Namysłowska-Gabrysiak, *op.cit.*; M. Sokołowska-Walewska, *Op.cit.*

³⁹ L. Gardocki, *Prawo karne* (Warszawa 2005) 293

⁴⁰ M. Jakubowska-Brodecka, "Podstawy prawne systemu eliminowania handlu ludźmi w Polsce" in: Z. Lasocik, *Eliminowanie handlu ludźmi w Polsce. Analiza systemu*, Ośrodek Badań Handlu Ludźmi Uniwersytet Warszawski (Warszawa 2011) 27-45

⁴¹ Act of 13 June 2003 on Foreigners (Journal of Laws of 2003, No. 128, item 1175)

⁴² B. Namysłowska-Gabrysiak, *Op.cit.* 141

the trafficking victims no longer get immediately deported from the given country and efforts can be taken to identify and punish the perpetrators, this in turn creating better conditions for developing a unified system for eliminating the crime.

More regulations, useful especially in the context of forced labor, can be found in the Act on the Chief Labor Inspectorate (*Panstwowa Inspekcja Pracy*).⁴³ These give certain powers to labor inspectors who may now enter business establishments to inspect the premises, review employment contracts, check the identity of employees and examine working conditions. The job of the Chief Labor Inspectorate is to verify and supervise the legality of employment, thus doing more to eliminate abuse of employee rights and employment in the black economy.⁴⁴

Another piece of legislation in Poland helping to eliminate human trafficking and improve the legal protection accorded to victims of this crime is the Act on Removal, Storage and Transplantation of Cells, Tissues and Organs which sets out restrictions on interference with the human body and is particularly important in countering trafficking in human organs, tissues and cells,⁴⁵ or the Act on Border Guard Forces whose job is to control borders and cross-border traffic, and hence also to spot cases of illegal crossing of borders, especially when trafficking in persons is suspected. These are just some laws that have been instrumental in increasing the effectiveness of the system designed to combat human trafficking. What must change first and foremost, however, is the social perception of victims of this crime since well-entrenched stereotypes and prejudices often result in these people being subjected to repeat victimization by the public and state officials responsible for first contacts with the victims.

III. REGULATIONS GOVERNING HUMAN TRAFFICKING IN GERMAN LAW

⁴³ Act of 13 April 2007 on the Chief Labor Inspectorate (Journal of Laws 2007, No. 89, item 589)

⁴⁴ B. Andrees, *Praca przymusowa i handel ludźmi. Podręcznik dla Inspektorów Pracy*, 2010 25

⁴⁵ M. Jakubowska-Brodecka, *Op.cit* 37

German law is particularly worth looking at as this is a European Union state that is among the principal destinations for trafficked persons.⁴⁶ The crime of trafficking in persons was previously referred to in Section 180b of the German Penal Code (StGb) which regulated the basic forms of this crime, and in Section 181 StGb which deal with its aggravated forms.⁴⁷ Section 180b StGb imposed penalties of deprivation of liberty for a term of six months to ten years on whoever persuaded a person in a state of helplessness arising from being in a foreign country to engage in or continue engaging in prostitution.⁴⁸ The regulations in force at that time also provided for penalties for those who merely attempted to perpetrate the described crime and exploit the subordination/subjection of another person.⁴⁹

As noted by K. Karsznicki,⁵⁰ today the crime of human trafficking for the purpose of sexual exploitation is regulated in Section 232 StGb which provides that whoever exploits another person's predicament or helplessness arising from being in a foreign country in order to induce them to engage in or continue to engage in prostitution or to engage in exploitative sexual activity shall be liable to imprisonment from six months to ten years. Human trafficking for the purpose of forced labor is penalized under Section 233 StGb which provides that whoever subjects a person to slavery, servitude or bonded labor or makes him work for him or a third person under working conditions that are in clear discrepancy to those of other workers performing the same or a similar activity while exploiting this person's predicament or helplessness arising from being in a foreign country is liable to the same penalty. The German Penal Code also provides for penalties for merely attempting human trafficking (Section 233a StGb).

These extensive regulations are not the only factor shaping the legal situation of victims of this crime.⁵¹ Germany has implemented a range of extremely effective programs to protect and support victims of trafficking, making it easier for them to

⁴⁶ *Handel ludmi. Statystyka*, IPSIR, Uniwersytet Warszawski: www.ipsir.uw.edu.pl, accessed on 5 May 2016

⁴⁷ E. Niesner, Ch. Jones-Pauly, *Trafficking in Women in Europe. Prosecution and Victim Protection in a European Context*, 2001 171

⁴⁸ K. Karsznicki, "Handel kobietami w wietle spraw karnych", *Prokuratura i Prawo* 12, 2002 79

⁴⁹ E. Niesner, Ch. Jones-Pauly, *Op.cit.* 174

⁵⁰ K. Karsznicki, *igianie przestpstwa handlu ludmi w Polsce*, Odeon Bada Handlu Ludmi Uniwersytet Warszawski (Warszawa 2010) 124-125

⁵¹ K. Karsznicki, *Pp.cit.* 125

legalize their stay in the country and deal with many other issues they must deal with in order to “return to society”.⁵² K. Karsznicki describes Germany’s witness protection program under which victims receive assistance in legalizing their stay in the country, are given reflection time, and can then assume new identities and find legal employment.⁵³ Germany’s Federal Criminal Police Office (BKA) publishes reports and statistics on human trafficking in this country and monitors the numbers of victims of this crime.⁵⁴

Most of the efforts to accord greater protection to victims of human trafficking were brought in line with international regulations dealing with issues such as the protection of the victims’ privacy, legalization of their stay, and the right to compensation for the harm suffered, to mention but the Palermo Protocol and the European Council Convention on the Suppression of the Traffic in Persons.

An important point to make in this context is that Poland and Germany differ in their positions on the legality of prostitution, a phenomenon that significantly fuels interest in trafficking in people for sexual exploitation. Poland adopted the so-called new abolitionism stance which is one of the models presented the Report presented to the European Parliament in 2005⁵⁵ in which the existence of brothels is prohibited and profiting from prostitution by third parties deemed a crime. Germany legalized prostitution, subject to compliance with specific requirements set by the state, prompting a large-scale development of this phenomenon in this country.⁵⁶

IV. SUMMARY

Trafficking in persons is a crime involving the most drastic infringements of human freedom, dignity and intimacy. Combating this crime requires many international-scale problems to be tackled, including gender inequality, the economic situa-

⁵² E. Niesner, Ch. Jones-Pauly, *Trafficking in Women in European Context*, 2001 188-194

⁵³ K. Karsznicki, *Op.cit.* 125

⁵⁴ *Handel ludźmi. Statystyka*, IPSIR, Uniwersytet Warszawski, www.ipsir.uw.edu.pl; accessed on 6 May 2016

⁵⁵ Raport National Legislation on Prostitution and the Trafficking in Women and Children, European Parliament, 2005 study

⁵⁶ B. Błochowska, *Zjawisko prostytucji w Polsce w świetle badań kryminologicznych* (Warszawa 2009) 102

tion of the countries concerned, and a wide range of issues having to do with migration policies and stereotypical perception of victims. One may nevertheless venture the opinion that the laws of European Union Member States are gradually being modified to address these issues in the adopted policy statements and international strategies. We must not forget, however, that human trafficking is on the rise. Perhaps one would do well to keep in mind the observation made by I. Bieżunska-Malowitz⁵⁷ that although the exploitation of human beings and the treatment of persons as chattel makes us think of Antiquity and the era of black slavery, "... the 20th century brought with it new forms of slavery, more wicked and murderous than those of the days past ...".⁵⁸

⁵⁷ I. Bieżunska-Malowitz, Marian Malowitz, *Niewolnictwo* (Warszawa 1987) 7

⁵⁸ I. Bieżunska-Malowitz, M. Malowitz, *Op.cit.* 409

Selected aspects of formation of the Spanish capital companies

Krzysztof Olszak¹

Abstract

The following article concerns the issue of formation of the Spanish capital companies. It undertakes to present the regulation applicable to a limited liability company, a joint stock company and a limited joint-stock partnership. The analysis focuses on basic rules governing the requirements for a registered office, a deed of incorporation, articles of association and contributions. It also examines the formation of a single member company and the causes for nullity of a company.

I. INTRODUCTION

The title issue is currently regulated by Royal Legislative Decree 1/2010, of July 2, 2010 approving the consolidated text of the Capital Companies Law² (hereinafter referred to as: the Capital Companies Law). This act marked the end of the traditional separate regulation of the forms of corporate bodies designated by that generic term, which now, with its inclusion in the title of the act, attains definitional status.

Capital companies are understood to mean a limited liability company (*la sociedad de responsabilidad limitada*), a joint stock company (*la sociedad anónima*) and a limited joint-stock partnership (*la sociedad comanditaria por acciones*). Their respective abbreviations are “S.A.,” “S.R.L.” or “S.L.” and “S. Com. por A.” A capital company may not use a name that is identical to the name of an existing company. All capital companies with registered offices on Spanish soil, irrespective of the place of their formation, shall be Spanish companies and subject to the Capital Companies Law.

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² Royal legislative decree 1/2010 approving the consolidated text of the Capital Companies Law

II. REGISTERED OFFICE

Capital companies shall establish their registered office at the place on Spanish soil where their actual administrative and management activities, or their main business establishment or operations, are located. In the case of discrepancy between the registered office entered in the Mercantile Registry and the office mentioned above, third parties may consider either of them to be the valid address. It is obligatory for capital companies whose main business establishment or operation is in Spain to have a registered office in Spain. However, capital companies may open branches at any location in Spain or abroad. The management board is vested with the power to create, close or transfer branches unless the articles of association provide otherwise.

III. THE DEED OF INCORPORATION AND THE ARTICLES OF ASSOCIATION

Capital companies are formed under an agreement concluded by and between two or more parties or, in the case of single member companies, under a unilateral instrument. In addition, a joint stock company may be formed successively through public share offerings. The formation of capital companies must be recorded in a notarial deed, which shall be registered in the Mercantile Registry. The deed of incorporation of capital companies must be signed by all founding shareholders (or their proxies), whether natural or legal persons, who must subscribe for all of the shares therein. Each and every deed of incorporation of a capital company must include at least the five following items: the identity of the shareholder or the shareholders; a declaration of intent to form a company, specifying the type of the company; the contributions made or, in the case of joint stock companies, committed to by each shareholder, as well as the number of shares attributed thereto as consideration; the

articles of association of the company and the identity of the person or persons initially entrusted with company management and representation. In the case of a limited liability company, the deed of incorporation shall determine the specific arrangements to be adopted for company management, if the articles of association envisage several options. In the case of a joint stock company, the deed of incorporation shall also state the full amount of the start-up expenses, at least as estimated, including both outlays and costs anticipated up to and including registration

The articles of association governing capital companies shall contain: company name; corporate purpose, specifying the activities included thereunder; registered office; capital and the shares into which it is divided, their par value and consecutive numbering. In sequential formation of limited liability companies, until the capital reaches the minimum sum of three thousand euros, the articles of association shall explicitly state that the company is subject to the rules in place for such concerns. Mercantile Registrars shall include a note on this circumstance *ex officio* in the record of entry notes made on any registrable document concerning the company, as well as in any certificates issued. In a limited liability company, a note shall be made on the number of shares into which the capital is divided, their par value, consecutive numbering and, where such shares are not equal, the rights granted thereby to their holders and the proportion of capital owned. In a joint stock company, a note shall be made on the share class and series, as appropriate, specifying the proportion of the par value outstanding, payment method and deadline, and whether the shares are represented by certificates or book entries. Where share certificates are issued, they shall specify whether they represent registered or bearer shares and whether the issue of multiple share certificates is envisaged. Furthermore, the articles of association shall include: governance arrangements, the number of directors or at least the minimum and maximum number thereof, as well as their term of office and the remuneration scheme, as appropriate; the manner in which the company governing bodies conduct their discussions and adopt their decisions. In a limited joint-stock partnership, the identity of the general partners shall also be provided.

The founders are held jointly and severally liable to the company, its shareholders and third parties for including the items required by law in the deed of incorporation, for the accuracy of any statements made therein and the due invest-

ment of the funds paid to cover start-up expenses. Founder liability extends to any persons in whose stead or on whose behalf they may act. The deed of incorporation and the articles of association may also include any agreements or terms that the founding partners or shareholders deem suitable, provided they are neither unlawful nor breach the principles of the type of company involved. The agreements between shareholders not included in the articles of association are not effective in respect of the company.

When an operational start-up is concerned, company operations shall begin on the date of formalisation of the deed of incorporation unless it is indicated otherwise in the articles of association. Yet, the articles of association of the company may not set forth a start-up date prior to the date of formation, except in the event of conversions. There is a presumption of an indefinite duration of the company. The company's financial year shall be understood to end on the thirty-first of December of each year. Nevertheless, in both of the above mentioned cases, the articles of association may indicate otherwise.

The main difference between a limited liability company, a joint stock company and a limited joint-stock partnership is that in the first two companies the capital shall be divided into shares, shall comprise the contributions made by all shareholders, who shall not be held personally liable for company debt, whereas in the last one, the capital also shall be divided into shares, shall comprise the contributions made by all partners, but at least one of whom, as the general partner, shall be held personally liable for company debt. Due to this difference, a limited joint-stock partnership is governed by regulations specifically applicable to this type of company and, in any matters not governed therein, by the provisions set forth for a joint stock companies in the Capital Companies Law.

In a limited liability company, as a general rule, the capital shall be at least three thousand euro and must be denominated in that currency. However, there are special provisions that allow the functioning of the limited liability companies time until the above mentioned minimum capital is reached (Article 4 *bis* of the Capital

Companies Law). In such a case limited liability companies are subject to three rules:

1. An amount at least equal to 20 per cent of the year's profits has to be allocated to the legal reserve (there is no upper limit of possible allocation),
2. Dividends may only be distributed among shareholders after compliance with the requirements laid down by law or the articles of association and only if the company's net equity is not, or as a result of the distribution would not be, under 60 per cent of the minimum legal capital,
3. The yearly sum of the consideration paid to shareholders and directors for performing their duties may not be in excess of 20 per cent of the net equity for the respective year, without prejudice to the remuneration due them as company employees or for professional services commissioned therefrom by the company.

IV. CONTRIBUTIONS

The common thing for all types of the capital companies is that contributions may comprise only goods or rights may be economically appraised. Under no circumstances, work performed or services rendered shall constitute contributions to company capital. Shares created or issued but not backed by a valid contribution to company equity are null and void. Obviously, no shares may be created or issued for a sum lower than their par value. If it is not stipulated otherwise, it is understood that the right of ownership of all contributions is transferred.

Cash contributions may only be denominated in euros. However, if the contribution is made in any other currency, its equivalent value in euros shall be calculated, as stipulated by law. Cash contributions must be substantiated before the notary public legalises the deed of incorporation or an instrument on capital increase, or in a joint stock company, the instruments formalised on the occasion of successive payments. Such substantiation, which shall consist of a document certifying the deposit of the respective funds in the company's favour at a financial institution, shall be attached by the notary public to the deed or instrument. The certificate of payment

expires two months after the date of issue.

Non-cash contributions must be described in the deed of incorporation or an instrument on capital increase, including registry data as appropriate, the value thereof in euros and the numbers of the shares attributed thereto. If the contribution consists of real or movable property or of rights attached thereto, the contributor shall be bound to surrender and disencumber the asset constituting the object of the contribution pursuant to the provisions of the Civil Code³ on bills of sale. The rules laid down in the Commercial Code⁴ on transfer of risk in such transactions shall apply respectively. Should the contribution consist of lender's rights, the contributor is held liable for the legitimacy thereof and the debtor's solvency.

In a joint stock company, non-cash contributions are subject to valuation. Non-cash contributions, irrespective of the nature thereof, made on the occasion of joint stock company formation or capital increases subsequent thereto shall constitute the object of a report prepared by one or several independent professionals. These experts must be duly qualified and appointed to this end, pursuant to the applicable regulations, by the mercantile registrar competent for the place where the company's registered office is located. The report contains a description of the contribution, registry data as appropriate, and the valuation of the contribution and whether it concurs with the par value and, if applicable, the value of the issue premium of the shares issued in exchange therefor. The value attributed to the contribution in the deed of incorporation shall not be higher than the value estimated by the experts.

Experts are held liable by the company, its shareholders and creditors for any damages resulting from the valuation but are exonerated therefrom, if they can provide evidence of having acted with due diligence and pursuant to the standards associated with the task entrusted. The right to file claims in this regard lapses after four years as of the date of the report.

³ Royal Decree of July 24, 1889 by which the Civil Code is published

⁴ Royal Decree of August 22, 1885 by which the Commercial Code is published

There are five situations in which an expert report is not required. Firstly, when the non-cash contribution consists of money market instruments or movable assets listed on an official secondary market or any other regulated market. Such assets are valued at the average weighted trading price on one or various regulated markets during the quarter immediately preceding the date of actual contribution, in accordance with the certification issued by the governing body of the official secondary or regulated market in question. Yet, if such price has been affected by exceptional circumstances that might have significantly modified the value of the assets on the actual date of contribution, the company directors shall file a request for the appointment of an independent expert to prepare a report. Secondly, when the contribution consists of assets other than those mentioned above, whose fair value was determined by an independent professional with the necessary expertise not appointed by the parties concerned, within six months prior to the date of the actual contribution, in accordance with generally accepted rules and principles for the valuation of such assets. If new circumstances that might significantly alter the fair value of the assets on the date of contribution ensue, the company directors must lodge a request for the appointment of an independent expert to prepare a report. If the directors fail to appoint an expert where bound to do so, any shareholder or shareholders representing at least five per cent of the share capital may ask the Mercantile Registry competent for the place where the registered office is located to appoint an expert, at the company's expense, to value the assets involved. The request may be filed up to the date of the actual contribution, provided the shareholders concerned continue to represent at least five per cent of the company's share capital at the time the request is made. Thirdly, when on the occasion of the formation of a new company by way of a merger or spin-off, a report has been drafted by an independent expert on the proposed merger or spin-off. Fourthly, when the share capital is increased to issue new shares to the partners or shareholders of the company taken over or spun off subsequent to the preparation of an independent expert's report on the proposed merger or spin-off. Last but not least, when the share capital is increased to issue new shares to the shareholders of the company that is the object of a takeover bid.

In a joint stock company, the articles of association may reserve special rights of a financial nature to founders and promoters. The overall value of such rights,

irrespective of the nature thereof, may not exceed ten per cent of the net book earnings after accounting for the legal reserve, nor may they be in place for longer than ten years. The articles of association must specify a system for compensation in the event of an early expiry of special rights. These rights may be laid down in registered non-share certificates, whose transferability may be restricted in the articles of association.

V. A SINGLE MEMBER COMPANY

A limited liability company and a joint stock company can be single member companies. There are two situations in which a company may be defined as a single member company. Firstly, a company formed by a sole shareholder. The sole shareholder may be a natural person or a legal person. Secondly, a company formed by two or more shareholders when ownership of all shares is transferred to the sole shareholder. Shares owned by a single member company are deemed to be owned by its sole shareholder.

To maintain the trading safety, the establishment of a single member company, the assumption of such status as a result of the subscription of all shares by only one shareholder, the loss of such status or a change in the identity of the sole shareholder as a result of the transfer of some or all of the shares shall be recorded in a notarial deed entered in the Mercantile Registry. The entry must state the identity of the sole shareholder. Furthermore, whilst a company maintains its single member status, such status shall be expressly recorded in all documentation, correspondence, purchase orders and invoices, as well as in all announcements that must be made pursuant to the legislation or the articles of association. If the single member status is not entered in the Mercantile Registry within six months of the acquisition thereof, the sole shareholder shall be held personally, unlimitedly and jointly and severally liable for any company debt incurred while such situation persists. Once single member company status is registered, the sole shareholder shall not be held accountable

for debts incurred after the registration.

There are special provisions governing single member companies. The sole shareholder exercises the powers reserved to general meetings. Decisions made by a sole shareholder shall be recorded in the minutes signed by the sole shareholder or his or her proxy, and may be implemented and formalised by the shareholder him/herself or by the company's directors. Besides, to avoid any fraud, agreements concluded between the sole shareholder and the company must be recorded in writing or in the form of a document legally required according to the nature thereof, and shall be transcribed into a company ledger that shall be legalised pursuant to regulations governing company books of minutes. The annual report shall contain explicit and individual reference to such agreements, indicating the nature, terms and conditions thereof. For two years after the date of formalisation of the agreements, the sole shareholder shall be held liable by the company for any gains earned either directly or indirectly to the detriment thereof, as a result of such agreements.

In the event of insolvency proceedings against the sole shareholder or the company, any of the agreements referred to in the preceding paragraph that have not been transcribed into the company ledger and are not referenced in the annual report or have been mentioned in a report that has not been filed as required by law shall not be binding on the estate.

VI. NULLITY OF THE COMPANY

Once the company has been registered, it may only be declared null and void due to seven causes. The causes for nullity are: non-concurrence of the effective intent (legally correct) in constitutive act of at least two founding shareholders, where there are several, or by the founding shareholder in a single member company; incapacity of all founding partners or shareholders; failure to include shareholders' contributions in the deed of incorporation; failure to include the company name in the deed of incorporation; failure to include the corporate purpose in the articles of association, or the inclusion of a purpose that is unlawful or incompatible with law or public order; failure to include the amount of the share capital in the articles of asso-

ciation; In a limited liability company, failure to pay up the capital in full; and in a joint stock companies, failure to pay up the legal minimum. It is essential that companies may not be declared to be non-existent, null and void or extinct for reasons other than mentioned above. A ruling declaring the nullity of a company constitutes the first step in liquidation proceedings. Nullity does not affect the validity of any obligations or debt owed by or to the company. In the case of a limited liability company, if it is declared null and void due to the failure to pay up the capital in full, the shareholders are bound to furnish the amount outstanding. In a joint stock company declared null and void and required to honour the obligations undertaken by the company with third parties, the shareholders are required to pay up any sums outstanding.

The influence of moral responsibility on legal responsibility and definition of causation

Daniel Drabarz

Abstract

The tort law and criminal law find causation as sine qua non condition of legal liability. This paper tries to answer the question does causation matter to moral responsibility? In my opinion, moral responsibility influences the concept of causation, since moral blameworthiness is emphasized by causation, and causation enables the acceptability of weighing so-called evil in order to find justification for wrongful actions to be determined. This paper presents and emphasizes the main issues to consider in this debate, endeavors to provide responses for some of them and serves as a starting point for further debate over the issues.

I. INTRODUCTION

Whilst causation is found to be a prerequisite to legal liability, there is the underlying moral issue of whether causation is important to moral responsibility. In essence there are two main ways that causation could be important to moral responsibility. The first is connected with the role that causation takes regarding moral blameworthiness, and the second is connected with the role that causation takes in allowing previous events to be used to justify wrong doings. Here we will be focusing on the first of these. This is in fact an old issue that has come up in all legal systems of both civil and criminal liability.

Regarding criminal law, the main issue is connected with crimes of intent and risk creation or crimes involving a failed attempt to do something. The question then is, should someone who attempts a crime but fails – for example, attempted murder, where the victim escapes or survives – be punished as if the attempt had been suc-

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cessful; or should a crime which created a risk for a third party be punished in the same way, regardless of the actual outcome. For example, if someone does something to endanger the life of another person and they dies, he will be charged for manslaughter; if the person survives, the crime of creating risk was the same and the outcome did not depend on the actions of the perpetrator, so should he also be punished in the same way as if the outcome had been death? The ethics provides an opportunity to solve such cases.

It would be possible to create laws based on causation being sufficient to incur liability, meaning that guilty intent is not necessary for punishment to follow; equally, laws could be created stating that harm is a prerequisite for liability. But in fact, US and UK laws do not follow either of these. The Anglo American model is based on the idea that it is worse to do harm by intentionally causing a risk than it is to just intentionally cause the risk. Traditional rulings suggest that it is twice as bad if harm results from the action or risk taken. Legal theory has constantly challenged this doctrine, suggesting causing harm is irrelevant in assessing the risk that was taken.

II. MORAL LUCK

The moral issue may not be efficiently presented under the concept of moral luck. The axiological and moral problem which deserves a thorough approach is so-called moral luck. The issue of moral luck differs from the traditional approach to moral responsibility stating that the moral responsibility is earned.¹ Both negative and positive moral responsibility cannot be only an issue of luck since the morality would be unfair otherwise. According to this notion, luck decides whether one causes the harm, intends to cause harm, or only risks causing harm, which means that all the variables necessary to realize intentions or risks are not under control. The concept of moral luck under which everybody may bear consequences is better understood from the legal perspective as assigning the blame for results as a general rule.

¹ cf B Williams, *Moral luck. Proceedings of the Aristotelian Society*, (Cambridge University Press 1981) 115-151

First of all, it implies a perplexing presumption regarding the idea of luck. To visualize the idea, consider the situation, where a trade is done with insider information and as a result of the transaction the trader obtains a significant profit. In such circumstances, luck is inherent, since it shall be defined as the issues being out of control like: the electricity running the computers, the decision is made by the trader after a calculation made by a fellow, the actual influence of information on the price, the authenticity of inside information delivered etc. The common positive understanding of the word “luck” is misleading.² Consequently, the moral luck redefines the standard approach. Hence, considering the mentioned trader it may be said that he was lucky making a trade using the insider information, since as a result of his action he made proceeds higher than he expected even though the source of information was not reliable enough. The luck of a given entity is typically defined in relation to its predetermined aims.

From an ontological perspective, the value and influence of moral luck on responsibility is recognized. The notion of moral luck provides an opportunity to observe the increase of responsibility since a trader who earns more is also to a greater degree morally unlucky since his blame seems to be more significant as the investors and the market suffers more as a result of his insider trading. A simplification of this perplexing problem shall be achieved if the luck as the main point of consideration will be replaced by causation. Consequently, the moral blameworthiness is increased by the causation, but the causation creates a framework for an obligation to compensate.³ Hence, the causation is not germane to responsibility.

III. THE ISSUE OF CONTROL

The issue of control delineates the moral responsibility and causation.⁴ Since the general direction of analysis refers to the concept of control the definition of how control is understood shall be provided. Control is defined as the chance to bring about an event when there is no possibility to control each condition required

² cf MS Moore, The independent moral significance of wrongdoing, (1994) *Journal of Contemporary Legal Issues*, 237

³ cf MS Moore, Causation and excuses, (1985) *California Law Review* 73

⁴ cf M Ravizza, *Responsibility and Control*, (Cambridge University Press 1998) 298-350

to the realize that event.⁵ One approach to control represented by the group called “Compatibilists” indicates that control corresponds to a reasonable chance to avoid the occurrence of the result.⁶ In turn in the view of the group called “Incompatibilists” the result is under control only in the case when the choices are causally efficacious and they refer to each factor which prevents or brings about the result.

The concept of control is based on 2 pillars. One of them underlines unfairness of moral blameworthiness and it occurs when it is associated with uncontrollable factors, since in those circumstances moral responsibility is not ascribed to the offender. In order to visualize, that the weather shall be considered, since there is no control over the weather, bad weather should not itself result in a liability. The other pillar is regarding the ability to control the consequences of actions performed. Consider the case in which the moves are based on uncontrollable factors e.g. a trader would like to make a certain profit using insider information and in order to achieve this goal he uses a program to publish this data. He intends to earn money by taking advantage of the asymmetry of information, and by pushing the button he will aggrieve other participants of the market if the information delivered is price-setting, market conditions are favorable, IT systems work properly as usual, nobody stops the trader from doing a trade etc. Hence, the conclusion arises that moral responsibility as a consequence of certain activities is shaped by causation and control over actions. Therefore, a given person can be held liable for under-control actions which are either intentional or by choice, and also for execution of that choice or intention. Nonetheless greater responsibility which exceeds controllable actions is not acceptable.

From the point of view of axiology and moral responsibility it is not necessary to apply only one meaning of the word control in each case. Rather unambiguous meaning of the word control set by incompatibilists' approach allows the formulation of the scope of responsibility with the use of axiology. However, the plausibility of using the science of axiology might be self-defeating. It can be observed that control by the meaning proposed by incompatibilists has an environmental and genetic factor

⁵ cf B. Bishin, Ch. Stone, *Law Language and Ethics*, (Mineola Foundation Press 1972) 520-536

⁶ J. Bishop, *Natural Agency*, (Cambridge University Press 1989) 20-30

influencing the decision making process which provides an opportunity to avoid the responsibility.⁷ Hence the choices, which are not controllable in the sense of being possible to achieve willingly or intentionally or by planned body movement, should be associated with liability limited by the actual results of the actions. It is also observable that the incompatibilists' approach to the definition of "control" varies significantly, but it complements the timeless metaphysical debate regarding free-will and values underlying human actions.

The common phrase used by compatibilists are characterized by the free-will, ability, intention, freedom, the possibility of opposite chain of events than expected. The compatibilists are vying with the incompatibilists' in texts regarding those issues. From the compatibilists' perspective the issue of free-will has limited importance since it is perceived to have a high degree of ambiguity and allows for behaviors which do not comply with the ethics. For incompatibilists, the issue of free-will does not carry weight. Nevertheless, the responsibility for the results is notified and shows the need for cognitive debate over the issue.

One key ethical issue to which attention shall be paid is whether it may be demonstrated that the ethics of a given person influence control over their intentions and the manner or extent of their realization. The constructive debate over this issue provides some conclusion that a lot of non-controllable factors may stop a given person who has made an ethically questionable decision from realizing some evil. The factors obstruct a possibility to cause detriment that a given person decided to provoke. The fortuity which brings a failure in performance and does not indicate obeying the ethical principles and shall not exculpate an actor for an action that he decided to perform.⁸ Those ethics underline that the choice is of higher significance whilst the results are a less important additional aspect. Thus the moral understanding and ethics make it possible to minimize the weight and significance of fortuity (i.e. an equivalent of lack of control). The other key problem under consideration is whether in the light of the control argument the law perceives the difference between

⁷ See FH Bradley, *Appearance and Reality: A metaphysical essay*, (Oxford University Press 1987) 10-40

⁸ cf S Kadish, Foreword: The criminal law and the luck of the draw, (1994) *Journal of Criminal Law and Criminology* 84

the choice and the result. In my opinion, the legal doctrine looks for differences between choices and results by applying the criterion of control.

Luck can be categorized into result luck, constitutive luck, circumstantial luck, planning luck and executional luck.⁹ In a world which is deterministic, a set of non-controllable factors influence the occurrence of an event from the initial stage of thought to the actual execution stage of thought. Such a variety of non-controllable variables describe the concept of luck in theoretical terms.¹⁰ The concept of luck might not provide a workable ethical basis delineating the line which separates the moral responsibility for a given action and moral responsibility for the consequential results of the action.¹¹ The luck seems to be another factor leading to the reduction in the influence of will.

The capacity to be guided by a sense of a reason seems to be one of limited forms of assessing the responsibility and reasonability of an actor's will and actions. Such a value characterizes most adult individuals and suggests a satisfactory way of conduct and also complements the assessment from an ethical perspective. This point of view seems to provide a proper justification to draw the necessary line categorizing human actions whereby an action can only be guided by the common sense of reason and the individual's sense of reason (both do not always corresponds with ethics). Nonetheless I believe that it would be necessary to find a sound argument to hold a given person morally responsible for actions only whilst leaving responsibility for results aside. Regarding the above categorization, there is a sound justification to underline the distinction between constitutive luck and result luck.

The assumption exists under which the position regarding the control over choice or will seems to be immune to luck. This means that it is morally and qualitatively different from the luck of control regarding a given environment or heredity that is the variety of situations in which we may find ourselves and the typical results and consequences of our decisions. The causation may not carry weight from the ethical point of view when we contend with the possible alternatives or the casual influences

⁹ cf L Alexander, *Crime and Culpability*, (1994) *Journal of Contemporary legal issues* 5

¹⁰ See M Zimmerman, *Taking the luck more seriously*, (2012) *Journal of Philosophy* 99

¹¹ See S Wolf, *The moral of moral luck*, (2000) *Philosophical Exchange* 3

after comparing them with those we trigger. This is ethically questionable because the decision regarding several alternatives are upon us and the ethical principles should be obeyed. There is always significantly more control over the decisions and choices than over circumstances. Consequently, an individual complying with the code of ethics cannot foresee with the scope and extent of the adverse effects of the ethically acceptable action. Thus so-called “bad luck” prior to a choice and the bad luck following a given choice does not have an impact on culpability.

IV. REASON-RESPONSIVENESS

This issue of control shall be analyzed in the light of reason-responsiveness.¹² Reason-responsiveness means that choices and actions may be supported by reason and not otherwise. This is another evident way to conceptualize how responsibility is influenced by ethics and the concept of control. By the use of criteria of reason it categorizes the moral responsibility for choices which can be controlled, but where the results of those choice are out of the control. Consider the event where an individual A has the intention to murder another individual B. The individual A neatly loads the pistol then one more time verifies that all the bullets are in the right place. Then the potential murderer inspects the mechanisms of the gun and also makes sure that the potential victim will not receive medical treatment or any other help. Then the murderer eliminates the risk of inference by any animal or other distracting thing. In order to be sure that his attempt will be successful the murderer puts the gun to the victim’s head and shoots him dead. In that common view the mentioned murderer is the individual controlling the chain of events. The control issue according to compatibilists is apparently different. The prospective victim’s death is not a response to a certain reason whereas choosing the decision to kill the victim does respond to certain reason.¹³ Applying the other way of thinking to decisions and choices, despite the fact that the murderer is able to control the closest action he has no power to control the great range of possible disrupters and preventers during the execution

¹² See MS Moore, The independent moral significance of wrongdoing, (1994) *Journal of Contemporary Legal Issues* 237

¹³ MS Moore, *Placing the blame: a general theory of the criminal law*, (Oxford Clarendon Press 2007) 120-140

of his decisions and choices. The analysis should be focused further on the extent of murderer's control over his choices i.e. the death of the victim. The murderer's decisions and choices are supposed to be reason-responsive i.e. there are determined outcomes of the processes of murderer's reasoning underlying his immoral action. The reasoning process of a murderer results in 3 responses: the murderer's choice to kill; the movement of the parts of the body pulling the trigger and intended victims death.¹⁴

Reason-responsiveness implies the need to include direct causation criterion. Without causation the issue of making a choice would not be associated with making other choices. The movement of the finger which triggers the shooting mechanism of the gun is made after primarily making the decision to kill; hence the victim is killed by moving the finger. The standard suggestion that a thing or an event is under control only when it is directly caused by a given person. It provides too narrow a definition of control, and does not include the influence of other actors.

The notion of reason-responsiveness has its disadvantages since following that line of thinking those choices and decisions are only to a certain extent controllable; however, the limited ability to control them is caused by performing another activity before. By way of example a person drinking alcohol may be more brave or vulnerable to provocation and his actions are not reasonable. Similarly, the routine of repeating thoughts about hating another person may have similar negative impact especially when a person is under influence of stimulants etc. This seems to be relevant to the ability to control the decision to kill in the desired manner and the scope of control of the method or person by which the victim is murdered. Causation helps to make that person liable for their actions whilst the ethics as result of luck of reason would try to minimize their culpability.¹⁵ Reason-Responsiveness may not be an adequate notion regarding the control since it expects direct causation.

So how can we reasonably draw a line and put all of these events in the same category? Note, however, that control cannot differentiate choices from the results,

¹⁴ cf D Enoch, A Marmor, The case against moral luck, (2007) *Law and Philosophy* 26 400-410

¹⁵ J Brand-Ballard, Moral emotions and culpability for resultant harm, (2011) *Rutgers Law Journal* 42 320-330

so we cannot conclude that causation is not important for moral responsibility. In fact all we have shown is that the arguments on both sides are weak, and we have not shown that lack of control means that causing harm increases moral responsibility.¹⁶ So let's try a thought experiment. Common experience tells us that if we do harm we tend to feel guiltier than if we take the same action or risk but escape from causing harm. For example, we would feel guiltier when killing a child while drunk driving, than if we drive drunk but do not kill a child as there is no child around. The action and risk is the same but the result is different. Also in a near miss situation we would likely feel some guilt, but less than when actually causing harm, and also in this case the predominant feeling may be that of relief.¹⁷

One argument for us feeling less guilty in these circumstances is that we actually are less guilty. In other words, actually causing harm increases our guilt, even when acting or risking in the same way. Some may argue that feelings are not a basis for such a philosophical argument, but how can we evaluate moral responsibility without considering emotions. One counter argument is that if we cause harm but not at our own fault we also have a deep feeling of regret (as opposed to guilt). When we are at fault and we cause harm, the regret and guilt combine to give an enhanced sense of guilt. Taking this further, the feeling of regret in such circumstances is personal (as opposed to general regret we may feel when some harm comes to someone without our involvement), and as such may lead us to virtuously take even more responsibility than we actually should. To defend the original argument, guilt and regret are two distinct emotions, and at times when we culpably cause harm to others it is indeed the guilt that eats away at us, not regret. We judge ourselves as being to blame, and the emotion that corresponds to this is guilt. Even if we consider other people who performed similar actions like us that did not result in harm to a third party, thus suggesting that they are just as guilty and we are in fact just unlucky, the feeling of guilt does not recede. It was our culpable actions that resulted in the harm and for this we really are and really feel guilty.

¹⁶ See D Domskey, *There is no door: finally solving the problem of moral luck*, (2004) *Journal of Philosophy* 99

¹⁷ H Morris, *On Guilt and Innocence*, (University of California Press 1976) 501-505

V. CONCLUSION

In summary, when our own actions result in harm to others we feel more guilt than when the same action results in no harm, or when it cannot reasonably be assessed as our fault. This is the way in which causation matters from a moral perspective. Thus we can reasonably infer that in cases of criminal law, causation should be connected to liability in this way. Causation matters in criminal law. Causation is complemented by ethics since the awareness of immoral behavior makes the actor morally liable to the greater extent. Ethics links the desire of someone's wrongdoing with the choice to do wrong and underlines that both approaches are not acceptable. And also we see that the causation is intuitively connected to moral liability since feelings of guilt resulting.

The Impact of European Union Regulations on Development Assistance: Comparison between the United States and Polish Regulations Concerning Official Development Assistance

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Abstract

This article is a comparison of two donation systems of Official Development Assistance (ODA). The United States and Poland are countries which officially use ODA as one of foreign policy instruments. Essay presents the short story of shaping the modern systems of donation of both countries. The article describes the changes which can be observed as the Polish donation system is influenced by EU's regulations which appear to enable and inspire using existing legal frames in the way complying with modern trends in ODA.

I. INTRODUCTION

According to the title, the main purpose of this essay is to compare the donation system of Official Development Assistance (ODA) of United States and of Poland. There are two reasons which stand behind choosing these two countries: the first one is the fact that it concerns both the United States and Poland - the ODA as one of foreign policy instruments. This attitude determines approach towards the regulations concerning the development policy. The second reason is the possibility of comparing the system of development assistance built on bilateral aid (which in the United States is 84% of ODA),¹ in which the aims of foreign policy are easier to be successfully achieved with the system in which the European Union regulations grow to be one of the most important factors shaping the policy regarding develop-

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¹Ewa Latoszek, Magdalena Proczek (eds.), *Polityka rozwojowa. Rola organizacji międzynarodowych w zwalczaniu ubóstwa na świecie* (Warsaw 2010) 235

ment assistance. The tension between the development policy of the community, its regulations, and the aims of the foreign policy of Poland is an interesting example of the difficulties caused by convergence of legal systems.

The first part of the comparison presents the legal sources, international as well as internal acts of the development assistance of the United States and Poland. The second part of the essay is focused on the influence of the European Union law regarding development policy on the Polish system of donating ODA. The last chapter, which is the summary of the article, describes more practical dimension of the law frames on development assistance of U.S. and Poland. I will try to present the impact of the regulations analysed in the first and second part of the essay on the actions, which are being held by the United States and Poland as the form of implementation of the development policy in the foreign policy of these countries. In the essay, I would argue that the impact of the European Law on development policy of Poland stimulates the shift from using ODA as an instrument of foreign policy towards fulfilling international agreements concerning the regulations of donation of development assistance.

II. LEGAL FRAMES OF DEVELOPMENT POLICY OF THE UNITED STATES AND POLAND

When analysing the system of development assistance of the United States, we should not omit the fact, that the history of development assistance in its modern form begins with the Marshall plan. As Paweł Bagiński notices, the success of the European Recovery Program caused an optimistic approach towards the possibilities held by development assistance and was one of the factors which reasons for the insensitivity of actions in this area in 1950s.² Moreover, soon after the *European Recovery Act* (1948) the first act that officially pertained to assistance for developing coun-

²See Paweł Bagiński, Katarzyna Czaplicka, Jan Szczyciński (eds), *Międzynarodowa współpraca na rzecz rozwoju* (Warsaw 2009) 56-57

tries as one of the aims of the United States policy was achieved: *the Act for International Development* (1950).³ *Act for International Development* was meant to create the legal basis for the Point Four of President Truman's inaugural address (1949), which contained the necessity of aiding the development of economically underdeveloped areas by making available technical resources and, on a cooperative basis, fostering capital investment in them.⁴

From this point on, the process of creating institutions responsible for the implementation development assistance aims begins. It must not be forgotten, that in 1950's the United States were not only the biggest donor of development aid, but also the precursor of implementing juridical as well as institutional solutions for this area of international relations. Therefore, the creation of the Mutual Security Agency (created through the transformation of the Economic Cooperation Agency (ECA) which administered the Marshall Plan aid in 1951)⁵, Foreign Operations Administration (1953), International Cooperation Administration (1954) and Development Loan Fund (1957) should be seen as steps in the process of finding the proper way of implementing the regulations included in *the Act for International Development*.

As the mentioned institutions did not fulfil the expectations which lay behind their creation, the new administration of J. F. Kennedy began the reform of the development policy of the United States. In 1961, under the *Foreign Assistance Act*, the development assistance donated by the U.S., as well as the institutions which were supposed to participate in realization of the program was thoroughly reconstructed. As part of the reform, the U.S. Agency for International Development was created and it has remained one of the most important actors regarding governance of the U.S. development assistance to date.

However, it is in fact the one and only element of Kennedy's plan which the administrations of the subsequent Presidents did not modify or try to modify. This mechanism, characteristic of the regulations on development assistance in the United States, is illustrated by Andrzej Rasiniak with the example of *the Foreign Assistance Act*

3Helmut Führer, *The Story of Official Development Assistance. A History of the Development Assistance Committee and the Development Co-operation Directorate in Dates, Names and Figures* (Paris 1996) 5

4See Committee on Foreign Affairs, *Point Four. Background and Program (International Technical Cooperation. Act of 1949)* <http://pdf.usaid.gov/pdf_docs/PCAAC280.pdf> accessed 27 February 2015

5See Helmut Führer (n 3) 6

which, in accordance with the changes proposed by the administration of G. H. W. Bush, was meant to grow within twenty years from a short document to an almost five hundred page long act⁶. Due to the political conflict about the power of the executive in the area of the development policy, these changes were not finally implemented, nor were the changes proposed by the administration of Bill Clinton in 1994 (*Peace, Prosperity, and Democracy Act*).

Great changes in this area were implemented by the administration of G. W. Bush after the attack on the World Trade Center. In 2002, development became officially one of the three pillars of the National Security Strategy⁷ (repeated in 2006, 2010 and 2015)⁸. *Presidential Policy Directive on Global Development*, which was a document signed by Barack Obama on the 22nd of September 2010, had a similar function for development assistance. According to this document, the development policy of the United States should from that moment be based on formulating a U.S. *Global Development Strategy* for approval by the President every four years.⁹ A radical shift which should be noted regarding *Presidential Policy Directive...* is the suggestion to turn to multilateral development assistance, for example proposals concerning Global Food Security (Feed the Future, program presented in 2009 on G20 summit in London), as well as idea of continuation of the Global Health Initiative (built on the foundation laid by G. W. Bush through the creation of the President's Emergency Program for AIDS Relief - PEPFAR) and the Global Climate Change Initiative.

As it was mentioned in the introduction, the U.S. development assistance continues to be heavily focused on the bilateral type of cooperation. Due to this fact, the proposal made by Obama in London was not typical of the development policy of the U.S. This aspect should lead us to another context in which the changes in the development policy should be interpreted. The 21st century seems to be the time of

6Ewa Latoszek, Magdalena Proczek (eds.) (n 1) 216

7Curt Turnhoff, Mariano Leonardo Lawson, *Foreign Aid: An Introduction to U.S. Programs and Policy*, (Washington 2012) 1 <<http://www.fpc.state.gov/documents/organization/157097.pdf>> accessed 27 February 2015

8*Fact Sheet: The 2015 National Security Strategy* (Washington 2015) <<http://www.whitehouse.gov/the-press-office/2015/02/06/fact-sheet-2015-national-security-strategy>> accessed 27 February 2015

9*Fact Sheet: U.S. Global Development Policy* (Washington 2010) 6 <<http://www.fas.org/irp/offdocs/ppd/global-dev.pdf>> accessed 27 February 2015

significant changes in this area of international relations and in the attitude towards development assistance as an instrument of foreign policy. Not only the phenomenon of emerging donors (countries which used to be rather beneficiaries of development assistance, such as China, India or Brazil, which enter nowadays the group of donors) but also the focus on multilateral cooperation in this area should be noticed while considering the U.S. development policy.

This shift is marked by summits called the High Level Forum of Aid Effectiveness, which took place every three years between 2003 and 2011 and whose participants were not only donor and beneficiaries countries, but also organizations whose activity focuses on development assistance issues. Even though the documents which are the effects of the series of the High Level Forums do not have binding force, the demands which were formulated during the summits in Rome (2003),¹⁰ Paris (2005) and Accra (2008)¹¹ and Pusan (2011)¹² play an important role as soft law. The statement¹³ adopted by the Parliamentary Meeting on the Occasion on the First High-Level Meeting of the Global Partnership for Effective Development Cooperation which was held in 2014 in Mexico City notes the continuity of the process began with the High Level Forums. The ideas of *alignment*, understood as treating development assistance as an instrument which should be complimentary to the strategies which are being implemented by the potential beneficiaries, attitude in which managing the results should be the rule according to which development assistance would be organized or *mutual accountability*, as co-responsibility for the projects, gained strong position in the global discourse on development policy.

When comparing the development policy of Poland to that of the U.S., one should not forget the fact that the U.S. has been donating donor country, since birth of the idea of official development assistance. In contrast, before 2013, Poland did not become a member of the Development Assistance Committee, the body of Or-

10 *Rome Declaration on Harmonization*, <<http://www.oecd.org/dac/effectiveness/31451637.pdf>> accessed 28 February 2015

11 *The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action* <<http://www.oecd.org/development/effectiveness/34428351.pdf>> accessed 28 February 2015

12 *Busan Partnership for Effective Development Co-Operation* <<http://www.oecd.org/dac/effectiveness/49650173.pdf>> accessed 28 February 2015

13 *Statement of Parliamentary Meeting on the Occasion on the First High-Level Meeting of the GPEDC* (Mexico City 2014) <<http://www.ipu.org/splz-e/mexico14/statement.pdf>> accessed 28 February 2015

ganization of Economic Co-Operation and Development, which unites the countries which are the most financially involved in development assistance. Even though Poland declared an increase of funds directed to beneficiary countries to 0.17% GNI by 2010 and 0.33% GNI by 2015¹⁴ and, eventually, reached the level of 0.1% GNI in 2013 due to the fact that the world crisis caused common difficulties among the donating countries to fulfil their previous declarations, the contribution of Poland allowed it to join DAC.

Regarding the sources of Polish development assistance policy, the most important legislative act is *Ustawa o wspólnym rozwoju (Development Cooperation Act)*¹⁵ of 16th September 2011. The first article of the Act should direct one's attention to the fact that Polish development assistance is allocated to the purposes laid down in the international treaties that bind Poland. This fact should be remembered in the context of the impact of the European Union law on the Polish system of donating ODA which is analysed in second chapter of this essay. The Act also created the framework for the achievement of the objectives of the Polish development assistance: it assumes publishing programme which describes plans to be executed within a relevant period, every four years. Minister of Foreign Affairs is responsible for the development of the programme, but it needs to be approved by the Council of Ministers of Poland in the form of a resolution.

This solution seems to be similar to the abovementioned U.S. *Global Development Strategy*. However, for the years 2012-2016, no separate plan for development assistance has been created and, therefore, Polish actions in this area were based on the *Priorities of Polish Foreign Policy for 2012-2016 (Priorytety polskiej polityki zagranicznej 2012-2016)*.¹⁶ In this context, one should pay attention to the fact that, since the announcement that a *Global Development Strategy* would be drawn up, the document has not been prepared. Although USAID programmes, including actions taken up in each of the beneficiary countries are based on four-year plans, there is no one docu-

14Ewa Latoszek (ed), *Pomoc rozwojowa dla krajów rozwijających się na przełomie XX i XXI wieku*, (Warsaw 2010) 160

15Ustawa z dnia 16 września 2011 o wspólnym rozwoju
<<http://isap.sejm.gov.pl/DetailsServlet?id=WDU20112341386>> accessed 28 February 2015

16Priorytety polskiej polityki zagranicznej (Warszawa 2012) <<http://www.msz.gov.pl/resource/aa1c4aec-a52f-45a7-96e5-06658e73bb4e:JCR>> accessed 1 March 2015

ment which would fulfil the intentions standing behind the declaration to create a *Global Development Strategy*. It seems that, as the Polish programme for the development assistance has been limited to one of the priorities of foreign policy, the U.S. regulations are focused on specific actions, without providing a wider framework for USAID actions.

III. INFLUENCE OF THE EUROPEAN UNION LAW ON THE POLISH SYSTEM OF DONATING ODA

In this context, the impact of the European Union law on the Polish system of donating ODA should be considered as an important factor minimizing the negative aspects which are the results of the underdeveloped regulation in the country's development assistance policy. It should be noted that, since the beginning of the European integration, the elements of development assistance remained a part of the process. The Conventions from Yaoundé (1963, 1969) and Lomé (1975, 1979, 1984, 1989) served the purpose of regulating relations between the member states and the countries in Africa, mainly created by decolonization. The Treaty on European Union officially implemented the policy of European Union in cooperation for the development to the European law.¹⁷ The most important step in this area of integration was the first strategy of development policy implemented in the form of the common statement of the Council and the Commission on 10th November 2000. From this point on, the main aim of the European policy on development assistance has been reduction of poverty.

The next huge step in the European development policy is the *European Consensus on Development* (2006).¹⁸ That act contains the common aims, values and rules of development cooperation. Accordingly, the development assistance of the member states, as well as of EU institutions (European Development Fund), complies with

¹⁷See Paweł Bagiński, *Europejska Polityka Rozwojowa. Organizacja pomocy Unii Europejskiej dla krajów rozwijających się* (Warszawa 2009) 65

¹⁸*European Consensus on Development* (Brussels 2006) <<http://enpi-programming.eu/files/wcm/dmdocuments/EU-consensus-development.pdf>> accessed 1 March 2015

rules such as *ownership*, *partnership* or *mutual accountability*, which are the axioms of modern development assistance. This mechanism of institutionalization of the abovementioned rules should be seen as the qualitative dimension of the impact of the European Union law on development assistance. Nevertheless, EU regulations also have a quantitative dimension.

The European Union's involvement in development assistance reflects the dichotomised character of the role played by this actor: not only does influence the policy of the member states, but also it takes its own actions in this area of international politics. What is more, the European Union is the greatest donor of multilateral development assistance according to the OECD report (36% of the funds donated under multilateral assistance between 2006 and 2010).¹⁹ Due to this fact, which has positive influence on the effectiveness of donated ODA, as well as to the mechanism of strengthening the obligation to increase the donated amount,²⁰ the European Union development policy is doubtlessly an important factor changing the structure of development assistance donations. The last chapter of the article presents the *practica*

IV. PUTTING THEORY INTO PRACTICE

In this article I argue that European Union regulations on development policy are the reason for the limitation of using development assistance as a tool of foreign policy. When comparing the U.S. and Poland, first of all, it is worth noting that the structure of assistance of these two countries is reversed. 84% of the US aid is bilateral cooperation. For Poland, the proportions are PLN 1 059 968 598.16 of

¹⁹Development Assistance Committee, *Multilateral Aid Report* <[http://www.oecd.org/dac/aid-architecture/DCD_DAC\(2012\)33_FINAL.pdf](http://www.oecd.org/dac/aid-architecture/DCD_DAC(2012)33_FINAL.pdf)> accessed 1 March 2015

²⁰See *European Consensus on Development* (Brussels 2006) 10 <<http://enpi-programming.eu/files/wcm/dmdocuments/EU-consensus-development.pdf>> accessed 1 March 2015

multilateral assistance to PLN 362 779 932.86 of bilateral aid.²¹ Taking into consideration the fact that spending of the funds on bilateral assistance is entirely under the control of the donating country, it is understandable that this model of development aid is more efficient as an instrument of a country's foreign policy. 30% of Polish bilateral aid (PLN 110 454 000.71) is addressed to the countries of the Eastern Partnership.

This percentage shows the mechanism of using development assistance as part of the foreign policy towards specified regions. Considering the fact, that in this period the highest assistance from EU institutions was donated to Turkey, Serbia and Morocco²² the impact of the common regulations regarding cooperation on development is clearly visible. However, the biggest European Union development assistance flows are donated to African countries. As the Polish bilateral development assistance is not focused on this region, the impact of the shift from development assistance as a tool of foreign policy to the aim of reducing poverty in global perspective. In the case of reduction of proportion of bilateral assistance in donated ODA, the political dimension becomes less powerful. On the other hand, the bigger proportion of bilateral assistance – the more important the role played by the foreign policy in donating ODA. In this context, it should be noted that the highest amount of U.S. aid is donated to Afghanistan.

A more important factor of the impact of EU regulations on the development policy of the Member States is the quality of the terms on which the assistance is donated. The abovementioned *ownership* and *partnership* are the key rules of common policy of development, which are not recognized by bilateral assistance donated by the U.S. Even though Poland does not donate bilateral assistance in the form of direct budget support, which is one of the methods preferred by EU institutions, the aid is donated, for example, in the form of small grants, which are compatible with the modern trends of rules improving the effectiveness of donations.

21Ministerstwo Spraw Zagarnicznych RP. Departament Współpracy Rozwojowej, *Polska współpraca na rzecz rozwoju. Raport roczny 2012* (Warsaw 2013) 78-95 <<http://www.msz.gov.pl/resource/753f303b-1a4e-417f-b63b-2e30767aafad:JCR>> accessed 1 March 2015

22Data of OECD: <https://public.tableausoftware.com/views/AidAtAGlance/DACmembers?:embed=y&:display_count=no&:showVizHome=no#1> accessed 1 March 2015

The abovementioned aspects of impact of the EU regulations on the Polish system of donating development assistance present the advantages of the common development policy. It minimizes the usage of ODA as a tool of foreign policy and has a positive influence on the effectiveness of donated funds.²³ This should be considered even more interesting regarding the fact that the legal frames of the internal law concerning development assistance are similar in both examples which have been described above.

²³It is worth to remind that progress of Poland in the area of development cooperation caused the decision of DAC to accept Poland as the member of the Committee