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THE LIBYAN UPRISING AND THE RIGHT OF REVOLUTION IN INTERNATIONAL LAW

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Summary: Despite the ubiquitous coverage of the Libyan revolution throughout the last six months, very little has been said regarding the legal foundations for the rebels’ actions. Within the international legal framework, it must be asked whether the Libyan people even had a legal right in the first place to overthrow the Gaddafi regime. In fact, the existence of a right to rebel under international law is very much an unsettled matter. Among the sources of international law, a right to rebel is not enumerated in any of the principal international instruments. In truth, the only significant mention of the right is a passing but ambiguous reference in the preamble of the Universal Declaration of Human Rights. A customary right of revolution is similarly absent, as many nations criminalize treason and other insurrectionary activities. Instead, if such a right exists in international law, it must derive from the well-enshrined right of self-determination. This right would thus constitute an additional exception to international law’s general prohibition on the use force, standing alongside self-defense and Security Council peace enforcement. Yet establishing a right of revolution would mark a significant departure from these other exemptions. In essence, the right of revolution represents an allowance for non-state actors to resort to force unilaterally for the protection of human rights. For this very reason, contemporary international law likely does not recognize a popular right to revolt. In light of international law’s firm restrictions on lawful uses of force, there is no evidence that the law currently acknowledges a novel exception for the individual enforcement of human rights. Thus, in the absence of a change in the law, the proper legal remedy for the Libyan people was not rebellion but rather an appeal to the international community.

Keywords: International law, revolution, right of revolution, uprising, Libya

1 Candidate for Juris Doctor, University of Notre Dame Law School, 2012; B.A., History, Georgetown University, 2008. Many thanks to Professor Mary Ellen O’Connell for all her help in preparing this Note.
Introduction

The civil unrest that spread throughout much of North Africa and the Middle East in the early weeks of 2011 quickly deteriorated into horrific violence with the onset of civil war in Libya in late February. Reports of heavy casualties sustained by protestors saturated the airwaves as Libyan leader Colonel Muammar Muhammad al-Gaddafi ordered heavy artillery and aerial strikes to combat the uprising. The protestors soon responded with force of their own, making initial territorial advances across the country. By mid-March, the international community decided to intervene by imposing a Security Council-approved no-fly zone. Despite months of stagnation due to the inability of the disorganized rebels to successfully oust Gaddafi, recent months have witnessed the liberation of Libya and the death of its former dictator. Though much of the academic focus on Libya has concentrated on the validity of the international intervention, the question remains whether the Libyan rebels even had the legal right to resort to force in the first place under current international law.

In fact, the legality of revolution within international law is quite uncertain. A right to rebel is not present in any major international treaty and establishing a customary rule would be difficult, if not impossible. Rather, the right of revolution, if it exists at all, must stand as a means of enforcing the recognized right of self-determination.

This Note will examine the asserted right of revolution and its application to Libya. Part I presents an in-depth analysis of the modern Libyan state and the circumstances that led to the revolution. Part II discusses the location of the right within international law, presenting a historical analysis of rebellion followed by a contemporary approach that accepts revolution as a complement to the right of self-determination. Next, Part III evaluates the case for and against

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6 The scope of this Note is limited to evaluating whether the Libyan rebels exercised a recognized right to rebel under current international law. In the case that an actual right is not found in the present law, this Note does not speak to the normative claim that international law should recognize a right of revolution.

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the existence of such a right, weighing the arguments in light of the purposes of the international system, wars of liberation, Just War Theory, and the doctrine of humanitarian intervention. In sum, because the current international legal framework does not acknowledge an exception to the general prohibition on the use of force for the enforcement of human rights in the revolutionary context, there is likely no right of revolution in international law today. Finally, Part IV applies the right of revolution, assuming that it did exist, to the situation in Libya, concluding that the Libyan rebels may not have a sufficient case to sustain their decision to use force under Just War Theory.

I. The Revolution in Libya

A. The Birth of Modern Libya and the Rise of Gaddafi

Born out of tumultuous circumstances, the modern state of Libya can trace its origins to the 1969 coup d’etat that placed Colonel Muammar Gaddafi in power. Following independence from Italian colonial rule after World War II, Libya became a constitutional monarchy under King Idris al-Sanusi in 1951. Yet the accumulation of oil wealth in the hands of the more privileged members of Libyan society, paired with the growth of Arab nationalism in the region, soon aroused the ire of the populace. This resentment came to a head in 1969 when a group of military officers led by Colonel Muammar al-Gaddafi successfully staged a coup against King Idrus, overthrowing the monarchy and installing Libya’s current political system.

Known as the Third Universal Theory according to his manifesto The Green Book, Gaddafi’s regime represented an amalgamation of socialism and Islamic practices particular to Libya’s tribal makeup. This theory stressed a direct democratic participation by the people to implement a political system founded on social justice and Arab unity. Although he technically held no leadership role, Gaddafi served as the de facto head of state as the “Brother Leader and Guide of the Revolution.”

Gaddafi’s administration, however, had been marked by the suppression of dissent and a disregard for human rights. In 1973, Gaddafi delivered his “Five-Point Address” that, among other things, announced the imposition of Sharia

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9 See Background Note: Libya, U.S. DEP’T St., http://www.state.gov/r/pa/ei/bgn/5425.htm (last visited Apr. 3, 2011).
10 See The World Factbook, supra note 6.
11 See id.
12 See Background Note: Libya, supra note 8.
law and a program for “purging the country of the politically sick.”\textsuperscript{13} Declaring a cultural revolution for the newly christened Great Socialist People’s Libyan Arab Jamahiriya, the Gaddafi government sought to quash its opposition, often doing so in the form of executions or assassinations.\textsuperscript{14} Fearing possible threats from both his own military and emerging Islamic fundamentalist groups, Gaddafi initiated a campaign to uproot potential coups in the late 1980s and early 1990s. This in turn led to massive arrests and allegations of torture and other abuses.\textsuperscript{15} Libyan law also imposed severe restrictions on freedom of expression and association, even going so far as to ban all groups who opposed the ideologies of the 1969 revolution.\textsuperscript{16}

More recently, in June of 1996 a mass killing of detainees took place at Abu Salim prison, a high security detention center in Tripoli. According to eyewitnesses, the massacre began in response to an uprising by prisoners demanding an improvement in living conditions.\textsuperscript{17} Although the precise number of killed is not known, several human rights organizations including Amnesty International and Human Rights Watch have estimated the figure to be over 1,200.\textsuperscript{18} Despite initial denials, Gaddafi himself eventually acknowledged that killings took place at Abu Salim.\textsuperscript{19} Nevertheless, the failure by the government to properly address the needs of the affected families resulted in widespread criticism and vocal protests.\textsuperscript{20} Accordingly, the Abu Salim massacre, along with the Gaddafi regime’s history of systematic human rights violations, set the stage for the protests that surged throughout many areas of Libya in February 2011.

\textbf{B. Revolution}

On December 17, 2010, Mohamed Bouazizi, a Tunisian fruit vendor, set himself on fire in protest against the harassment he had experienced throughout his life from local police.\textsuperscript{21} Remarkably, this event sparked a wave of upheaval that would fundamentally alter the political and social order of North Africa and the

\begin{thebibliography}{99}
\bibitem{id} See id.
\bibitem{BackgroundNoteLibya} See Background Note: Libya, supra note 8.
\bibitem{Investigation} See \textit{Investigation, supra note 17}.
\bibitem{Truth} See \textit{Truth, supra note 16}.
\end{thebibliography}
Middle East over the coming months.\textsuperscript{22} Responding to rising food prices, high unemployment, and a historical lack of fundamental political freedoms, Tunisian citizens successfully expelled President Zine El Abidine Ali from the country on January 14, 2011.\textsuperscript{23} Protestors in Egypt soon followed suit, demanding the removal of President Hosni Mubarak from office after years of corruption, human rights abuses, rigged elections, and poor economic conditions.\textsuperscript{24} With the resignation of President Mubarak on February 11, the revolutionary momentum turned to Libya.

Not surprisingly, Libya’s deplorable human rights situation under the Gaddafi regime provided a firm foundation for a popular revolt. On February 15, Libyan authorities arrested Fathi Terbil, a lawyer representing the families of Abu Salim victims.\textsuperscript{25} As hundreds of protestors gathered outside the detention center in Benghazi to demand Terbil’s release, Libyan officials used tear gas and batons to break up the crowd.\textsuperscript{26} However, the unrest in Benghazi continued into the following day as protestors began hurling stones and homemade incendiary devices at police attempting to disperse the rally with rubber bullets and water cannons.\textsuperscript{27} The situation soon unraveled as protestors set fire to cars and a police headquarters.\textsuperscript{28} Utilizing online social networking sites, Libyans across the country called for a “Day of Rage” on February 17.\textsuperscript{29}

In fact, February 17 stood as powerful reminder to many Libyans of Gaddafi’s heavy-handed approach in dealing with dissent. On February 17, 2006, an anti-Gaddafi protest in Benghazi turned deadly when security forces forcefully intervened to disperse the crowd.\textsuperscript{30} When activists tried to organize a demonstration to mark the one-year anniversary of the protests, the regime responded with mass arrests and convictions that initially ranged from six to twenty-five years.\textsuperscript{31}

\begin{thebibliography}{99}
\bibitem{id} See id.
\bibitem{Second_City} See id.
\bibitem{Libya_Protests: Second_City_Benghazi_Hit_by_Violence} See \textit{Libya Protests: Second City Benghazi Hit by Violence}, \textsc{BBC News}, Feb. 16, 2011, available at \url{http://www.bbc.co.uk/news/world-africa-12477275} [hereinafter \textit{Second City}].
\bibitem{Second_City, supra note 26} See \textit{Second City}, supra note 26.
\bibitem{Death_Toll_Hits_19_in_Libya’s “Day of Rage”} See \textit{Death Toll Hits 19 in Libya’s “Day of Rage”}, \textsc{Al Arabiya News Channel}, Feb. 17, 2011, available at \url{http://www.alarabiya.net/articles/2011/02/17/138021.html}.
\end{thebibliography}
With these memories fresh in many Libyan minds, anti-government groups rose up in several cities across the country on February 17, 2011. Activists set government buildings ablaze in Zentan while security forces opened fire on a rally in al-Bayda. In Benghazi, government efforts to control the uprisings left approximately fourteen people dead. Eyewitnesses reported that the government released thirty prisoners from a local prison to aid in the repression of the protestors. Others claimed that security forces employed helicopters and snipers to attack demonstrators. Government supporters also staged their own counter-protests, assembling in pro-Gaddafi strongholds like Tripoli.

The collective death toll soon escalated into the hundreds as police and security officials struggled to suppress the revolts. Allegations soon emerged that Gaddafi was hiring mercenaries from neighboring countries to support his containment efforts. In addition, the government restricted access to certain websites and cut off electricity in many areas. On the ground, government forces persisted in resorting to deadly force to quell the unrest. In Benghazi, Libyan troops fired at protestors with machine guns, mortars, helicopter gunships, and other “large-calibre weapons.” Anti-government efforts in Tripoli met with tear gas, live ammunition, and eventually even warplanes. On February 20, Gaddafi’s son Saif al-Islam warned of an impending civil war, maintaining that the government would fight to “the last man, the last woman, the last bullet” to defend itself.
As events in Libya quickly spun out of control, the international community condemned Gaddafi for targeting his people. Human rights organizations promptly demanded that Gaddafi be held accountable for his actions.\(^{43}\) On March 1, the General Assembly by consensus suspended Libya from its position on the United Nations Human Rights Council.\(^{44}\) Likewise, the African Court on Human and Peoples’ Rights on March 25 issued a decision ordering the government of Libya to cease any actions in violation of international human rights law.\(^{45}\) The Security Council eventually weighed in on the matter, issuing Resolution 1970 that both deplored “the gross and systematic violation of human rights, including the repression of peaceful demonstrators”\(^{46}\) and referred Libya to the International Criminal Court (ICC) for possible crimes against humanity.\(^{47}\)

Even many of those acting on behalf of the state had compunctions about the manner in which Gaddafi was responding to the protests. A number of Libya’s diplomats abroad denounced the government’s actions and repudiated their allegiance to the Gaddafi regime, including Libya’s ambassador to the United States as well the country’s delegation to the United Nations.\(^{48}\) Within Libya itself, factions of the police and the Libyan armed forces began defecting based on tribal and other loyalties.\(^{49}\)

By the end of February, the first outward signs of actual revolution materialized as cities began to fall into the hands of anti-government forces. Though the new rebel power was focused primarily in the east, the revolution’s influence did extend into certain western cities such as Misrata.\(^{50}\) However, the rebel’s position in many cities was tenuous at best as Gaddafi quickly responded with counterattacks.\(^{51}\) On February 27, rebels in Benghazi formed the National Transitional


\(^{47}\) See id. ¶ 4.


Council (NTC) to act as the political wing of the revolution.52 Within days, the NTC had declared itself the “sole national representative of Libya with all its social and political strata and all its geographical regions.”53

As increasing amounts of Libyans took up arms against the Gaddafi regime, the rebels made significant gains in the first few days of March, only to then be set back by more government counterattacks. At this time, a number of foreign states sought to intervene in the conflict on the side of the rebellion. In particular, France, the United Kingdom, and several Gulf states sought permission from the Security Council to implement a no-fly zone.54 Meanwhile, the European Parliament called on all European Union members to recognize the NTC as the official government of Libya.55 Within a matter of days, a few members of the international community, including France56 and Qatar,57 had done just that.

Finally, on March 17 the United States joined in the call for a no-fly zone, leading the Security Council to pass Resolution 1973 authorizing Member States to “take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack.”58 The Resolution reaffirmed the duty of Libyan authorities to protect the civilian population and again noted that the systematic attacks against civilians could constitute crimes against humanity.59 On March 19, an international coalition principally led by the United States, the United Kingdom, and France launched over 100 missiles into Libya against regime targets.60 As President Barack Obama would later explain, the decision to intervene was based on humanitarian concerns. Recalling the decades of oppression that the Libyan people had endured under Gaddafi and the “looming humanitarian crisis” that they now faced, President Obama maintained that the United States had a responsibility “to commit resources to stop the killing.”61

59 See id. at pmbl.
61 President Barack Obama, Address at the National Defense University (Mar. 28, 2011).
After months of a protracted stalemate, the rebels finally turned the tide in August with a successful offensive against Tripoli.\textsuperscript{62} Fresh from their recent liberation of the capital, rebel troops pursued the remnants of Gaddafi’s armed forces until the tyrant himself was captured and killed on October 20.\textsuperscript{63} Yet reports indicate that the rebels would not have made these gains without extensive reliance on coalition air support.\textsuperscript{64} Indeed, throughout the conflict, foreign military advisers have been covertly providing support to the rebel troops, transforming them from a “poorly trained and equipped”\textsuperscript{65} group into a “moderately effective fighting force.”\textsuperscript{66}

II. International Law and the Right of Revolution

Whether a right of revolution exists in law has been a matter of contention for centuries. Throughout Western history, scholarly opinions have differed greatly on the matter, ranging from John Locke’s endorsement of the right to rebel via social contract theory to Hugo Grotius’ general denial that such a right exists entirely.\textsuperscript{67} Not surprisingly, the place of a right of revolution within the modern international legal framework is equally uncertain. It is not explicitly enumerated in any major treaty or international document apart from a brief reference in the preamble of the Universal Declaration of Human Rights (UDHR).\textsuperscript{68} And based on the right’s inherent focus on justifying the ability of non-state actors to throw off the recognized system of governance, one would be hard-pressed to find the \textit{opinio juris} necessary to establish a customary rule of international law. Instead, any legal sanction of the right of revolution will likely come, if at all, as a way to enforce the right of self-determination.

A. Historical Treatment of the Right of Revolution

As it still remains today, the right of revolution has been a heavily disputed topic throughout the development of Western jurisprudence. In the Middle

\begin{footnotesize}
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  \item[\textsuperscript{64}] See \textit{Libya Targeted Civilian Protestors—War Crimes Court}, BBC News, Apr. 6, 2011, available at \url{http://www.bbc.co.uk/news/world-africa-12983054}.
  \item[\textsuperscript{65}] \textit{Rebels Move}, supra note 3.
  \item[\textsuperscript{67}] See infra Part II.A.
  \item[\textsuperscript{68}] See Universal Declaration of Human Rights pmbl., G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR] (“Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law . . . .”).
\end{itemize}
\end{footnotesize}
Ages, a number of legal philosophers demonstrated favorable opinions toward the right. Speaking in twelfth-century England, John of Salisbury proclaimed that “[t]o slay [a] tyrant is not merely licit, [but] is equitable and right; for it is commanded by our Lord that whoever takes the sword shall die by the sword.”69 A century later, Saint Thomas Aquinas asserted that people have a limited right to renounce a sovereign who acquired power illegitimately, such as through violence or simony.70 This acquisition by “defect,” as Aquinas called it, “prevent[ed] the establishment of any just authority… for whoever possesse[d] himself of power by violence [could] not truly become lord or master; except in the case that it subsequently became legitimate, either through public consent or through the intervention of higher authority.”71

Yet the ongoing development of natural law and natural rights jurisprudence in the Renaissance marked a change in opinion as philosophers reconsidered the propriety of the right of revolution. For instance, in his seminal work Leviathan Thomas Hobbes declares that an individual only has the liberty to disobey the sovereign in cases of self-defense.72 Additionally, the father of modern international law, Hugo Grotius, generally denied a popular right to rebel. Asserting that the purpose of civil society is the “Preservation of Peace,” Grotius insisted that “a superior Right in the State over us and ours [exists], so far as is necessary for that End.”73 If that “promiscuous Right of Rebellion” were allowed, the state could not attain its proper end for “there would be no longer a State, but a Multitude without Union.”74 For this reason, “those who are invested with the sovereign Power …cannot lawfully be resisted.”75

Interestingly though, Grotius admitted a few exceptions to his rule. Most pertinently, he accepted a right to rebel against a king who “design[s] the utter Destruction of the whole Body of his People.”76 By this very act, the sovereign “declares himself an Enemy to the whole Nation, [and] is presumed… to renounce the Government.”77 Yet Grotius could not foresee any sovereign in his right mind ever attempting to do such a thing, provided that the sovereign only ruled over one country.78 Furthermore, Grotius concluded that in disputed cases,
the people should simply accept the sovereign’s authority: “But especially in a controverted Right, no private Person ought to determine; for then he ought to side with Possessor. Thus CHRIST commanded us to pay Tribute to Caesar…”

Grotius’ renunciation of rebellion notwithstanding, the Enlightenment brought with it the strongest supporter yet of a right of revolution in the figure of John Locke. Writing in the context of England’s Glorious Revolution, Locke premised his version of social contract theory on the concept of inherent individual natural rights, namely life, liberty, and property. To ensure fuller protection of these rights, people come together in the state of nature to form a social contract whereby the new state will act as the common judge in resolving disputes. The people thus consent to a surrender of their sovereignty in exchange for a guarantee that the state will protect their natural rights.

But when the sovereign abuses its power, defying the trust that the people have placed in it, Locke asserted that the people have a right to rebel. At that point, the state has breached the social contract by violating the very natural rights it promised to protect. A popular use of force is thus warranted to meet the state’s violence against the social contract. “[W]hen the oppressed people resist tyranny it is not they who disturb government or bring back the state of war. Rebellion is an ‘Opposition, not to Persons, but Authority.’ A tyrant has no authority. It is tyrants who are the true rebels.”

Locke’s theory of the right of revolution took on even greater significance when Thomas Jefferson adopted it as the basis for the American Declaration of Independence. In the Declaration, Jefferson begins by proclaiming that “Governments are instituted among Men, deriving their just powers from the consent of the governed” for the purpose of securing the natural rights of the people. But when a government “becomes destructive of these ends, it is the Right of the People to alter or to abolish it,” and to erect in its place a new one that will ensure these rights. Over a decade later, the French Declaration of the Rights of Man and of the Citizen echoed the sentiment, emphasizing that the aim of all government is the “preservation of the natural and imprescriptible rights of man,” namely “liberty, property, security, and resistance to oppression.”

79 Id. at 125.
80 See John Locke, Two Treatises of Government (1689), reprinted in The Great Legal Philosophers 137 (Clarence Morris ed., 1959)
81 See M.D.A. Freeman, Lloyd’s Introduction to Jurisprudence 107 (8th ed. 2008).
82 See id. at 108–09.
83 See id. at 109.
84 The Declaration of Independence para. 2 (U.S. 1776).
85 Id.
86 Declaration of the Rights of Man and of the Citizen art. 2 (Fr. 1789) (emphasis added).
B. The Rights of Self-Determination and Revolution in International Law

As a matter of the international law of armed conflict, the question of revolution is one of the *jus ad bellum*. Under the current international framework, the United Nations Charter in Article 2(4) strictly regulates the *jus ad bellum*, imposing a general prohibition on the threat or use of force by one state against the integrity and independence of another, with limited exceptions for Security Council authorizations and state self-defense. However, the right of revolution is unique in that it is a purely internal right claimed by non-state actors. The present regulatory system thus does not conclusively speak to the merits of the legal argument for revolution.

In light of its contentious nature, it is not surprising that the very existence of an independent right of revolution remains uncertain in international law today. In fact, among the instruments central to modern international law, the resort to revolutionary force is only explicitly referenced once. In its preamble, the UDHR states that the legal protection of human rights is essential “if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression.”

Customary support for a right to rebel is equally absent as the concept of revolution threatens the very foundations of international law’s state-centric system. States by and large are not apt to support a general right of non-state actors to upset international stability, especially where such support could potentially invite foreign interference in a state’s domestic affairs. Indeed, any revolution by its nature will begin as an uprising that the opposing government and often other states do not consider legally valid. Though the international

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87 See U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).
88 See id. at art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”).
89 See id. at art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”).
90 See UDHR, supra note 67, at pmbl.
92 In fact, many states criminalize treason and other insurrectionary activities. See, e.g., U.S. CONST. art. III § 3 (defining treason as “levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort” and directing Congress to assign a punishment for the crime); Treason Act, 1351, 25 Edw. 3, c. 2 (Eng.) (prohibiting “levy[ing] war against our lord the King in his realm”); CODE PENAL [C. PEN.] art. 412–3–412–6 (Fr.) (criminalizing insurrections); STRAFGESETZBUCH [StGB] [PENAL CODE], May 15, 1871, § 81(1) (Ger.) (“Whoever undertakes with force or through threat of force . . . to change the constitutional order based on the Basic Law of the Federal Republic of Germany, shall be punished with imprisonment for life or for not less than ten years.”).
community has thrown its weight behind certain revolutionary efforts in the past, its behavior on the whole has been “rather vacillating or ambiguous.”

Indeed, if the right of revolution is to be found anywhere in international law, it almost certainly will act as a necessary extension of the recognized right of self-determination. This right of self-determination is plainly present in many of the foundational documents of international law. The United Nations Charter sets out as one of the United Nations’ purposes the development of “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.” Within the UDHR itself, Article 21 stresses that “[t]he will of the people shall be the basis of the authority of government,” though it also notes that this will shall be expressed through periodic elections.

Self-determination also features prominently in the two major international covenants that implement the UDHR, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Under Article 1 of both treaties, “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” Furthermore, the two treaties instruct all states parties to “promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”

Among relevant regional agreements, the African Charter on Human and Peoples’ Rights states in Article 20 that all peoples have an “unquestionable and inalienable right to self – determination.” This right entails the people’s ability to “freely determine their political status and . . . pursue their economic and social development according to the policy they have freely chosen.” The Charter then notes in the following paragraphs that “[c]olonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community” and that “[a]ll peoples shall have the right to the assistance of the States parties to the present

93 Bertil Dunér, Rebellion: The Ultimate Human Right?, 9 INT’L J. HUM. RTS. 247, 250 (2005). To illustrate this point, Dunér notes that while three of the states emerging from the former Yugoslavia received international recognition within a period of a few years, the United Nations has consistently condemned the de facto partition of Cyprus for decades. See id. The same may be said about the yet unsettled international recognition of Kosovo.
94 U.N. Charter art. 1, para. 2.
95 UDHR, supra note 67, at art. 21, para. 3.
97 ICCPR, supra note 95, at art. 1, para. 3; ICESCR, supra note 95, at art. 1, para. 3.
99 Id.
100 Id. at art. 20, para. 2.
Charter in their liberation struggle against foreign domination, be it political, economic or cultural.\textsuperscript{101}

The United Nations General Assembly has also made a point of reaffirming the significance of self-determination in Resolution 2625, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation. The Resolution directs states to refrain “from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.”\textsuperscript{102}

Moreover, the General Assembly acknowledged popular enforcement of the right, holding that “[i]n their actions against, and resistance to, such forcible action [by oppressive states] in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.”\textsuperscript{103} Likewise, the International Court of Justice in its advisory opinion in the Western Sahara case\textsuperscript{104} characterized the right of self-determination as a universal popular right requiring “a free and genuine expression of the will of the peoples concerned.”\textsuperscript{105}

Thus conceivably a right of revolution does exist in international law as a mechanism for enforcing the right of self-determination. This right arguably then provides an avenue for bypassing domestic prohibitions on treason and other insurrectionary activities, inserting in their place a positive right to overthrow fundamentally unjust regimes. In fact, taking a cue from John Locke, those contemporary scholars who defend a right of revolution largely find support for their arguments in the right of self-determination. For example, Michael Walzer argues that a state is only legitimate to the extent that it represents the will of the people.\textsuperscript{106} Consequently, citizens are in no way bound to defend a tyrannical regime. Rather, citizens are always free to rebel against an “illiberal or undemocratic government.”\textsuperscript{107}

Accordingly, as Jordan J. Paust contends, revolution is “one of the strategies available to a people for the securing of authority, national self-determination and a relatively free and equal enjoyment of the human right of all persons to participate in the political processes of their society.”\textsuperscript{108} Yet Paust is careful to

\textsuperscript{101} Id. at art. 20, para. 3 (emphasis added).
\textsuperscript{103} Id.
\textsuperscript{104} See 1975 I.C.J. 12 (Oct. 16).
\textsuperscript{105} Id. at 31–33.
\textsuperscript{107} Id. at 215.
reject revolution as a means of righting mere political wrongs.\textsuperscript{109} Instead, revolution is only justified if it meets two conditions: first, it must be must be taken up on the authority and interest of a majority of the population, and second, it must be in response to a state that “becomes destructive of the process of self-determination and the right of individual participation,” oppressing its citizenry either politically or economically.\textsuperscript{110} Hence, as Karl Doehring stated, “[o]nly oppression of a very brutal kind, . . . constituting a severe violation of human rights, would justify armed self-help.”\textsuperscript{111}

III. The Law of Armed Conflict and the Right of Revolution

At its core, the dispute over the existence of a legal right to revolt reflects the uncertain scope of contemporary international law’s two foundational tenets. On the one hand, international law staunchly values the preservation of order and stability among states. For this reason, international law imposes an expansive proscription on the use of force, leaving narrow allowances for self-defense and Security Council actions to enforce the peace.\textsuperscript{112} On the other hand, the defense of human rights and fundamental freedoms remains critical. The crucial question then is whether international law admits a similar allowance for non-state actors to resort to force for the protection of human rights.

The arguments for the existence of a right of revolution within international law all represent an attempt to demonstrate that international law does in fact contain this human rights enforcement mechanism. From the outset, revolution as a means of realizing the right of self-determination is arguably consistent with the United Nations Charter’s overarching support for human rights. Additionally, supporters of the right call attention to international law’s sanction of wars of liberation against colonial and other foreign oppressors, arguing that it would be inconsistent to recognize this use of force but not a right to rebel. Third, revolutions may meet the requirements of Just War Theory. Finally, proponents point to the growing acceptance within the international community of humanitarian interventions by third-party states. According to these advocates, if foreign states

\textsuperscript{109} See id. at 445 (“Today, it is common to recognize that all peoples have a right of self-determination and, as a necessary concomitant of national self-determination, a right to engage in revolution.” (footnote omitted)). In doing so, he relies primarily on natural law theories, American legal history and constitutional jurisprudence, the preamble of the UDHR, and the asserted right of self-determination. See id. at 446–52.

\textsuperscript{110} See id. at 449 (“[T]he right of revolution is necessarily a right of the majority against, for example, an oppressive governmental elite.”).

\textsuperscript{111} See Karl Doehring, \textit{Self-Determination, in The Charter of The United Nations} 47, 61 (Bruno Simma et al. eds. 2d ed. 2002).

\textsuperscript{112} See supra notes 86–88 and accompanying text.
have a right to intercede on the behalf of a subjugated people, surely the people themselves do as well.

Yet, despite these efforts, a number of commentators have submitted equally persuasive counterarguments, largely premised on the law’s reluctance to endorse additional exceptions to the general prohibition on the use of force. Consequently, a resolution of this matter principally depends on whether international law permits breaches of the peace in order to further the protection of human rights in revolutionary circumstances, or instead restricts the lawful uses of force to narrow instances like the preservation of international stability. Based on the law’s longstanding constraints on the permissibility of force as demonstrated in the United Nations Charter and the international law of armed conflict, international law likely does not recognize a right of revolution at present.

A. The Right of Revolution and the Charter Framework

From the perspective of revolution as an instrument in the achievement of human rights, the right of rebellion is consistent with many aspects of the Charter system. As enunciated in Article 1 of its Charter, the purposes of the United Nations include developing “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” along with promoting and encouraging “respect for human rights and for fundamental freedoms for all.” As mentioned, the UDHR endeavors to institute a structure adequate to the protection of human rights so that people do not have to “have recourse, as a last resort, to rebellion against tyranny and oppression.” In order then to effectively defend these rights, and in particular the right of self-determination, people should have the right to use force in the most extreme of circumstances. Denying this option calls into question the fundamental and universal nature of human rights.

Moreover, as the UDHR ostensibly suggests, if the international structure fails to sufficiently guard fundamental freedoms, the people may exercise force as a last resort in the defense of their rights. Where a government uses force to suppress the exercise of the very rights entitled to a people by virtue of their humanity, the people need not wait on a prolonged appeal to the international community. Indeed, the right of revolution fills the void where the international community is unable or unwilling to protect a people from a brutally oppressive

113 U.N. Charter art. 1, para. 2.
114 Id. at art. 1, para. 3.
115 UDHR, supra note 67, at pmbl.
116 See Dunér, supra note 92, at 251.
117 See Gerald Sumida, The Right of Revolution: Implications for International Law and Order, in POWER AND LAW 130, 134 (Charles A. Barker ed. 1971) (“[T]he right of a people to revolt against tyranny is now a recognized principle of international law.”).
regime. As Antonio Cassese noted, recognition of the right of self-determination would be of “scant legal value” without some sort of enforcement mechanism.\textsuperscript{118}

At the same time, the Charter framework places considerable emphasis on sustaining international tranquility. The first purpose of the United Nations enumerated in the Charter is to “maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace.”\textsuperscript{119} Thus the Charter generally forbids threats or the use of force against the “territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations,”\textsuperscript{120} only providing for the lawful use of force for the purpose of ensuring state sovereignty\textsuperscript{121} and peaceful relations among states.\textsuperscript{122}

Some scholars even go so far as to suggest that the pursuit of international peace and order may supersede the defense of human rights in the case of a conflict between the two. Simon Chesterman observes that while “the promotion of human rights through ‘international cooperation’ is to be found among the purposes of the United Nations, the first listed purpose in Article 1 is the maintenance of international peace and security.”\textsuperscript{123} Even Karl Doehring, who supported a right to “armed self-help” in extreme circumstances, admitted that the dominant view within the international community is that the “sovereignty of States remains the highest authority.”\textsuperscript{124} Additionally, numerous commentators have challenged the absolute, universal nature of human rights, contending that a natural law approach to rights is untenable.\textsuperscript{125} As stated by Bertil Dunér, these “formulations in terms of inherent values and the like used in UN parlance are mystifying and cannot be taken to the letter.”\textsuperscript{126} The current international human rights system then, according to Dunér, appears to side with the regime against a rebelling populace for the sake of upholding international stability.\textsuperscript{127}

Though these opinions rest on the questionable presumption that one founda-

\textsuperscript{118} See Cassese, supra note 90, at 311.
\textsuperscript{119} U.N. Charter art. 1, para. 1.
\textsuperscript{120} Id. at art. 2, para. 4.
\textsuperscript{121} See id. at art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”).
\textsuperscript{122} See id. at art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”).
\textsuperscript{123} Nehal Bhuta, “Paved with Good Intentions . . . “—Humanitarian War, the New Interventionism and Legal Regulation of the Use of Force, in INTERNATIONAL LAW AND THE USE OF FORCE 362, 364 (Mary Ellen O’Connell ed., 2d ed. 2009).
\textsuperscript{124} See Doehring, supra note 110, at 61.
\textsuperscript{125} See Dunér, supra note 92, at 251.
\textsuperscript{126} Id.
\textsuperscript{127} See id. at 248.
tional precept must necessarily trump the other, they do serve to indicate at
the very least that the Charter’s use of force exceptions do not extend to the realm
of revolutionary human rights enforcement.

Moreover, the isolated reference to the right of revolution in the UDHR Pre-
amble by itself holds little legal weight. The fact that a right to rebel is nowhere
referred in any other major international instrument indicates a lack of clear
acceptance for the right within international law. In truth, though a few states
during the drafting of the UDHR did seek to include the right of revolution
among the document’s articles, the dominant view among the states present was
that revolution should be relegated to the Preamble. Thus, “[r]ather than con-
veying a precise” right, the language in the Preamble is likely nothing more than
“a rhetorical device to put aside differences.”

From a more practical standpoint, acknowledging the right of revolution
could very well lead to increased international violence. When legal recognition
is bestowed upon a revolutionary movement, it may aggravate the current hos-
tilities by providing an authority for the rebellious party to wage full-scale war.
This not only would escalate the suffering endured within the particular country,
but could also disrupt the peace in neighboring states through the migration of
refugees or even the extraterritorial extension of the conflict. Moreover, revo-
lutionary legitimacy provides a plausible basis for foreign intervention, thereby
leading to a steady erosion of the principle of non-intervention. Furthermore,
as rebellions are granted legitimacy, people across the globe can cite them as a
precedent in justifying their right to resort to force, regardless of whether their
cause is actually bona fide. If the Charter truly does restrict the use of force to
exclusive scenarios like the perpetuation of international peace, then the window
for locating a general right of revolution becomes increasingly limited.

B. Wars of Liberation and the Right of Revolution

A second argument in favor of the right of revolution stems from a com-
parison to wars of liberation. As it stands, international law accepts narrow
circumstances for forceful self-determination, namely in the context of seces-
sion or liberation. As the Supreme Court of Canada admitted in the Secession
of Quebec case, a right of secession arises under international law where peo-

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128 Rather than operating from the presumption that one foundational tenet must prevail over
its counterpart, this Note treats the preservation of international stability and the pro-
tection of human rights as co-equal concerns. The question that this Note addresses is
whether the Charter system permits “use of force” enforcement of human rights principles
(here in a revolutionary context) like it does for peace and stability principles.
129 See id. at 253–54.
130 Id. at 254.
131 See id. at 258.
132 See id.
people are governed as part of a colonial empire, subject to foreign subjugation, or possibly where they are denied any “meaningful exercise” of their right of self-determination within their own state.\textsuperscript{134} Thus Additional Protocol I to the Geneva Conventions applies to armed conflicts in which “peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations.”\textsuperscript{135}

Yet scholars like Karl Doehring have highlighted the fact that the right of self-determination, as enumerated in the principal human rights treaties, is universal; it is not limited merely to peoples living under colonial or other alien regimes.\textsuperscript{136} Hence, the view that only military struggles against colonialism are justified can no longer be sustained.\textsuperscript{137} The inability then to distinguish between wars of liberation and revolutions, where the people in both scenarios strive to free themselves of a government that does not represent their interests, remains an inconsistency in the law that must be resolved in favor of the right of revolution.

Though opponents of rebellion concede that this inconsistency exists,\textsuperscript{138} they argue that a sensible explanation lies behind it. The post-1945 condemnation of imperialism and the injustices that inevitably follow from it pervade many of international law’s foundational documents. Freedom from colonial or racist regimes therefore offers more of a prima facie case for action than a general right of revolution, the validations for which remain heavily fact-specific.\textsuperscript{139} Accordingly, “liberation” movements arguably have a stronger presumption of validity than revolutionary ones. This presumption sufficiently supports a right to resort to force in the liberation context, but not in a revolutionary one. Acknowledging a general right of revolution does not provide an adequate safeguard against unsavory revolutionary groups that seek to breach the peace for illicit purposes.

C. Just War Theory and the Right of Revolution

From a moral standpoint, support for a right of revolution can also potentially be found in Just War Theory. As originally articulated by medieval philosophers like Saint Thomas Aquinas, Just War Theory sets forth five requisite conditions that must be met to validate a use of force.\textsuperscript{140} First, Right Authority

\textsuperscript{134} Id. ¶ 154.
\textsuperscript{135} Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 1, para. 4, June 8, 1977, 1125 U.N.T.S. 3.
\textsuperscript{136} See Doehring, supra note 110, at 61.
\textsuperscript{137} See id.
\textsuperscript{138} See, e.g., Dunér, supra note 92, at 252 (calling this incongruence in the law the “strongest argument in favour of the right of rebellion”).
\textsuperscript{139} See id.
\textsuperscript{140} See Mary Ellen O’Connell, International Law and the Use of Force 120 (2d ed. © Palacký University Olomouc, Czech Republic, 2011. ISSN 1213-8770 25
mandates that only a leader with the proper authority can make the decision to go to war.\footnote{141} Second, a just war must have a Just Cause.\footnote{142} Third, those waging the war must have a Right Intention in resorting to force.\footnote{143} Fourth, force can only be a Last Resort.\footnote{144} Last, Chance of Success dictates that force is not permissible if there is no chance of victory.\footnote{145} These requirements speak to both the legal basis of force and necessity obligations.

For the first prerequisite, revolutions may derive their Right Authority from the popular sovereignty inherent in the right of self-determination. As Michael Walzer has argued, a government is only legitimate insofar as it adequately represents the will of the people.\footnote{146} Thus, under Lockean notions of state authority, when a regime ceases to represent the will of the people, instead turning its military might against the citizenry, the proper authority reverts to the people to set up a new government. Yet, due to the fundamental difficulties in ascertaining the popular will in such circumstances, a justifiable revolution will likely need to receive, at the very least, extensive and unequivocal support throughout the particular nation.

In the revolutionary context, Just Cause may lie in the popular response to gross violations of human rights. Not only are the people acting in self-defense; they are also exercising their lawful right of self-determination. Likewise, a proper revolution has Right Intention when it sets as its goal the replacement of a tyrannical regime with a government that is more responsive to the needs of the people.

From a necessity standpoint, a revolution conceivably satisfies Last Resort when it acts as a response to flagrant violations of international law. Once a state utilizes lethal force against its citizenry, determined to utterly suppress the people in the exercise of their rights, the time is ripe for a popular use of force. It cannot reasonably be expected that an oppressed people, facing the full wrath of a violent regime, must wait for the international community to come to their aid.

Lastly, though a rebellion likely does not have overwhelming odds in its favor when it stands up against a government, a rebellion may comply with the Chance of Success condition if it has a reasonable chance of victory. Indeed, the past is rife with examples of revolutions that have succeeded in the face of tremendous adversity. A widespread popular uprising, resolute in the defense of their liberties and their very lives, can overcome this necessity threshold.

\footnote{141}{See id.} \footnote{142}{See id.} \footnote{143}{See id.} \footnote{144}{See Mary Ellen O'Connell, Class Lecture (Jan. 26, 2011).} \footnote{145}{See id.} \footnote{146}{See Walzer, supra note 105, at 214.}
From the outset, however, the Just War rationale runs into a number of potential problems. The recognition of this particular form of popular sovereignty challenges the state-centric focus that underlies the international legal system. At least prior to the onset of hostilities, a rebel group necessarily is not the legitimate government recognized at the international level.\textsuperscript{147} Acknowledging a right of the people to simply declare themselves sovereign “invites chaos” by legitimizing the rebellion at the expense of the present government’s legitimacy.\textsuperscript{148} As mentioned, this may encourage a growth in the conflict as foreign states may use this newfound authority to stage interventions.\textsuperscript{149}

Additionally, proponents of international stability have maintained that characterizing the overthrow of a government as a Just Cause stretches the concept “to the breaking point.”\textsuperscript{150} If peace and order are paramount, as these scholars argue, the resort to rebellious force cannot be justified. Additionally, a general right of revolution provides no mechanism for adjudicating the conflict between the rebels’ and the government’s competing “Right” Intentions.\textsuperscript{151} And, as previously mentioned, there is no way of ensuring that revolutionary groups even have Right Intentions to begin with.\textsuperscript{152} A broad right of rebellion will conflate genuine efforts with groups that may eventually adopt regimes that are just as undesirable as their predecessors, leaving the international community in a precarious position if a successful rebellion seeks international recognition for its indefensible replacement.

Finally, though a government’s forceful repression of its people may present a compelling reason to justify popular resistance, Last Resort may require an appeal to the international community. Just as the Charter framework places strict limits on the appropriate use of force, the preservation of international peace and security is primarily the duty of the United Nations. To ensure respect for this system and the values upon which it rests, an oppressed people cannot unilaterally decide to use force.

\textit{D. Humanitarian Intervention and the Right of Revolution}

A final argument for the right of revolution hinges on the emerging recognition of third-party humanitarian intervention. In recent years, the motivations for several international actions have incorporated humanitarian concerns,

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  \item \textsuperscript{147} See Hamner Hill, \textit{Can Just War Theory Survive the War on Terror?}, 2010 J. Inst. Just. & Int’l Stud. 77, 82.
  \item \textsuperscript{148} See Dunér, supra note 92, at 258.
  \item \textsuperscript{149} See supra note 131 and accompanying text.
  \item \textsuperscript{150} See Hill, supra note 146, at 82.
  \item \textsuperscript{151} See id.
  \item \textsuperscript{152} See supra Part III.A.
\end{itemize}
including Kosovo in 1999,\textsuperscript{153} Iraq in 2003,\textsuperscript{154} and, most significantly, the multi-lateral effort in Libya. As President Obama himself stated in defending the decision to intervene in Libya, the United States reserves the right to use its military “unilaterally when necessary to defend our people, our homeland, our allies, and our core interests,” interests that include “challenges that threaten our common humanity and our common security.”\textsuperscript{155} Further evidence of nascent international acceptance for humanitarian interventions comes in the form of the Responsibility to Protect (R2P) doctrine. R2P holds that where a state is unwilling or unable to live up to its obligation to protect its citizens from gross human rights violations, the \textit{duty} to protect falls to other states.\textsuperscript{156}

For purposes of the right of revolution, it would be absurd to grant third-party states a right to intervene, only to deny the people a similar right to respond. Again, in light of the United Nations’ dual purposes, both humanitarian intervention and the right of revolution would further the cause of human rights.\textsuperscript{157} As states increasingly admit a right to intervene on a humanitarian basis, so does international law correspondingly admit a stronger right of revolution.

Despite the prevalence of the debate on humanitarian intervention, this is the weakest argument in favor of a right to rebel for the simple reason that humanitarian intervention is not part of contemporary international law, at least not yet.\textsuperscript{158} Though human rights can certainly play a role in the decision to use force, strictly speaking they do not by themselves validate force under the Charter system for third-party states.\textsuperscript{159} The concept of humanitarian intervention seriously erodes the Charter’s prohibition on the use of force and the inviolability of state sovereignty.\textsuperscript{160} “Thus past unilateral humanitarian interventions such as NATO’s bombing campaign in Kosovo have been regarded as unlawful.\textsuperscript{161} Though the humanitarian intervention movement has gained momentum, it has not conclu-

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\item \textsuperscript{153} See \textit{Int’l Comm’n on Intervention & State Sovereignty, The Responsibility to Protect VII} (2001) [hereinafter R2P Report].
\item \textsuperscript{154} See Dunér, \textit{supra} note 92, at 247 (referencing Prime Minister Tony Blair’s human rights argument in support of the Iraq invasion).
\item \textsuperscript{155} See Obama, \textit{supra} note 60.
\item \textsuperscript{156} See R2P Report, \textit{supra} note 152, at VIII.
\item \textsuperscript{157} Richard Lillich, \textit{Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives, in International Law and the Use of Force} 353, 355 (Mary Ellen O’Connell ed., 2d ed. 2009).
\item \textsuperscript{158} See Dunér, \textit{supra} note 92, at 247 (“[N]o right to humanitarian intervention is recognised by international law.”).
\item \textsuperscript{159} See Bhuta, \textit{supra} note 122, at 364 (“[I]t does not follow that hortatory statements concerning human rights protections within the Charter provide any legal basis for the unilateral use of force to prevent human rights abuses.”).
\item \textsuperscript{160} See \textit{id.} at 363 (“[T]he intention of the drafters [of the United Nations Charter] . . . was to prohibit the use of force in the broadest possible terms.”).
\end{itemize}
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sively become an accepted rule of international law. Without this rule, there is no intervention hook upon which the right of revolution may hang.

IV. The Right of Revolution as Applied to Libya

Assuming that a right of revolution does exist in international law, the Libyan rebels had strong arguments in their favor, but ultimately may have lacked a complete case for rebellion. As mentioned, this right would likely arise as an enforcement mechanism for the protection of human rights within the Charter system, especially the right of self-determination. In this case, the Libyan rebels arguably had a legal right stemming from their intent to overthrow the Gaddafi regime after decades of repression, but this intent in itself was not sufficient. Due to the absence of an established legal method for evaluating revolutionary cases, this Note will analyze the *jus ad bellum* claim of the Libyan rebels from a Just War perspective. This approach will adequately assess the necessity arguments for and against the Libyan resistance. Indeed, the rebels likely satisfied the first two Just War conditions, Right Authority and Just Cause. But arguments for Right Intention and Last Resort in this scenario, however, are somewhat more dubious. And finally, the rebels should have seriously considered their Chance of Success in order to meet the final Just War requirement before committing to violent regime change.

If legal authority truly does revert to the people when a government demonstrates its unwillingness to act in the interests of its people, such as through the commission of flagrant human rights abuses, then the case for Right Authority in the Libyan people was unquestionably strong. Within days of the uprising’s commencement, the government had employed heavy artillery and helicopter gunships to quell the insurrection.\(^\text{162}\) It is true that the protests had grown unruly in a short amount of time, but Gaddafi’s response was patently disproportionate. Mortars, mercenaries, and aerial attacks are not justifiable means for dealing with a disorderly popular movement. The condemnations in the Security Council resolutions and Libya’s referral to the ICC only confirm this.\(^\text{163}\) Though doubts may be raised regarding the lack of organization among the rebels and the basis for the NTC’s legitimacy, these misgivings are probably not enough to detract from the general popular authority to seek a change in governance. The fact that the rebellion was widespread, extending beyond its eastern roots to western cities like Misrata, demonstrates that this was not simply a minority movement, but rather a pervasive attempt to remove Gaddafi from power.

Likewise, the long train of human rights abuses committed by the Gaddafi regime, including the violent response to the recent protests, provided a Just Cause. Granted, when the demonstrations degenerated into disorder, leading to property damage and attacks on police, Gaddafi was well within his legal author-

\(^{162}\) See *supra* note 39–40 and accompanying text.

\(^{163}\) See *supra* notes 45–46 and accompanying text.
ity to respond with an increased police presence akin to the Egyptian uprising. But to counter the protests in Benghazi and other cities in a manner more suited to wartime urban assaults was unacceptable. The rhetoric of the Libyan government, including its warning that “rivers of blood” would flow if a resolution to the situation was not found,\(^\text{164}\) indicates the lengths that this regime was willing to go to in order to restore control. After nearly a half-century of repression, the Libyan people had a right to demand change.

Finding Right Intention for the rebel cause is a bit more problematic due to the haphazard nature of the rebellion. Serious questions can be raised regarding the rebels’ plans for the restoration of government in the aftermath of ousting Gaddafi. In fact, it took the NTC months to submit a roadmap for rebuilding the Libyan state in the event of Gaddafi’s fall.\(^\text{165}\) Presumably, as the NTC declared in its mission statement, many of the now ex-rebels are “committed . . . to build[ing] a constitutional democratic civil state based on the rule of law, respect for human rights and the guarantee of equal rights and opportunities for all.”\(^\text{166}\) Yet Libya possesses an incredible diversity which permeates the ranks of the revolution. Throughout the conflict, the NTC was not been the only group vying for a leadership position; indeed, other rebel-controlled cities had governing councils of their own.\(^\text{167}\) Moreover, there were even divisions within the rebel armed forces as rival commanders rose in competition with one another.\(^\text{168}\) Indeed, as the NTC has had trouble disarming the numerous armed groups that roam the countryside, violence has flared up between the rival factions as they struggle to fill the power vacuum in certain areas.\(^\text{169}\) Even more alarming is the possibility that unrecovered portions of Gaddafi’s enormous weapons stockpile may end up in the hands of hostile groups.\(^\text{170}\) This fundamental lack of organization casts some doubt on whether the rebels now share a unified, defensible vision for the future of Libya.

Similar doubts attach to the Last Resort requirement, particularly because the protests so swiftly deteriorated into a full-fledged armed conflict. In comparison to the relative nonviolence from protestors participating in the Tunisian and


\(^\text{168}\) See id.


Egyptian revolts, Libya devolved into civil war within a matter of days. Despite the initial attacks on Benghazi, perhaps the rebels should have made more concerted efforts to negotiate with the Gaddafi government or to reach out to the international community for a solution. Indeed, although the unrest in Egypt resulted in over 800 deaths as government forces used live ammunition, snipers, and security vehicles to restrain the protests, a general resort to force was not necessary to overthrow President Mubarak.

At the same time, given the Libyan government’s apparent motive to completely eradicate dissent, a viable argument may be made that the only option remaining for the protestors was to respond to force with force. Once Gaddafi threw the full might of the Libyan military at the protestors, the proverbial Rubicon may have been crossed.

Finally, the rebels face an uphill battle in establishing Chance of Success. As demonstrated by the stalemate in the months preceding the Tripoli offensive, it is difficult to argue the revolution by itself ever had a significant likelihood of victory. The rebel troops’ disorganization, lack of training, and reliance on international air support all stand as strong evidence of their inability to topple the Gaddafi regime on their own. Conceivably, if the bar for Chance of Success is low, the rebels could argue that, at least from their perspective prior to the onset of the conflict, they saw some prospect of attaining their goals, especially in light of early defections from the Libyan military and the spread of anti-Gaddafi sentiment across the country. Yet such improbability may not be enough to excuse the death and destruction that followed from what became a devastating civil war.

Moreover, the Chance of Success prerequisite cannot take into account any assumption by the rebels that their attempt would have received international support for two reasons. First, because legal international interventions in support of revolutions are the exception rather than the norm, an objective evaluation of revolutionary claims cannot realistically take into account the remote chance that the international community, via the Security Council, would have decided to take action. Second, even if an intervention was likely in this particular case, a problematic assumption in itself, hinging a revolution’s legality on third-party assistance subordinates the rebel’s role to that of the intervening states. The revolution then becomes an effort of the international community to depose the regime rather than one by the people themselves. In such a case, where ample support for action necessarily exists among other states, the rebels arguably should have appealed to the international community in the first place rather than resorting to force.

172 See supra notes 63–65 and accompanying text.
173 See supra notes 47–48 and accompanying text.
Conclusion

The ambiguity surrounding the right of revolution within international law arises from an uncertainty concerning the breadth of the asserted purposes of international law, namely whether the protection of human rights in a revolutionary context entails a lawful avenue for the use of force like the one that is present in the United Nations Charter for the maintenance of international order. As a matter of human rights, people may have a just claim to rebel in limited circumstances where their right of self-determination is violently suppressed by the state. The law arguably should not deny a people a right to forcefully free themselves of the most tyrannical regimes, where they unequivocally seek to establish a just system of governance that is responsive to their needs. Yet the international framework seems to prefer instead that an oppressed people take their complaints to the international system charged with the defense of their rights rather than permit them to resort to force unilaterally. Though a convincing case can be made that international law should recognize a right to revolution, the current state of the law appears to say otherwise, restricting the lawful use of force to limited instances such as the preservation of international peace and stability.

Even if international law did recognize a right of revolution, it must be one of extremely limited scope. In the case of Libya, the rebels did have strong arguments in their favor, but in the end may have fallen short of a conclusive justification. Under Just War Theory, the Libyan resistance had a persuasive claim on the grounds of Right Intention and Just Cause. However, they had a much more difficult case to make for the remaining Just War elements, especially for the Chance of Success requirement. Accordingly, the Libyan rebels’ decision to resort to force may not have fallen within the narrow confines of this theoretical right of revolution.
PROBLEMATIC ASPECTS OF CURRENT LEGAL REGULATION OF APPELLATE REVIEW AND THEIR SOLUTION IN SUGGESTED AMENDMENT OF CZECH CIVIL PROCEDURE CODE

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Summary: The aim of this article is to point to insufficiencies of the current legal regulation of the appellate review proceeding in civil cases, when the court competent to deal with the appellate reviews is not able to fulfill its function of a unifier of case law and the defender of lawfullness of decision-making any more. The proposed amendment of the Civil procedure code which is being prepared by the Ministry of Justice reacts to many of these insufficiencies. In the article we have only focused on crucial conceptual problems of the proposed legal regulation and we have avoided other deficiencies requiring deeper analysis and the knowledge of Czech legal regulation.

Keywords: regulation, appellate review, amendment, Civil Procedure Code

Appellate review as an extraordinary remedy in civil cases was embodied into the Civil procedure code (Act N. 99/1963 Coll.) through Act N. 519/1991 Coll., coming into effect on 1st January 1992. This institute replaced complaint against a breach of law. Through the complaint against a breach of law it was possible to challenge a final decision of a court or a public notary’s office on the grounds that law was breached in the procedure or during the process of decision making. The fact that the filing of a complaint laid at the discretion of the general prosecutor of the Czechoslovak state, general prosecutors of both Republics or Justice Ministers was a major drawback of this extraordinary remedy. Participants of proceedings could only initiate the complaint; however, they did not dispose of such a remedy themselves. The time-limit for filing a complaint, which was 3

1 This article was written within the project of Student grant competition no. PF_2011_006 (New conception of extraordinary appeal in civil proceedings in the context of comparison with foreign legal regulations).
years from the final and conclusive decision, was another controversy. This was causing a major violation of legal certainty of both, participants in the proceedings, as well as the third parties.

Through the appellate review it is possible to challenge the final decisions of the court of appeal if it is admissible under the law. The Civil procedure code includes a full list of decisions against which it is possible to file an appellate review. These are mainly decisions of meritorious nature. At the same time it also regulates so called negative conditions of admissibility, i.e. it provides an exhaustive list of decisions, against which an appellate review is not possible. Appellate review can be filed only on the grounds specifically listed. A participant can challenge the decision of the court of appeal at the court which made the decision as the court of first instance within the time-limit of two months from the delivery. It is a duty of the court of the first instance to remove possible defects of the appellate review, send the appellate review to the other participants and examine whether the requirements of the proceedings have been met. The court itself can only decide on refusal of the appellate review on the grounds of failing to comply within the time-limit and discontinuance of the proceedings on the grounds of failing to pay the court fee. If this is not the case, the court sends the file and a report to the court competent to deal with appellate review.

In case the court competent to deal with appellate review does not reject the appellate review due to delay (unless the court of first instance has already done so), inadmissibility, apparent unlawfulness, or due to the fact that it was filed by unauthorized person, or unless it discontinues the appellate review proceeding, then it decides whether or not to order a hearing. It orders a hearing if it is considered reasonable or if evidence is introduced. This is only possible in order to prove the grounds for appellate review. Thus it is not possible to apply new facts or evidence concerning the case itself. The appellate review is under the current legal regulation based on cassation remedial system. Therefore the court competent to deal with appellate review can only nullify the decision of the court of appeal; it cannot change its decision. It is entitled to re-examine the case only from legal aspects. It is always the Supreme Court which is competent to decide the appellate review.

The Supreme Court as the final judicial authority in matters falling within the powers of courts in the civil court procedure and in criminal procedure secures unity and lawfulness of the decision-making. It is supposed to achieve this goal mainly through the process of decision-making on appellate review. However the Supreme Court currently copes with a large number of appellate reviews filed, many of which are either totally unimportant, or of no significance from the legal aspect. However, the Supreme Court has to deal with all of them and with respect to the scope of admissibility of the appellate review it in fact becomes a court of third instance. In 2010, 4 986 appellate reviews in civil cases were filed at the Supreme Court. In addition to this number of cases 5 595 remaining
cases from the previous period had not been concluded by that time. However, according to the information obtained from the Supreme Court, only about 200 cases yearly have the power of judicial precedents.

Thus the Supreme Court does not fulfill its function sufficiently neither from the viewpoint of the unification of judicial decisions, nor from the viewpoint of protection of rights of participants. For this reason the Ministry of Justice is currently working on crucial amendment to the whole appellate review proceeding. This bill was drafted as a result of close cooperation with the Supreme Court of the Czech Republic and it mainly reacts to the Memorandum of the Government of the Czech Republic, which, apart from other things expresses the Government’s readiness to do something about the state of busyness of the Supreme Court through the restriction of reasons for appellate review and preferences of its role through the means of unification of case law.

I. Admissibility of Appellate Review

The crucial point of the amendment is the restriction of the admissibility of the appellate review. Under the current legal regulation it is possible to file appellate review against the meritorious decision of the court of appeal, if one of the following conditions has been satisfied:

1. it is a decision, through which the meritorious decision of the court of first instance was changed,

2. it is a decision, through which the meritorious decision of the court of first instance was upheld, by which the court of first instance decided in a way different from its previous decision as it was bound by the legal opinion of the court of appeal, which reversed the previous decision,

3. it is a decision, through which the decision of the court of first instance was upheld if the appellate review is not admissible under the letter b) and the court of appeal concludes that the challenged decision is of crucial significance from legal aspect.

In the first two cases the current legal regulation only requires satisfying formal pre-requisites for the appellate review to be admissible without taking into...
consideration whether or not from the viewpoint of the fulfilling of the function of the Supreme Court there is any significance in dealing with and deciding about the appellate review from legal aspect. For this reason the proposed legal regulation does not take into account the admissibility of the appellate review in accordance with these criteria and it restricts the admissibility of the appellate review only to the cases of crucial significance from legal aspect. Currently the Civil procedure code contains a demonstrative list of cases in which the decision of the court of appeal is of crucial significance from legal aspect. This is the case when the court of appeal deals with a legal issue, which has not been solved by the court competent to deal with the appellate review, or which is decided in a different way by different courts, or if the legal issue resolved by the court competent to deal with appellate review is to be judged in a different way. In connection with this situation during the preparation of the amendment discussions keep appearing whether the current demonstrative list should be kept or replaced by a full one. We incline to the conclusion that the demonstrative list should be kept, as it not only enables the Supreme Court to achieve its main goal, which is securing unity and lawfulness of courts' decision-making, but it also enables the Supreme Court to intervene in cases of excesses of the courts of appeal concerning cases where there already are constant and clear judicial decisions.

The proposed legal regulation left the idea of demonstrative list, however when defining the case of crucial significance from the legal aspect it includes all situations, which can lead to the fact that the decision of the court of appeal is of crucial significance from legal aspect including cases when the court of appeal departed from the case law of the court competent to deal with the appellate review.

In relation to non-meritorious decisions the valid and effective legal regulation dealing with the admissibility of appellate review is rather complicated. It is based on a full list of decisions for which the appellate review is admissible. In most of them the law sets out conditions, which were mentioned above, which must be satisfied if the appellate review is to be admissible. If the Ministry of Justice is considering omission of the first two conditions of the admissibility of the appellate review, the next time appellate reviews against procedural decisions should also be admissible only in those cases, which are of crucial significance from legal aspect. The next question is, whether the mentioned full list should be broadened including also other procedural decisions, or if some of them should be left out.

The amendment allows to file an appellate review against all final decisions of the court of appeal, i.e. even those of procedural nature. However, even in these cases it holds true that the case must be of crucial significance from legal aspect. Apart from this the amendment also regulates absolute admissibility of the appellate review (i.e. regardless of the fact whether the matter is of crucial
significance from legal aspect) against the enumerative list of resolutions of the court of appeal, which were issued during the appellate review proceeding.

In addition to positive conditions of the admissibility of the appellate review the law also regulates negative conditions of admissibility. Currently, the appellate review is not admitted:

1. in cases, where it was decided in favor of monetary remedy not exceeding 50 000 CZK and in business matters 100 000 CZK, however, accessions of a claim are not taken into account. The regulation dealing with the restriction of admissibility according to the monetary value of the case has undergone certain development. The original amount which was 20 000 CZK and in business cases 50 000 CZK was increased as a result of Act N. 7/2009 Coll. coming into effect on 1st July 2009. Therefore the exact impact of this restriction on the amount of appellate reviews filed has not been found out yet. The proposed legal regulation is considering a unified limit of 50 000 CZK, in some matters this limit should not be set.

2. in cases regulated by Family Act, with the exception of judgment of restriction or removal of parental duties or discontinuing of their performance, determination (denial) of parenthood or irrevocable adoption. Opinions whether or not to keep this restriction vary. The fact that unification of case law in some crucial issues of this area of law is missing speaks in favor of omission of this negative condition. The reason for keeping this condition is the effort to make the proceeding as fast as possible as well as ensure the legal certainty of litigants. In most of these cases it is also possible to use a special institute, which is called “clausula rebus sic stantibus“. This remedy provides the participants with a much more flexible way of using the correction of a court’s decision. This can be seen especially in the issues of alimony. Although the clausula rebus sic stantibus does not serve primarily to correct a faulty decision, but to react to a change of circumstances, it can be used even in these cases. The plaintiff can often claim that a change of circumstances occurred in the meantime and thus he can get a favourable decision in much shorter time.

In our opinion the enactment of the admissibility of appellate review in family law cases would not be contra-productive, especially with respect to the fact that the admissibility of appellate review is conditioned by the crucial legal significance of the case.

A temporary restriction of the admissibility of appellate review in these cases would also be worth considering, before a constant case law in the most significant issues of family law is formed. However, if we take into account the specific nature of these relationships and a fast development of cultural, social, economic
and psychological aspects in this area, this solution does not seem to be very beneficial.

The proposed amendment of the Civil procedure code still counts with the inadmissibility of the appellate review in family law cases. However, it allows the court competent to deal with appellate reviews to consider, whether the case deserves a special attention from the viewpoint of securing unity and lawfulness of the court’s decision-making. In such cases the appellate review is admissible. However, the amendment does not go on to specify, what can be understood by the term “a case deserving a special attention”. Again this can cause unpredictability in the court procedure, and this in turn can diminish legal certainty of participants.

3. in cases of international kidnapping of children. Here, the inadmissibility depends on the necessity to handle these cases as fast as possible. The institute of returning a child in cases of international kidnapping serves only to immediate restoration of the original condition.

In relation to final procedural decisions the proposed bill defines other negative conditions, which is the result of planned broadening of the admissibility of appellate review against these decisions.

II. Who is entitled to examine the Admissibility of the Appellate Review

Under the current legal regulation it is only the Supreme Court that is entitled to examine whether the case is of crucial significance from legal aspect and thus the appellate review is admissible. This was established through the amendment of the Civil procedure code Act N. 30/2000 Coll. Up to then the issue of admissibility was judged by the court of appeal in the appellate proceeding, which stated the admissibility or inadmissibility of the appellate review in its final decision. The admissibility of the appellate review could be stated by the court of appeal even without a motion. If the court of appeal did not comply with the litigant’s motion to pronounce the admissibility of the appellate review, the litigant was still allowed to turn to the Supreme Court with his appellate review. Such appellate review was admissible if the court competent to deal with appellate reviews reached the conclusion that the challenged decision of the court of appeal was of crucial significance from legal aspect. Apart from the admissibility of appellate review in cases which were of crucial significance from legal aspect the appellate review was still admissible as today against decisions of court of appeal, through which a meritorious decision of court of first instance was changed, or through which a meritorious decision of the court of first instance was upheld, in which the court of first instance decided in the merit of the case in a way different from its previous decision because it was bound by the legal opinion of court of appeal, which reversed the previous decision.
The proposed amendment dealing with the appellate review takes into account only one criterion of the admissibility of appellate review that is the fact that the case is of a crucial significance from legal aspect. For this reason the discussion over who should the next time be entitled to examine whether the case is of crucial importance was resumed. The first possibility would be to draw inspiration from the model before the amendment 30/2000 Coll., i.e. the matter of admissibility of appellate review would be decided by courts of appeal as well as the Supreme Court. The Supreme Court would always be entitled to examine the decision of the court of appeal on admissibility and inadmissibility of the appellate review. This could definitely lead to at least partial unburdening of the Supreme Court. This would be achieved through the fact that part of the participants of the appellate proceeding would not file the appellate review if the court of appeal pronounced the inadmissibility of the appellate review. The fact that the court competent to deal with the appellate reviews could base its decision on the admissibility on the conclusions and reasoning of the court of appeal would definitely be another positive aspect of this system. However, the negative aspect of this option would be the fact that this process could be unpredictable for the participants and it could also increase the costs of the whole procedure in case that the Supreme Court reached a negative conclusion pronouncing the inadmissibility of the review in comparison with a positive decision of the court of appeal.

To leave the duty to examine the admissibility of the appellate review only up to the Supreme Court is another possibility. The proposed amendment of the Civil procedure code eventually inclined to this variant.

**III. Reasons for Filing of Appellate Review**

The current legal regulation takes into account three reasons for filing appellate review. The appellate review can be filed only for these reasons:

1. there has been a defect in the proceeding. This defect could have resulted in a wrong decision in the case
2. the decision is based on an erroneous legal qualification in the case
3. the decision results from fact-finding, which is not supported in the pleadings by evidence (however, this rule cannot be applied in case of admissibility of appellate review under the criterion of crucial legal importance from legal aspect).

It is expected that in the future there will only be one single reason for filing the appellate review with respect to the proclaimed main purpose of the Supreme Court, which is securing unity and lawfulness of courts’ decision-making in civil court proceedings. The reason is the fact that the decision of the court of appeal has been based on an erroneous legal qualification in the case. The explanatory
note says that the above mentioned goal can be achieved through considering decisive issues of the substantive and procedural law. As a matter of fact such interpretation also relates to the definition of what can be regarded as a case of crucial significance from legal aspect. The decision of the court of appeal is of crucial significance if it depends on the settlement of the issue of substantive or procedural law which is important from the viewpoint of securing unity and lawfulness of the courts’ decision-making. Up to now procedural issues have been subjected under appellate review reason mentioned above under letter a), i.e. defects in proceedings which could result in a wrong decision in a case. Under the proposed legal regulation a procedural defect is a legitimate reason for filing the appellate review regardless of the fact whether this defect caused a wrong decision in the case. This definitely increases the chances to challenge the decision through appellate review.

IV. Limit for Filing of Appellate Review

The limit for filing appellate review is currently two months from delivery of the decision of the court of appeal. If the decision does not contain an instruction on admissibility of appellate review, limit for filing the appellate review or of the court at which the review is filed, or if it contains a wrong instruction on the fact that the appellate review is not admissible, it is possible to file appellate review within four months from the delivery of the decision of the court of appeal.

Under the proposed amendment it is expected that the time limit will be one month\(^5\), which is a return to the legal regulation before the amendment of the Civil procedure code Act N. 30/2000 Coll. It was in the explanatory note\(^6\) to the Act N. 30/2000 Coll. where it was stated that compulsory representation of the appellant, difficulty of drawing up of the appellate review as well as the possibility of the appellant to define the scope and the reason for which he challenges the decision of the court of appeal only within the limit for filing the appellate review were taken into account when extending the time-limit.

The proposed legal regulation is even stricter for the appellants in the fact that it rules out the application of § 43 of the Civil procedure code in the appellate review proceeding, under which the court shall challenge the appellant to remove the faults of filing the appellate review and sets a limit for doing so. The actual length of the time-limit is left at the discretion of the court. In case the appellant was not represented in the previous proceedings, or does not want to

\(^5\) In case the decision does not contain appellate review notification, notification of the time-limit for filing the appellate review or of the court at which it is filed, or if it contains a wrong notification of inadmissibility of the appellate review, it will be possible to file the appellate review within three months from the delivery of the decision of the court of appeal.

\(^6\) The explanatory note to the Act N. 30/2000 Coll. Parliamentary Press number 257/0.
be represented any more by the same advocate, he must get an advocate within the limit of one month and this advocate will file the appellate review. The advocate also has to study the whole case and then he must file an appellate review free from any defect. Thus if there is not a appellate review filed without any defect within the limit for filing the review, or if it was not corrected or completed within this limit, the court will reject this appellate review. Thus it is all the more possible to doubt about the adequacy of the proposed length of the limit for filing of the appellate review.

V. Elements of the Appellate Review

Apart from general essential elements, such as which court the appellate review is intended for, who is the one filing the review, what matter it concerns, what is the aim of the review, signature and date, the filing must also include the information about the decision against which the appellate review has been filed, the scope within the decision is to be challenged, definition of the reason of the appellate review and what the appellant is seeking (appellate review proposal). Under the proposed amendment the reason of appellate review shall be defined through the appellant stating the legal qualification of the case which he considers to be wrong and subsequently explaining the incorrectness of such a qualification. The decision of the court of appeal can be examined on the grounds set out in the appellate review only. Therefore it will also be necessary to make it clear, whether the Supreme Court is bound only by the specific qualification in which, according to the appellant, the court of appeal made a wrong decision, or also what is, according to the appellant, the nature of the wrong qualification. We ourselves incline to the first variant, i.e. the court competent to deal with the appellate review should be bound only by the fact, in which particular judgment the court of appeal made a wrong decision. Otherwise the position of a court would be denied. A court cannot be bound by legal opinion of the participant of a proceeding, which results from the principle iura novit curia.

Under the proposed amendment if the appellate review has any defects which have not been removed within the limit of one month from the delivery of the decision of the court of appeal and thus it is not possible to continue with the appellate review proceeding on account of this, the court competent to deal with the appellate review shall reject the review. It will proceed in the same manner if it reaches the conclusion that the appellate review is not admissible. The judicial resolution about this must be issued by the court competent to deal with the appellate review within 6 months from the day when the case was submitted to this court. However, in comparison with the original intentions the proposal does not include (in relation to passing this limit) the possibility of a fiction of a positive decision concerning the admissibility of the appellate review and the limit is a procedural time-limit only. Consequences which result from violating the time-limit can be of a certain significance only in cases where the length of
the proceeding has been taken into account, e.g. in disciplinary proceedings. The proposed six months limit can be found too long from the viewpoint of legal certainty, however, even with respect to the busyness of the Supreme Court and the number of cases not finalized, establishing a shorter time-limit would in fact not be of essential significance.

As far as the legal regulation of the process of the appellate review proceeding is concerned, no changes of crucial importance have been made in the proposed regulation. We can just draw attention to the legal regulation of evidence. In the appellate review proceeding it will not be possible to use new facts and evidence. Currently this restriction applies only to facts and evidence in the case itself. As a result of this, any evidence shall be ruled out in the appellate review proceeding.

The current legal regulation of the appellate review is based on cassation remedial system. The new proposal assumes that the court competent to deal with the appellate review can not only reverse the incorrect decision of the court of appeal, but it can also change the decision if the results of the proceeding show that it is possible to decide in the case. Thus the appellate review will be based on revisional remedial system. This system allows the participants to seek the re-examination of the challenged decision from the viewpoint of violation of substantive law as well as procedural rules within the limits of the appellate review and for reasons stated therein. The reviewing court can uphold and reverse the challenged decision; the change of decision is only possible in case the court of second instance correctly found the facts of the case, but they were incorrectly qualified.7

**Conclusion**

Appellate review is an extraordinary remedy. Thus it represents the last chance to defend the subjective rights of the participants of a court proceeding in the general justice system. The issue of considering the admissibility of the appellate review is of crucial importance even in relation to possible filing of constitutional complaint. It is the constitutional complaint which initiates the constitutional court proceeding. A natural person or legal entity is entitled to file a constitutional complaint if they claim that their basic right or freedom guaranteed by the constitutional order was violated through the final decision in the proceeding in which this person or entity participated or through another intervention of a public authority. The constitutional complaint is currently inadmissible unless the complainant has used all the procedural measures which are provided by law in order to protect his rights. However, this does not apply to the appellate review, which can be rejected by the Supreme Court as inadmissible for reasons which are discretionary (i.e. this is an example when it has to be considered whether the case is of crucial importance from legal aspect). Such legal regulation causes excessive busyness of the Constitutional Court, which

has to deal with cases which could well be handled on the level of general justice system (it is obvious that Constitutional Court deals with the case itself only in cases when the fundamental right or freedom of the participant guaranteed by the constitutional order has been violated).

In connection with the proposed legal regulation of appellate review which connects the admissibility of the appellate review only with satisfying the condition of crucial significance of the case from legal aspect, it will also be necessary to consider possible changes in legal regulation of constitutional complaint. If the proposed amendment is enacted and at the same time the current legal regulation dealing with the proceeding of constitutional complaint is kept then a situation may occur in which participants will turn to the Constitutional Court without using the opportunity to file appellate review first.

It is obvious that it is not possible to find a solution that would completely suit both courts. However, in this case it is necessary to bear in mind that the Constitutional Court is supposed to handle the cases of violation of rights and freedoms guaranteed by the constitutional order unless the protection has been provided by general justice system.

The Supreme Court is supposed to primarily ensure uniformity of case law. However, it is not possible to forget that “this purpose cannot outweigh the protection of participant’s rights so that the protection of these rights loses its sense and this participant will only become “a supplier of material” for unifying of the case law. On the contrary it is necessary to find a reasonably balanced relationship between the restriction of a right to the access to court and this purpose which also represents public interest. In this situation the public interest means securing of harmonious application and interpretation of law by general justice system”.8

The aim of this article is to point to insufficiencies of the current legal regulation of the appellate review proceeding in civil cases, when the court competent to deal with the appellate reviews is not able to fulfill its function of a unifier of case law and the defender of lawfullness of decision-making any more. The proposed amendment of the Civil procedure code which is being prepared by the Ministry of Justice reacts to many of these insufficiencies. The proposed amendment which has been sent to relevant institutions for comments is currently available to the public. After a deep analysis we have reached a conclusion that although this amendment in many respects tries to solve the current problematic aspects successfully, it can be found insufficient in many respects and thus further discussions and subsequent changes in this proposal can be anticipated. In this contribution we have only focused on crucial conceptual problems of the proposed legal regulation and we have avoided other deficiencies requiring deeper analysis and the knowledge of Czech legal regulation.

8 Ruling of the Constitutional Court of the Czech Republic of May 10th, 2005, evidence number IV. ÚS 128/05.
Summary: This paper examines judicial review and judicial power in Nigeria under the 1999 Constitution in relation to the constitution itself and in relation to the political branches of government. This is essentially to locate where lays supremacy between the branches and the judiciary particularly the Supreme Court with its final appellate jurisdiction. Judicial review and supremacy of the judiciary had been of recurring academic discuss in some jurisdictions with written Constitutions, particularly the United States from where Nigeria largely borrowed its presidential constitutionalism. This thus suggests that there is a need to examine the controversy within the context of Nigeria’s experience; is it really in the Constitution that creates branches of the government and that is proclaimed to be supreme over all authorities including the judiciary? Is it in the judiciary whose oversight function cuts across the political branches and whose interpretative decisions are binding on the constitution itself and the other branches? Is it in the executive that appoints and removes Justices of the court subject to confirmation by the Senate, or is it in the legislature? The paper argues that the overriding effect of the judicial power of the Supreme Court over all persons and authorities including the Constitution puts the judiciary in supreme position, that being the natural consequence of the power so vested in the judiciary by the “People Themselves.”

Keywords: Constitution, judicial review, separation of judicial powers, judicial supremacy, Supreme court, Nigeria

I. Introduction

The Constitution is a document ordained usually by the people setting out the relationship between the people and the three organs of government on the one hand and between the organs themselves on the other hand. It is important
to note from the outset that the constitution, in a normal constitutional setting,\(^1\) reflects the wishes and aspirations of the donors of the constitutional powers as contained in the document. The constitution, pursuant to the aspirations and wishes of the donors of its powers, creates the structures of government for the actualization of those goals.\(^2\) The structures with their substructures are political and therefore represent the constitutional arrangement put in place to ensure peace, order and good government.\(^3\) The document thus is the positivisation of the ideas, norms and normative concepts that the people, either directly or indirectly through their representatives or delegates at the appropriate or designated forum for that purpose, have adopted as the guiding rules between themselves, themselves and their government and between them and the external world.\(^4\) It may not be possible, at least in modern societies, for all adults to gather together at a forum for deliberations on the outlook of what they intend to be their constitution.\(^5\) For this reason, there may be no direct constitution, but an indirect constitution as distinct from an imposed type. This is typical of a written constitution that must also be distinguished from a formal constitution.

There is a marked distinction between a positive and a formal constitution.\(^6\) The formality of a written or a positive constitution does not depend on the

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1 By this it is meant to differentiate between a situation where the constitutional document does not reflect the actual intention, wishes and aspirations of the people. The people, in a normal constitutional setting, must be free to determine the nature and contents of the constitution. This marks the distinction between when the constitution is imposed as in the case of Iraq after Sadam and post-Taliban Afghanistan, and the Constitution of Nigeria, 1999. The Constitution was imposed on the people by the Military. The people were never allowed any impute in the constitution-making, but the preamble to the Constitution makes a blatant and treasonable misrepresentation of the source of the Constitution as the People.

2 see the Preamble to the Constitution of Nigeria, 1999 (henceforth referred to as the Constitution)

3 The essence of the arrangement is to accomplish the objectives of governance as are contained in the preamble, and as could be observed in Chapter II of the Constitution.


5 Usually, delegates are sent to the deliberation by the different interest groups. Good examples of this were the American Philadelphia Convention of 1787, May 25 where the American Constitution was debated and adopted and the various Nigerian Constitutional Conferences both during and after the colonial era.

6 The distinction lies in the fact that the positive constitution is the product of ideas, norms or the normative concepts that are formally written and codified in the written constitution. These political imputes are usually the rules, which the people intend to govern their affairs. Indeed, they are not independent of principles of natural law. These are not ordinary constitutional conventions as in Dicey's writing because once they formed the integral basis of the written constitution they become obligatory and thus enforceable by the
fact that it is written or that it is positive constitution. It all depends on the fact whether the constitution is or not subject to a superior or higher authority. The authority is not among the ones created by the constitution, it is superior to the constitution itself and it can be located outside the constitution, but its impact must as of necessity be felt in the constitution. That is, all organs created by the constitution must be guided in the exercise of the powers positively granted them by the principles of the superior, higher law or authority.

That is the principles of natural law; justice, equity and fairness. These again translate to reasonableness, legality, good conscience, good administration etc. These principles of natural law predate man; they had been there in the hearts of man through generations. They are thus not preclusive or exclusive to any particular race, tribe or nation.

The question then arises as to where actually lay the supremacy among the organs of government that are created by the positive constitution. Is it also in the constitution that ascribes supremacy to itself or that the people themselves have vested with superiority? Superiority must be understood in its normative nature and therefore be categorized into two; that is political and legal. It is political if it does not have finality of authority and legal if it has finality of authority. This may for proper understanding be further characterized into general in the sense that it has the final authority and specific because its authority can be called to question by the overriding authority. This paper addresses these questions and others and argues that supremacy, especially legal and general, is a complex matter and can not be located in the Constitution alone or in any organ other than the judiciary that has the final authority as far as interpretation of the laws and the constitution is concerned. The Constitution is nothing, like any statute, but whatever the court makes of it by its (court) interpretation; whatever the court says the Constitution is; it is and nothing more.

7 This is in contradistinction with Sir Edward Coke’s idea of “Common right and reason”, which is intrinsically linked to the common law unless it can be argued forcefully that what Coke meant in Dr. Bonham’s case is essentially a form of “shorthand for natural law...” For variety of intellectual discussions on this, see generally, Gary L. McDowell, Coke, Corwin and the Constitution: The “Higher Law Background” Reconsidered 55:3 The Review of Politics 393, 420 (1993), Leslie Friedman Goldstein, Popular Sovereignty, the Origin of Judicial Review, and the Revival of Unwritten law 48:1 The Journal of Politics 51,71(1986)

8 By this it is meant the organ with overriding or unquestionable power, whose power in the scheme, is not subject to the authority of any other organ.

9 Most written constitutions are vested with the toga of superiority, not as an organ of state, but as the organic source of powers of the organs. See examples, Constitution of Nigeria 1999, section 1 (henceforth referred to as “the Constitution”), S.2, Constitution of South Africa, S. 3 Constitution of Zimbabwe.
Although the judiciary is a creation of the constitution and positively granted powers, which in the end transcend the constitution itself, by the clear provisions of the Constitution, section 235, "no appeal shall lie to any other body or person from any determination of the Supreme Court." As the highest court of the land, it enjoys finality of authority, subject only to principles of natural justice, as are embedded in the rules of interpretation, which must constantly guide the court in its determination of matters brought before it.

It through its power of review or the interpretative adjudication assumes, inadvertently, superiority over all other organs and the constitution. When the courts exercise their interpretative jurisdiction particularly in the matters relating to the exercise of power by a political organ they most often determine the legality or otherwise of such exercise or its mode. And as in any other adjudicatory matter, the decisions of the courts are final and binding on all parties in the dispute. Constitutional democracy or constitutionalism presupposes that the laws that govern, including the constitution, must be interpreted by the courts that are created for that purpose, and that the decisions of the courts must bind all those who are directly or indirectly concerned or affected by the decisions. In that sphere the courts become fons et origo, and their decisions faith accompli unless set aside by a superior court. It is further argued that even when decision of a court is set aside by a superior court, the setting aside by the superior court is still a judicial decision epitomizing act of judicial superiomacism or supremacism.

This paper is not unaware that there are some democracies without written constitutions and in which case the Parliament may be sovereign in the sense that the courts lack power to set aside or void any law made by it. It also agrees that courts in some democracies with written constitutions do not have power to review and declare an act of the Parliament void. In such democracies, the search for general or legal supremacy must take a different approach. Nigeria is a constitutional democracy with a written constitution vesting in the judiciary the power of review of both executive and legislative acts and its decisions are binding on all persons and authorities within the Federation.

10 By the clear provisions of the Constitution, section 235, "no appeal shall lie to any other body or person from any determination of the Supreme Court." As the highest court of the land, it enjoys finality of authority, subject only to principles of natural justice, as are embedded in the rules of interpretation, which must constantly guide the court in its determination of matters brought before it.

11 The Constitution, section 287

12 Ben O. Nwabueze, CONSTITUTIONALISM IN THE EMERGENT STATES 14 (Associated University Press, 1973)

13 England is a good example of these countries.

14 The third republic of France, and Canada are with written constitutions, but without the courts having power of review; Malaysia and Swiss both have written constitutions, but with limited power of review vested in the courts.

15 This is so because it has satisfied some conditions: a written constitution that enshrines principles of democracy; popular and periodic election, legislature with members that are directly elected by the people themselves, the doctrine of recall of legislators etc. See also preamble to the constitution.

16 The Constitution, section 287
II. Constitution and power allocation

Democracy has now gained ground in most countries of the world, the military having lost tempo. This has been the result of many factors ranging from increase in political awareness at domestic level and efforts of international community and organizations to the awareness by the military itself that the primary function of the military is the protection of the sovereignty and territorial integrity of the nation, which essentially subordinates the military to the elected government of the day. Democracy entails learning process for it to take root and should therefore not be terminated at the very least misbehaviors or shortcomings of the political leaders.\(^\text{17}\)

One of the fundamental elements of democracy is the enthronement of a constitutional government. This is a marked distinction between a constitutional and a military or any form of arbitrary government. Thus, a government is constitutional when all the structures are put in place by a constitution, which regulates the affairs and relationship between the structures.\(^\text{18}\) This involves the creation of those structures and allocation of functions to each of them. These functions marked the areas of competencies of the organs. This is most evident with written constitutions like America, Nigeria, and India etc. This does not suggest that those democracies with unwritten constitution do not have structures with identifiable functions; they do have, but are seldom separable and distinct.

Today, the world over has experienced three forms of constitutional democracies or governments; the presidential as in America, Ghana and Nigeria, etc, parliamentary as in England and the hybrid system of the fifth republic of France. Notable with the presidential system is separation of powers\(^\text{19}\) between the three departments of government in such a way that the power to make laws is allocated to the legislature, the execution and maintenance of the laws vested in the executive while the interpretation of those laws is vested in the judiciary. This is a fundamental departure from the parliamentary system where even if lawmaking is for the Parliament, yet members of the executive are at one and the same time members of the legislature.


\(^{18}\) Nwabueze, supra note.12, at 2

\(^{19}\) The separation is not absolute in that the functions allocated to the organs are overlapping; the executive sometimes set-up Administrative Tribunals that perform quashi-judicial functions. The legislature also performs some sort of judicial functions as in the case of confirming judicial appointments and in impeachment proceedings. For a critique of the doctrine, see Geoffrey Marshall, Constitutional Theory. 113–124(Oxford University Press, 1971)
A. Legislative Competence

Two factors are important in discussing division of powers between levels of legislature. The first is the mode of division that may be “double” model or the “single” model. This may seem a matter of style because it does not in any sense affect the extent of the power granted or the mode of exercising the power; all it shows is that in the double model, the areas of legislative competency of legislative authorities are enumerated so that the areas of competence of each legislative authority are clearly separated and identifiable. This is the approach in Nigeria where, being a federation, the legislative powers of the federation are shared between the three levels of legislative authorities: national, states and the local councils.

As stated above, the exclusive list enumerated 68 items over which only the National Assembly is competent; the concurrent list enumerated 30 items over which both the National Assembly and State Houses of Assembly are competent, and 2 items over which a local governments has competence in addition to other functions that may be conferred on the Council by a law passed by the State House of Assembly in accordance with the Constitution. No other authority except the local councils can legislate on the matters constitutionally allocated to them and no other authority except the national legislature is competent over the exclusive list. In the case of the concurrent list, if any law made by a State House of Assembly is in conflict with that made by the National Assembly, the state law is null and void. If however there is no conflict except that the National Assembly has made a law on that subject matter the state law would be in abeyance, not being null and void, but solely because the central authority has legislated on the matter. The “single” model is perhaps the fancy of countries with unitary system as in Ghana, Zambia, England; etc. The approach with this model is that the areas of competence of only a level are enumerated while the areas of competence of the other level of legislative authority are unenumerated thus making them residual. The importance of this division is that the competence of each level of legislative authority is expressly identifiable in the Constitution and this reduces possibilities of encroachment by one authority into the areas of

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20 Paul Craig and Mark Walters, *The Courts, Devolution and Judicial Review*, Public Law 293, 293–299 (Spring, 1999)

21 The Constitution, sections 4and 7

22 see, The Constitution, Part I Second Schedule

23 see, The Constitution, Part II Second Schedule

24 The Constitution, Section 7 and the Fourth Schedule


26 This is based on the principle of “covering the field” as enunciated by Dixon, J., in the Australian case *Ex parte Mc Lean* (1930) 43 CLR 472, at 483, and approved in *Lakami v. A.G. Western Region* (1971) 1 UILR 201, at 209

27 There is usually no power devolution in Unitary Countries except between the National legislative and the Local Councils in which case the unenumerated powers are reserved for the Councils.
competence of the other and it provides the basis for test of validity of exercise of powers. Where the competence of an authority is clearly enumerated or une-numerated in the Constitution, it presupposes that that authority has no other competence beyond those enumerated or the residue; meaning that the powers of that authority are circumscribed to the extent of those enumerated powers or the residue.\textsuperscript{28} This is the second fundamental issue in the distribution of powers between the various legislative authorities in that it provides the extent of powers allocated to each authority. However, there may be situations where the extent of powers is not enumerated, but only the prohibited areas are mentioned. In such situations, the legislative authority has competence over all matters not included in the prohibited list.\textsuperscript{29}

Federalism entails, among other things, devolution of powers between the federating units and a written constitution. By its very nature, federalism, according to Schmitt\textsuperscript{30} involves the coming together of different entities “in lasting but limited unions, in such a way as to provide for the energetic pursuit of common goals while maintaining the respective integrities of all parties.” There is no much difference, if any at all, between Schmitt and Ekeh,\textsuperscript{31} who defines the concept as a form of voluntary political union, whether temporary or permanent, of independent authorities for common purposes such as “defense, trade and communication or for other reasons.” One apparent difference between the two approaches is that while Ekeh appreciates that in most case the federating units are hitherto autonomous and have decided to join the union, Schmitt seems not to recognize this all important factor that is often at the background of devolution; interestingly, they both reorganize the place of common “goal” or “purpose” in federalizing. From this however, it is clear that devolution of power is essential to federalism and the devolution model is determined by many factors which include defense of the territorial integrity of the federation. This presupposes a strong centre, charged with foreign affairs on behalf of all, with a strong army that is centrally put together, sustained and controlled. These are for the common “goal” and “purpose” of all the units which also determine what other powers are necessary to be assigned to the central authority and what should be left for the units bearing in mind the need for equality of units, competitive development needs, and autonomy in certain sphere.

In Nigeria, the lawmaking power is vested in the National Assembly at the federal level with two chambers; the Senate and the House of Representatives.\textsuperscript{32} The power is for “peace, order and good government” of the Federal Republic

\textsuperscript{29} Paul Craig et al. supra note 20 at 293–294  
\textsuperscript{31} Cited by Nuhu O. Yaqub, \textit{State Creation and the Federal Principle, in CONSTITUTION AND FEDERALISM}, id. at 186, 197  
\textsuperscript{32} The Constitution, section 4
of Nigeria. At the States level is the Houses of Assembly and also “for peace, order and good government”33. As a federation, the lawmaking power is shared between the National and States Legislatures. The power of national legislature covers all matters in the exclusive legislative list34 while those on the concurrent list are shared with the State Houses of Assembly.35 All other matters not contained in either the exclusive or concurrent list are vested in the local government.36

Incidental to the lawmaking power is the oversight functions.37 This is the area of legislative control and supervision of the executive. The legislature, being the representatives of the people has the duty to ensure that the powers exercised by the executive are in strict compliance with the provisions of the statute and or the constitution. This power necessitates the involvement of the legislatures in the day to day administration of the federation and the states. By implication, therefore, the legislature is involved in policy formulation and implementation.38 It may however be argued that policy formulation and implementation are outside lawmaking. The question must then arise as to what law is all about.

Basically, law is about the regulation of conduct of affairs and relationships within the society, whether at individual level, group or at the level of government.39 Also, the laws that are made by the legislature, being representatives of the people, are in a way to give legitimacy to the programmes and policies of the executive.40 This presupposes that the legislature must be abreast of the programmes and policies of the government. Most of the Bills being passed into laws

33 Id. 34 see, The Constitution, Part I Second Schedule 35 see, The Constitution, Part II Second Schedule 36 The Constitution, Section 7 and the Fourth Schedule 37 see, for example, The Constitution, sections 86, 88, 126, 128, 143, 147 and 153 38 see, Bello-Imam, I.B. The Legislature; Its Role, Performance, Problems and Prospect in Nigeria, in DEMOCRATIC GOVERNANCE & DEVELOPMENT MANAGEMENT IN NIGERIA’S FOURTH REPUBLIC 1999–2003, Bello-Imam, I.B. et al. (eds.) 409–423 (JODAD Publishers, 2004) 39 Joseph Omoregbe, AN INTRODUCTION TO PHILOSOPHICAL JURISPRUDENCE, viii (Joja Educational Research and Publishers Ltd., 1994), the Author points out to this attribute of law when he says “…I believe, is obligation. The obligation is of a moral nature…law is sacred and it imposes an obligation on all those subject to it.” 40 For example, the executive needs money to execute the laws made by the legislature, but that the executive can not just appropriate the fund without the approval of the legislature in the form of appropriation law. The legislative approval gives legitimacy to executive action, otherwise the action may be without the appropriate sanction. See Governor of Kaduna State v House of Assembly (1982) 3 NCLR 635, at 641 where the High Court of Kaduna State, Mohammed, CJ, held that the exercise of executive power of the Governor is subject “firstly to the provisions of the Constitution and, secondly and equally important also subject to the provisions of any law made by the House of Assembly of the State.” Kaduna State is one of the Sates of the Federation and indeed has the misfortune of being the first state to have its Governor impeached by the State House of Assembly in 1982.
are usually executive Bills seeking legitimacy for executive policies of administration and while they are being considered, the legislature must of necessity engage in thorough analysis of such Bills. This process entails in-depth studies and appraisal of the social, economic, political and financial implications of the Bills sought to be passed into law to confer legitimacy.

The traditional function of the parliament or legislature is to make laws for the society. From Traditional African Societies to the modern and complex world, the traditional function of the legislature has remained that of making laws. All other functions that are performed by the parliament all over the world are fundamentally to assist the parliament in its lawmaking functions. Certainly, no other authorities, by whatever name, rival the parliament in legislative business. However, the legislature may think it fit, in certain circumstances, to delegate certain aspects of its functions to a ministerial department. This delegated legislation must itself conform to the prescribed rules or conditions made by the parliament. So where the parliament has delegated powers to a body, the question of vires may arise. Although the court may not look into the validity of an Act of Parliament where the contention is not an issue of jurisdiction or breach of a constitutional provision, the court would look into the validity of a delegated legislation especially when the question is whether or not it has exceeded the limits set by the legislature. So, where a ministerial regulation made pursuant to an Act has failed to conform to the limits set in that Act, that ministerial regulation would be declared null and invalid.

The nature of power of the parliament to make laws engendered the questionable doctrine of parliamentary sovereignty. What the doctrine means is that when it comes to legislation, the parliament has unlimited power to make and unmake any law. Dicey states that it means that only the parliament has the right to make or to unmake any law. And that no one except the parliament itself can set aside the laws. A close look at the doctrine would show a clear indication of an impetus, at least one, of legal positivism. Austin, theorizing under the influence of English constitution; opines that: … Law established or posited in an independent political community by the express or tacit authority of the sovereign or supreme government … if a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in the society; and the society… is a society political and independent.

In practice, there is hardly any authority, whether single, group or assemblage that wields unquestionable powers to do anything. The contemporary world sit-

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42 Id., 193
43 Dicey, A.V., supra note 6 at 39–40
44 Adaramola Funsho, BASIC JURISPRUDENCE 85–88 (Rahamat Printing Press, 1995)
ution does not even support absolutism in governance. Austinian conception of law is not different from that of Jeremy Bentham (1748–1792) who posits that law … as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power…

It must be stated that the positions held by Bentham and Austin are generalizations on the sovereignty of parliament instead of talking about supremacy of the parliament as far as lawmaking is concerned. It is beyond any spell of doubt that the parliament makes the law. It is also true that the lawmaking procedure or the internal organization of the parliament is entirely its exclusive privilege, yet the parliament must operate within certain norms acceptable to the society in which it operates. These norms must be understood not in a sociological sense, but most certainly in an organic sense, the constitution. Thus, even if we agree to parliamentary sovereignty in England, the position is markedly different in Nigeria and the United States.

The Constitutions of both Countries have clearly delimited the powers of the parliament and nowhere has it been accorded any sovereignty or supremacy in the Constitution. The Nigerian Constitution 1999 provides that it is supreme (this is also questionable) and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria. The Constitution yet declares that sovereignty belongs to the people.

Apparently, the notion of parliamentary sovereignty, if at all accepted with peculiar constraints, is not contemplated by the constitution in Nigeria. Supremacy of the parliament is also limited to its internal organization and legislative procedure. This is a privilege accorded the legislature, as done in the United States, by the makers of the constitution to ensure the independence of the lawmaking body. It is the norm that the legislature be given that privilege of determining its own structural organization and powers to determine the rules for its legislative function; the court would not even look into procedural matter of the legislature unless the procedure is patently in conflict with any provision of the Constitution.

It should therefore be noted that, except in matters aforesaid, the legislature in Nigeria is not supreme and does not enjoy any sovereignty. The Courts have the inherent powers to determine whether or not an Act of the legislature is ultra vires the Constitution. Simply put, the powers of the legislature, at least in

45 Lord Llyod, INTRODUCTION TO JURISPRUDENCE 114, 116 (Stevens,1979); Riiddall, JG JURISPRUDENCE 21–22 (Butterworth, 1991)
46 Hon. Edwin Ume Ezeoke v Alhaji Isa Aliyu Makarfi (1982) 3N.C.L.R.633, at 674
47 Constitution of Nigeria 1999, section 1. It appears there are no equivalent provisions in the US Constitution, but, see US v Brewster 1972, 408 U.S.501
48 Constitution of Nigeria 1999, section 14 (2) (a)
49 Id. section 60 See , Ezeoke v Makarfi (1982) 3 NCLR 663, at 675
Nigeria, like in most democracies with written Constitution, are circumscribed by some limitations, namely, the constitutional limitations, International Conventions, public opinion etc.

Firstly, the extent of powers of the legislature for “peace, order and good government” is limited to legislative power over all matters contained in the constitution. It provides:

(2) The National Assembly shall have power to make Laws for ...with respect to any matter included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to this Constitution.

(4) In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make Laws with respect to the following matters, That is to say-

(a) any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and

(b) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.\(^50\)

From the above, therefore, it is clear that beyond those provisions, the legislature cannot make any law, otherwise such law shall be inconsistent with the constitution,\(^51\) and it would be ultra vires. In \textit{Uzodima \textit{V} COP},\(^52\) the appellant was tried and convicted of stealing by an Area Court which refused to allow him a counsel to defend him because section 390 by the Criminal Procedure Code denies a right of Lawyers in the Area Court. On appeal, the High Court of Benue State declared section 390 of the CPC as null and void on the ground that it is inconsistent with section 33 (6) (c) of the 1979 Constitution which provides that any person charged with a criminal offence shall be entitled to defense by a counsel of his choice.\(^53\) Similarly, in \textit{INEC \& Anor \textit{V} Balarabe Musa \& Ors},\(^54\) the National Assembly passed the Electoral Act 2001, which set out additional conditions, apart from those already prescribed by section 222 of the 1999 Constitution. The respondent not being satisfied instituted an action in the Court of Appeal.

The Court declared certain sections of the Act unconstitutional, null and void. Not being satisfied, the defendants appealed to the Supreme Court. The Court held, in part that:

50 The Constitution, section 4 See also Constitution of Nigeria, s. 4, 1979 and 1989 respectively.

51 The Constitution, section 1, (3), it provides for the doctrine of inconsistency that any law made by the legislature which is inconsistent with the constitution shall be declared null.

52 (1982) 3 NCLR 325

53 see The Constitution, s. 33 (6) (c)

54 (2003) 13 NSCQR 39
Section 79 (2) (c) of the Act was invalid because it was inconsistent with section 40 of the Constitution. In terms of section 45 (1) (a) of the Constitution, there is nothing reasonably justifiable in a democratic society in the interest of defence… The submission that the restriction is a valid derogation from section 40 by virtue of section 45 (1) (a) of the Constitution was erroneous.\textsuperscript{55}

Also, in \textit{A.G. Ondo State VA.G Federation & 35 ORS}, the Supreme Court declared sections 26 (3) and 35 of the Independent Corrupt Practices And Other Related Offences Act 2000 unconstitutional, null and void.\textsuperscript{56}

Secondly, International Conventions and opinions are very strong limitations on the legislative powers of the Legislature. It may be argued that Nigeria is an independent, sovereign nation, yet she dare not embark on legislations that would offend sensitivities of the international community. There are certain standards to which a nation must conform to remain a responsible member of the international community. Any derogation from those standards or norms may certainly be resisted. Also, in International Law, once a country is a signatory to certain conventions, such become binding on that country and can therefore not make legislation that would run in conflict to such conventions. What is more important to note is that by ratifying a convention at the international level makes such a convention superior to municipal legislation! Therefore, by implication, the legislature would have only two options, that is, to allow the country to remain within the confines of such convention and avoid some unpleasant consequences, or legislate against such conventions, damn and face the unpleasant consequences.

The decision of the Supreme Court in \textit{Abacha V. Fawehinmi}\textsuperscript{57} is very illuminating and instructive on this. Men of the State Security Services and Police men arrested the respondent, Chief Gani Fawehinmi at his residence without a warrant, and he was detained at Shangisha. At the time of his arrest he was neither informed of nor was he charged with any offence. He then applied to the Lagos Division of the Federal High Court for the enforcement of his fundamental rights both under sections 31 and 38 of the 1999 Constitution and Articles 4, 5, 6, and 12 of the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria, 1990.

The Federal High Court struck out the suit on the ground of ouster clause in Decree 2 of 1984 as amended and Decree 12 of 1994. The Respondent was dissatisfied and appealed to the Court of Appeal. However, both parties were dissatisfied by the decision of the Court of Appeal, and cross-appealed to the Supreme Court. It is important to note that one of the issues before their Lordships was the Status of the African Charter in Nigeria. It should also be noted that the

\textsuperscript{55} Id. at 75–76
\textsuperscript{56} (2002) 10 NSCQR 1036, 1083–1084.
\textsuperscript{57} (2000) 4.S.C. (pt.) 1
African Charter has been domesticated and is now part of Nigeria's municipal Law. However, delivering the judgment of the Court, Ogundare, JSC pointed out that International Statutes, once signed by a country, has “a greater vigor and strength” than other domestic statute." All authorities and persons exercising legislative, executive or judicial powers in Nigeria are enjoined to give full recognition and effect to the African Charter.

The effect of the Supreme Court decision in the case is that an International Treaty or Convention to which Nigeria or any country for that matter is a Signatory is superior to municipal legislation. This, essentially, is a limitation on the legislative power of the parliament. It is argued that it does not matter that Nigeria, or any country, is a voluntary signatory; once signed, it is binding because it becomes an international obligation that must be effectuated. It is further argued that once a signatory has acquired a benefit under such statute, to pull-out of it would amount to disrespect for and disloyalty to an international obligation such that other signatories to that international statute have the right to demand for specific performance or sanction against the disrespectful and disloyal state. The truth is that, once a signatory, it is a tacit submission of a part of the country's sovereignty and parliamentary supremacy. Other limitations to supremacy of the legislature include the collective will of the people, public opinion and activities of pressure groups. There are yet self-imposed limitations. Because of the social contract between the electors and the legislators, the legislature would not make any law that would offend the sensibilities of the Electors.

B. Execution and Maintenance

As usual with presidential system, the Constitution of Nigeria, as in the United States of America, established for the country a President who is the Head of State and at the same time the Chief Executive with the power to execute and maintain the constitution and all laws made by the legislature. Also, in consonance with federalism, there is established for each state an Executive Governor who is the Chief Executive of the State in who it is vested the executive power of the state. The executive power clause is couched in a clumsy style that it becomes difficult to determine the actual extent of the executive powers.

58 Id. at 21–7
59 Id. at 25–26
60 The Constitution, section 130
61 Id. section 176
62 This is the position in America where Article II of the Constitution vests the executive power in the President that "he shall take care that the Laws be faithfully executed", without defining what is meant by “... executive power”; whether it is the power to ensure that the laws passed by the Congress are “faithfully executed” or otherwise. This lapse has made many Presidents to determine for themselves the extent of the executive power. See, Frederic A. and P. Orman Ray, INTRODUCTION TO AMERICAN GOVERNMENT, 398–415, 398–402 (Appleton-Century-Crofts, Inc., Tenth Edition, 1951); Edward S. Corwin, THE CONSTITUTION AND WHAT IT MEANS TODAY, 191–197
Apart from the fact that the word “executive” is not defined by the constitution, the powers further extend to execution and maintenance of all matters over which the National Assembly has power to make law but has not made any:

Subject to the provisions of this Constitution, the executive powers of the Federation—shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws.\(^63\)

It would be observed that the provisions on the extent of executive powers of the Federation and, of the states, start with the word “shall extend to” without laying any foundation as to what powers preceded the extended ones. This makes it somewhat impossible or rather difficult to determine with mathematical accuracy the actual powers that are squarely vested in the President (and the Governors) or the extent of the executive powers. Ordinaril, one would expect that the powers so vested in the chief executive officers shall be limited to the execution of the Constitution and to all matters with respect to which the legislature(s) has powers to make laws for the time being. This would be in consonance with the idea of limited government in which case the powers are clearly defined by the Constitution, and not left to mere matter of academic or judicial conjectures.

The draftsmen or makers of the Constitution closed their eyes to the implication of imprecision in the definition and or the delimitations of such important aspect of the Constitution. I shall however return to this soonest, suffice it to say that to understand the different phrases that are put together in the provisions on the executive powers would require a thorough understanding of their linguistic and conceptual formalism in so far as this is the only way to enhance the understanding of its legal or constitutional formalism. Commenting on the executive and executive powers, Benjamin posits the definitive and descriptive picture of the term. He defines it as the “the person or the persons in whom the power of the state is vested,” adopting the definition put forward by Selassie.\(^64\) He again points out that the term connotes, in modern democracies, the powers and functions performed by the government.\(^65\) In other words, executive, according to him, could mean either of two things; the person in whom the powers of the state is vested including all the persons through whom he performs all the executive functions or the actual functions performed by that person, and further pointing out that the word is “widely referred to as the whole branch of political system responsible for implementing the will of the state, and as such charged with the execution of laws.”\(^66\)

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\(^{(Princeton University Press, 14th Ed., 1978)}\)

\(^63\) The Constitution, section 4


\(^65\) Id. at 388

\(^66\) Id. at 389
The positions held by Benjamin can only be appreciated if only resort is made to the constitutional provisions prescribing that the President shall be the chief executive in whom the executive powers of the federation are vested. Thus, the constitution creates two perspectives of the term executive; the first being the President who incidentally is crowned the “Chief Executive”, meaning that there are many people who are the executive and that the president is their overall head. Thus conceptualized, one must agree with Benjamin when he says that the executive includes the president and all those who partake in the affairs of the public sector from the vice-president, ministers, advisers (their counter-parts at states level) and all those who in one way or the other assist in actualizing the executive functions.

The second perspective is in the use of the phrase “executive powers of the Federation” as in the case of the President or “executive powers of the State” as in the case of the Governors. This can only mean, as pointed out by Benjamin, the powers or functions of state or government that are vested in the President or the Governor as the Chief Executive. Traditionally, one would argue or assume that the executive powers or functions are all in the parameters of policies formulation, seeking approval for the policies and the eventual implementation of the policies in line with the Constitution and the laws. This argument or assumption is in contradistinction with the express provisions of the Constitution relating to the executive powers. This thus necessitates a careful appraisal of the constitutional provisions on the executive powers to enable a proper fixation of the extent of the powers so conferred.

The executive powers can be divided into two broad categories: the extended unidentifiables and the identifiables, or the extended unenumerated and enumerated powers. In the first category are those powers that though extended, they are not specifically identifiable or enumerated. This is so because all the Constitution states is that the executive powers “shall extend to”, meaning that there are other powers that are being extended to the extended ones without them being mentioned. In the second category is the execution and maintenance of: the Constitution, all laws made by the National Assembly and all matters with respect to which the National Assembly has, for the time being, power to make laws. In this second category again are there clearly expressed specific grants, and the other being “all the matters with respect to which the National Assembly… has power to make laws”, but on which the legislature has, for the time being, not made any laws. This third leg of the powers is pregnant with interpretative problems and thus necessitates an appraisal of the whole stratum of executive powers to see what this category of power actually entails.

Executive power is usually discussed under three theories: the specific power theory, the inherent power theory and the theory of necessity or stewardship theory. The specific power theory contends that apart from the powers that are
ostensibly conferred on the chief executive officer or the head of state by the Constitution and Acts of the parliament, there are no other powers exercisable by the incumbent.\textsuperscript{68} The Constitution conferred on President the powers to and that are necessary for the execution and maintenance of provisions of the Constitution and of other statutes made by the parliament. It should be observed that the provisions on the powers are preceded with “Subject to the provisions of this Constitution”\textsuperscript{69} to show that the powers so vested in the President and or their execution are not independent of the other provisions of the Constitution.

The purport of the opening phrase is to subject the entire provisions to other provisions of the Constitution making the operation of the provisions conditional upon other provisions in the Constitution. Thus in a case, Uwais, J., while adopting Black’s Law Dictionary definition of the phrase, added that the phrase introduces condition, a restriction, a limitation, a proviso; that what the provision is subject to shall control, govern and prevail over the subject section.\textsuperscript{70} In other words, the provisions on “executive powers” are inferior and subordinate to the entire provisions of the Constitution. The provisions presuppose a limited and not an absolute President whose executive powers may know no limits notwithstanding that the Constitution does not define what “executive powers” are.

It is rather curious and incomprehensible that what extends to what is not even mentioned. The framers of the 1999 Constitution, and their 1979 and 1989 predecessors did not do better either. “Executive powers shall extend to…” is rather ambiguous. It could be conceded that the extensions are known, but those that are extended to them are not so clear if at all they are clear. Nor can it be argued that apart from those extended powers, the president, being the Chief Executive, Head of State and Commander in-Chief of the Armed forces of Nigeria do possess some constitutional powers which are not specified by the Constitution. If this is so, such powers must belong to the inherent realm.

Certainly, the powers vested in the President extend to the execution and maintenance of all laws made by the National Assembly and the provisions of the Constitution in the first instance, and in the second, to all matters in the exclusive legislative list, and those meant for the National Assembly in the concurrent legislative list irrespective of whether or not the National Assembly has made laws in respect thereof. The distinction between the two clauses is clear and important because it indicates two different set of powers; execution of the constitution and the laws of the legislature, and acting on matters over which the legislature has, for the time being, power to make laws, but in respect of which laws have not being made by the legislature. It is argued that legislatures do not legislate in vacuum, there is therefore compelling reason for granting unspeci-

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\item \textsuperscript{68} E. Michael Joye & Kingsley, I. INTRODUCTION TO THE 1979 NIGERIA CONSTITUTION, 221–223 (Macmillan Press Ltd., 1982)
\item \textsuperscript{69} The Constitution, section 5
\item \textsuperscript{70} NDIC v Nkem Ltd. (2004) 18 NSCQR 42, at 90–91
\end{itemize}
\end{footnotesize}
fied power in respect of the matters over which the legislature could make but has not made any law. It is further argued that the framers of the constitution may intend well by the provision, unless well guided, it is capable of creating tension between the executive and the legislature. This is simply because that power element is very wide and portends no limitation contrary to the culture of limited government that is the main goal of the spirit of the constitution.

The President is the Chief Executive, Head of State and Commander-in – Chief of the Armed Forces of the Federal Republic of Nigeria. These make it compelling to confer on him powers that are beyond execution of the laws made by the National Assembly and provisions of the Constitution. As the chief administrative officer, head of state and chief defense officer, the overall wellbeing and stability of the nation depends on him; his ability to act promptly in time of peace and during emergencies. He is the symbol of unity, sovereignty and integrity of the nation that he represents the nation at international level taking major and far reaching decisions on behalf of the entire nation. All these place on the office of the president more responsibilities that could have been possibly envisaged during deliberation on the form of constitution.

Consequently, there is a need for some level of discretionary power if the President must carry out the mandate that the people have given to him. No reasonable person or any person with his senses expects the President to look elsewhere when there is a need for prompt attention to a matter simply because there is no extant law on such situation. By the very political mandate vested in him, he must act promptly. This was made clear by Chief Justice Marshall in *Marbury v Madison* 1 Cranch 137 (1803). The people's mandate being the real source of the powers of the president presupposes that though the president must source legitimacy for his actions in either the constitution or the statutes; this would not mean that the president would not act pre-emptively when the need arises or when the interest of the nation so demands, particularly in emergency situations.

### C. The Judicial Competence

This is usually the third arm in any modern government, whether in the countries with or without written constitutions, be it federal or unitary. The nature of human societies demanded that there should be a body, impartial and independent in nature, and well groomed in the science of the law, charged

71 Section 14 (1) (b), Fundamental Objectives and Directive Principles of State Policy. Although it has often been argued that objectives and principles and merely directory and therefore not justiciable, the Supreme Court of Nigeria has decided that some of the directive principles are justiciable. see Attorney General, Ondo State v A.G. Federation (2002) 10 NSCQR1036, at 1079

72 see Edward S. Corwin, PRESIDENT POWER AND THE CONSTITUTION, 122 (Cornell University Press, 1977)

73 These are requirements for ensuring justice; any court or any person called upon to act in
with the duty of settling disputes amongst the people or in the sphere of public life. In other words, the function of the judiciary is tripartite; settling between people in their private affairs, between people and the authorities and between the various arms of the government. This essentially entails the interpretation of the laws and the constitution.

One striking, but often overlooked nature of the judiciary is the fact that it is ordained by God and Himself is the first Judge ever known on earth dispensing justice according to the laws He set for mankind. When He created the heavens, He created Adams, made and appointed for him a wife in the garden of eve. Then passed the law setting the limits of their existence in the garden. When, as usual, men violated the limits set for them, God called them, listen to their evidences and pleas and consequently passed judgment on them. The origin of the judiciary thus indicates the special or prime position it occupies or that it ought to occupy in the affairs of men, whether private or public. It may be argued therefore that the establishment of judiciary by modern constitutions is nothing, but the furtherance of the act of God. Even if we agree that separation of powers had its origin with God we must equally agree that all with Him were subordinate and over them He assumed supreme jurisdiction in all matters including adjudication.

The most apparent purpose of the divine origin of judiciary is to ensure justice among man for with that comes the peace that man need for the fulfillment of their very existence on earth. Human existence and its quality, for all purposes, require that there be peace in the environment to allow for social, economic, political and spiritual development. Justice, therefore, is an essential requirement for peace; with justice there is certainly the possibility of peace and the absence of it (justice) makes crisis and conflicts inevitable. To therefore ensure peace, men have, throughout history and generations to generations, continuously search for means of ensuring justice. Thus in the process ordained law to regulate and direct their affairs and this entails the establishment of the judiciary to apply and ensure compliance with the law. The recent developments at international level do not only support but points perfectly to this historical perspective and

74 For meaning of justice in its contemporary view, see Niki Tobi. Law, Justice and Democracy, in All Nigeria Judges Conference Papers, 1995, 61 (MIJ Professional Publishers Ltd., 1996)

75 see also, M.T. Ladan, INTRODUCTION TO JURISPRUDENCE CLASSICAL AND ISLAMIC.77–84 (Malthouse Press Limited, 2006)

76 The developments leading to the establishment of International Court of Justice and the International Criminal Court are good examples of this point from the League of Nation...
the systemic growth of that branch of government to the present, contemporary
enviable, but not all satisfactory position.\textsuperscript{77} It is this quest for justice that has
necessitated, in all Countries, the establishment of judiciary either by the Consti-
tution or Acts of Parliament, and charged with the power to adjudicate between
persons, persons and authorities, and between authorities.\textsuperscript{78}

The Constitution of the Federal Republic of Nigeria established the judiciary\textsuperscript{79}
which consists, for the whole nation, the Supreme Court, Court of Appeal and Fed-
eral High Court. Established for the Federal Capital Territory are the High Court,
the Sharia Court of Appeal and the Customary Court of Appeal. The Constitution
also established for each State of the Federation High Court, and Sharia Court
of Appeal or Customary Court of Appeal, for any State that requires it.\textsuperscript{80} Apart
from these courts, the National and State Houses of Assembly may establish for
their respective domain such other courts as may be authorized by law to exercise
jurisdiction on matters with respect to which could make law.\textsuperscript{81} The powers vested
in the judiciary extend, notwithstanding any thing to the contrary in the Constitu-
tion, “to all inherent powers and sanctions of a court of law”, and to:

…all matters between persons, or between government or authority and to
any person in Nigeria, and to all actions and proceedings relating thereto, for the
determination of any question as to the civil rights and obligations of that person;\textsuperscript{82}

The power thus granted the judiciary extends to all the inherent powers and
sanctions of courts of law. If the sanctions of a court can be determined with exact-
ness, what about the inherent powers? Could this be power to review the activities
of the other arms of the government without more or the power to review the
activities and declare any infraction illegal or unconstitutional?

\textsuperscript{77} The situation in many countries today is that the judiciary is not constitutionally made
directly answerable to the people, who are the real sovereign, but to either the executive
or the legislature or to both. Also, it should be realized that the organ in whose hand is the
control of the nation’s purse is superior to others in that hierarchy. Not until the judiciary
is financially autonomy can it be said to have independence.
\textsuperscript{78} The difference in the two approaches is fundamentally that while those courts created by
the Constitution can only be abolished through constitutional amendment, those created
by Legislative Acts can be abolished by the same Legislative Acts. The necessary impli-
cation in this latter approach is that the independence of judiciary may be dangerously
jeopardized particularly in this era of judicial review as a cornerstone of democratic con-
stitutionalism.
\textsuperscript{79} The Constitution, section 6
\textsuperscript{80} Id. sections 275 and 280
\textsuperscript{81} Id. section 6 (5) (j) (k)
\textsuperscript{82} Id. section 6 (6)
III. Judicial review

A constitutional government is such that all powers of the various apparatus of governance have limited powers to the extent allowed by the constitution.\(^{83}\) Therefore, inherent powers granted the judiciary would mean all powers incidental to attainment of justice in the society. This power would include power to grant injunction or make any declaration against any arm of the government or against any person or authority in the process of doing justice to any matter brought before the court. To argue generally, however, that inherent power includes review may be absurd because not all constitutions allow or grant the judiciary the power to review legislation; it would depend on the nature of constitutionalism in each jurisdiction.\(^{84}\) In some jurisdictions, the Parliament is “supreme” to the extent that it’s Act can not be struck down by the judiciary.\(^{85}\)

Provisions of section 6 of the Constitution of Nigeria 1999 confer generally the judicial powers of the nation in the judiciary to mark the separation of judicial power from the other powers of the nation; the section “concern itself with the delimitation of the separation of powers between the judiciary and the other departments of the Constitution.”\(^{86}\) The competence vested generally in the courts thus includes power to adjudicate on matters relating to civil rights and obligations of a person.\(^{87}\) It is the existence of rights and obligations that eventually determines the justiciability of the matters brought before the courts.\(^{88}\) In other words, where there is no right or obligation known to the law there is no competence to invoke the power of the court. Besides, the Constitution prescribed the areas of competence of the courts so established.\(^{89}\) Also, courts that are established by statutes have their areas of competence prescribed by such statutes.

More important to this paper at the present is the power of judicial review of acts of the sitting legislature and the executive,\(^{90}\) which power it would appear is not specifically or expressly prescribed by the Constitution, but yet has hitherto been exercised by the judiciary. It is extant that the Constitution is “supreme”

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83 see Niki Tobi, supra note 74 at 63–64
84 It should be realized that once a matter is not expressly denied the judiciary by the Constitution, but not itemized as such falling within the jurisdiction of the Court, it may fall under the inherent powers of the Courts or that which has become a traditional power of the Courts the world over. Apparently, the courts determine what the Constitution and the laws say; whatever they say is within the ambit of their inherent or traditional powers, be so it.
85 Dicey, A.V. supra note 43 at 39–40
87 Okitipupa Oil Palm Co. Ltd. V Hon. J.E. Jegede (1982) 3 NCLR 494, at 500
88 Hon. Edwin Ume Ezeoke v Alhaji Isa Aliyu Makarfi (1982) 3 NCLR 663, at 672
89 see generally, The Judicature, Chapter VII of the Constitution.
90 The use of “sitting” here is to distinguish between the acts of the previous and present legislature and executive in order to give effect to the provisions of section 315(3) of the Constitution
and any law that is found inconsistent with any of its provision, the Constitution "shall prevail, and that other law shall to the extent of the inconsistency be void." 91 Unfortunately, the power to declare such other law inconsistent is nowhere in the Constitution expressly conferred on the judiciary; it may therefore be said that the power is incidental or inherent. However, the judiciary is vested with the power "to declare invalid any provision of an existing law on the ground of inconsistency with the provision of any other law, that is to say – (a) any other existing law; (b) a law of a House of Assembly; (c) an Act of the National Assembly; or (d) any provision of this Constitution." 92 The phrase "an existing law" in this provision means:

any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force or which having been passed or made before that date comes into force after that date... 93

Thus "an existing law" within the context of the provision simply means a law that has been in existence before the 29th May, 1999 when the present Constitution came into force. Therefore, a liberal construction of the provision will tend towards a limited reviewability of legislation, but this is not so because the judiciary has often engage in blanket review of both legislative and executive acts; a power the judiciary has actively defended as incidental to the spirit of separation of powers that had been associated with the presidential democracy and the rule of law. This position has also been fortified by the paramount position the judiciary occupies under the Constitution; the decisions of the courts have binding force on all authorities, persons and courts of subordinate jurisdictions, and those of the Supreme Court being the final authority on all. 94 The word authorities include the other arms of the government over which the judiciary has exercised power of review since the coming of presidential system in the country. A few examples would prove this point.

A. Recent Review of Legislative Action

Judicial review of legislation or legislative actions has generated consistent or rather persistent controversy in some jurisdictions 95, but it has certainly not in

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91 The Constitution, section 1 (3)
92 The Constitution, section 315 (3)
93 Id. section 315 (4) (b)
94 Id. section 287
95 The debate is multifaceted. On the one hand is the controversy over the real foundation of judicial review. On another hand is the scope of review; whether it covers jurisdictional and non-jurisdictional errors. Also, it has now assumed another dimension in America; whether or not Marbury V Madison is rightly the origin of judicial review. For scholarly discussions, see generally; Andrew Halpin, The Theoretical Controversy Concerning Judicial Review, 64:3 The Modern Law Review 500, 511 (2001), Brabley Selway, QC, The Principle behind Common Law Judicial Review of Administrative Action-The Search Contin-
Nigeria, particularly under the presidential system, which has been the constitutional order since 1979. It is not however the intention in this part of this paper to generate the controversy, (it may however be a necessary development); it is rather to discuss the doctrine in the light of the position the judiciary occupies in the Nigerian constitutionalism since the adoption of American type of presidential system with modification under the 1979 Constitution. Certainly, the Constitution did not expressly provide that the judiciary shall have the power to “review” legislative and executive actions, yet the judiciary has assumed the power without any cry from the other arms, meaning that the judiciary is right or that the other arms have taken it so because there is no court to appeal to or simply because the legislature has no power to make any law that would oust or purport to oust the power of the courts from looking into the validity of any acts of the legislature including legislation, or is it because the Constitutions subject the exercise of legislative powers to the judiciary. What can not be denied is that the judiciary has exercised the power of review without any huff, and a few examples would suffice.

The Supreme Court asserted the power in *Attorney-General of Bendel State v Attorney-General of Federation & Others*\(^96\). The plaintiff in this suit was one of the States of the Federation who was entitled to share from the Federation Account.\(^97\) The President, on the 28th October, 1980 presented to the National Assembly a Bill on the formula for the distribution of the money standing to the credit of the account among the three level of government as provided by section 149 of the 1979 Constitution. The Bill was passed by the Senate on the 15th January, 1981 with amendments, while the House of Representatives also passed the Bill with different sets of amendment on the 22nd January, 1981. There was controversy between the Senate and the House of Representatives on the passage of the Bill, and the Senate President, in line with provision of section 55(2) of the Constitution arranged and convened a meeting of the joint finance committee of the National Assembly to examine the Bill with a view to resolving the differences between the two houses of the National Assembly. The committee met and finally adopted the Senate’s amendments with certain modification. The Committee’s approved version was, without recourse to the National Assembly\(^98\), presented to the Clerk of the National Assembly who in turn presented same to the President.

\(^96\) (1982) 3 NCLR 1
\(^97\) see Constitution of Nigeria, 1979, section 149
\(^98\) That was done in clear disregard for provisions of sections 55 and 58 of the 1979 Constitution.
of the Federal Republic of Nigeria, for assent in line with the Constitution. The President gave assent to the Bill on the 3rd February, 1981 in so far as it was not his duty to find-out whether or not a Bill has been properly passed into law by the National Assembly, and it became the Allocation of Revenue (Federation Account etc.) Act 1981. The plaintiff, dissatisfied with the mode and manner of passage and presentation of the Bill to the President for assent, filed an originating summons in the Supreme Court challenging the constitutionality of the Act. Delivering the judgment of the court, Fatai-Williams, J. held as follows:

... various provisions of the Constitution to which I have earlier referred clearly indicate a different Legislative process from that followed by the National Assembly in this case. Since this legislative process has not been followed in the passing of the Allocation of Revenue (Federation Account, etc) Act, 1981, the Act, to my mind, is not a valid ...

The ground upon which the court struck-down the Act is what can be referred to, for the purpose of categorization, as procedural (irregularity) inconsistency. This is because one, the Legislature had power to enact the Act, and two, there was no infraction pointed against the Act itself, only that the Legislature failed to comply with the procedure laid down by the Constitution for passing such a Bill into law:

(3) The Senate and the House of representatives shall appoint a joint committee on Finance consisting of an equal number of persons appointed by each House and may appoint any other joint committee under the provision s of the section.

(4) Nothing in this section shall be construed as authorizing such house to delegate to a committee the power to decide whether a bill shall be passed into law or to determine any matter which it is empowered to determine by resolution under the provisions of this Constitution, but the committee may be authorized to make recommendations to the House on any such matter.

Procedurally, the joint finance committee was only empowered to look into the areas of differences between the Senate and the House of Representatives on the Bill, and to recommend to the National Assembly as found appropriate in the circumstance instead of passing the Bill into law. No committee of the National Assembly is empowered to pass any Bill into law. On this ground, the Supreme Court was perfectly in order declaring the Act invalid, it not being an Act of the National Assembly. However, this ground of review does not take care of the source of the power of the court to declare the Act invalid. Fatai-Williams, J. was mindful of this and declared that:

99 see Constitution of Nigeria 1979, section 54(1)
100 supra note 96 at 40
101 Constitution of Nigeria 1979, section 58
By virtue of section 4 (8) of the Constitution, the Courts of Law in Nigeria have the power …, the duty to see to it that there is no infraction of the exercise of Legislative power, whether substantive or procedural, as laid down in the relevant provisions of the Constitution. If there is any such infraction, the courts will declare any Legislation passed pursuant to it unconstitutional and invalid.\textsuperscript{102}

Expressly, the provisions of section 4 (8) referred to by His Lordship subject the exercise of legislative powers by the National Assembly or by a State House of Assembly to the judiciary and prohibit the making of any law that would oust the supervisory jurisdiction of the courts. The combined effect of the provisions and those of section 1(3) of the 1979 Constitution as those of the 1999, without any doubt, point to a conclusion that in Nigerian constitutionalism the source of the power of review is the written Constitution. This is unlike in America where there is power of review the source of which is not express, but inferred and has been a subject of persistent controversy.\textsuperscript{103}

In yet another case, \textit{A.G. Abia State \& 35 others v A.G. Federation,}\textsuperscript{104} the Electoral Act, 2001 (herein referred to as the Act) was the subject of contention before the Supreme Court. The Plaintiffs, all the component States of the Federation, contended that some of the provisions of the Act are \textit{ultra vires} the constitutional powers of the National Assembly and they urged the Court to accordingly declare the provisions invalid and unconstitutional. Their claims as contained in paragraph 12 of their amended statement of claim, briefly stated, were particularly that; (1) the National Assembly lacks power to enact a law extending or otherwise alter the tenure of office of elected officials of local government councils in Nigeria against the clear provisions of Section 7(1) of the 1999 Constitution, (2) the National Assembly lacks power to make laws with respect to the conduct of election into the office of Chairman, Vice Chairman or Councilors of a local government Council, (3) Section 25 of the Act has the effect of amending the relevant provisions of the Constitution relating to qualification and disqualification of persons seeking election into the public offices without first complying with the provisions of Section 9 of the Constitution on amendment of the Constitution, consequently (4) that Sections 15 to 73 and 110to 122 of the Act are null, void and inoperative, and finally, (5) that the Act “is rendered null and void and inoperative in its entirety.”\textsuperscript{105}

Delivering the judgment of the apex Court, kutigi, J., on the first, second and third claims found for the plaintiffs and declared that the National Assembly lacks powers; (1) to make laws to increase or otherwise alter the tenure of office of elected officers or councilors of local government councils except in relation

\textsuperscript{102} Id. at 40
\textsuperscript{103} see, supra note 95
\textsuperscript{104} (2002) 3S.C. 106
\textsuperscript{105} Id. at 112–114
to the Federal Capital Territory,\textsuperscript{106} (2) to make laws with respect to matters relating to or connected with elections to the office of the Chairman or Vice Chairman of Local Government Council or to the office of Councilors \textsuperscript{107} and (3) to make laws with respect to the qualification or disqualification of candidates for elections “without first of all complying with the requirements of section 9 of the Constitution.”\textsuperscript{108} Consequently, sections 15, 17 – 25, 110–115(1)-(6), 116–118(1)-(8) and 121–122 of the Act were struck down for “duplication, inconsistency and lack of legislative competence.”\textsuperscript{109} It should be noted that “duplication” as a ground of review arose here because the Constitution has already covered the area and in such a situation, under the doctrine of “covering the field”, the legislation becomes void or inoperative.\textsuperscript{110}

\textit{B. Recent Review of Executive Action}

Earlier, judicial review of legislative actions was looked into with the view to see where the judiciary stands in the order of the organs of the government. In the process, exercise of power of review was espoused and the grounds upon which certain Acts were struck down by the courts were also identified. Interestingly, the decisions of the Supreme Court in those instances have been final; no other court to appeal to and no law in the aftermath passed by the legislature to reverse the demolishing decisions of the court. It may however be that in one of the cases, the grounds for sticking out the legislation or a provision of it was found directly in the Constitution, the grounds in another appear to be a product of judicial interpretative approach. This is particularly with “duplication” as a ground that the court did not aver to any constitutional authority other than the approach in another jurisdiction even though the constitution in that jurisdiction is not the same with the Nigeria’s.

This part looks into the power of the judiciary to review executive actions. It would be observed that while the Constitution subjects the exercise of legislative powers to the jurisdiction of the Courts, no such supervisory role on the executive is expressly accorded the judiciary. In spite of this apparent omission, the judiciary assumed that power over the executive. It may however be argued that since the Constitution does not expressly provide for such power, it could not have being the intention of the Constitution to subject the exercise of executive powers to the supervisory jurisdiction of the courts. This assumption would be corollary and antithetical to the spirit and one of the fundamental objectives of separation of powers and constitutionalism. While separation of powers dictates institutional constraints, constitutionalism presupposes limited powers of state

\begin{itemize}
  \item \textsuperscript{106} Id. at 124–125
  \item \textsuperscript{107} Id. at 126
  \item \textsuperscript{108} Id. at 127
  \item \textsuperscript{109} Id. at 129–132
  \item \textsuperscript{110} see the concurring judgment of Ogundare, J. supra note 104 at 198
\end{itemize}
apparatus to the extent that powers of each organ of government are properly sourced from the constitution.

In *A.G. Lagos V A.G. Federation*, the plaintiff, Lagos State by originating summons instituted an action in the Supreme Court to determine whether, among things, the Federal Government (or the President) has power under the Constitution to withhold, for any reason, any statutory allocation due to the State from the Federation Account. This action was precipitated by a circular letter from the Minister of State for Finance and addressed to all State Governors and Chairmen of Local Government Councils in the Federation. The circular letter drew attention to an earlier letter from the President raising three fundamental constitutional issues, namely: (1) that some States have created new and conducted election into the New Local Government Councils; (2) that though the States are constitutionally empowered to create such Local Government Councils, but with the consequential confirmatory Act of the National Assembly, which the States have not secured; and (3) that some States have not complied with the requirements of section 162 (6) (7) of the Constitution the provisions of which require each state of the Federation to maintain a special account “state joint Local Government Account,” and to pay to each Local Government in the State certain percentage of its total revenue as may be prescribed by an Act of the National Assembly. It was on the second issue, non-compliance with the provisions of Section 8 (3) (5) that the President ordered that no allocation from the Federal Account should be released to those states mentioned in the letter.

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112 Section 3 of the 1999 Constitution created thirty-six (Lagos State inclusive) states and seven hundred and sixty-eight local government areas in Nigeria. See parts I & II of first schedule to the Constitution.
113 Section 162 (1) provides that these shall be for the federation a special account to be called “the federation Account.” All revenues accruing to the federation, with certain exceptions, are to be paid into this Account subsection 3 provides that any amount standing to the credit of the Federation Account shall be distributed among the Federal, State and local governments on such term and in such manner as may be prescribed by the National Assembly subsection 5 provides the amount standing to the credit of local government councils in the Federation Account shall be allocated to the states for the benefit of their local government councils on such term and in such manner as may be prescribed by the National Assembly. A close scrutiny of these provisions would show a clear creation of trusteeship model between the Federal and State Government and the Local Government Councils on the one hand, and another between the States and their Local Government Council. The trust is that the Federal Government as the central authority collects all revenues accruing to the federation and deposits same in “the federation Account. This amount standing to the credit of the Account is neither for the central authority nor for its own benefit. The account is kept and maintained by the central authority for and on behalf of all Nigerians, and all level of governments for distribution. Also, the state governments collect from the federal authority any amount standing to the credit of the local government areas.
114 supra note 111 at 117–120
The defendant counter-claimed and asked the Court to declare, among others, that the plaintiff has no power under the Constitution to abolish Local Government Areas created by the Constitution unless in compliance with the provisions of Section 8 (5) of the Constitution. He also sought, *inter alia*, a declaration that the creation of additional Local Government Areas without compliance with provisions of the said section 8 (5) of the Constitution was illegal, unconstitutional, null and void. The provision of section 8 (5) of the Constitution is to the effect that the National Assembly shall pass a consequential Act effecting necessary amendment to the provisions of section 3 of the Constitution. To enable the National Assembly carry out its constitutional role in this regard, the House of Assembly of the state that has created additional Local Government Areas must duly inform the National Assembly.

The plaintiff’s argument was that the President has no right to withhold the payment of fund due to the Local Government Councils from the Federation Account under Section 162 subsection 3 of the 1999 Constitution. It also argued that the power of the President in that regard is purely executive, mandatory and not discretionary.

The defendant also argued, *inter alia*, that since the plaintiff has created additional local government councils in the state, from 20 to 57, the defendant has no obligation under the Constitution to pay to the plaintiff the statutory allocation. It was further argued for the President that he has subscribed to the Oath of Allegiance; he is obliged to “preserve, protect and defend the Constitution of the Federal Republic of Nigeria.” Also argued was the fact that the executive powers of the Federation are vested in the President and that by section 5 (6) of the Constitution “the executive powers extend to the execution and maintenance of the Constitution.” It would be observed that the fundamental question of constitutional dimension was whether or not the President has express or implied power to so withhold or suspend statutory allocation that was due or payable to a State Government for the benefit of her Local Government Areas.

In his judgment, Chief Justice Uwais conceded that the President by the Oath he has taken on assumption of office the President has a duty “to protect and defend the Constitution and that the “executive powers” constitutionally extend to the execution and maintenance of the Constitution. The Lord Justice however asked, “does such power extend to the President committing an illegality?” It was pointed out that the attention of the Court was not drawn to any provision of the Constitution which empowers the President to exercise the power of withholding or suspending any payment of allocation from the Federation Account to Local Government Councils or to State Government on behalf of the Local Government Areas.

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115 Id. at 121–122
116 The Constitution, section 8 (6)
117 supra note 111 at 123
118 Id. at 147
Councils as provided by section 162 subsection (3) and (5) of the Constitution. The Court finally held, *inter alia*, that the President has no power vested in him (by executive or administrative action) to suspend or withhold for any reason whatsoever the statutory allocation due and payable to Lagos state pursuant to section 162 (5) of the Constitution.\(^\text{119}\)

The concurring judgment of Justice Kutigi, presently the Chief Justice,\(^\text{120}\) emphasized that “nowhere in the constitution is the President expressly or impliedly authorized to withhold the Statutory Allocation payable to Lagos State...” The Supreme Court rightly decided that the action of the Mr. President lacks constitutional backing. Although the court did not categorically use the word “illegal” to describe the action of the President, that is the only conclusion that could be drawn from the answer: “…the Constitution does not and could not have intended that”\(^\text{121}\) provided for the question: “does such power extend to the President committing an illegality?” and thus illegal, where there is, on the one hand, no specific grant of power the President can not act merely upon his own discretion especially where the situation or the event is properly governed by an express provision in either the Constitution or an Act of the National Assembly. Nothing in section 162 or section 8 (5) of the Constitution suggests that the President could for whatever reason withhold or suspend statutory allocations due to a state from the Federation Account.

It must be recalled that the powers of each organ in a constitutional democracy like Nigeria must be traceable to the organic law of the country otherwise the exercise of those powers become illegal, unconstitutional, null and void. Thus far, the power of judicial review of the exercise of executive powers could not expressly be traced to the Constitution and yet the power is being exercised. Can it be regarded as “inherent”, if so, what does it portend bearing in mind that no other institution enjoys such inherent power? What is the extent of that power and whether exercised rightly or wrongly could any one questions the court, particularly where the power is exercised by the highest court? These are some of the likely issues for the future, but suffice for now to say that only the court, especially the highest court determines the extent of that inherent power and whether it has been exercised rightly or wrongly is its preserve subject only to the sovereign will of the people who may subsequently call for the removal of the red herring judge.

IV. Conclusion

The Constitution in most Countries of the world is declared as the supreme law of the land\(^\text{122}\), indeed the organic law that regulates the relationship between

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119 Id.
120 Id. at 152–157
121 Id. at 147
122 see, for example, Constitution of Republic of Zambia, Article 1; Constitution of Japan,
the people and the government, between the organs and even between the country and other nations of the world. What then is the extent of that superiority? Is it over all other norms in the hierarchy of norms? Or is it over the organs of government that derive their existence and powers from the very Constitution? The superiority from within the circle of norms does not present any difficulty to determine. This is certainly because the people have, through the Constitution, subordinated all other laws to the forms and limits dictated by the Constitution. The lawmaking powers whether substantive, procedural, or even the delegated legislation all have the sources of their very existence and enforceability right from the Constitution epitomizing the will, desire and aspiration of the people in whom lies the sovereignty. It is the power conferred on the Constitution that makes it the superior law over all other forms of law, otherwise the constitution would have ranked equal with other laws. This means there is nothing special about the power except as the people have decided in their political reasoning and wisdom to accord the Constitution that special status so that it is not subject to the political forces that often dictates the course and direction of and the majority dictatorship characteristic of legislation or made a mere moral obligation the obedience to which may be a matter of mere choice or convenience.

Imperatively, a cursory look at the provision on status of the constitution wherever they are expressed would show clearly that the nature of the status and although it is the basis of other constitutional competences, it does not provide for ranking between the three departments of government. This suggests that a Constitution does address the issue of supremacy only between itself and the departments of government, but it is to be found necessary the ranking in this era of judicial review and the dwindling or decaying theory of parliamentary sovereignty. Today, the British membership of the European Community has thrown pebbles in the eyes of parliamentary sovereignty; any Act of the Parliament that is inconsistent with the Community Act is null and void. The question of superiority between the Constitution and the Judiciary is not strange in legal writings. Corwin is perhaps the contemporary advocate of supremacism of the judiciary for he writes that the real Constitution is the Constitution as interpreted by the judiciary and that since the positive constitution is supreme the judicial version of it must equally be supreme. The interpretative power of

Article 98; Constitution of Ghana, section 2 and Constitution of South Africa, section 2.
124 Edward S. Corwin, Judicial Review in Action, 74:7 University of Pennsylvania Law Review 639, 651–652(1926). This idea of judicial version of the Constitution has been markedly attacked certainly on grounds not really of concern presently, but suffices to say for now that what appears in the critique of Corwin’s scholarship as “internal tension” is really
the Court gives it a latitude which makes it a distinct institution with the over-
riding power when it comes to law in action. This overriding power may be in
America “an act of faith” as Corwin puts it, it is in Nigeria a demand of the Con-
stitution as in other democracies where the Constitutions clothed the judiciary
with the power of finality of decisions. This presupposes that the Constitution
advertently creates dual supremacy as between itself and the judiciary\footnote{Sedley, J. captured the true position of the situation in what His Lordship referred to as “mutuality of respect between two constitutional sovereignties”. see, Lord Harry Woolf, \textit{Judicial Review-the tensions between the Executive and the Judiciary}, 114 L.Q.R 579, 581(1998)} or that it unconsciously abdicates its superiority in favor of the Judiciary. The implicit
new paradigm in this abdication is that the hitherto supremacy of the positive
Constitution over the institutions is now a metaphor for the supremacy of the
judiciary over all the other institutions. The explicit idea in the scheme is simply
that if the real Constitution is the judicial version that is equally supreme as the
positive Constitution, it logically follows that the judiciary with its finality of
decisions is in a temple higher than the other institutions whose decisions or
acts are subject to review by the judiciary. The judges’ mode of appointment or
removal has nothing to do in this affair save as has been ordained by the will of
the sovereign people to make the institution answerable to the representatives of
the people, ensure uniformity in the structural organization of the department
and to ensure unity of purpose of governance. This has necessitated the institu-
tion of independence of the judiciary as a way of insulating the department from
political forces and the partisan politicians that often characterize decision-mak-
ing process in the executive and the legislature. This does not suggest that politi-
cal consideration does not have any role to play or that it does not play any role in
the interpretative process by the courts. This is important in so far as the courts
also must look at the political spirit of the positive Constitution to determine and
pronounce on the contents of the real, judicial version of the Constitution the
legality of which is supreme and binding on all. This is certainly the demand of
democracy and the new constitutionalism. The apprehension expressed by Elliot
while criticizing Sir John Laws on the basis of grounds of judicial review by the
courts in England that it is indeed a “trailer for a constitutional theory of judi-
cial supremacism”\footnote{Mark Elliot, \textit{The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law} , 58:1 C. L. J. 121, 132 (1999)} notwithstanding, though reasonably “demands the closest
inspection”; the field is now clearer than before for judicial supremacy. Certainly,
the judiciary in Nigeria with its power of finality of decisions on interpretative
and adjudicatory jurisdictions cannot be on the same constitutional hierarchy
with the other organs whose actions, inactions, omissions, decisions or interpre-
tations of the law and the constitution may be call to question before the judici-
ary. The legislature though enjoys legislative supremacy while the executive also
has the same supremacy, the fact is still that their supremacies are still subject to the constitutional supervision by the judiciary to ensure that the will of the people of Nigeria as enshrined in the Constitution is strictly complied with by the organs, and that is the constitutionalism; the overriding judicial oversight of the political branches of government.
ACCOMMODATION OF WESTERN LEGISLATION FOR PLURALITY OF BELIEFS IN FAMILY LAW

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**Summary**: In the last several years, the European societies, that in their majority were fairly uniform as far as race, culture or religion, have been converted into intercultural places where many different visions of the world live together. Together with a factor of exogenous plurality, produced by the increase in immigration, an internal desegregation should also be highlighted in our own societies. In this new environment of diversity, it is without a doubt, difficult for the Law to accommodate all the different ethical, religious or cultural demands of the people. In my paper I study the means of accommodation rooted in our legal tradition such as: the conscientious objection, the agreements of the State with religious groups, mediation and arbitration as a way of accommodation of plurality in the field of Family Law, etc. I conclude by stressing the fact that allowing space for diversity does not mean giving up our own values. Quite the opposite, accommodation comes from our own values: that is, from the respect for freedom and non-discrimination, founded on the dignity of the person.

**Keywords**: Plurality, multiculturalism, religious freedom, conscientious objection, human rights, Law and Religion.

I. Conscientious objection in a pluralistic society.

In the last few years, the Western European societies, that in their majority were quite uniform as far as race, culture or religion are concerned, have been converted into intercultural places where many different visions of the world live together.

Besides a factor of exogenous plurality, produced by an increase in immigration, an internal desegregation should also be highlighted in our own societies. The result is that we find living, under the same jurisdiction, people with very different convictions such as: agnostics, Catholics following the teachings of the
Church, Muslims of distinct tendencies, protestants, Jehovah witnesses, etc. This is a rather new situation in our countries¹.

In this current environment of diversity, it is difficult for the Law to accommodate all the different ethical, religious or cultural demands of the people, especially due to the lack of flexibility in the Civil Law or Continental-Law countries (to a lesser extent in the Common-Law countries, which enjoy a rather flexible system).

Thus, we find ourselves with a double conflict:

a) On the one hand, the conflicts of individual convictions colliding with the legal system. This is what happens with conscientious objection.

In just a few years, we have gone from the almost-exclusive prominence of the objection to military service, to the proliferation of objections in different areas: in the health arena (objection to abortion, artificial reproduction…), objection to medical treatments or blood transfusions, objections in the labor field (for example, to work on certain holidays), etc.²

Recently, in Spain, two new types of objections have been proposed: the objection of judges to the celebration of marriage between people of the same sex and the objection of some parents to their children receiving the new subject: “civic education”, due to it contents.

b) On the other hand, together with the conflict of the people who reject the legislation as contrary to their own value system, due to immigration we find ourselves with conflicts arisen from the penetration in the Law of foreign cultural-religious elements, with the consequent “perplexity” of the Law.

This is what happens, for example, with some Islamic matrimonial institutions such as polygamy, unfamiliar to our legal tradition and values. The Western European legal systems do not recognize polygamous marriage because of domestic public policy. However, despite the direct rejection, the Law is forced to give some indirect effects to polygamy³. This happens, for example, when the several wives of a polygamist immigrant, legally married to him in their country of origin, claim a widow’s pension in their host country. In these cases, the Spanish courts have agreed to divide the pension among the wives, assigning equal parts to each of them (regardless of the amount of time spent living with

¹ Certainly Spain has an important historical tradition of coexistence between cultures, but this tradition ended with the expulsion of Muslims and Jews in the XV century. Since then, we have had a quite uniform society.


the husband), therefore giving indirect recognition to polygamy\(^4\). Another example of indirect recognition is produced when the polygamist immigrant tries to regroup with his different wives\(^5\). He is only allowed to regroup with one of them, not necessarily the first one; he can regroup as spouse with the second, the third or the fourth wife and the choice is up to the husband. So, it is also an indirect recognition to polygamy.

Thus, as a consequence of the plurality of our new social horizon in Western Europe, we require to move towards a more flexible Law in order to accommodate the diversity.

Before referring to the possible tools of accommodation I shall briefly mention the theories contrary to accommodation.

**II. An alternative between “secular absolutism” and “mosaic societies” to accommodate the plurality of society.**

Opposed to the need of moving towards flexibility is the so-called “secular absolutism”\(^6\). In this approach, the myth of the neutrality of secular law and the privacy of convictions survive. According to this view, beliefs should remain in the private arena (the home, the conscience, the temple), because when they invade public life, they disturb social peace and cohabitation.

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6 This is the expression used by in the Report on review of arbitration process prepared by the former Ontario attorney general Marion Boyd because of the social debate caused by Islamic arbitration. See the report in: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/.
A clear example of this consideration is the polemic French law that prohibits the Islamic headscarf or other religious signs in public schools\(^7\). The philosophy underlying is that religion should not be present in school. The notion of secularity that proposes turning religion into a “bubble religion”, that is not present in (that does not contaminate) society, ties in with an ancient opinion that springs from the French Revolution in 1789 and that historically had its raison d’être in Europe, and was possibly even necessary. But, in the XXI century, if the secular State is not at the service of people’s freedom to profess their religion; if, in the name of secularity, freedom is banned, then an abuse is being committed that in my opinion, cannot be justified and jeopardizes democracy and the progress on which it is frequently based. That is, what was a step forwards in the XIX century, is a step backwards in the XXI century.

Opposite to assimilationism we have the so-called “mosaic societies” in which different cultures coexist, without mixing with one another: that is to say that cultural ghettos are created made up of foreigners who do not know the language, who do not attend the same schools, who do not go to the same shops, and who do not establish relationships with people from their adoptive country.

The alternative to both extremes would be that of a single intercultural society: common, yet plural, with shared basic values, but one in which there is room for everyone. This intercultural-ness would suppose: a) on the one hand, the acceptance of certain common principles and values that would be defined by the dignity of the person and respect for human rights\(^8\); b) but, on the other hand, along with the acceptance of certain common principles, respect for plurality.

I shall now refer to some tools rooted in our legal tradition that we can use to make the Law more flexible in order to accommodate plurality.

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8 From this standpoint, “cultural” practices such as genital mutilation would plainly be unacceptable. This is what is clearly stated in a law that came into effect in Spain a few years ago with the purpose of fostering the social integration of immigrants. Between several reforms it typifies genital mutilation as a separate crime on the basis that (I read the introduction of the Law) it is “a practice that must be fought against with all the force possible, without any possible justification on the basis of so-called religious or cultural grounds”.

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III. Means of accommodation rooted to our legal tradition.

3.1. From the “conscientious objection” to the legally protected “conscientious option”.

A way to avoid the conflicts between Law and convictions would be to convert the foreseeable conscientious objections in legally protected options when the ethical rejection of certain sectors of society is expected, as is the case of laws approved after an important social controversy. That is the case in Spain, for example, regarding same-sex marriage law⁹.

It would mean the inclusion of a conscientious clause in the controversial regulation. The advantage of this process is that it does not place the objector in opposition to the system, but within it.

Spain stated this, by constitutional imperative, for the objection to military service. On the other hand, almost all the Western European laws legalizing abortion include a conscientious clause for the health personnel¹⁰. In Spain, when the jury law was passed, there was an amendment (that eventually did not prosper) to include the conscientious objection within the excuses to act as jury¹¹.

So, to convert conscientious objections into a legal option would be a way to accommodate plurality within the Law.

3.2. The agreements of the State with religious groups as a means of accommodation.

Another possible tool to accommodate the Law to the demands of conscience are the Agreements of the State with religious communities.

We have this system of Cooperation Agreements for example in Spain, Germany and Italy.

In Spain, bilateral instruments to regulate matters of common interest between Church and State have used since the eighteenth century, but exclusively to define the legal status of the Catholic Church. These were the Concordats, an ancient institution with a legal nature analogous to that of international treaties. The Concordat with the Catholic Church that is currently in effect in Spain dates from 1976–1979. One year later, in 1980, as a consequence of the Constitutional neutrality of the State, the Organic Law of Religious Freedom created a sort of

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¹⁰ Recently a new legislation on abortion has been enacted in Spain (Ley Orgánica 2/2010, de 3 de marzo, de salud sexual y reproductiva y de la interrupción voluntaria del embarazo). It provides specifically in section 19.2 the conscientious objection of the health staff.

replica of the Concordats and made it available to any religious community with deep roots in Spanish society.

Which religious beliefs have been considered to have deep roots in Spain? In addition to The Catholic Church, Protestants, Jews and Muslims were, and in 1992 these three religions signed their respective cooperation agreements with the State.

The Agreements are, without any doubt, an appropriate instrument to the accommodation of religious diversity. In this way, the Agreements recognize civil validity of marriage administered in accordance with the Canon law or with the Islamic, Jewish or Evangelical ceremony. They recognize the communities the possibility of teaching their religion in state schools when students ask for it; and if there are at least ten students in each class, the teacher is paid by the State. In the agreements with the Jews and Muslims, the public powers commit themselves to protecting, in terms of food products, the denomination halal (for the Muslims) and kosher (for the Jews). If the communities register these denominations in the Patent and Trademark Office, it is guaranteed that the products that carry the denomination will be produced in accordance with the respective religious laws. This order is not stipulated for Christians, who have no religious dietary laws. In matters of religious holidays, the Agreements establish, for example, (I copy the Agreement with the Jews although the other two Agreements are expressed in similar terms): “The weekly day of rest of the followers of the Communities belonging to the Federation of Jews Communities may, with the agreement of the parties, include Friday evening and Saturday, in lieu of the day provided by (…) the Workers’ Statute as the general rule…” (art. 12). Although the adaptation submits to mediating an agreement between the parties, one should at least understand that there is a certain obligation for the employer to try, if possible, a reasonable adjustment.

In short, the Agreements are an appropriate instrument to efficiently resolve the conflicts that religious communities can provoke in the adaptation of their religious precepts to the general demands of legislation. Nonetheless we are not taking all the advantages that the Agreements are able to provide us.

In Spain, there was a lot of interest in signing the Agreements with Muslims, Jews and Protestants in 1992, coinciding with the 500-year anniversary of

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12 Art. 7,1: “The State, taking account of the religious beliefs existing in Spanish society, shall establish, as appropriate, Cooperation Agreements or Conventions with the Churches, Faiths or Religious Communities enrolled in the Registry where warranted by their notorious influence in Spanish society, due to their domain or number of followers. Such Agreements shall, in any case, be subject to approval by an Act of Parliament”.

13 Laws nn. 24, 25 and 26 of 10 November 1992 approving the Cooperation Agreement Between the Spanish State and: the Federation of Evangelical Religious Entities of Spain (law n. 24), the Jewish Communities of Spain (law n. 25) and the Islamic Commission of Spain (law n. 26), in B.O.E. n. 272, 12 November 1992.
the expulsion from our country of the religious minorities, possibly with more political than legal intention. And I think that it is proper for the Law to answer to social demands but not to anticipate them as it occurred with the 1992 Agreements.

In this way, the Spanish Agreement with the Islamic Commission was signed at a time when the cooperation with Islam still did not present problems in Spain. When they began, upon the notable increase of the Muslim presence in Spain as a consequence of immigration, the solutions that the Agreement offered were extremely vague and insufficient. With the 1992 Agreement, a representative organism for Islam was also established in our country, absolutely artificial, that is not representative of Islam in Spain and that is paralyzing the efficient application of the Agreement. This has occurred because, in order to sign the Agreement, the State requested the two existing federations of Islamic communities to unite in a single one (the Islamic Commission of Spain). The problem is that between the two Islamic federations there are important differences and rivalry. As they cannot agree between themselves, it is often difficult to apply the cooperation agreement signed with the State.

Let me illustrate this with an example – for the civil validity of Islamic weddings in Spain, the consent of the parties shall be lent in the presence of two witnesses, who must be of age and one Islamic religious leader or Imam accredited by the Islamic Commission of Spain. We have been celebrating Islamic weddings with civil effects in spite of not having any religious leader or Imam accredited by the ICS. What would happen if the civil validity of these marriages were challenged? I don’t know, it has not occurred till the moment. Another example: to be able to teach Islamic education in Spanish public schools the Islamic Commission of Spain must present to the Administration, so that it can approve it, a list of teachers of religion. However, the two Islamic Groups that constitute the Commission cannot agree on a list of teachers, and in some Spanish cities this Islamic education is not yet being imparted for this reason.

In any case, despite its deficiencies, the truth is that the Agreements with religious communities have provided tools for the accommodation of the Law.

3.3. Mediation and arbitration as a way of accommodation of plurality in the field of Family Law: special reference to the Canadian case.

In the area of Family law, a legal resource that is being used in our countries to adapt to the different cultural identities is the institution of mediation and arbitration. It makes it easier for the parties involved to resolve their conflicts in compliance with a law that is more close to them.

Furthermore, the alternative dispute resolution procedures contribute to lighten the court system load, to reduce the costs of the process, to avoid the publicity of subjects that parties want to keep private and to obtain a quick decision that prevents a greater exacerbation of the matrimonial conflict.

Mediation and arbitration also help to avoid the civil courts from the obligation to declare with reference to institutions with which they are not familiarized. In this way, there have even been cases in which the civil courts have interpreted religious Law. Allow me to cite a curious example from a California Court. The disagreement between the different experts called to testify before the Court, has forced the American Court to take part in the interpretation of the Islamic law when it shouldn’t because it has neither the qualifications nor the competence to do it. The Court had to decide whether a Muslim woman loses her right to the dower or not when she is the one asking for a divorce. Particularly shocking is the following affirmation in which the American Court dares to refer to the wisdom of the Prophet. These are the words of the Court: “The court also finds that, if the wife initiates a termination of the relationship, she foregoes the dower, and the court so finds that, in this case, the wife initiated the termination of the marriage and common sense and wisdom of Mohamed would dictate that she forego the dower, unless the parties agree otherwise…”\textsuperscript{15}

However, despite the advantages, the submission of the conflicts of family Law to arbitration (and specifically religious arbitration) is not exempt from difficulties. Allow me to illustrate the problem with the example of Canada.

In Canada, the system in force in Ontario from 1991 to 2005, allowed arbitration to resolve certain family matters and, in fact, some religious communities had their own arbitration courts under the protection of this regulation. However, the creation of the Islamic Institute of Civil Justice at the end of 2003 that was created in order to allow Canadian Muslims to resolve their conflicts according to Islamic Law sparked an intense debate in the country. Among the group that rejected the Islamic arbitration were some sectors of the Canadian Muslim population, such as the Canadian Council of Muslim Women that played a fundamental role.

The reasons given to object were that there is not just one but several interpretations of the Islamic Law and that some of them are of patriarchal inspiration, harmful to women’s equality.

The answer to this was that arbitration is voluntary and requires the consent of both parties. However, it was said that some women could feel obligated to attend these Islamic courts, in virtue of their religious convictions or under family and community pressure. This was one of the main reasons for the govern-

\textsuperscript{15} Dajani v. Dajani, Court of Appeal of California, Fourth Appellate District, Division Three, 1988. In a similar way, in Schwartzman v. Schwartzman (N.Y. Supreme Court, 1976) the Court ends by interpreting the Jewish law relative to the Mikvah as an essential element to become a Jew.
ment to resolve the conflict in 2005 modifying the legislation in such a way that, after the reform, religious arbitration is no longer possible\textsuperscript{16}.

Despite the unquestionable advantages of religious mediation and arbitration, it seems advisable to promote a gradual and prudent implementation, may be starting with mediation that allows judicial revision\textsuperscript{17}.

\textbf{IV. Conclusion}

To conclude, Western European legal systems are being claimed to accommodate a new social reality that is eminently plural. In my paper, I have pointed out some tools directed to this purpose.

I conclude by stressing the fact that allowing space for diversity does not mean, as some European people believe and fear, giving up our own values. Quite the opposite, accommodation comes from our own values: that is, from the respect for freedom and non-discrimination, founded on the dignity of the person.

\textsuperscript{16} Family Statute Law Amendment Act, introduced on November 15, 2005.

\textsuperscript{17} While the religious communities are not in a place to offer guarantees for an application of these means that is adequate in their idiosyncrasy but also compatible with the values and fundamental rights of our legislation.

Summary: The article deals with the phenomena of human migration, especially migration from the rural surroundings to the city structures and legal approach to it. Author describes the acknowledgment and legal regulation of the migration into the city structures in ancient world (e.g. in Roman law), deals with the contemporary legal concepts related to this sort of migration in Polish law and evaluate the impact of EU law approach to this question. Finally author pleads against the protective and closing regulations and call for the open approach to the in-city migration flows.

Keywords: Migration, local government, rural space, urban space, legal regulation, openness

I. Great migrations from a historical perspective

Population movement is the phenomenon immanently linked with the history of mankind. People have moved for ages, usually searching the better living conditions. However, there have been also the other reasons of migration of nations, like a plunder, a conquest of the new territories, or providing for the religious needs. The migrations were undertaken by the whole nations, but also by the smaller groups or tribes, which later became the origin of big national groups.

The oldest, known mainly from the archeological excavations, was the Indo-European migration of nations towards the west of Europe, which took place between IV and V millennium Before Christ. That event had the determinative influence on the ethnic, and indirectly, cultural form of the contemporary Europe. Though, together with those nations came the Italics, German people, Celts, Hittites, Medes, Persians, or Greek people1. The following great migrations

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took place in III and IV centuries AD, when the territories of the Roman Empire were invaded by the barbaric nations: Vandals, Huns and German people, contributing considerably to the fall of the empire².

The most famous migration of the smaller tribal groups is the peregrina-
tion by Abraham, from Charan to Canaan, in other words, to the territories of contemporary Israel, which was inhabited then by different tribes. The group of people was relatively small. According to the Bible message, the head of that group was Abraham together with his nephew Lot and their dependants, who, in this case, should be understood as the members of the tribe³. They became the origin of the Chosen People.

The birth of Islam at the beginning of VII century initiated the gradual polarization of the world of that time, to the Islamic and Christian parts. Both parts quite quickly became culturally and politically closed, in this way, making impossible any migrations between those two worlds. The basic form of the migration of the groups of people in the Middle Ages were the conquests carried out both, by the Muslims and by the Christians.

Nowadays, the phenomenon of the people migration fundamentally differentiates significantly from that previous ones, from the past. The appropriate international regulations exist, therein in the European Union legislation. There are also the suitable systems of the emigrants control bodies. Moreover, within this framework, there is worked out, the appropriate policy of the individual states and the international community. Nowadays, the most common purpose of the migration, particularly from Africa and Asia, is searching the better living conditions.

Not going too deeply in the historical analysis of the migrations, there should be realized that mixing the population leads first of all to the profound cultural transformations. The fear of these transformations leads to the contemporary fight among the civilizations⁴. Also in Europe the local communities experience the fear of the inflow of the outsiders, which are culturally unfamiliar, chiefly those of the Muslim faith. The analysis of the legal rules also indicates that the status of the newcomers, even today, is always worse than the status of the native people.
In the further part of this short work I will stop only at some specific aspects of the relationships occurring among the local communities and between the original residents and the immigrant population. The analysis will be carried out from the perspective of the legal regulations existed in the Roman, Polish and Union law. It will allow to reveal the fears of the local communities, appearing because of the inflow of the outsiders culturally unfamiliar.

II. The Roman law

The organization of the ancient world was based on the culture of cities. Each local community was autonomic, and even in broad understanding of this word, it was sovereign. The model example of such organizations are the Greek polis. Each of those cities had their own public authorities, their own law, the army and the policy. The Greek influences on the Apennine Peninsula prejudged about the form of the organization of Italy. Till the Punic wars there were, in principle, the independent cities, they cooperated among each other only on the basis of the existed contracts concluded by them. Only just in III and II centuries BC the process of cultural unification of Italy was initiated, creating in this way, one nation. The expression of the existence of the consciousness of Italian people in regard of creating the common nation is the inscription which comes from 193 BC, and which was found on the Sicily. The inscription commemorates raising the monument by Italici in honour of Lucius Scypion5, the conqueror over the enemies’ armed forces.

The expansive policy of Rome results in the loss of the sovereignty of the cities states. However, the wide ranging autonomy of the local communities was preserved. They held their own constitutive bodies ordo decurionum and the executive bodies – duumvirs, ediles and questors. Moreover, the whole clerkly instrument existed – apparitores.

The municipalities were entitled to keep in touch among each other, among other things, through sending the delegations (legatio) to different kinds of celebrations. The legations in Rome usually consisted of 10 people – decem legati. Whereas in municipalities that number was significantly lower and it did not exceed three members6.

The fundamental element of life in the local communities was the trade. The numerous groups of traders, chiefly from the east, paced through the territory of the Roman state. They wandered from one city to the other. The migrating traders transferred with them the new ideas, apart from the economic aspect. Hence, they became the unintentional instrument of mixing the cultures of the ancient

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world, creating the multicultural communities. Even of more importance was the fact that the numerous traders settled down in different municipalities, quite often taking up the teaching.

Similarly like nowadays, the people changed the places of residence searching jobs, or because of matrimonial reasons. In this way, there were two groups of citizens created in municipalities. The first one municipes, which means the citizens having full rights, and the second group incolae, which means the influenced people, which was in the worse legal situation than the first one7.

In each municipality the most important category of citizens constituted the municipes, in other words, those who lived in the given municipality from their birth (municipalis origo)8. They had the full civil rights, chiefly the political ones. In case, if the place of birth (origo) was not the city, but any of its fraction, as for example conciliabulum, forum or praefectura, then, it was assumed that the place of birth was gens, civitas or regio.

The second category in the Roman municipalities constituted those who were not born in the given city, and they only had the domicile – incolae9. However, not all the newcomers in the city could be determined as incolae, but only those, who possessed the land and the place of living, within the borders of the city – domicilium.

The existence of those two groups, within the local communities, particularly on the west of the Empire, appears in two different dimensions. First of all, the citizens with full rights had the access to bear the offices in the city, such as: duumvirs, ediles or questors. Whereas, within the framework of bearing the duties, that was the burden of all the citizens, also the people not being the citizens of the city. Those duties were both, the physical work and the fiscal duties.

From the perspective of the threats of people migration, there should be stated, that the society of that time was multicultural, and for that reason, it was more tolerant. The Romans were ready to tolerate the other beliefs, the foreign customs and as a consequence, the other systems of values.

The fears about the preservation of the influences on the local authorities were guaranteed through introducing the restrictions in the access to the public

7 More about obtaining the citizenship in Rome, see: A. Jurewicz, The Mobility of the populat10ion and obtaining the citizenship in the Roman law – some chosen problems, [in:] Free flow of people from the perspective of the European integration process. Atti della IV Conferenza Internazionale dei Diritti dell’Uomo, Olsztyn 2002, p. 290 and following.
8 Paul. lib. sing. de cognitionibus (50.16.228): „Municipes” intelligendi sunt et qui in eodem municipio nati sunt (There should be accepted that the municipes were those who were born in the given municipality).
9 Pomp. lib. sing. enchiridi (50.16.239): „Incola” est, qui aliqua regione domicilium suum contulit: quem Graeci paroikon appellant. Nec tantum hi, qui in oppido morantur, incola sunt, sed etiam qui aliquius oppidi finibus ita agrum habent, ut in eum se quasi in aliquam sedem recipient.
offices by the people not having the Roman citizenship. Generally, the municipalities kept the right relationships among each others, among other things, the economic relationships. The expression of good relationships was, sending the delegations to the celebrations with the specific messages.

III. The Polish law

On the basis of the article no.1, item 1 of the act about the local government\(^\text{10}\), all the citizens create the residential community, by virtue of law. According to the article 25 of the civil code\(^\text{11}\), the members of this community can be only the natural persons, who have the intention of the permanent staying at the territory of the community. Therefore, possessing only the permanent documents, it is not enough. It is necessary to declare the will of permanent staying, for example by the factual inhabitation or by doing business. In the jurisdiction there is also the notion of concentrating the life centre of the given person. In the judgment of the Administrative Court in Opole from 27th April 2007, sign. Act I C 395/06 there was stated that to determine the permanent place of living this is necessary to transfer not only the inhabitance, e.g. through buying the house, but also transferring the place of work, the place of paying the taxes and to do this at relatively short time. It cannot exceed several months\(^\text{12}\).

According to the article 32 of the Constitution of the Republic of Poland\(^\text{13}\) all the people are equal in relation to law, what, at the same time, implicates the duty to treat equally all the citizens of the community by the authorities. Nobody can be discriminated by the authorities because of the political, social or economic reasons. There are, therefore, no legal basis to introduce the division to the inhabitants of the community, and those who reside there temporarily or illegally.

However, there is an exception from this rule, if we mean the active and passive election law. According to the article 5, item 1 of the legal act, the electoral system to the community councils, administrative district councils and the regional councils of the voivodeships\(^\text{14}\), the active election right to the given council has each Polish citizen who is 18, on the day of voting, and who permanently lives on the territory of the activity of the given council. In the item 2 of the same article, there were specified some cases excluding this right, namely, the active election right to the community councils do not have the persons:

- deprived of the public rights by the valid decision of the court;

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\(^{10}\) Official Journal from 1990. No. 16, pos. 95.
\(^{11}\) Official Journal from 1964. No. 16 pos. 93.
\(^{12}\) The judgment is given according to: http://www.bip.mswia.gov.pl/portal/bip/4/15930/Nabywanie_nieruchomosci.html [1 V 2010].
\(^{13}\) Official Journal from 1997. No. 78, pos. 483.
\(^{14}\) Official Journal from 2003. No. 159, pos. 1547.
• deprived of the election rights by the decision of the State Court of Justice;
• incapacitated by the valid decision of the court.

The consequence of the Polish membership in the European Union is the fact, that the right to the election to the community council has also the European Union citizen who is not the Polish citizen, who is 18 on the day of voting, and who permanently lives on the territory of the activity of this council. The right to vote does not have the citizen of the European Union, who is not the Polish citizen and who is deprived of the right to vote in the member state of the European Union, where he is the citizen.\textsuperscript{15}

The above time censorship results from the legal and natural prerequisites and is not the discrimination symptom. The person participating in the election has to make the conscious choices, however, there is needed here not only to use the mind but also to have the basic knowledge about the subject.

The community citizens create the self governmental community, which means that they are linked to each other not only by the legal connections but also by the cultural and economic links\textsuperscript{16}. In the cultural aspect, there is not common, the conception of the community based on the natural unity, which means the blood ties or the common origin, what was also typical for the oldest period of the Roman and Polish statehoods. The dominating community was then the tribal community. The contemporary cultural ties are based on the rule of multiculturalism, neighborhood and friendship (toleration). Multiculturalism assumes the possibility of coexistence of many cultures, also the religious ones, even in the small local government communities. The neighborhood results from the fact of the co inhabitation. The friendship is therefore the condition and at the same time the result of the corresponding work, and the same common activities\textsuperscript{17}.

The economic links are extremely important for existing the self government community. The natural persons very often migrate searching jobs or the better conditions to run their own business activities. The local communities cannot introduce any restrictions or the instruments discriminating the outside subjects to run their economic activities on the territory of the community\textsuperscript{18}. To realize

\textsuperscript{15} More about the right to stay on the territory of Poland by the European Union citizens, see: W. Brzęk, The right to stay in Poland by the European Union member states citizens and the members of their families [in:] Free flow of people from the perspective of the European integration process. Atti della IV Conferenza Internazionale dei Diritti dell’Uomo, Olsztyn 2002, p. 88 and following.
\textsuperscript{18} See: M. Królikowska-Olczak, The economic freedom in the community law [in:] The free
their purposes the communities can join together into the unions or associations. In this way they can better realize their tasks.

The common activities are not perceived nowadays as the threats, but as the possibility to achieve the better economic or other results. The similar situation is with the development of the cultural initiatives. Their joining together is not perceived as the kind of the threat for the local community.

**IV. The European law**

In the Treaty on the European Union, the question of the local self-government is described in the article no. 4 of the act. The European legislator constitutes there: *The Union respects the equality of the Member States in relation to the Treaties, as well as their national identity, linked inseparably with their basic political and constitutional structures, therein, in relation to the regional and local self government. It respects the basic functions of the state, particularly the functions aiming to assure the territorial integration, preserving the public order and the national security protection. In particular the national security stays within the framework of the exclusive responsibility of each Member State.* From this text we understand that the Union does not intervene into the organizational structure of the individual member states. Because of existing the EU diversity of the self-government organization and the differences of the terminology, in the community charters there are the notions the regional and the local self-government. The local one can be identified with the community self-government.

The European Union policy continues the European Community policy, they preserve the wide ranging local communities autonomies. It only assures the suitable legal regulations allowing the free flow of people, services and capital and the proportional development of the economically weaker regions. There were implemented different kinds of community policies and programmes, therein the coherency policies\(^\text{19}\).

Moreover, the European Union respect the equal treating of all the union citizens chiefly on the local level. The expression of it is the common active and passive election law in the self-government elections, independently on the owned citizenship. Such powers acquire the citizens of any member states, having in this way the right of the European Union (article 8 of the Treaty on the European

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flow of people from the perspective of the European migration process. Atti della IV Conferenza Internazionale dei Diritti dell’Uomo, Olsztyn 2002, p. 72 and following.

19 Summing up the Union Policy of cohesion took place at the conference in Vienna and Bratislava, which was held on 19th-21th April 2010. See: the report on the website http://ec.europa.eu/regional_policy/cooperation/danube/conference/vienna_bratislava_en.htm [1 V 2010]. See also: S. Naruszewicz, The policy of cohesion of the European Union. The chosen questions, Warszawa 203, p. 275 and following.
Giving the active or passive right to vote to all the citizens exists also in the Charter of Fundamental Rights from 2000. In the article no.40 of the legal act: *Each Union citizen has the right to vote and to be the candidate in the local elections in the Member State where he has the place of residence, on the same rules as the citizens of that State.*

The multicultural character of the European Union prejudges about the necessity of undertaking the common activities on the local level through joining the various enterprises. Just precisely the multicultural activities have the chance to obtain the financial support in numerous projects. However, it does not mean the resignation from the previous culture. There are a lot of European programmes supporting the existing culture.

V. Opening the local self governments the chance or the threat for Europe?

During my yearly stay in Munich, from 1989, I had the opportunity to observe the profound transformations occurring in the heart of the symbol of Germanity. Twenty years ago, at the Marienplatz the German people dominated. There were a lot of German restaurants everywhere, the famous Gasthouse, the German banks and offices. On the underground there were in general only the white people. Over the years I have had the chance to see the transformation of this city into the multicultural centre. Now, at the Marienplatz, the majority of people are the Arabs, Hindus, Latin Americans or the people of Asian origin. Good German restaurants can be found only in the German villages. It is extremely difficult to find in the centre of the city any institution which is the symbol of Germanity, as for example the Deutsche Bank. On the underground (U–Bahn), the white people constitute the vast minority. Therefore, what conclusions can be drawn from the described transformation of the typical German city? Some people think that the disaster is approaching, the consequence of which will be the end of the white people. The others state that it is good, we are learning the tolerance, obtain the new hands to work, what is extremely important in relation to the senescenting Europe. Everything provokes in the end the birth of the new culture.

It seems to me that both these opinions do not answer the question asked in this work. Namely, what consequences can appear in the future because of so wide opening of the local communities in Europe on the newcomers from the other continents? I think that we had it behind, that fear of the new, which accompanied the old societies, till the 20th century. Thanks to the Christian values, the Roman law and the natural law current, this is obvious that all the people are equal, they have the right to manifest their convictions and beliefs. This is

the obvious truth, even from the perspective of the organized fight against the Christianity and its system of values.

The possible threat caused by the civilization transformation, particularly by the migration, giving the birth of the negative results for the local communities, is the threat of the terrorism and the increase of the crime.

There should be realized the different forms of the terrorism and their purposes. From the point of view of the subject of this work the internal terrorism has its importance, which is the consequence of the lack of the full integration of the immigrant population with the existing state of things. The example can be the burst of social dissatisfaction and as a consequence the terroristic attacks around Paris, which took place in 2005.

The local communities can feel threatened also by the international crime. The media news inform the society about arresting the wanted boss of mafia in one of the Polish towns, for example, in Kosno or Lwówek Śląski. Hence, the European Union implemented the numerous instruments to the fight against the crime, particularly against the organized crime. It is worth to indicate here such the institutions as: Europol, Interpol, the Schengen Information System SIS. The extremely important instrument to fight against the crime is the European arrest warrant, thanks to which the criminals cannot feel safely on the territory of the European Union. Also in this case, the media informs about the newer and newer criminals arresting from Poland e.g. in Barcelona or Athens.

In the end, the local communities can feel the economic threat. The bigger firms, richer in capital, can easily transfer from one end of the Union to the other and to win the tenders called for by the local self governments. However, the regional Union policy assumes the equality of all the economic subjects, therefore, it is impossible preferring any local economic subjects, and discriminating the others. However, in practice, such the phenomenon occurs. The local lobby, often linked with the local authorities, arranges the auctions according to the predetermined economic subjects. The need of the economic security is better

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22 The internal terrorism is the combination of social behavior contradictory to the particular interests of the local community. In this way “advertising” the particular local or religious group.


24 See: http://www.emetro.pl/emetro/1,50145,1966123.html [1 V 2010].


visible after the bankruptcy in Iceland and Greece and in relation to the threat that the same fate can happen in Portugal and Spain. The local communities, in relation to such a perspective, close more and more on the foreign firms, to move away the specter of the economic disaster.

**Conclusion**

The migration of people for ages has aroused the fear and threat of the new, among the native people. From the moment of inventing the system of law, the most effective instrument of protecting the local communities, became the preclusion of the access to holding the most important offices in the authorities of the local communities. It was realized that the newcomers, if there were the traders, teachers, or the enemies of the army, they carried with them the threat for the local beliefs and customs. There was the same situation in the Ancient Rome and there has been till the 20th century.

However, this is necessary to become aware that nowadays the culture which dominates in Europe was created on the basis of mixing four cultures, Greek, Roman, Judaic and Christian. It seems that also nowadays this is necessary to open towards the new cultural currents, however, which do not destroy the existing state of things.

These fears and treats of the new look more different from the local perspective, in other words from the perspective of the community self government. These communities are particularly sensitized to any changes. Hence, the European Union through its regulations enabled also the non citizens of the given state, and the Union citizens, an active or passive participation in the self government elections.

As the result in Spain, France or in Italy, in many communities the mayors are the community dwellers, who are not the citizens of the given state. Thus, Barbara Czarniecka Yerolemou became the mayor of Ealing in Great Britain. Is this possible that in Poland, for example, the German woman would become the mayor?
THE USE OF INTERNAL AUDIT IN ECONOMIC DEVELOPMENT

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Summary: The functioning of modern public administration must necessarily be related to the audit of its activities. The Polish legal system stands out because of the following criteria, which are made in the supervisory system, namely: the legality, economy, reliability and usefulness.

Keywords: adaministracja public, public management, entrepreneur.

Introduction

Internal audit in every organ of public administration and in the private sector – can help organizations achieve their goals. It aims to give managers a reasonable assurance of achieving these goals. It does not guarantee, however, to achieve these objectives. Acting with the authority of public administration or a private company, the system of internal audit may not always be ensured the reliability of financial statements and compliance with the law, but it certainly minimizes the risk in this regard. Limitations of internal audit may result primarily from:

• making wrong decisions on the basis of audit findings,
• carelessness, distraction or fatigue of workers,
• neglect by the management audit,
• collusion of persons acting together to commit or conceal a tort.

Therefore, internal audit is therefore not a cure for all evils, but – as demonstrated by the experience of the entities in which the internal audit system has been operating – it helps to seek the designated path, avoiding any unpleasant surprises on the road.

The functioning of modern public administration must necessarily be related to the audit of its activities. The Polish legal system stands out because of the following criteria, which are made in the supervisory system, namely, the legality,
economy, reliability and usefulness\textsuperscript{1}. These criteria are specified in the statute. It should be emphasized here that not all government entities are controlled by taking into account all criteria. As to how the body is controlled, the legislature decides. The primary objective of the audit of public entities, to ensure their smooth operation and eliminate the errors detected. It also serves as the basis for prevention and removal of malfunctioning in the future. In 2009, the Ministry of Finance – Department of Public Finance Sector Audit introduced in the amended Act on Public Finances changes in the functioning of internal audit in the public finance sector\textsuperscript{2}

It is worth noting that in 2009 announced a new version of the translation of the Internal Audit Standards, which are provided in Ordinance No 1 of the Minister of Finance, 19 February 2009 on the standards of internal audit in the public finance sector. The new version of the Standards Board has introduced many changes, both in their content and structure. These changes are substantive or editorial and consist of:

- announcement of the interpretation of certain attributes or Standards Action,
- formulation of the new wording of certain attributes Standards, Measures and Implementations,
- adding new Attribute Standards, and Implementation Actions.

**I. New legislation**

Before the auditors and the heads of the units appeared in subsequent rule changes. Adopted by the Parliament Act of 27 August 2009 on public finances, which entered into force on 1 January 2010, contains many new regulations regarding the functioning of internal audit in the public finance sector.

It is worth mentioning at this point about the changes. This act, among others:

- contains a revised definition of internal audit,
- extends the list of units that have conducted internal audits, and also indicate those units in which audit can be conducted,
- introduces new rules for management control and internal audit,
- sets new rules for the coordination of management control and internal audit,
- imposes an obligation to establish audit committees, including the rules of the committees, and specifies the qualifications of members of committees,


\textsuperscript{2} Act of 27 August 2009 on public finances (Journal of Laws, Number 157, item 1240 with subsequent amendments).
• sets deadline for preparing reports on the implementation of the audit plan for the previous year to the end of January next year,
• introduces the possibility of conducting an internal audit by the provider from outside the units and determines which individuals are concerned,
• amend the list of professional qualifications of the internal auditor conducting an audit in the public finance sector.

In discussing the position of internal audit in policy control and supervision should be to define the concept of the audit. Internal audit is an independent and objective, which aims to support the minister in charge of department or head of the aims and objectives through a systematic assessment of the management control and operations consultancy. This assessment applies in particular to the adequacy, efficiency and effectiveness of management control in a government department or unit of local government. Internal audit is carried out, for example, the Prime Minister’s Office, ministries, provincial offices, customs houses, chambers of Treasury, or the National Health Fund. **Internal audit is carried out also in:**

1. state budgetary units, if the amount included in the financial plan or budget unit income exceeded the amount of spending the amount of 40,000 thousand gold;
2. public schools, if the amount included in the plan, material and financial income or expenses exceeded the amount of 40,000 thousand gold;
3. independent public health care facilities that have not been created by local government units, if the amount included in the financial plan of revenues or expenses exceed the amount of 40,000 thousand gold;
4. executive agencies, if the amount included in the financial plan of revenues and expenses exceeded the amount of 40,000 thousand gold;
5. state-appropriated funds, if the amount included in the financial plan of revenues and expenses exceeded the amount of 40,000 thousand gold.

Internal audit is carried out in local government units, if included in the budget resolution the amount of local government revenue and income or the amount of expenses and expenditures exceeded the amount of 40,000 thousand gold. The internal audit unit carries the internal auditor employed by the entity or provider not employed in the unit, hereinafter referred to as service provider.

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3 Analysis of Chapter VI, Internal Audit and the coordination of internal audit units of public finance law of 27 August 2009 on public finances (Journal of Laws, Number 157, item 1240 with subsequent amendments).
4 Article 274, paragraph 2 of the Act of 27 August 2009 on public finances (Journal of Laws, Number 157, item 1240 with subsequent amendments).
II. Powers of auditors

The internal auditor employed in the community may be a person who:

1. is a national of a Member State of the European Union or another country whose citizens, on the basis of international agreements and Community law, shall be entitled to employment on Polish territory;
2. has full legal capacity and shall exercise full civil rights;
3. has not been punished for an intentional crime or intentional tax crime;
4. have higher education;
5. has the following qualifications for internal audit:

   a. one of the certifications: Certified Internal Auditor (CIA), Certified Government Auditing Professional (CGAP), Certified Information Systems Auditor (CISA), the Association of Chartered Certified Accountants (ACCA), Certified Fraud Examiner (CFE), Certification in Control Self Assessment (CCSA), Certified Financial Services Auditor (CFSA) or Chartered Financial Analyst (CFA), or

   b. passed, in 2003–2006, passed the exam on the internal auditor before the Examination Committee appointed by the Minister of Finance, or

   c. powers of an auditor, or

   d. two years of internal audit, and holds a postgraduate diploma in internal auditing issued by the university, which at the date of the diploma was entitled, in accordance with special regulations, to confer a doctoral degree in economics or law.

To carry out internal audit in public administration, including its organizational units, the internal auditor employed by the office of local government units authorized, respectively, mayor, mayor, city president, board chairman of the local government unit. However, when an internal audit is necessary to proceed in a unit subordinate to or supervised by, the parent unit manager or supervisor may authorize the internal auditor employed in this unit to make them.

The local government unit head of the unit assigned tasks related to internal audit exercise, respectively, mayor, mayor, city president, board chairman of the local government unit. Very often, however, the internal auditing function are created in private companies, in addition to a functioning internal control system, strengthen the protection of resources and deal effectively with various irregularities and errors.

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5 Act of 27 August 2009 on public finances (Journal of Laws, Number 157, item 1240 with subsequent amendments).
Head of the unit, in the office of government, which created the post of Director General of Office – Chief executive Officer, provides the conditions necessary for an independent, impartial and effective internal audit, including organizational autonomy provides internal audit and business continuity in the internal audit unit.

The internal auditor making the audit task has certain rights. Has the right to enter any premises and inspect the unit to any documents, information and data and other materials related to the functioning of individuals, including recorded on electronic data carriers, as well as to draw up their copies, duplicates, extracts, summaries or printed in compliance with regulations the mystery of the statutorily protected. Employees are required to provide individuals with information and explanations, as well as make and certify copies, excerpts, extracts, or the statement.

An internal audit conducted on the basis of an annual internal audit plan, hereinafter called the audit plan. Where appropriate, internal audit is carried out outside the audit plan. By the end of head of internal audit in consultation with the head of the unit prepares for the risk-based audit plan for next year. Head of internal audit, conducting a risk analysis takes into account in particular the tasks arising from the business plan and guidance minister directing a branch, the audit committee and detailed guidelines for the Ministry of Finance. By the end of January each year, manager of internal audit report with the implementation of the audit plan for the previous year. The audit plan and report on the implementation of an audit plan, is available on request, public information within the meaning of the Act of 6 September 2001 on Access to public information. Public information does not represent other documents produced by the internal auditor in the conduct of internal audit.

For the internal audit unit of local government, including its organizational units, the internal auditor employed by the office of local government units authorized, respectively, mayor, mayor, city president, board chairman of the local government unit. Where internal audit is necessary to proceed in other units in the department, the minister may authorize a department head of internal auditor employed by the Ministry for their achievements. However, where an internal audit is necessary to proceed in a unit subordinate to or supervised by, the head of the master unit or supervisor may authorize the internal auditor employed in this facility for their achievements. However, where an internal audit is necessary to proceed in the organizational units on which the camera assistant managers of complex services, inspections and guards, the gov-

7 Ustawa z dnia 5 sierpnia 2010 r. o ochronie informacji niejawnych (Dz. U. Nr 182, poz. 1228).
ernor may authorize the internal auditor employed by the regional office for their achievements.

III. Reference to the private sector

Executives of private companies, using the experience of public administration bodies, in order to effectively reduce the risk of their own operations and to protect the company against losses, should undergo periodic inspection of business processes, operation systems and organizational units in the structure of the body and internal control mechanisms. That the results may actually serve to improve internal processes and improve the effectiveness of controls, testing should be performed by a professional and independent auditor.

The role of auditing in private firms, a similar public institutions, is designed to monitor and improve the system of internal control mechanisms and evaluate risk management. On the basis of risk analysis, internal audit examines and evaluates functional systems businesses, as well as business processes and efficiency and adequacy of internal controls. We constantly recommend appropriate changes. Private company can create its own internal audit function, or opt for external audit. Created in the company organizational unit of the internal audit has the ability to systematically identify risk areas, in particular during the introduction of various changes and innovations.

Related to the audit function may not perform key employees of the company. In this way, the basic rule would be broken, saying that the persons involved in the audit should not operate or be responsible for the actions, which then controlled, since their evaluation will be devoid of the characteristics of objectivity, independence and impartiality. Thus far, this principle undermines the arguments of those managers who expect that the internal audit function can execute in parallel with other employees performing executive functions in the enterprise. Many companies may be difficult to find adequately prepared personnel to work in internal audit. This problem can be solved by outsourcing or co-sourcing of auditing tasks.

Outsourcing involves delegating to outside firms specialized support for certain business processes and internal company functions that are critical to its operations, but support core activities. Specialized outsourcing services encompass many faces of the enterprise. Within contracts are commonly in information services, organization of seminars, personal consulting, accounting, finance and corporate financial analysis, legal advice, organization and management, marketing, design, technology and manufacturing, logistics, administrative and other functions.

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The reasons why private companies decide to delegate certain functions and business processes to external entities:

- staff an opportunity to concentrate only on business-critical tasks companies,
- improve business management,
- to knowledge and the experience of other companies,
- the possibility of using the most advanced solutions, including IT,
- matching resources to actual needs of the entity,
- reduce infrastructure costs,
- reduction in fixed costs.

However, co-sourcing also involves commissioning a company from outside the execution of certain works, for which the company has no specialized staff or sufficient resources. The difference between outsourcing and co-sourcing is that in the first case, the company assigns the entire area or task to an external company, in the second case the company shall have only part of the job, thereby helping its staff. There is no doubt therefore that in order to conclude such an agreement is primarily to improve internal processes of corporate management, a significant reduction in operating costs and increase competitiveness of the company in the market.

Entrepreneurs who plan entering into partnership with a specialist external company, they expect to benefit from the knowledge and experience of other companies without the cost of maintaining their own specialist staff. Through an agreement with the firm receives a guarantee the company access to an extensive, highly specialized knowledge and experience, supported by practitioners. Moreover, in this way the company can reduce the fixed operating costs associated with personnel costs and, above all, systematic training of workers. Does not assume any cost of staff recruitment, in the event of termination of employment – severance pay. Using external services, bear only the costs associated with the implementation of tasks specified in the contract. Executives, assigning tasks and support functions to an outsourcer, has the opportunity to focus on business-critical enterprise tasks. Freeing executives from the part of the job of understanding the issues and using the specialized professional advice, achieves much greater efficiency in business management.

In the case of larger companies outsourcing of internal audit, despite the many advantages, it is not the best solution. This is linked with greater scope, complexity and specific activity. In addition, notice the lack of continuity audits by the same auditors. The variability of staff auditors and ignorance of the spe-
specific activities of the auditee company private limited largely objective assessment of the actual situation, to detect signs of deteriorating financial conditions, and above all the many other threats, both inherent in the company, as well as the benefits of its environment. In any large organization, the internal auditor should look at the processes occurring in the company in a continuous manner, as to date have assessed whether the system of internal control is effective, appropriate, or falling behind in all internal and external changes, whether there is reasonable assurance that the objectives of the organization, and above all – that all procedures are followed in the institution. This goal can only serve to isolate the internal auditing function within the organization. So much more perfect solution for larger companies will be on the basis of internal audit co-sourcing. First of all, because it is a way to supplement their own resources, internal audit specialist staff from outside. Hired an external consultant will assist the permanent staff, who also gain from the new expertise and skills.

IV. Requests for entrepreneurs

The role played by the internal audit function within the company visible in the public administration, is reduced to monitoring, verification and evaluation of the effectiveness of risk management. In practice, internal audit can help businesses control system, with independent opinions on the functioning and effectiveness of this control. In business management, internal audit may verify the compliance of various levels with the objectives such as business valuation, and identify the specific changes that will raise the level of effectiveness of these levels.

Many enterprising people, also from the Warmia and Mazury, who dream of starting their own business, is initially dismayed by the requirements of the organization, conduct, by any bureaucratic barriers. For small businesses, all these procedures are, however, very simplified, making it easy to start business. For larger organizations, the case is somewhat complicated. Managing a large company is associated with complex decision-making process, and planning some moves in advance is becoming a necessity. The functioning of such bodies is an efficient system of internal control is used to rapid detection of problems and correcting them. The role played by the internal audit in the company amounts to monitoring, verification and evaluation of the effectiveness of risk management. In practice, tax audit internal control system may be assisted by independent opinions on the functioning and effectiveness of this control. The management of a company internal audit may verify the due-diligence of the various levels of compliance with established goals, and identify the specific changes that will raise the level of effectiveness of these levels.

But in recent years significantly increases the advisory role of internal audit, which is characterized by a specific focus on generating value added for the organi-

zation and management support in current management\textsuperscript{12}. These changes seem to induce the belief among executives that the internal audit unit may increasingly participate in the activities of the organization. What then is the future of internal audit? Does the internal auditor is able to provide the necessary assurance (with English assurance) on the proper functioning of the processes taking place in private companies, and at the same time engage in business operations while maintaining their independence?

The answer is yes. In certain situations, and to a limited extent, in accordance with the standards of the Institute of Internal Auditors (IIA stands for), the audit can actually engage in specific work, to support selected areas of the organization. However it can not assume responsibility for the functioning of these areas, because in accordance with existing regulations and practices always remain the responsibility of the management company.

In addition, the changing organizational environment of each organization, including firms, new technologies, globalization, regulatory tightening will force the entrepreneurs to constant changes. All of these factors directly affect the formation of expectations of shareholders and directors of companies and other stakeholders to the internal audit function\textsuperscript{13}. The list of areas where internal audit can assist individual operators, it is long.

Internal audit should assist the organization in achieving its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, internal control and corporate governance. In particular, as part of their core responsibilities, is responsible for evaluating the adequacy, efficiency and effectiveness of internal control and risk management. Mentioned in the introduction, the changes seem to induce the accelerated development of the audit, and on many other levels. Thus activate the development of new techniques of organization management, while giving some areas of particular importance. These include inter alia the principles of corporate governance and enterprise risk management process. Let’s try to focus on presenting the needs and benefits of implementing these tools and to identify the role of internal audit in the process\textsuperscript{14}.

Internal auditor, with its privileged position independent of the internal observer, is an important link in corporate governance. Inform the management board, board of trustees, management and external auditors about the potential problems associated with internal control, while evaluates the effectiveness of risk


\textsuperscript{13} Internal audit (as defined by the International Association of Internal Auditors) – activities of independent, objective assurance (with English assurance) and advisory activities, which aims to add value and improve business operations. The internal audit activity helps an organization accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, internal control and corporate governance.

management. In addition, the internal audit unit, through direct cooperation with the board of trustees, supports its members in carrying out disclosure obligations (in accordance with the requirements of corporate governance, the supervisory board should evaluate the risk management systems and internal controls and prepare a report on that assessment.)

Audit based on risk assessment is much more efficient and effective for the entire organization. Permits to reduce the commitment of providing much more valuable and timely information, assisting the current management processes and decision-making.
THE EUROPEAN UNION POLICY OF COMBATING THE DRUG TURNOVER

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Summary: The article deals with the problem of fighting the drug trafficking and drug abuse within the European Union. It describes the background of the issue and deals with the impact of the abolition of border controls within the Union on the increase and character of the drug turnover. She moreover points on the other negative side-effect, i.e. the increase of criminality caused by the abuse of drugs. Then she analyses the contemporary legal regulation of the drug trafficking and drug abuse in Poland and within the European Union and compare both regulations. She critically calls for the establishment of the comprehensive common strategy to avoid the negative outcomes of the “free drugs turnover” within the territory of the Union.

Keywords: drug trafficking, turnover, EU, Poland, European policy, common strategy

I. Drug abuse and the human rights – pros and cons of the European integration

The long awaited European integration has been considerably accomplished. The indicators of the new reality became the currency union and the economic union. For the need to create the new European space there were cancelled the state and customs boarders. That enabled to introduce four basic rights, i.e. free flow of people, capital, services and goods. Nowadays, it is difficult to imagine the Europe from the past, when it was divided by the boarders. In this way the former conflicts were expired on the borderlands of France and Germany, Poland and Germany, Spain and France. The single market was created, which enables the better fight with the unemployment, poverty or the other social problems.¹

However, if something sometimes seems to be enormously useful, it has also its disadvantages. Cancellation of boarders made it easier to expand the organized crime. There are known some examples of transferring the mafia groups from one country to the other, particularly the Italian and Russian mafias. It is easier to hide the economic crime and the offences against the consumers. There are some numerous cases of avoiding paying the owing taxes and the insurance premiums by the large nets of shops and restaurants. There is the mechanism used here to permanent transformation of the legal structure of the organization, at preserving the economic uniformity of the firm. The old firm with the debts declares a bankrupt, while the new one is born instead, which overtakes the assets of the failed firm, but without the indebtedness, chiefly in relation to the Treasury².

Cancellation of the borders simplifies making the numerous offences against the human being. The number of the cases of white slavery increased, chiefly the women and children trade. It appeared the new phenomenon of the slavery, chiefly in relation of the field works, which the numerous examples we observed in Italy and Spain³.

Moreover, the economic crisis of one of the states has its serious influence not only on the economy of the neighboring countries, but also on the whole European Union. Nowadays the European Union is struggling with huge financial troubles in Greece, and it is possible that in the nearest future the same can happen in much more bigger countries, such as Spain or Portugal. Functioning within the framework of the single market, on the one hand helps to fight with the economic crisis in the individual member states or the regions, but on the other hand, it can destabilize the economy in the whole Union.

The subject of this paper is another negative phenomenon, namely the drug abuse, which has intensified to a large extend because of cancelling the borders in Europe. In particularly we take into consideration growing the drugs, their trade, illegal possessing, using, export and import. The phenomenon of drug abuse can be seen from different points of view, as for example sociological, psychological, biological or legal.

² The present legal status in Poland does not allow to differentiate the national and foreign subjects, as far as it concerns paying taxes. Therefore, everybody is obliged to bring in the income taxes. Such an attitude we can find in the answer of the undersecretary in the Ministry of Treasury – by procuration of the minister – asked by the deputy K. Borkowski no. 4900 concerning the amount of the tax revenues from the particular subjects. The deputy claims that the foreign subjects avoid paying taxes. Despite the conclusive answer of the Ministry, it is impossible to negate the statement of the representative. See: http://www.podatki.biz/sn_autoryzacja/logowanie.php5/artykuly/14_8874.htm?idDzialu=14&idArtykułu=8874 [11 V 2010].

³ See. F. Dammacco, La criminalità organizzata, il traffico di esseri umani e nuove forme di schiavitù, [w:] G. Dammacco, B. Sitek, O. Cabaj, Człowiek pomiędzy prawem a ekonomią w procesie integracji europejskiej, Olsztyn-Bari 2008, p. 691.
The phenomenon of drug abuse is multiaspect and because of this, it is the subject of numerous scientific and popular – science dissertations. There are some well known authors who write about the problems associated with drug abuse, for example Cekiera⁴, Juszczynski⁵ and Tatala⁶.

By virtue of the subject of this paper, we mostly take into consideration combating the demand and supply of the drugs within the European Union because there is the need to protect the fundamental human rights, chiefly the health and life. The discussion is being continued about the need to protect the people addicted to drugs, the potential drugs purchasers. Such the activities are undoubted⁷. However, there is the need to remember that the addicted people constitute the threat to the health and even the life of the third persons. Hence, the need of protecting the human rights in broad meaning of this word, demands providing a deep, true reflexion about the problem of drug abuse in the united Europe. All the more, that every convention of human rights are silent in this subject.

From the legal point of view, the specificity of drug abuse is its punishability for only possessing the drugs, independently on the aim. This is constituted in art. 62 of the Act from 29th July 2005 about counteracting the drug abuse⁸. Taking into consideration the subject of protection, the legislator used here the dogmatic construction of the abstract endangerment of the legal good. Therefore, to prove the criminal responsibility of the offender, it is not necessary to have the material result of the offence, the behaviour itself is enough. This is the offence which has the continuous character and it starts at the moment when the offender purchases the dazing agents. In this case, I disregard the explanation of the notion dazing agents, because of the extensiveness of the subject matter⁹. The legal aspects of drug abuse are in the interest of such author as S. Pikulski¹⁰.

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⁷ Such an attitude towards the threats connected with taking the drugs was presented by the lecturers during the conference organized by the Parliamentary Commission of Law and Justice, in 2003. The materials from that conference were published in the library edition the Conferences and Seminars. Human rights – of the people taking the drugs and infected by the HIV,¹⁰(54)03.
¹⁰ S. Pikulski, dz. cyt.
II. Cryminogenic role of drug abuse

The analysis of the subject, and the analysis of the police and court records indicate explicitly the connection of drug abuse with the criminality. This statement finds its justification in the number of the criminal acts committed by the drug addicts against the third persons and against the other drug addicts. In the first case, the matter is that the people being under influence of the dazing agents make crimes and also they do it to gain the dazing agents. In the report of the activity of the Central Investigation Agency KGP from 2009 there is the data associated with the dynamics of the increase in criminality linked with drug abuse. From the data included there appears that in comparison with the year 2008, in 2009 the consumption and the trade of amphetamine and marihuana distinctly increased\(^\text{11}\).

It is obvious that the persons being under influence of the dazing agents very often commit various crimes, both consciously and unconsciously. The intensification of the criminal activity depends on the quantity and quality of the dazing agents. Their effects are temporary. The drug addicts not seldom commit the grave crimes, such as assassinations or robberies with battery, which are the result of limiting or eliminating the self control. A lot of incidents on roads traffic are caused by the people taking drugs. The other crimes committed by the drug addicts are the result of weakening the moral ties, what can lead for example to the rape\(^\text{12}\).

Gaining the drugs and their trade, apart from their illegality, cause also the other criminal acts, such as: theft, fencing the stolen goods, forgery of documents, chiefly the prescriptions, blackmail, very often together with the physical enforcement used against the third persons to receive the valuable things. Drug traffickers commit also the illegal turnover and smuggling. The drug trade as a very good “business” is controlled by the big international cartels, so it is the organized crime.

In the end the drug abuse harms the health of the person who takes drugs. Everybody indeed can decide about their own luck. However, we cannot forget that the drug addicts need treatment, also in case of falling ill because of the HIV virus. In this case, the costs of irresponsibility are paid by the society and the risk of infection is transferred on the relations and the medical personnel. Moreover, the drug addicts also create the negative problems within the frame of their families and bringing up their children. The problem is that the children repeat the behaviour of their parents and at the same time they transfer the threat of HIV virus.

\(^{11}\) The report of the activity of Central Investigation Agency KGP from 2009, Warszawa 2010, p. 6, computer printing.
The range of the phenomenon of drug abuse and its cryminogenic results presented above, indicates that there is the need of creating the legal policy within the framework of combating the drug abuse and its negative results. The statistical data shows that it is not enough to introduce the coherent legal system on the territory of one state. Hence, this is necessary, at first to present the policy of combating the drug abuse in Poland, and then in the European Union. In the last item of this paper we are going to present some issues of the cooperation among Poland, the Czech Republic and Slovakia.

III. The legal and institutional policy of combating the drug abuse in Poland

The anti drug strategy in Poland is based mainly on the act from 29th July 2005 about counteracting the drug abuse. Furthermore, there are issued 25 regulations of different ministries, depending on the need to manage combating the drug abuse. In the legal act itself the legislator indicated the ways and instruments of combating the drug abuse.

The basic ways of combating the drug abuse is counteracting, which means the preventive activities. According to the art 2 act 1 of the legal act, the ways of combating the drug abuse are:

- The educational, tutorial, informative and preventive activities;
- Treatment, rehabilitation and reintegration of the addicted persons;
- Restricting the health and social damage;
- The supervision of the substances which using can lead to drug abuse;
- Combating the illegal trade, producing, processing and possessing the substances which using can lead to drug abuse;
- The supervision of growing the plants containing the substances, which using can lead to drug abuse.

Whereas the fundamental instruments to combat the drug abuse are: law, the institutions responsible for preventing activities, criminal and administrative measures.

There are numerous institutions which lead the preventing activities in the process of combating the drug abuse, they can be divided into the institutions which do it voluntarily and those which realize their legal duty to counteract the drug abuse. In the first case there are different kinds of religious organizations, particularly the catholic church, but there are also numerous foundations and associations which can be indicated as well. In the second case the legislator in art 5 act 2 indicated the specific subjects legally obliged to undertake such the activities. There are:

13 Official Journal No 179, pos. 1485.
• Kindergartens, schools and the other organizational units mentioned in art 2 items 3–5, 7–9 of the legal act from 7th September 1991 about the educational system (Official Journal from 2004, no 256, pos. 2572 with later changes);
• Universities;
• The health care centers and the other subjects acting for the health protection;
• Polish Military Units, the Police and the Border Guard;
• Customs agencies;
• The organizational units of Prison Service and the Young Offenders’ Homes and the Hostels for Juvenile Offenders;
• The social aid centers, the district centers of help for families and the regional centers of the social policy;
• The media.

The above set of institutions responsible for counteracting the drug abuse was completed by creating the National Agency for Counteracting the Drug Abuse (art. 6).

Apart from the legal act, some instructions to the anti narcotic strategy in Poland are contained in the National Programme of Counteracting the Drug Abuse. In this programme there are drafted some directions and the types of activities within the framework of counteracting the drug abuse, the schedule of the accepted activities, purposes and the ways of their achieving and the ministers responsible for their realization and also the subjects appropriate to undertake the particular activities. Moreover, in each province there has to be the Provincial Programme of Prevention of the Drug Abuse.

The Council of Prevention of the Drug Abuse works at the Prime Minister. This is the coordinative – advisory body of the cases of preventing the drug abuse. The members of the Council are the secretaries or under secretaries from the Ministry of Health Matters (chairman) Ministry of the Interior, Justice, Education, Ministry of National Defense, Agriculture, Social, the Treasury, Foreign Matters and science. The tasks of the Council are in particular:

• Monitoring and coordinating the activities within the framework of realization the state policy in the area of dazing agents, the psychotropic drugs and precursors;
• Submitting the Ministry of health the matters associated with creating, changes and amendments to the national strategies and plans of prevention the problems caused by the trade and using the dazing agents, the psychotropic substances and precursors;
- Monitoring the information about realization of the national strategies and plans of action;
- Monitoring of the National Programme realization;
- Offering the organizational solutions concerning the prevention of drug abuse;
- Cooperation with the subjects, which are mentioned in art. 5 concerning the Council activity.

Combating the drug abuse is also the task for the local authority. This duty is regulated by the art. 10 paragraph 1 of the act and it includes:

- Increase in the accessibility for therapeutic help and rehabilitation for the addicted persons and the persons endangered by the addiction;
- Providing psychological-social and legal help to families in which the drug abuse problems appear;
- Running the preventive, informative, educational and training activity within the framework of solving the drug abusing problems, particularly for children and teenagers, including running the sport – recreational classes for students, and also the activities to give additional food for children taking part at the after school tutorial, educational and socio therapeutic programmes;
- Support for the activities of the institutions, off – government organizations and the natural persons helping to solve the drug abuse problems;
- Social assistance for addicted people and their families suffering from poverty and the social elimination and the integration with the local community using the welfare work and the social contract.

To implement this task the village head (mayor, mayor of the city) has to work out the project of the Local Authority Programme of the Drug Abuse Prevention, which should consider the tasks drafted in the article 2 paragraph 1 item 1–3 and the directions of the activities which result from the National Programme. To implement this task, the village head can appoint the legal representative.

Combating the consequences of drug abuse can be achieved mainly basing on the penalty regulations, included in chapter 7 of the law. The legislator made the penalization of the following deeds: possessing the dazing agents, their elaborateness, preparing for elaborateness e.g. purchasing the equipment for drugs production, promotion at purchasing, making personal profits from the drug abuse, growing and harvesting the drugs.

In the regulations there are introduced some administrative instruments, which aim is, first of all, to prevent the drug abuse. These instruments are:
Introducing the permits to harvest the poppy milk and opium from poppy\textsuperscript{14}, the permits for import and export of dazing agents\textsuperscript{15} and the permits to run the wholesale trade turnover of the dazing agents\textsuperscript{16};

- Payments for giving the permits for producing the psychotropic substances\textsuperscript{17};
- The records of production or the precursors trade turnover\textsuperscript{18};
- The procedure at alternative treatment\textsuperscript{19} and the procedure with the addictive products\textsuperscript{20}.

**IV. The Union policy within the framework of combating the drug abuse**

In the European Union does not exist the general policy of preventive activities and combating the consequences of drug abuse. The rule is that each mem-

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\textsuperscript{14} The Regulation of Health Minister from 28th October 2008 about giving and withdrawing the permits to pick up the poppy milk and opium from poppy and wort or cannabis resin, different than fibrous, to carry the scientific research and to prepare the extracts from the poppy straw and paregoric. (Official Journal 2008. 197. 1225)

\textsuperscript{15} The Regulation of Health Minister from 13th January 2003 about the detailed conditions and the procedure of giving the permits for import from abroad and for export abroad the dazing agents, psychotropic substances and the precursors of the group I-R and the documents which entitle to their import from abroad and to export abroad for your own health needs (Official Journal No 36, paragraph 316).

\textsuperscript{16} The Regulation of Health Minister from 13th January 2003 about the detailed conditions and the procedure of giving and withdrawing the permits for carrying the wholesale trade turnover of the dazing agents, the psychotropic substances and precursors of I-R group and about the duties of the persons possessing such permits (Official Journal No 36, pos.317).

\textsuperscript{17} The Regulation of Health Minister from 25th October 2005 about the Mount of payments for giving permits for producing, elaboration, using for research and the permits for import, export, internal community purchasing and the internal community delivery of the dazing agents, the psychotropic substances and precursors of category 1, and also the change of these permits and licences (Official Journal 2005. 214.1818); the Regulation of Health Minister from 13th January 2003 about the detailed conditions and the procedure of giving and withdrawing the permits for producing, elaboration the dazing agents, the psychotropic substances and precursors of group I-R, and the detailed conditions of entering the business activity consisting in using the agents to carry out the scientific researches (Official Journal No 36, pos.315).

\textsuperscript{18} The Regulation of Health Minister from 23rd December 2002 about the procedure of running the records of production or the trade turnover of precursors of groups IIA-R and IIB-R and submitting the precursors of group IIA-R(Official Journal from 2003 No 7, pos.88).

\textsuperscript{19} The Regulation of Health Minister from 19 October 2007 about the detailed procedure at the alternative treatment and the detailed conditions which should be performed by the health center giving the alternative treatment (Official Journal No 205, pos. 1493).

\textsuperscript{20} The Regulation of Health Minister from 19 October 2007 about the detailed procedure at the alternative treatment and the detailed conditions which should be performed by the health center giving the alternative treatment (Official Journal No 205, pos. 1493).
Each state has its own legal regulations and its own policy of combating the drug abuse. However, it does not mean the whole lack of such policy, chiefly the legal and institutional policy, as for example police, court and administrative policies. The European Union works on the basis of the rule of subsidiarity and the acknowledge to act in the area of combating the drug abuse results implicite from the treaty decisions. In the article 152 TWE the European legislator decided that the Community fills the activities of the Member States leading to limit the harms which result from taking drugs, including the information and the prevention. This decision is now in article 168 in the Treaty on Functioning the European Union. The activities of European Union cover the problems within the framework of justice, security and public health.

The drug abuse problem in the Union scale has the growth dynamics. This is proved by the analysis of the statistical data gathered and worked out by the Statistical Office of the European Communities Eurostat. It refers particularly to the new Member States. Thus, in the years 2002 – 2007 the number of crimes traditionally linked with the drug abuse, so illegal possessing, production or taking drugs increased in Poland by 8%, in Bulgaria by 24%, in Slovenia by 18%, but in Slovakia the situation remained without changes. In the countries of the previous Union the growth of drug abuse was noticed only in the Northern Ireland by 10%, in France by 5%, in Holland by 11%. In the other countries there was noticed even the decrease, e.g. in Finland by 5%.

The phenomenon of drug abuse is first of all directed against the human being, hence the Union policy is directed towards the human protection, particularly towards such the values as health and life itself in different stages of its development. Then the following purposes are realized such as combating the crimes associated with the drug abuse.

According to the European Monitoring Centre on Drugs and Drug Abuse, every year in the European Union there are 6500–9000 deaths caused by drug abuse, particularly by lethal overdose. Moreover, taking drugs intravenously brings the consequent threats. This is the main source of haematogenous transmission of the infections such as HIV/AIDS, hepatitis B and C. about 2 million

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people in the European Union has problems associated with taking drugs – half of them takes the drugs intravenously. The preventive activities caused that the frequency of appearing HIV, among the persons taking drugs intravenously, decreased in the years 2001–2005, and it was recorded in 2005 about 3500 new cases of morbidities.\(^\text{24}\)

According to the Maastricht treaty the Union policy of combating drug abuse belongs to the third pillar of the European Union. This pillar involves the Administration of Justice and the Internal Affairs and the cooperation within the framework of the police services. Combating the drug abuse and the drug trading, together with combating the international crime and terrorism, is the main subject of the police and judicial cooperation. Within the framework of the third pillar there are appointed some institutions, which play the substantial role within the framework of the cooperation associated with the common solving problems. These institutions are – Europol – European Police Office, Eurojust – European Unit of Judicial Cooperation, European Monitoring Centre on Drug Abuse.\(^\text{25}\) From our point of view the most important is the third institution. Apart from the institutions the fundamental element of combating the drug abuse are the European rights and the programmes.

V. The treaty bases of combating the drug abuse

The legal basis to combat the drug abuse in the European Union constitute the treaty decisions. There should be emphasized that till the European Single Act (SEA) of 1986, the issue of combating the drug abuse was at the exclusive competences of the Member States. The acknowledgement of this is in the declarations included to the SEA, where there is stated that this document does not disturb in any way the right of the Member States to undertake the activities in this area.

For the first time the task to combat the drug abuse, then the European Community, was formulated in the Treaty on European Union. in the article 29 (K.1) there was stated that the Union should assure the high standard of security through undertaking the common activities within the framework of the police and judicial cooperation. This purpose should be accomplished through combating and preventing the crimes, among others in the area of illegal drug smuggling. In the article (K 3) of the same treaty there is stated about the common activities within the framework of judicial cooperation in the criminal matters. In paragraph e) there was decided that in the whole European Union there will be the lower limit of penalties predicted for the illegal drug smuggling. This resolution is now in article 83 TEU (Treaty on European Union).

VI. Union (community) anti drug strategies

The first Union anti drug strategy was implemented in the years 1995 – 1999\(^{26}\). The purpose of that strategy was strengthening the further cooperation among the Member States within the framework of reducing the consumption of drugs and limiting their trade within the borders of the European Union. The other Union anti drug strategy was implemented in the years 2000 – 2004\(^{27}\). Its purpose was the implementation and the further tightening the Member States cooperation in the area of limiting the drugs consumption and their trade. The purposes of that strategy were not fully realized, this is proved by the statistical data of that period. In effect the number of people taking drugs in 2004 increased over 2 million Union citizens. That increase referred mainly the synthetic drugs, therein ecstasy.

Nowadays there is realized the Union anti drug strategy for the years 2005 – 2012. This is the continuation of the previous strategies. First of all the preventive activities should be directed towards combating the organized crime and liquidating the wholesale deliveries. Particularly this strategy is directed towards:

- prevention of drug consumption and addiction,
- limiting the supply of illegal drugs and the demand on them,
- limiting the social damages (marginalization),
- limiting the health damages,
- limiting the side crime associated with the drugs and the organized crime.

Undoubtedly there is here the lack of mention about combating the retail traders, in other words dealers. However, there was kept the drugs prohibition. They are also going not to punish the persons taking drugs.

VII. The Union (Community) Plans of Combating the Drugs

The normative act used to combat the drug abuse these are the Union plans (Community). The first Union (Community) Plan of Combating the drugs was accepted by the European Council in 1990 and was obliged in the years 1990 – 1994\(^{28}\). In that Plan there was the attempt to define the aims and the rules of the common attitude of Member States to the problems of combating the drug abuse. There was assumed the direction of limiting the demand on drugs by virtue of the health criterion and limiting the supply by virtue of the need to combat the symptoms of cryminogenic drug abuse\(^{29}\).

\(^{26}\) 9012/99 CORDROGUE 33.
\(^{27}\) 12555/3/99 CORDROGUE 64; 9283/00 CORDROGUE 3.
\(^{28}\) 10234/1/90, 10.12.1990.
\(^{29}\) See: Z. Czachór, A. Graś, Vademecum. Europa od A-Z, Warszawa 2006, p. 107 and follow-
The effect of realization of the Plan was publishing by the European Commission, the message on the legal cooperation among the Member States in the area of combating the drug abuse. Then, there was created the European Police Office – Europol (1994), European Unit on Judicial Cooperation – Eurojust, European Centre on Monitoring the Drug Abuse (1993).

The following European Plans of Combating the Drugs were realized in the years 1995 – 1999 and 2000 – 2004. However, they were the continuation of the first Plan and the Strategy at the same time. The present Strategy concerning the drugs, which is realized in the years 2005 – 2012 includes two Plans. The first of them was accomplished in the years 2005 – 2008 and the second one in the years 2009 – 2012.

The European Plans to Combat the Drugs from the years 2005 – 2008 were the continuation of the previous plan. Namely, one of the purposes of the undertaken activities was decreasing the demand and at the same time the considerable limitation of the drugs supply. Those activities had to be in accordance with the European Anti Drug Strategy. The activities defined in that Plan were realized in the Member States of the European Union and at the international arena. There was emphasized the need of cooperation among the Member States within the framework of the data transmission and the best practice. There was also emphasized the need of better interrelation of the Union policy of combating the drug abuse with the scientific researches.

Within the framework of the cooperation among the Member States there was emphasized the need to standardize the legal regulations, strategies and national plans. Particularly, there was emphasized the necessity of decreasing the consumption of drugs in the closed centers e.g. in the army, in prisons and the treatment of the addicted persons. At the same time there were intensified the activities in the interest of decreasing the drugs production and strengthening the control of “money laundering”.

Within the framework of the cooperation among the Member States the most important appeared transmitting the information about the dynamics of drug consumption and about the crimes associated with the drug abuse.

The basic task of the European Plan of Combating Drugs for the years 2009–2012 is the further implementation of the previous Plan assumptions, considering that there is the significant progress in the combat with the drugs consumption and trade in the territory of the European Union. In the present Plan, which is now realized the number of purposes to achieve and the activities were limiting.
ited. These measures were taken to make it easier to define the subjects, which are responsible for the realization of the existing tasks. Moreover, there is the tendency of convergence the Union policy of combating the drug abuse with the other kinds of policies, chiefly with the policy of protection the public health. These countries are encouraged to use the funds of the European Union programmes when they realize their own plans. To decrease the level of the drugs demand, there was assumed the intensification of the policy of realizing the drug harmfulness for the health and the life safety. The additional activities are introduced, which aim is the treatment of the addicted people who suffer from jaundice or HIV. In the area of combating the negative drug abuse results there is the tendency to unify the activities by closing the legislations of the Member States. The similar activities have to be undertaken in the field of international law, particularly, standardizing the law, exchange the information about the drugs demand and sales.

**VIII. The secondary law and the drugs**

The policy of combating the drug abuse phenomenon, particularly the drug trade, became the subject of legal regulations after accepting the Maastricht Treaty in 1992, where the first time the foundations were put for the common (Union) policy of combating this phenomenon. The first act of the second law was the regulation of the Council (EEC) no 302/93 of 8th February 1993 about appointing the European Center of Monitoring the Drugs and Drug Abuse. The following act was the statement of the Commission for the European Council and the Parliament about the Plan of Action of the European Union within the domain of combating the drugs (1995 – 1999). The following Plan of Action was assumed by the decision no 102/97/EC of the European Parliament and the Council of 16th December 1996. There was the Community Plan of Action within the area of prevention of the drug addiction within the framework of the activities in the public health (1996 – 2000).

Closing the legislations of the Member States within the framework of combating the drug abuse and prevention and combating the illegal drug trade were started on the base of Common Activity of the Council 96/750/WS and SW from 17th December 1996. The necessary instrument of this closing was the information exchange and the risk evaluation. Then the next document was published Common Council Activity 97/396/WS SW from 16th June 1997 concerning the information exchange, the risk evaluation and the control of the new synthetic medicines.

34 COM(1994)0234.
The following important legal acts are the Council Regulation no 2046/97 from 13th October 1997 about the North – South cooperation at the campaign against the drugs and drug abuse and the document accepting the Plan of Action of the Council and the Commission about the optimal accomplishing the Amsterdam Treaty resolutions at deciding the area of freedom, security and justice.

At the end of the nineties there were published the normative acts associated with the strategies and plans, which were obliged over the following years. Thus, there was accepted the document from the European Council session, which debated in Helsinki ion 10th – 11th December 1999, particularly there was the Conclusion no 53, in which there was considered the EU anti drug Strategy (2000 – 2004) and the European Council Conclusions debating in Santa Maria da Feira on 19th – 20th June 2000, particularly paragraph 51, where the Council accepted the European Union Plan of Action within the framework of combating the drugs (2000–2004). There were the act belonging to the category soft law.


In the end there is a recommendation of the European Parliament for the Council and the European Council about the European anti drug strategy (2005–2012).

IX. The European Institutions combating the drug abuse

On the basis of the Council resolution (EEC) no 302/93 from 8th February 1993 there was appointed the European Center of Monitoring the Drugs and the Drug Abuse. It was the consequence of introducing to the Treaty on European Union, the first elements of the Community policy of combating the drugs.
drug abuse. The Center is the decentralized European agency, and although it was appointed in 1993, it started its activity in 1995. The head quarters of the Center is located in Lisbon, but the Agency has also its office in Brussels. Whereas institutionally it is depended to the European Commission.

The fundamental task of the European Center of Monitoring the Drugs and the Drug Abuse is gathering the information within the framework of the problems with drug abuse in the EU. The collected data are then analyzed and publicized by the media and the other publishers. In this way the decision makers, chiefly the politicians, but also the scientists, media or the organizational units dealing with combating the drug abuse have the access to the independent, reliable and comparable information about the drug abuse phenomenon. There should not be also forgotten about the documentation of the drug abuse phenomenon in Europe.

The collected data is used to work out the anti drug national and Union strategies. It is possible due to increasing the comparativeness of information about drugs and drug abuse in Europe and working out the methods and tools necessary to achieve the purpose. In this way the Member States can compare, and as a consequence, to claim what is their situation like against the background of the other European countries and to analyze the common problems and purposes.

The Center has also the other own tasks, namely the definition of the dynamics of the drug abuse problem. Hence, thank to “Reitox network”\textsuperscript{45}, the monitoring center appear in each of the 27 Member State in EU and in Norway, in the candidate countries to the EU and at the European Commission. In this way the yearly reports are prepared about the present situation of the drugs and drug abuse problems in the European Union and in Norway. In the Internet statistical Bulletin there is the yearly report about the present situation and the trends within the framework of drugs and drug abuse. The activities of the Center contribute to work out the effective anti drug strategy. However, the Center cannot submit the model of such strategy. The other institution dealing with the drug abuse is the European Police Office – Europol. This is the police agency, appointed in 1999 on the basis of the Treaty on European Union and it has its headquarters in Hague. Within the framework of drug abuse there are some actions of combating the crime linked with drug abuse, mainly the illegal drugs trade and the drugs production.

The third body responsible for combating the drug abuse is the European Commission itself. It assures the significant money to combat the drug problems within the new budget for the years 2007–2013. There are also continued

\textsuperscript{45} This is the computer European Network of Information about Drugs and Drug Abuse Reitox. The abbreviation comes from the French name Réseau Européen d’Information sur les Drogues et les Toxicomanies.
the works about the new instruments of financing the preventive treatment and the anti drug information. There are the financial measures assured of 21 million Euros. There are also appointed some new financial instruments, such as the Programme of prevention and combating the crime. The programme of public health for the years 2007–2013 and the seventh general programme in the interest of the researches and the technological development for the years 2007–2013. They assure the possibility to help financially the organizations working in different aspects of the domain of drugs. Moreover, from 2005, the European Commission and the Member States co financed the sum of 750 million Euros the helping projects associated with the drugs and realized in the third countries.

X. The legalization of possessing the drugs in the Czech Republic

The lack of coherent policy for combating the drug abuse in the European Union causes that each Member State can posses its own legal regulations within this framework. It often refers to the neighboring countries, as for example Poland and the Czech Republic. In Poland possessing even a small amount of drugs is the penal act. Similarly, if we mean the drugs production, export or import.

Meanwhile, from 5th January 2010 in the Czech Republic it is legal to possess 1,5 gm of heroine, 1 gm of cocaine, 2 gm of methamphetamine, till 15 gm of marihuana, till 4 pills of ecstasy, 5 gm of hashish, 40 hallucinogenic mushrooms and till 5 tablets of LSD. Possessing the bigger amount of drugs is penalized. The drug abuse in the Czech Republic becomes bigger and bigger. The report of the European Center of Monitoring the Drugs and Drug Addictions says that almost every third young Czech admits to smoke marihuana. Yearly they smoke 11,5 tons of marihuana and they take 1,2 million pills of ecstasy.

The simple question which has to be asked about this distinguishing difference in the legal regulations of possessing the drugs, between Poland and the Czech Republic, what about the consequences and the effectiveness of combating the drug abuse in the countries with the higher thresholds of combating the drug abuse. The police and media data says that the drug tourism started from Poland to the Czech Republic. It is easy to omit in this way all the prohibitions and programmes of combating the drug abuse.

Such divergences hit out at the fundamental human rights, chiefly at the right to life and health. The discussion is being made about the rights of the addicted persons and their exclusion. Naturally, such an attitude to the connection between the human rights and drug abuse has its deep justification

in the everyday life. However, we cannot forget about the threats which are caused by the addicted and possibly infected persons. The people having contact accidentally are subjected to lose their health and even life. Therefore, this is the reverse of the medal, protection of infected persons and the permissibility of free drugs trade.

Introducing in the Czech Republic the permit to possess and trade the drugs creates in consequence the wide – ranging negative results for the individual persons and for the whole society in Poland. The freedom of some people, widely understood, cannot limitate the freedom of the others.

Conclusions

The drug abuse phenomenon, particularly the drug supply and demand have become the worldwide problem for at least thirty years. In the individual countries there are undertaken some activities towards combating the drug addiction and illegal drug trade. The reason of undertaking the activities within this framework is not only the need of protecting the fundamental human rights, particularly life and health of addicted persons, but also the necessity of limiting the treatment costs and minimizing the threats of infection the HIV virus or the jaundice C from strangers. The actions undertaken have the preventive character, and further they can become therapeutic. The investigative authorities and the judicial bodies prosecute the illegal drug possessing and trade.

In Poland the anti drug actions were undertaken in the nineties. The fundamental legal act within this framework is the law about drug abuse prevention and 25 different regulations. Moreover, there is the National Programme of Drug Abuse Prevention. The similar programmes function in voivodeships, administrative districts and local commune administrations. There is a wide range of the institutions which are legally responsible for the preventive actions.

The European Union undertakes the actions only on the basis of subsidiary, thus it does not replace the actions of the countries, but it only completes them. Hence, the first ideas of (community) anti drug policy appeared in the Maastricht Treaty in 1992. As a consequence, the first regulations appeared, which have the normative character in the secondary law. There was worked out the Union Anti Drug Strategy and the Plans of Action. There were appointed two institutions combating the drug abuse. The first of them is the European Police Office –Europol, which prosecutes and give the information about the illegal drugs trade or it investigates the other crimes connected with drugs. The next institution is the European Center on Monitoring Drug Abuse, which collects information about the quantity of drugs consumption on the territory of the Member States. Then the data are used to work out the anti drug strategies in the individual countries.
The lack of equal Union policy within the framework of combating the drugs supply and demand cause the distinguish differentiation of the legal regulations among the particular Member States. The example is Poland, where possessing any amount of drugs is forbidden and the Czech Republic, where they implemented the legal drugs turnover. The effectiveness of Polish regulations, from this perspective, seems to be inconsiderable, since without any obstacles the persons who want to purchase the drugs can cross the border to go to the Czech Republic.

The lack of the equal (strategy) of the European Union within the framework of combating drug abuse, chiefly the drug demand and supply, does not guarantee the proper protection of human rights. The addicted person is really treated not as the human being, but absolutely as the potential client of the international cartels. The lives of such persons are not important, but their consumption abilities. The drug lobby, stronger and stronger, make the legalization of drug supply, at the same time enabling the legalization of the so far illegal ways of earning fortunes. There is lack of prevention of the people endangered by the virus HIV infections, or the jaundice C being in relationships with the addicted persons, thus the members of families or the medical personnel. The money which the society has to invest to carry out the prevention and therapeutic activities, are not taken into consideration at all.
THE ABUSE OF RIGHTS IN TAX AND ADMINISTRATIVE LAW

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Summary: Aim of this article is to point out the recent development of the principle of abuse of rights in tax and administrative law. Subject of this article is not abuse of discretion, abuse of rule of law, abuse of power or eventual other abuses. Although abuse of rights is traditionally category of private law, we could observe application of this institute in European public law including the Czech public law.

Keywords: abuse of law, abuse of rights, contra legem, in fraudem legis, dissimulation, principles, principle-based legislation, intention

Introduction

Aim of this article is to point out the recent development of the principle of abuse of rights in tax and administrative law. Subject of this article is not abuse of discretion, abuse of rule of law, abuse of power or eventual other abuses. Although abuse of rights is traditionally category of private law, we could observe application of this institute in European public law including the Czech public law.

Historically, abuse of rights had been observed in the times of Roman law and firstly was connected with property law. Then it spread further in the whole private law. Although I have not found sources describing abuse of law in tax law or other branches of public law in history, I am convinced that reason for this fact is only absence of reference. If taxes and tax law exist as long as our society, there had to be attempts to reduce taxes always. While describing abuse of law and comparing various attitudes, differences between legal systems and national jurisdictions are important. It is to note one more fact: tax law is in the Czech Republic regarded as part of public law, contrary to some Western jurisdictions. Moreover, according to some opinions, common law has no general doctrine of abuse of law.
Definition of abuse of rights does not exist in the Czech law and neither in many other countries. Abuse of rights is connected with subjective rights. Several authors defined abuse of rights, their papers will be referred also later. According to Paul Lasok „abuse“ is rhetorical device whose purpose is to express disagreement with particular, but lawful, exercise of rights. French courts developed concept of abuse of rights to cope with misuses of unqualified rights. According Hui Ling McCarthy (analysing abuse of rights in connection with VAT planning – see further reference) there is still no precise definition of “abuse of rights”. Instead there is an evolving body of EU case law, formulating the circumstances in which abuse may be present. In the absence of national abuse provisions prescribing those circumstances, the purpose of the doctrine is to catch cases where either a person is attempting to rely on a European legal right to circumvent or displace national law, or a person is looking to gain a financial or other advantage by way of an abusive use of Community law. Czech author Zdeněk Pulkrábek refers to French definition which construes abuse of law broadly and regards intent to cause somebody harm as a feature of abuse of law. According to other opinion the attribute is illegal caused behaviour which differs from acting of ordinary, reasonable and vigilant individual. His third quotation and criterion of abuse of law is economic and social purpose of law. What all definitions have in common, is purpose or intent to harm other person (or society) and get an advantage. The way how to reach this is related to creation of situation which differs from original one, that means we see a reconstruction or simulation. The line between legal and illegal behaviour is very difficult to find since there are legal ways how to reduce tax base (or observe other rules both in letter and spirit).

To describe theory of abuse of rights (or law), I refer to monography of Czech author Zdeněk Pulkrábek.\textsuperscript{1} Although this work was done for private (civil) law, some of thoughts of author can be useful. Abuse of rights relates to exercise of rights (also filing a suit could be considered as abuse of rights). Pulkrábek defines abuse of law as such a relying on the law which is somehow faulty. Means to prevent defectiveness of that is to apply the principle of abuse of law. Defective can be relying on the law, result of exercise of rights or the law itself. Interpretation of the terms mentioned above is related to values and principles applied by interpreter. As a ground for interpretation serves idea of purpose of law, requirement for law to be balanced, harmonious and moral, ethical and fair. Purpose of law is fundamental for law and constitutionally based in preambule of the Czech constitution. Purpose of law is to provide benefits for entitled persons, to satisfy their needs and interests and the aims of this stipulations are fairness, justice, equity. The abuse of law should impact firstly on the law itself (derogation), secondly on behaviour of person entitled of rights and person obliged to do something (regulation) and thirdly on enforcement of the law. Abuse of rights is coupled with behaviour of entitled person or with behaviour of person

obliged to do something, with their position, with unilateral act or other acts (objection, protest, notice, dismissal, motion, action etc.). Essential is to answer what constitutes abuse of rights and how is the principle to be applied. Abused can be only rights – where is not right (law), there is no abuse. The content of the law can be recognized solely under particular circumstances, abuse of law is not abstract category. Derogation of abused rights could be absolute or partial. Effects of derogation of abused right are *ex nunc* or *ex tunc* – it depends on the fact if the abuse there was from the beginning of the transaction. The act arised from abused right is null and void and the court must take it into account *ex officio*.

Pulkrábek distinguishes four forms of abuse of law:

1. entitled person intends to harm other; damage could be any detriment or disadvantage,
2. entitled person can follow other purpose than that which is defined by the law,
3. entitled person is mistaken and supposes benefit,
4. entitled person is only stubborn, the aim is solely exercise of right, not the consequences of that exercise.

Pulkrábek believes that also negligible, very small benefit should be protected. Author quotes Swiss author H. Merz who regards as general principle obligation to exercise rights in the most modest manner. In opinion of Pulkrábek, defectiveness in abuse of law is based also on other factors (different from the contradiction to purpose of law): that is contradiction to good moral, serious contradiction between benefit and harm, exercise of rights is unscrupulous to interests of obliged person, contradiction in own behaviour and conflict with public interest. Abuse of law relates both to objective contradiction to purpose of law (connected to benefit) and subjective contradiction to purpose of law (connected to intention of acting person). According to author of monography, abuse can concern any right. Contrary to principle of abuse of rights there is requirement of legal certainty.

Comparing above mentioned ideas with fundamental principles of public law, several issues emerge. Firstly, accordance with public interest is prescribed by the Czech Administrative Procedure Code. Fundamental principles are elaborated in detail in particular provisions in administrative law. Application of law deals more with particular breach of law then solely with breach of principle, both in administrative and judicial procedures. To reject the right (application, request) only on the basis of contradiction with public interest is very rare and usually it is related to application of abuse of law or circumvention of law. On the other hand, to grant right solely on the basis of application of principle has been observed several times (it is to note that it was chiefly in judicial practice).
There are still other concepts similar to abuse of law or other terms for same or similar situations. To name some of them, there is malice, false intent, absence of good faith, bullying, harassment. Especially in tax law is to refer to anti-avoidance rule (which differs from evasion). Abused can be both substantive and process law.

Abuse of law is associated fundamentally with interpretation of law. Textualists and contextualists discuss the issue, we can take into account natural justice and positivism etc. Some authors speak about abuse of interpretation. According to Steven Dean and Lawrence Solan "the goal of statutory interpretation is to find and enforce the intended meaning of the legislature and that the best evidence of this intent is the language of the statute". Tax shelters take advantage of the flexibility of words and of the gaps in legislation. Authors remark on recent use of rule of lenity by courts. According to this rule (originated in penal law) statutes should be strictly construed against the government. Lexis survey found that federal and state courts used the word "intent" in their decisions 60,000 times in ten years period. Some courts found intent of legislator in the language of the statute, some outside of it. According to Justice Scalia meaning can be understood in accord with context and ordinary usage of the language (for this the whole Congress voted) and as compatible with surrounding body of law, he would not permit to examine any historical and legislative material. He does not regard intent of legislator as the proper criterion of the law. Authors believe that textualists consider legislative history as unreliable and weak argument and aggrandizing the role of congressional committees. The lenity principle has been used both in civil and criminal cases. The U. S. Supreme Court applied it in civil cases where the statute in question had both civil and criminal remedies. This could be inspirative also for the Czech law. Authors of the paper do not believe that applying lenity rule to Tax Code is likely and that it would have good result. In fact, lenity rule was articulated by Chief Justice John Marshall in United States v. Fischer in 1805. Due to interpretation government was given priority over other creditors. Practically, where administrative agencies are entitled to enforce law both through civil courts and criminal law, they become more aggressive over time. Tax fraud has a strong mens rea (guilty mind) element. This rule then can resolve an ambiguity. These tools come into operation not in the beginning of their process but in the end of construing. This is the function of judiciary and of course also of tax administration. Although judges use reasonableness as key principle and when can not determine intent of the legislature, they resolve disputes in favor of taxpayers, result is uncertainty. Also sta-

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tistics does not help: victories of government and taxpayers are almost the same. As a solution authors do not see aggressive purposive approach (it is not credible) but think that anti-abuse doctrines are important, regardless if they are established in statutes or judicially. In fact they permit courts to focus on statute’s purpose without looking outside its language.

Gianluigi Palombella⁴ considers abuse of rights from the point of view of rule of law. Author regards using abuse of law as the resistance of formal principles as a shield to hide objectives incompatible with the legal order and then quotes Justice Antonin Scalia’s question whether to decide case on the basis of „totality of factual circumstances“ or to define general rule.

I. European law and abuse of rights

The abuse of rights in European law shines through all this paper. I would like to highlight few of best analysis on this topic. The paper devoted to origins and history of the principle was elaborated by Paul Lasok.⁵ He splits up the situations of abuse of EC law into abuse of 1. private persons and 2. member states and further in three contexts:

1. reliance upon EC law which results in abuse of domestic law,
2. application of EC law leads to extracting (financial) benefit from the Community,
3. application of harmonised legislation which does not contain explicitly anti-abuse rule.

None of these situations has a character of dishonesty or fraud. To define the terms due to linguistic differences, author divides: „right“ is subjective and „law“ is objective. Also Lasok sees the responsibility of legislature to define what is „right“ and what is „wrong“. And also points out the difference between legislative approach (that means if legislature defines abuse of law) and jurisprudential approach (technically imposing limits on the exersice of lawful right). Lasok compares – in common law of England and Wales non-existing – doctrine of abuse of law to principles of equity and in European law with principle if proportionality. Abuse of law is discussed since attempts to avoid an abligation mean putting it in another way, to create situation that falls outside the scope of the obligation. This resulted in need for more sophisticated approach to redress the situation and use of more complex remedy as liberty or freedom are abused. Author refers to raids on the revenue and differences on just minimising tax liability (footnote 14), to the cases where existence of the concept of abuse of law

was denied by Denmark, Ireland and the United Kingdom in 1998 (case Kefalas – footnote 23, see this paper for further reference) and abuse of power by the States (misuse of power and acting outside the scope of power which is extremely difficult to recognize in public law). As to abuse of rights Lasok highlights that intensity of disparity in the situation with abuse of rights must be so great that the only sensible explanation for the exercise of the right is the predominant purpose to cause harm to another. In this point I must refer to other concepts where sufficient is causing harm, regardless of intensity of the act and other reasons of the act. Lasok came to conclusions that:

1. Distinction between definition of right and abuse of right is tenuous, abuse of rights is better expressed with particular types of limitation of its exercise, what matters is not legal nature of origin of limitation but its rationale.

2. There is no reason why public bodies should be in different legal position – the other concept is misuse of power rather than right, differences in concepts are rather material than formal.

3. Abuse of right is based on the end contrary of purpose served by the right or its excessive or disproportionate manner.

4. Material differences in particular cases must be emphasized.

5. The concept of abuse of rights is not suited to converse, that is, the conduct of harmed persons is not object of this concept, certainly in public law.

In case C-367/96 Kefalas v. Greece, the ECJ was asked whether national court should apply domestic definition of abuse of right or of Community. The ECJ held that a domestic anti-abuse rule can, under Community law, be applied for the purpose of assessing whether or not the exercise of a right under EC law is “abusive” but “the application of such a national rule must not prejudice the full effect and uniform application of Community law in the Member States...” and that “it is not open to national courts, when assessing the exercise of a right arising from a provision of Community law, to alter the scope of that provision or to compromise the objectives pursued by it”. According to Lasok the substantive elements of the principle are:

1. reliance on a provision of EC law,

2. the derivation of an improper advantage to the detriment of another, and

3. the advantage must be manifestly contrary to the objective of the provision relied upon. There is also an evidential requirement: the evidence of abuse must be “sufficiently telling”.

In Case C-373/97 Diamantis v. Greece the ECJ refined the test by objective evidence: “first, a combination of objective circumstances in which, despite formal
observance of the conditions laid down by the Community rules, the purpose of the rules has not been achieved” and “second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it”.

In Case C-255/02 Halifax plc and others v Commissioners of Customs and Excise abusive practice is described as “transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law”. The ECJ went on to hold: “…an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of [EC law] and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage”. Hui Ling McCarthy⁶ points out that the ECJ was clear that the doctrine was not a general anti-avoidance principle, nor could it be used to invalidate all structures where tax mitigation comprised merely one of a number of drivers. Indeed, the doctrine does not operate in a vacuum – it must be considered in conjunction with other well-established principles of Community law, such as legal certainty and fiscal neutrality.

Lasok regards reliance on EC law to abuse domestic law as real problem and seen from the perspective of domestic law, EC law is nothing other than vast avoidance exercise. Author illustrates this on several examples (reimports, abuse of freedom of establishment in order to circumvent the minimum capital requirements in domestic country etc.). Application of EC law does not necessarily mean that domestic concept of abuse of law can not be applied at all but it must be in compliance with EC law.

The third group of abuses deals with obtaining benefit from EC by direct application of EC provisions. There the ECJ held again as necessary conditions for abuse of law meeting both objective and subjective criteria. Anti-avoidance or anti-abuse rule is set up in article 4(3) of Council Regulation No. 2988/95. Definition labels abusive acts as acts established to have as their purpose the obtaining of an advantage contrary to the objectives of Community law by artificially creating the conditions required for obtaining that advantage which would result in either the failure to obtain the advantage or, if it had been obtained, the withdrawal of the advantage.

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Lasok worries if the implication of Halifax case which contains best known concept of abuse and harmonised anti-abuse rule, allows to apply domestic anti-abuse rules in future.

Abuse of EC rules by member states is indirectly incorporated in Article 30 of the EC Treaty.

As to examination of intention, quide was offered by the ECJ on 12.1.2006 in joined Cases Optigen Ltd (C-354/03), Fulcrum Electronics Ltd (C-355/03) a Bond House Systems Ltd (C-484/03) v. Commissioners of Customs & Excise. The court held that: „Transactions … which are not themselves vitiated by value added tax fraud, constitute supplies of goods or services effected by a taxable person acting as such and an economic activity within the meaning of Articles 2(1), 4 and 5(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, as amended by Council Directive 95/7/EC of 10 April 1995, where they fulfil the objective criteria on which the definitions of those terms are based, regardless of the intention of a trader other than the taxable person concerned involved in the same chain of supply and/or the possible fraudulent nature of another transaction in the chain, prior or subsequent to the transaction carried out by that taxable person, of which that taxable person had no knowledge and no means of knowledge. The right to deduct input value added tax of a taxable person who carries out such transactions cannot be affected by the fact that in the chain of supply of which those transactions form part another prior or subsequent transaction is vitiated by value added tax fraud, without that taxable person knowing or having any means of knowing.“

Another case (Weald Leasing Limited v. the Commissioners for Her Majesty’s Revenue and Customs, C-103/09) deals with abusive practice in connection with involvement of third party in the transaction. The ECJ held that „1) the tax advantage accruing from an undertaking’s recourse to asset leasing transactions, such as those at issue in the main proceedings, instead of the outright purchase of those assets, does not constitute a tax advantage the grant of which would be contrary to the purpose of the relevant provisions of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, as amended by Council Directive 95/7/EC of 10 April 1995, and of the national legislation transposing it, provided that the contractual terms of those transactions, particularly those concerned with setting the level of rentals, correspond to arm’s length terms and that the involvement of an intermediate third party company in those transactions is not such as to preclude the application of those provisions, a matter which it is for the national court to determine. The fact that the undertaking does not engage in leasing transactions in the context of its normal commercial operations is irrelevant in that regard. 2) If certain contractual terms of the leasing transactions at issue in the main proceedings, and/or the intervention of an inter-
mediate third party company in those transactions, constituted an abusive practice, those transactions must be redefined so as to re-establish the situation that would have prevailed in the absence of the elements of those contractual terms which were abusive and/or in the absence of the intervention of that company.” The issue is whether the courts of all member states would apply rule stipulated in the decision in the correct fashion in similar cases.

II. Tax law and abuse of rights

As I mentioned above, tax law is old as society and therefore intention to reduce tax burden is old alike. Serious reference is observed in modern history. Especially recently, there is concern on issues of abuse of tax law. Roots of this matter must be seen in economic and social reality. As to legal point of view, concept of abuse of law or similar concept such as sham doctrine, fraus legis doctrine or doctrine „substance over form“ (dissimulation doctrine) are observed in many jurisdictions, regardless of their content.

In focused comparison with illustrative case law examples authors concluded that tax avoidance is problem for all countries. They start with drawing the line between „mitigation“ as legal reducing one´s tax, „evasion“ as lying about one´s income and „avoidance“ which is between two and means contriving artificial transactions to reduce tax. According authors this is description rather then definition. Main authors with Svenja Brandt explain German civil law doctrine of abuse of right. Its underlying principle is good faith, stipulated in Para. 242 of German Civil Code (Mißbrauchsverbot), and broadly judicially interpreted (original Schikaneverbot according to Para. 226 BGB has been seldom applied). Four categories of abuse of rights are:

1. the prohibition on inconsistent behaviour;
2. the prohibition on exercising rights which, though valid, were fraudulently acquired;
3. the prohibition on making a claim where what is claimed would have to be given back immediately;
4. the suspension of rights that were not exercised within a reasonable time, even if they have not legally expired.

What is noteworthy, this concept is fully applied to German procedural, public and tax law. Furthermore, German Federal Code of Tax Procedure in Para. 42 sets down general anti-avoidance rule. It disallows the tax effects of any legal arrangement that constitutes an abuse of rights. Taxpayers may not arrange

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their affairs to manipulate or distort the economic reality of a transaction. Such manipulation or distortion is tax avoidance and is countered by the doctrine of Rechtsmissbrauch or, in the context of tax law, by the more specific concept of abuse of possible legal arrangements (Gestaltungsmisstrauh). German courts interpret this abuse according to four elements:

1. legal arrangement must be inadequate,
2. arrangement must have affect of reducing tax,
3. there must be important grounds for reasonableness and justification for contrary arrangement by non-economic or other considerations,
4. there must be subjective element.

Test of inadequacy asks whether an objective third party, in the same circumstances and with the same economic purpose as the taxpayer, would have proceeded as the taxpayer did.

Example of Croatia shows that this country has no anti-avoidance provisions and deals only with sham doctrine (above all, Croatia is reportedly focused on tax evasion). Interestingly, this doctrine has never been used (I remind that the article was published in 2008). Sham is transaction which is not real. Authors prefer as a model Hungary which is only country in Eastern Europe that enacted general anti-avodance rule (Para. 1/7 of Tax Administration Act). It is based on abuse of law or fraus legis doctrine, similar to Germany´s model. Hungary´s anti-avoidance rule provides that transaction whose purpose is to avoid tax would be taxed according to its economic base (we can call it also doctrine „substance over form“). By the way, as I mention in more detailed manner for the Czech Republic later, information that Hungary is sole Eastern country with this rule is not correct.

New Zealand anti-avoidance rule is similar to other, Income Tax Law adds that purpose or effect of avoidance is not merely incidental. Tax avoidance agreement is void against Commissioner. Avoidance arrangement can rest upon agreement, plan, contract or understanding, including steps and transactions. Difference between New Zealand and Australia are not in legal definitions but in judicial interpretation and application. New Zealand does not rely only on the result that tax was reduced. First dichotomy is between legal form and legal substance and the second on legal and economic substance. The tax avoidance test is objective and examines whether the parties would have entered into the transaction even in the absence of the tax advantage. For example in the Case V20 (dentist left partnership and established a trading trust) Justice Barber held that there was no tax avoidance since the tax advantage was incidental to the transaction´s commercially valid chief objectives to protect assets and limit liability and tax savings were minor. Nevertheless, the same dentist in the 1996 income year was judged in the Case W33 and the court concluded that large tax savings of the
dentist were not merely incidental. Third method refers to the scheme and purpose of the Income Tax Act 2007 (intention of the Parliament). As tax avoidance is regarded inserting a related entity into a transaction in order to create artificial deductions (see contrary decision of ECJ mentioned later).

Australia is an example of activist judiciary and efforts of government to overturn it (reported in 2008). Courts use mainly two interpretative techniques: predication test (similar to New Zealand doctrine described above) and choice principle which was developed by High Court of Australia to protect general provisions of tax law rather than to deny taxpayers the rights to choose between alternatives open to them by that code (e.g. taxpayer can choose legal form but a university can not use tax advantage designed for farming business8). Australia’s current regime of anti-avoidance rule has three components:

1. taxpayer must obtain benefit,
2. the benefit must be from scheme, and
3. the scheme must have been entered into by a taxpayer for the sole purpose of obtaining the tax benefit.

The main focus is on dominant purpose. Contrary to New Zealand’s test which is objective, the Australian test is subjective and less general and uncertain. The latter is most controversial in purpose test and is interpreted rather narrowly. One remark involves the reflection that commercial purpose is not always necessary contrary to tax purpose and there is no certainty how the court would differentiate between ordinary commercial transactions and tax avoidance. Case described in the paper with tax haven was held against taxpayer as well as splitting home loans into two parts in order to increase the amount of deductible interest.

In France abuse of law is based on reasonableness and is important judicial tool. Abuse of law takes two main forms: social abuse and intentional abuse aimed to harm a third party. French Cassation Court in the middle of 19th century held that tax administration can not challenge taxpayer’s choice of arrangement. Few years later the same court came to the opposite conclusions and recognized the rights of tax administration to examine true substantive nature of the transaction. Para. L 64 of General Tax Code since 1981 (before it was part of Para. 244–1 since 1941) authorized the tax administration to a) disregard a legal act aimed

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8 The case involved a scheme designed to take advantage of income-averaging rules that were intended to assist pastoral farmers. A unit trust was established and carried on a modest pastoral farming business. The trust issued shares for AUD 1 to hundreds of university students in order to enable them to enjoy the tax-preferred status of primary producers. The High Court refused to apply Sec. 260 on the basis that adopting the arrangement was a choice open to the taxpayers under the ITAA 1936 (p. 157 in John Prebble and Zoë Prebble and others: Comparing the General Anti-Avoidance Rule of Income Tax Law with the Civil Law Doctrine of Abuse of Law. 2008. Bulletin for International Taxation. s. 151–170)
to dissimulate income or profit and b) to characterize transaction according to its genuine character. Consultative Committee for Supression of Abuse of Law was established for pre-litigation and burden of proof fell on taxpayer. Since 1963 penalty of 100% was increased to 200% for transactions involving abuse of law. Since 1987 also taxpayers could submit the case to the Committee. Burden of proof fall on the party that received negative opinion from the Committee, otherwise on the tax administration. Since 1981 French Conseil d’Etat ruled that abuse of law comprises also cases where 1. the documents produced by taxpayer are fictious and 2. the documents are not fictious but they cannot be explained or justified by any reason other then the exclusive and intentional purpose of reducing or avoiding tax. Sanctions are 80% increase of tax and parties of abusive transaction are jointly liable for the penalty. Para. L 64 of General Tax Law does not cover all matters, special procedure according to Para. L 64 must be followed strictly when the conditions are met. As to general abuse of law, Conseil d’Etat held in case Janfin that tax administration is entitled to use general abuse of law principle in situations in which Para. L 64 can not be applied. In such a case the tax administration must prove that transaction was fictious. The authors of the article describe also application of Para. L 64 and point to one case in which European Court of Justice concluded that Para. L 64 is compatible with Art. 43 of the EC Treaty. To complete recent development I refer to tax news⁹ and remark that Para. L 64 was amended in 2008 and abuse of law regard all taxes and since 9. 9. 2010 all decisions of tax administration (notices of French tax administrations 13 L-9–10, 13 M-2 and 13 N-3–10). In 2009 new case-law on abuse of law and dividend tax credits emerged¹⁰. In two cases Conseil d’Etat denied existence of abuse of law, ruled in favor of taxpayers and suggested that properly structured transactions should be able to withstand a challenge. Tax judges analysed legislative preparatory works and concluded that transaction in question were not in apparent contradiction with the legislator intent. Briefly, critical test was whether owner of the shares was retaining exposure to the economic risk. The fact that the transaction lasted very short period was irrelevant for judges.

However, references on other cases sum up that precedence of EC Treaty and its principle of freedom of establishment is not always in accord with efforts of EU member states. All members of EU have anti-avoidance rules but in practice they do not determine the scope of their provisions and in many states general abuse of law principle is applied. Anti-avoidance rules deal often cross-border situations and doctrines used in member states are able to couse unjustified restrictions on freedom of establishment. The definiton of „wholly artificial arrangements“ was proposed in case of British company Cadbury Schweppes and

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its subsidiary in Ireland by Advocat-General and ECJ confirmed it. He suggested that existence of tax reduction motive is too subjective criterion for the artificiality of chosen arrangements. The company took into account also level of taxation, like labour costs and infrastructure. There are three criteria to fulfil and if proved, company does not abuses law. Firstly, the subsidiary in question must be genuinely established in the host state a must have substance and capability of performing services that resulted in reducing tax burden. Secondly, the services of the subsidiary must be of genuine nature, its staff must be competent and make real decisions. Thirdly, the subsidiary must have economic value.

The United States with the United Kingdom are regarded as jurisdictions without having an anti-avoidance rule or an abuse of law doctrine (although we could cast doubt on it – as to essence of the issue). What is specific and known in connection with the United States, is compliance with the spirit, used from earliest days of the federal income tax law. Landmark decision of the Supreme Court is from 1935 (Gregory v. Helvering). The court used sham or business purpose doctrine. The sham doctrine is today shortcut phraseology for any number of judicial safeguards – the doctrine of „substance over form“, step transactions, economic substance and business purpose. The situation in the United States changed dramatically in the 1990s, in the time of rise of tax products. Surprisingly, courts favoured far more taxpayers. Test for economic substance must show that taxpayer subjectively had a non-tax purpose for the transaction and that there is objective of a realistic possibility of a pre-tax profit. Issues whether the test is exclusive or should be combined with other factors and whether is disjunctive or conjunctive imply uncertainty. Answers given by courts varied. For relevant case law favouring taxpayers I refer to the paper. Interestingly, none of the recent cases was considered by the Supreme Court on the basis of above mentioned safeguards. Textualism used by the courts caused reactions of the Congress and also its fear that the courts usurpe the role of legislative branch. Congress uses plain language in the law, the courts hardly find in the text intent of legislator and this language permits the taxpayers to receive their benefits. Shift to the responsibility of legislative branch is then observed. They are expected to provide safeguards in the statutes (see case Compaq). Consequently Senate amended tax bill in 2006 to clarify the economic substance doctrine by conjunctive test. Courts then became more restrained in applying these safeguards.

Simultaneously with establishment of Her Majesty Revenue and Customs in 2005 aiming to reduce tax gap „Anti-Avoidance Group“ was set up to systematically and more effectively combat tax avoidance. That means address three main areas: 1. opportunities to avoid taxes provided by legislation, 2. insufficiency of disincentives or deterrents to prevent taxpayers from avoidance schemes and 3. practical difficulty to identify avoidance transactions quickly. Courts do not recognize sham transactions, however „form over substance“ doctrine (or permissive approach) survived until 1980s. Then were courts confronted with new
and sophisticated tax avoidance devices a judicial attitudes varied. Purposive approach led to summary called „Less chaos, more uncertainty“. That position was compound by the incorporation of EU principle of abuse of law into the United Kingdom VAT law following ECJ´s *Halifax* decision. Author of this paper part notes that it will be fascinating how the developed concept will go beyond VAT borders in other tax areas. I must confirm his concern, refering to Czech case law which I describe later.

Czech tax law is from 1992 based on the doctrine „substance over form“ (dissimulation). In Tax Procedure Code of 1992 Para. 2 al. 7 stipulated that while applying tax laws in tax procedure real content of legal act or other fact crucial for collection or assessment of taxes must be taken into account, if the legal act is hidden by different formal act.

Landmark case regarding dissimulation was decided by the Supreme Administrative Court on 3rd April 2007 (No. 1 Afs 73/2004–89, all decisions are published on www.nssoud.cz in Czech language – but part of information and most important ones are in English). The Court held that there is dissimulation (hiding) when parties to the transaction pretend certain legal act which they do not really intend and hide another legal act which they mean. The key element of application of Para. 7 al. 2 of Tax Procedure Code is to examine relation between intention and demonstration (exercise) of the intent. Obligation of tax administration is to indicate not only ascertained formal situation but also dissimulated real situation and introduce reviewable deliberation leading to the decision including description and consideration of evidence. Dissimulation differs from the circumvention of law when the intention and its demonstration are in accord. The issue is whether dissimulation and abuse of law are different tools. The answer is: yes. Difference is in the intensity of intent of acting parties and also in possibilities of application of abuse of law. Nevertheless, I admit that opinions of various expert may differ and the issue could be more discussed and may also show how tricky, delicate and weak may be both approaches.

According to Czech experts of constitutional law Aleš Gerloch and Jan Tryzna principle of ban on abuse of law resembles principle of ban of exercise of law against good moral.\(^\text{11}\) Authors refer to Czech private case law and conclude that qualification of legal act as abuse of law is rather strict. In contrast with this approach there is decision of the Czech Supreme Administrative Court (of 10. 11. 2005, No. 1 Afs 107/2004 – 48). The facts of the case are as follows: parents of children established non-profit association and through gifts financed sports, cultural and educational activities of their children. Then they deducted these sums from the income tax base. The court held that in these cases must tax administration always consider if this is abuse of law. Court also concluded

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\(^{11}\) Gerloch, A., Tryzna, J. *Nad vázaností soudce zákonem z pohledu některých soudních rozhodnutí*. Právní rozhledy 1/2007, C.H.Beck, Praha (only in Czech language, text is not available on internet)
that this case does not deal with dissimulation but abuse of law. Gerloch and Tryzna regard the case as interesting due to several reasons. Firstly, the case deals with public law and in that branch principle of legality should be applied unconditionally. The Tax Procedure Code of 1992 did not know the term „abuse of law“. Therefore they consider issueable whether court is legitimate to use such an argument (if I follow up this idea, in certain perspective there could be observed abuse of power of the court; the same is valid for tax or other administration). Authors of the paper express objections that abuse of law is institute of private law and that the government (state, tax administration) can not „bully“ taxpayers. They also appeal for consistent application of abuse of law if it had been already defined by the Supreme Court in private law. Experts also refer to another case of the Supreme Administrative Court (7 Afs 115/2004) where the argumentation differed and suggested that tax administration can consider the act in question according to its content, not form (dissimulation). Although authors express concerns that freedom of deliberation (and I would watch the same problems in decision-making of administrative bodies), they finally support application of extralegal standards. Jointly, they warn that in such an approach the cases with the same facts and substance could be considered differently. Authors suggest that scope of rules for judicial deliberation should be at least in the Czech Republic stipulated by legislator. Only he is entitled to determine this. Especially in public law the approach to application of abuse of law should be restrictive although to specify unanimous guide is impossible. Authors consider very general scope of rules, as well as very casuistic rules as improper.

Since 2011 new Tax Procedure Code is in force (No. 280/2009 Coll.) and above mentioned principle is stipulated in Para. 8 al. 3: „tax administrator proceeds from real content of legal act or other fact crucial for tax proceedings“. I must say that other provisions regarding eventual abuse of law are not incorporated in the code.

Judith Freedman12 analyses strenghts and weaknesses of so called principle-based legislation in the times when under influence of European law and judiciary the approach to tax law has been changing. The role of primary and secondary legislation is discussed. The principles in primary legislation can mean legitimate expactations, certainty, equality and proportionality. Judiciary would be safeguard. Principles has higher level then broad or umbiguous rule. Principles have exceptions and they could be in conflict – secondary norms can not be in conflict – always one of them has priority. With principles there is no absence of legitimity both for courts and administration. Some regard principles only as a tool to help for interpretation. If we admit that there are gaps in law, we suppose that intention of lawmaker is not clear and that courts make law. Where

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are principles, there is no gap. This concept can function only if we trust tax administration and judiciary. There is a paradox here: principles-based regulation can give rise to a relationship of trust, but this relationship has to exist for principles-based regulation to be effective (see footnote 24). It is noteworthy that we can not mix principle-based legislation and purposive interpretation of law. In 1969 British judges were criticised for narrow and formalistic interpretation what changed later. British tax administration began to use provisions of the law containing written purposes (object clauses). In contrast, the principle needs to capture the outcomes in a way that is “intuitive or obvious to someone who understands the law’s context”. Argument against this concepts shows uncertainty and the fact that it switches the burden from the revenue authority, which must currently show that something is included in the charging provision, to the taxpayer, who must now show that a case is specifically excluded. Lenghty tax and court proceedings help nobody. With use of principle-based regulation would have tax administration issue further legislation and would have less discretion leeway. Australian experiment with principle-based regulation was not entirely successful. The issue is what was the cause. On the other hand, too much discretion entitled to administratuon and courts can lead to discussion on separation of powers and to the question if they are ready to cope with that. Principle-based regulation supplement strategy against tax-avoidance. Some experts believe that application of principle-based legislation would favour tax administration before courts. Concept of principles does not intend to involve morality into tax law. The issue is just to give effect to intention of Parliament. One major problem with using principles is that tax law is very abstract and may not always relate well to the real world, tax law often aims at special groups. Too sophisticated concept led in the past to technical character of tax law and was good basis for tax-avoidance. According to Freedman, associating principle-based legislation with a complex, non-intuitive and highly artificial area and with anti-avoidance legislation, tax administration (HMRC) have made this experiment difficult for themselves. Important is to define what is principle a how it is applied. Some indeterminacy is an essential feature of law and the important thing is that the law should provide a guide to the answers. The current route of ever increasing amounts of detailed legislation cannot continue and we need to find ways to improve the situation. The same opinion expressed earlier president of the Czech Supreme Administrative Court Josef Baxa in 2006.13

III. Administrative law and abuse of rights

As to administrative law, there is one landmark decision of the Czech Supreme Administrative Court regarding procedure on driving offences. The Court held in the Case (of 4. 5. 2011, No. 1 As 27/2011–81) that granting power of attorney to a person from Kuwait is abuse of law. In this case nobody has ever seen that

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person, there are doubts if this person even exists and this person is not lawyer (in the Czech Republic there are no qualification requirements for persons representing offenders in administrative proceedings or in court of first instance). The similar cases involved instructed persons from Somalia and similar delivering problems (e.g. the Czech Republic has no bilateral treaty regarding delivering post, or in this countries delivering post lasted reportedly about nine months whereas the term to end offence proceedings for administration is stipulated as one year including coming into force of the decision). Interesting is that above mentioned decision declares right of state to fair process.

In my practice I also met arguments of both parties (claimants and government) of application morality in administrative law. Although some Czech scholars deny this approach, it became reality for parties to the disputes. If my research was exhaustive, there is no decision of the Supreme Administrative Court which has dealt with the issue of morality in administrative law.

Conclusions

What have all definitions of abuse of law in common? Firstly, it is intent (to get advantage by creating artificial situation). Secondly, we ask how to find it, by subjective or objective criteria, or both, or plus others? It seems that subjective test was completed with objective part. I mentioned above various definitions of abuse of law (rights) which more or less differ. Necessarily I ask, is it at all something new? The answer is: yes and no. There are another concepts – similar or different – and they deal also with extralegal and/or legal standards (morality, good faith; frauds, tax avoidance, tax evasion, dissimiluation, circumvention of law etc.).

According to John and Zoë Prebble, administrations and courts have gone some way towards setting line between legal mitigation and illegal abuse of law. In spite of that effort, there is still considerable uncertainty which constitutes negative feature of general anti-avoidance rule. Nonetheless, concrete rules are the most open to avoidance. The line between tax mitigation and avoidance is fine. Various interests must be balanced and preventing tax avoidance must be addressed in consistent way, predictable and fair so that taxpayers can manage their affairs intelligently, confidently and in good faith. For EU member states balancing is even more complex. They must balance furthermore between their and EU legislation (especially take into account freedom of establishment). Approach of ECJ is formalistic and permissive of tax avoidance. Regardless of existence of provisions containing objective, purpose of statutes (law), this objective is always known (it is to collect taxes). Negative side of purposive approach (or also unlimited general anti-avoidance rule) is that this interpretation would always lead to the result in favour of tax administration. Experts agreed that the lower tax rates and the broader tax base, the less propensity of tax payers to attempt to avoid tax. Some assume that taxpayers are provoked by the tax rates
and legislation. Still the experience (in the United States) indicates that lowering rates does not lead simply to lowering tax avoidance. Legislation must operate in real world, including political world. Another problem is huge amount of legislative. Contribution of the quoted article can be seen not in proposing effective solution but rather in specifying essential issues.

Michael Byers suggests in his paper on abuse of rights in international law that the principle (of abuse rights) is supplemental to the principle of good faith. I can follow up this idea and suggest that in public law should be abuse of law applied (also) in respect to principle of legitimate expectation. Byers refers to number of scholars who have suggested that unnecessary and extreme but otherwise legal actions taken by a state against its own population, including mass revocations of nationality so as to cause statelessness, could be regarded as abuses of rights. Another area where abuse of rights finds application is with regard to activities that occur outside the territory of any state, in „common spaces“ such as the high seas, or in multiple states without any particular territorial nexus, as is the case with the Internet and some sources of pollution. Territory is becoming a less salient feature of the international legal landscape as contemporary problems increasingly reach across and beyond state borders, blurring traditional concepts of sovereignty and responsibility (see page 423–424 of his paper). Byers thinks that in the absence of more specific rules and principles, international courts and tribunals faced with these issues could, and probably should, look to abuse of rights as a general principle of law whose violation in itself constitutes a wrong giving rise to state responsibility and notes that rights may be abused either immediately or prospectively. He serves also with examples of expropriation of property. Author refers to Wolfgang Friedmann´s notice that the notions, for example, of „equity,“, „reasonableness“ or „abuse of rights“ ... do, and are bound to, differ widely. Byers highlights that the rights of states are no longer general and primordial. He expressed this in respect to international law. My question is whether we can say this in connection with application in public law (and abuse of law etc.) inside the national state.

What is immanent to law, each actor’s rights are necessarily limited by the rights and interests of others (and also state and society has their rights).

When we regard as crucial intent, then there is resemblance to criminal law. Should we use more principles of criminal law while considering abuse of law? I referred above to several opinions which explain their arguments. To conclude, in many jurisdictions principles like in dubio mitius or interpretation following merely explicitly expressed obligations in public law are applied.

Unity of legal system is unanimously agreed principle by all experts. Should there be one perception of abuse of law principle? If the Czech Supreme Administrative Court declares that application of abuse of law in administrative (public) law (to be precise – in driving offence cases) must be extraordinary, does it comply with reality of acting of offenders? As Pulkrábek in private law suggests (and derives this from his judicial practice) that abuse of law is found often, and the same applies to reality in public law, how can be (above all in administrative penal law) abuse of law applied as extraordinary tool or ultima ratio? The only way how to deal with this issue is in my opinion to regard abuse of law as ordinary tool or to label the same situation by the same concept, just called not abuse of law and – for example – circumvention of law, dissimulation etc. Difference could by sometimes only rhetorical – strong word just provokes not winning party to the proceedings.

Moreover, there is something else what attacks sometimes hardly found unity of legal order and it is influence of community law – Czech law as any other national laws faces many challenges itself and EC law brings new appeals.

In many areas, it may in practice be impossible to maintain parallel concepts of abuse of right; and we may well see the adoption of the EC concept (or concepts) in the legal systems of some at least of the member states even in areas of the law that are not, de iure, affected by EC law (e.g. tax and administrative law).

Another issue is whether administrative bodies (agencies) are entitled to conclude that in the case was abuse of law? Quoted papers suggest that this issue is dealt chiefly by courts, but example of the United Kingdom or France display that also special units in administrations can address this issue. Same result can be observed in the Czech Republic. In my practice I have judged cases where administration explicitly found abuse of law in driving offence cases, as I described above (but here abuse of law was considered not by special units).

Back to the definiton and features of abuse of law like intent and spirit of the law. In my opinion, decision-maker must have strong sense for and knowledge of reality, fashion of interpretation, avoid formalism and sometimes maybe also judicial and administrative activism. Process is always communication. To have effective process, it is necessary to be confident that we speak the same language and that there are not two or more monologues, this is in my opinion really very important and it is not at all simple to achieve that goal.

Another problem are duality of legal norms (natural and positive), rule of law and general acceptance and position of law and good moral in society and problem of legitimacy and quality of decision-makers (in all three powers systems), all these aspect influence justice, fairness and equity.

As Judith Freedman said, a different approach to the way we legislate could both improve the way we think about policy and result in better implementation, application and legitimacy in decision making. Principles-based drafting is not
a solution to all ills. Nevertheless, it could offer one route, in appropriate cases, to improvement as well as, in other cases, highlighting the need for more fundamental reform. We should not give up this experiment simply because it has not yet delivered total success. No new drafting technique can deliver a perfect (tax) system, but it is worth preserving with principles-based legislation.

I join Lasok and his reference to opinion of Advocate General Tesauro in the Kefalas case who said: “any legal order which aspires to achieve a minimum level of completion must contain self-protection measures…to ensure that the rights it confers are not exercised in a manner which is abusive, excessive or distorted”. He also took the view that abuse of right is “a legal concept which certainly has a home, or at least a foundation, in well-established legal systems, but much less so in a legal order like that of the Community, whose evolution towards integration is far from being capable of being considered to be complete”. Also the Czech law has still been changing rather dramatically and has been influenced by EC law.

According to Javier Barnes we have administration of third generation which aims the best solution\textsuperscript{15}. However, do we know what is the best solution?

According to Richard Posner both the extreme of hyperlegalism and the opposite extreme of a purely discretionary system of justice (and according to me also of administration) are found only in primitive societies. Mature societies mix strict law with discretion.\textsuperscript{16}

In my opinion we must not give up efforts and we should weigh various values, to have in mind entirety (holistic approach – that means also to know enough about reality), communicate well and struggle to reach perfection, or at least come closer to it, and this includes to ask relevant questions and try to do our best to find best answers. Recent fragile social situation put challenges on weighing values and parties to the proceedings and administrations and courts face expectactions how to bring together legal and social harmony.


SURRENDER VS. EXTRADITION:
A COMPARISON FOCUSED ON INNOVATIONS
OF EUROPEAN ARREST WARRANT

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Summary: The European Union was aware of unwanted side-effect of the free movement of persons which has been the equally free movement criminals. With regards to Tampere European Council conclusions the traditional extradition procedures were replaced by the surrender procedure within Member States of the European Union. The article answers the question how the surrender procedure differs from classic extradition. It deals with the comparison of the surrender procedure and the extradition mechanism focused on innovations of the European arrest warrant. It points out at necessity of simpler and faster procedure in the EU. Further, it focuses on the comparison of the legal basis of both procedures and on procedural issues.

Keywords: Surrender procedure, Extradition, European arrest warrant, Convention vs. framework decision, Mutual recognition of judicial decisions in criminal matters in the EU, Removal of the double criminality requirement.

Introduction

At the end of the 1980's the outside world became aware for the first time of the huge extent of the financial damage which the European Community (hereinafter “EC”) suffers, partly as a result of laxity and carelessness on the part of national authorities. It was due to fraud, which was frequently internationally organized, including tax evasion and customs fraud. People became sufficiently aware that this also damaged the EC's credibility. Protection of the EC's financial interests gradually gained greater political priority. In those times the European...
arrest warrant (hereinafter “EAW”) was designed for protecting the EC’s financial interests, but it did not become successful.

However, after the 9/11 plane attacks in the USA the EAW was being discussed again and introduced as a procedural tool in the area of judicial co-operation in criminal matters in the EU. It is based on the surrender procedure, which replaced traditional extradition procedures between the EU Member States. The question is how the surrender procedure differs from classic extradition. This article deals with the comparison of the surrender procedure and the extradition mechanism. It points out at the necessity of simpler and faster procedure in the EU and than focuses on the comparison of the legal basis of both procedures and on procedural issues.

I. Necessity of Simpler and Faster Procedure

The EU Member States were aware of unwanted side-effect of the free movement of goods, persons, services and capital within Europe, which has been the equally free movement of crime and criminals. This produced a growth in certain forms of trans-national crime. It has also reinforced the much older and simpler phenomenon of people committing offences in country “A”, whose justice they seek to escape by running off to country “B”. The result has been a rapid increase in the number of suspects and convicted persons whose extradition is sought by one EU country from another.4

The European Council held a special meeting on 15 and 16 October 1999 in Tampere (Finland) on the creation of an area of freedom, security and justice in the EU. The European Council was determined to develop the EU as an area of freedom, security and justice by making full use of the possibilities offered by the Treaty of Amsterdam.5 The European Council sent a strong political message to reaffirm the importance of this objective and agreed on a number of policy orientations and priorities which would speedily make this area a reality. With regards to Presidency Conclusions of meeting and in particular point 35 thereof, the formal extradition procedure should be abolished among the EU


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Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons.

After the attacks on New York and Washington the enactment of the EAW became a top priority for the EU’s political leaders. The European Commission submitted a Proposal for a Framework Decision on the EAW and the surrender procedures between Member States.\(^7\) In preparing this proposal, the Commission departments organised a series of interviews in the EU Member States with legal practitioners, judicial officers, lawyers, academics and ministry officials responsible for extradition in almost all the Member States. In 2002 the Council of the EU adopted the Council framework decision on the European arrest warrant and the surrender procedures between Member States\(^8\) (hereinafter “FWD”). The EAW provided for in FWD is the first concrete measure in the field of EU Criminal Law implementing the principle of mutual recognition which the European Council referred to as the “cornerstone” of judicial co-operation in the EU.

**II. Legal Basis: Convention vs. Framework Decision**

Extradition can be defined as a process whereby States provide to each other assistance in criminal matters. It does not exist as an obligation upon states in customary law.\(^9\) The principal rules and practices of extradition constitute a significant body of international law. In certain important matters there is considerable uniformity in bilateral treaties and municipal extradition statutes. In many other respects, extradition treaties and legislation present a complex and varying picture throughout the world. Many States insist on reciprocity and require an international agreement for extradition. To achieve this international cooperation some form of arrangement is necessary between the states involved. The arrangement may be based on a treaty, bilateral or multilateral, or on the application with respect to the requesting State of the requested State’s domestic extradition legislation.

Apart from numerous bilateral agreements, the basic multilateral treaty in Europe is the European Convention on Extradition\(^10\) (and its additional protocols), adopted by the Council of Europe in 1957, which represents a traditional scheme on extradition. It is the oldest of the conventions relating to penal matters prepared within the Council of Europe. Extradition is normally subject to

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strict requirements. In addition, at the level of the EU extradition is covered in further conventions (see below).

On the other hand, the co-operation intra Third Pillar of the EU (1993–2009) used own legal mechanism performed by specific legal instruments. As we have seen, the EAW was introduced by framework decision, not by convention. With regards to the Treaty on EU (as amended by the Treaty of Nice) the framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. Aforementioned provision added – they shall not entail direct effect.\textsuperscript{11} The drafters of the Treaty on EU made this addition so the case law of the Court of Justice on the direct effect of directive provisions (implemented late, incorrectly or not at all) do not apply to framework decisions.\textsuperscript{12} Framework decisions can best be compared with the legal instrument of a directive. Both instruments are binding upon the EU Member States as to the result to be achieved but leave to the national authorities the choice of form and methods. However, framework decisions do not entail direct effect. It implies that the EU Member States were required to introduce national legislation to bring the EAW into force.

The EU Member States had to introduce legislation to bring the EAW into force by 1 January 2004.\textsuperscript{13} Despite the fact that in the case Maria Pupino\textsuperscript{14} the Court of Justice accepted the obligation to interpret national legislation in conformity with framework decisions, implementing the EAW appeared conflicts of laws what prevented its full application throughout the EU for a time in 2005 and 2006. Some of the national implementing provisions were found to be unconstitutional in certain EU Member States (Poland, Germany and Cyprus).\textsuperscript{15} Moreover, the implementation in the United Kingdom has been far from a straightforward task. Both at the level of legislative drafting for implementation, and at the level of judicial interpretation, a number of sensitive issues had to be addressed. From a legislative drafting point of view, it has been pointed out repeatedly that the Extradition Act 2003 (law implementing the EAW in the UK) does not follow the same wording and structure of the FWD. This choice may be explained by the effort to ensure continuity with pre-existing extradition law and practice, in

\textsuperscript{11} See Article 34(2) of the Treaty on EU as amended by the Treaty of Nice. OJ C 321/E/5 of 29.12.2006.
\textsuperscript{13} The FWD came into force on 7 July 2002 and the deadline to introduce legislation to bring the EAW into force was 31 December 2003.
\textsuperscript{14} Judgment of the Court of Justice of the EC of 16 June 2005 – Case C-105/03 – Maria Pupino.
particular bearing in mind that the Extradition Act extends beyond the implementation of the EAW to a general reform of the UK extradition system.\textsuperscript{16}

Implemented provisions of the FWD did not derogate extradition conventions, nor did not provide cancellation. The conventions became obsolete. Without prejudice to their application in relations between Member States of the EU and third states, from 1 January 2004, the FWD replace the corresponding provisions of the following conventions applicable in the field of extradition in relations between Member States of the EU:

- the European Convention on Extradition, its first Additional Protocol and the Second Additional Protocol,
- the European Convention on the suppression of terrorism\textsuperscript{17} (as far as extradition is concerned),
- the Agreement on the simplification and modernization of methods of transmitting extradition requests,
- the Convention on simplified extradition procedure between the Member States of the EU\textsuperscript{18},
- the Convention relating to extradition between the Member States of the EU\textsuperscript{19},
- the Convention implementing the Schengen Agreement\textsuperscript{20} (Title III, Chapter 4).

In 2004 a non profit making association Advocaten voor de Wereld brought an action before Belgian court in which it sought the annulment, in whole or in part, of the Belgian law transposing the provisions of the FWD into national law. Belgium referred for a preliminary ruling to the Court of Justice question concerning the validity of the framework decision, whether the FWD was compatible with the Treaty on EU for purposes of EAW adoption. This was the case that

\begin{footnotesize}
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\item\textsuperscript{17} European Convention on the suppression of terrorism. Council of Europe, Strasbourg, 1975.
\item\textsuperscript{20} Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. OJ C 239/9 of 22.9.2000.
\end{itemize}
\end{footnotesize}
gave the Court of Justice the opportunity to make an authoritative decision that would settle the EAW question, a highly controversial and delicate matter that involves structural issues pertaining to the EU, national constitutional limits, and the authority of European and national courts. Naturally, the EAW could equally have been the subject of a convention, but it was within the Council’s discretion to give preference to the legal instrument of the framework decision in the case where, as here, the conditions governing the adoption of such a measure are satisfied. The Court of Justice ruled that examination of the questions submitted has revealed no factor capable of affecting the validity of the FWD.

III. Selected Procedural Issues

In the previous system the provisional arrest warrant and the extradition request were two separate phases of the procedure. The request for extradition is normally made formally through the diplomatic channel, accompanied by the arrest warrant, information about the identity of the accused, and the basic facts of the offence. In most states, the request is scrutinised by the courts. The final decision is taken usually by the executive, to which the domestic law will usually give discretion to refuse the request, subject only to treaty obligations. The surrender procedure does not distinguish the two phases. The mechanism of the EAW is based on the mutual recognition of judicial decisions in criminal matters. When a judicial authority of a Member State of the EU requests the surrender of a person, its decision must be recognised and executed automatically throughout the EU. The surrender procedure is primarily judicial, i.e. the political phase inherent in the extradition procedure is abolished. The removal of these two procedural levels improves the effectiveness and speed of surrender mechanism. As pointed out by Otto Lagodny, the FWD generally avoids the term “extradition” as well as the word “requested” state. Instead, it uses “surrender” and “executing judicial authority”. The major and relevant change is of a procedural nature, not a matter of substance or of concept.

Below, we focus on selected procedural issues, namely the impact of EU citizenship in surrender procedure, the principle of mutual recognition of judicial decisions in criminal matters in the EU, the consequences of the removal of the

22 Judgment of the Court of Justice of the EC of 3 May 2007 – Case C-303/05 – Advocaten voor de Wereld.
double criminality requirement, the execution of the surrender request and the time limits.

3.1 Nationals vs. EU Citizens

Many states do not allow the extradition of nationals to another state, but this is usually in circumstances where the state concerned has wide powers to prosecute nationals for offences committed abroad. On the other hand, the surrender procedure takes account of the principle of citizenship of the EU. The primary criterion is not nationality but the place of the person’s main residence, in particular with regard to the execution of sentences. This idea is made for facilitating the execution of the sentence passed in the country of arrest when it is there that the person is the most likely to achieve integration, and moreover, when the EAW is executed, for making it possible to make it conditional on the guarantee of the person’s subsequent return for the execution of the sentence passed by the foreign authority. The FWD relies upon EU citizenship to explain that nationals of Member States are no longer protected against extradition in another Member State if the EAW is issued. At least in some EU Member States, the right not to be extradited to a foreign jurisdiction has long been considered an important element of nationality. Therefore, constitutional laws had to be changed to implement the Council framework decision on a European Arrest Warrant.

The citizens of the EU Member States have, in addition to their rights as citizens of their own countries, additional rights as EU citizens, which among other things guarantees them freedom of movement throughout the EU. The EU is the area of freedom, security and justice which facilitates the free movement of citizens and also ensures their security and protection. The EAW arises from these realities and makes co-operation between the bodies responsible for conducting criminal proceedings more effective.

3.2 Mutual Recognition of Judicial Decisions: Obligation to recognize and execute the European Arrest Warrant automatically throughout the entire EU

Within the EU, the impetus for greater co-operation in criminal matters was the belief that criminals were benefiting from the free movement of persons at the heart of the internal market. The UK Presidency of the EU proposed to make

the principle of mutual recognition the cornerstone of increased co-operation in criminal justice in Europe. The idea behind the UK proposal was based on an analogy with the internal market of the EU. Following the Cassis de Dijon case, mutual recognition paved the way for the completion of the market. If the same principle could be harnessed in relation to criminal justice, then a European criminal law could be built without facing the difficult task of adopting harmonising measures.

Mutual recognition of judicial decisions has dominated the development of EU Criminal Law. The central aim of this principle is the quasi-automatic recognition and execution of judicial decisions in criminal matters from Member State “A” to other Member States of the EU, with minimal formalities and limited grounds for refusal. The political appeal of mutual recognition for the EU Member States lies in the fact that, instead of embarking in a very visible attempt to harmonise their criminal laws under the banner of the EU, they can promote judicial co-operation by not having to change in principle their criminal laws – they “only” agree to accept judicial decisions emanating from other Member States. This mechanism is widely understood as being based on the thought that while another Member State may not deal with a certain matter in the same or even a similar way as one’s own state, the results will be such that they are accepted as equivalent to decisions by one’s own state. Based on this idea of equivalence and the trust it is based on, the results the other Member State has reached are allowed to take effect in one’s own sphere of legal influence. A decision taken by an authority in one Member State could be accepted as such in another Member State, even though a comparable authority may not even exist in that state, or could not take such decisions, or would have taken an entirely different decision in a comparable case.

In real terms the mutual recognition of judicial decisions comprises the establishment of the free circulation of judicial decisions that have full and direct affect across the entire EU. It is therefore founded on the idea of equivalence between the decision of the issuing State and those of the executing State and reciprocal confidence between Member States in the quality of their respective judicial procedures, a guarantee of judicial security. For purposes of the EAW above mentioned implies that when a judicial authority of a EU Member State

29 Judgment of the Court of Justice of the EC of 20 February 1979 – Case C-120/78 – Cassis de Dijon (Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein).
requests the surrender of a person, its decision must be recognized and executed automatically throughout the entire EU, either because such person has been convicted of an offence or because such person is being prosecuted. On the other hand, the EU leaders should always keep in mind that the principle of mutual recognition of judicial decisions is envisaged not only to strengthen cooperation in the fight against the impunity of those labelled as criminals, but also to enhance the protection of individual rights in judicial proceedings. Ensuring this balance is crucial for a common sense of justice.

Moreover, as pointed out Valsamis Mitsilegas, applying the principle of mutual recognition has been the motor of European integration in criminal matters in the recent past. The adoption of the FWD constituted a spectacular development for EU Criminal Law.

3.3 Removal of the Double Criminality Requirement

Extradition treaties almost always incorporate the principle of speciality and the double criminality principle. The idea of the double criminality principle is that the extradition is granted only if the act for which extradition is sought is a crime in both the requesting and the requested states, although it does not have to be called by the same name. Under the European Convention on Extradition the main condition under which a requested state is obliged to extradite a person to a requesting state is the requirement that the act in relation to which extradition is requested is punishable under the laws of the requesting state and of the requested state. The absence of double criminality is a mandatory ground for refusing the requested extradition. The main rationale for this requirement is that states are reluctant to apply their sovereign powers for the enforcement of norms contrary to their own conceptions of law.

However, the principle of mutual recognition of judicial decisions has caused the abolition of the double criminality requirement. The long negotiations on this point led to an overall compromise. The rule of double criminality was abolished in terms of the sentence and only the sentence as defined by the domestic law of the issuing state is now taken into account. The verification of double criminality is abolished for a list of 32 offences (categories of crimes) in the FWD, for instance sexual exploitation of children and child pornography, computer-related crime (i.e. cyber crime), rape, or trafficking in human beings.


Complete list of all offences see Article 2(2) of the FWD.
ditions must be fulfilled: firstly, the offence described in the EAW is punishable in the state of issue by a custodial sentence or a detention order for a maximum period of at least three years, and secondly, the offence falls under one or more of the 32 offences mentioned in the FWD. If those conditions are fulfilled, the EAW gives rise to surrender without verification of the double criminality of the act.

3.4 Execution of the Request

A significant difference between the traditional extraditions before the implementation of the FWD is that there are now limited grounds for a refusal to surrender. The reasoning which lies behind the removal of the traditional grounds for non-surrender is based on the principle of mutual trust in the integrity of judicial systems in other Member States. Confidence and trust in the judicial processes applied in other Member States leads to a presumption in favour of surrender. The cases of refusal to execute the EAW are limited and are listed in order to simplify and accelerate the procedure. The limited grounds for non-execution of the EAW are divided into mandatory and optional.

The FWD introduced a limited scope of the mandatory non-execution of the EAW, namely amnesty, the principle of ne bis in idem, and the minor age of the requested person. Further, it introduced a limited scope of the optional grounds. However, many Member States of the EU have interpreted optional grounds as meaning that the State may choose whether a judge is required to refuse surrender where one of the grounds exists or whether the judge has discretion in the matter. As a consequence many States have made these grounds for refusal mandatory. At the same time, since they are optional some Member States have not transposed them at all. Hence the implementation of optional grounds amounts to a patchwork which is contrary to the FWD.

3.5 Time Limits

Where a classical extradition takes a few months or years, the FWD imposes time limits for the executing authority to take a decision on the EAW request. They are divided into two parts: time limits and procedures for the decision to execute the EAW, and time limits for surrender of the requested person.

Firstly, with regards to the FWD, the EAW shall be dealt with and executed as a matter of urgency. If the person arrested has given consent to being surrendered, the final decision should be taken within 10 days after the consent has been given. If the person does not consent to her/his surrender, the final decision on the execution of the EAW should be taken within 60 days after the arrest of

the requested person. Where in specific cases the EAW can not be executed within these time limits, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days.

Secondly, the FWD gives the executing authorities 10 days to actually surrender the person sought by the issuing State after the final decision on the execution of the EAW. If the surrender of the requested person within this period is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed. The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for instance, if there are substantial grounds for believing that it would manifestly endanger the requested person’s life or health. The execution of the EAW shall take place as soon as these grounds have ceased to exist. The executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.

**Conclusion**

The answer to the question how the surrender procedure differs from classic extradition is not easy to conclude. As we have seen, the basic multilateral treaty in the field of extradition is the European Convention on Extradition, adopted by the Council of Europe. The surrender procedure was introduced by the EU by the Council framework decision on the European arrest warrant. Implemented provisions of the FWD did not derogate extradition conventions, nor did not provide cancellation. The conventions became obsolete. Without prejudice to their application in relations between Member States of the EU and third states, from 1 January 2004, the FWD replaced the corresponding provisions of conventions applicable in the field of extradition in relations between Member States of the EU.

Further, in the extradition procedure the provisional arrest warrant and the extradition request were two separate phases of the procedure. The request for extradition is normally made formally through the diplomatic channel and the request is scrutinised by the courts. The final decision is taken usually by the executive, to which the domestic law will usually give discretion to refuse the request, subject only to treaty obligations. The surrender procedure does not distinguish the two phases. The mechanism of the EAW is based on the mutual recognition of judicial decisions in criminal matters in the EU. When a judicial authority of a Member State of the EU requests the surrender of a person, its decision must be recognised and executed automatically throughout the EU.
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Extradition treaties almost always incorporate the double criminality principle. The idea of this principle is that the extradition is granted only if the act for which extradition is sought is a crime in both the requesting and the requested states, although it does not have to be called by the same name. The principle of mutual recognition of judicial decisions has caused the abolition of the double criminality requirement. The rule of double criminality was abolished in terms of the sentence and only the sentence as defined by the domestic law of the issuing state is now taken into account. The verification of double criminality is abolished for a list of 32 offences in the FWD.

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