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Warszawski Przegląd Prawa Wschodniego

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Czasopismo naukowe wydawane przez Fundację Instytut Prawa Wschodniego im. Gabriela Szerszeniewicza przy współpracy z Centrum Badań na Prawem Europy Wschodniej i Azji Centralnej na Wydziale Prawa i Administracji Uniwersytetu Warszawskiego oraz magazynem Układ Sił.

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DIALOG

INSTYTUT PRAWA WSCHODNIEGO im. Gabriela Szerszeniewicza

CENTRUM BADAŃ NAD PRAWEM EUROPY WSCHODNIEJ I AZJI CENTRALNEJ

Szanowni Państwo, Drodzy Czytelnicy,

W imieniu własnym, Kolegium Redakcyjnego, Rady Naukowej oraz całego Instytutu Prawa Wschodniego im. G. Szerszeniewicza witam serdecznie na łamach nowego czasopisma prawniczego „Warszawski Przegląd Prawa Wschodniego", które będzie wydawane co pół roku.

Polski rynek wydawniczy czasopism prawniczych nie należy do najmniejszych w naszym regionie, zatem powstaje naturalne pytanie o sens założenia kolejnego czasopisma o profilu prawniczym. Odpowiedź kryje się w nazwie naszego periodyka. Mimo obfitości oferty brakuje w Polsce czasopisma, które specjalizowałoby się w problematyce szeroko rozumianego Wschodu, jak zwyczajowo nazywa się w Polsce obszar postradziecki. Od razu należy zastrzec, że chodzi o zagadnienia prawne i prawno-ustrojowe, nie zaś analizę od strony politologicznej czy socjologicznej, której w Polsce rzeczywiście nie brak.

Naukowe pozycje monograficzne czy nawet pojedyncze artykuły naukowe poddające analizie wszelkie aspekty funkcjonowania systemów prawnych krajów byłego ZSRR należą do rzadkości. Ponadto rzeczą charakterystyczną dla polskiego rynku literatury prawniczej dotyczącej obszaru postradzieckiego jest rozproszenie nawet tych nielicznych źródeł w zupełnie różnych czasopismach czy monografiach zbiorowych. Nie ma jednego uznanego tytułu prawniczego, który byłby forum wymiany myśli oraz łączył siły intelektualne wszystkich badaczy z tej dziedziny.

Do dzisiaj często postrzega się wszystkie kraje byłego ZSRR jako obszar jednolity prawnie, wręcz pozostający pod przemożnym wpływem prawa radzieckiego, mimo upadku rządów komunistów w 1991 r. Takie podejście pomija transformację prawną i ustrojową, którą poszczególne kraje przeszły w ciągu ostatnich 30 lat. Ustawodawstwo, ustrój czy tym bardziej orzecznictwo i doktryna obszaru postradzieckiego raczej nie są znane polskim prawnikom w stopniu porównywalnym do znajomości prawa chociażby niemieckiego czy amerykańskiego. Z tego powodu oprócz klasycznych artykułów prawniczych planujemy zamieszczać w czasopiśmie recenzje źródeł doktrynalnych obszaru postradzieckiego oraz tłumaczenia wybranego orzecznictwa.

Wysoki poziom merytoryczny czasopisma zagwarantuje międzynarodowa rada naukowa, składająca się z prawników specjalizujących się w tej dziedzinie. Uwzględniając specyfikę czasopisma, podjęliśmy decyzję o publikowaniu tekstów w trzech językach – angielskim, polskim i rosyjskim. Czasopismo będzie ukazywało się przy Instytucie Prawa Wschodniego im. G. Szerszeniewicza, gdyż jednym z celów Instytutu jest właśnie prowadzenie badań naukowych nad systemami prawa krajów byłego ZSRR.

Zapraszam serdecznie do współpracy i wysyłania własnych opracowań.

Redaktor naczelny „Warszawskiego Przeglądu Prawa Wschodniego"
dr Jarosław Turłukowski

Romans Apsītis[1] **(†)**
Jānis Lazdiņš

LATVIA'S DECLARATION OF INDEPENDENCE AND RESTORATION OF A STATE GOVERNED BY THE RULE OF LAW

Abstrakt: Artykuł niniejszy dotyczy dziejów najnowszych łotewskiego konstytucjonalizmu, a zwłaszcza spraw związanych z przywróceniem łotewskiej państwowości od 1990 r. Autorzy analizują podstawowe zagadnienia związane z łotewskim ustrojem konstytucjonym, a zwłaszcza zasadę rządów prawa.

Abstract: This article concerns the recent history of Latvian constitutionalism, and especially matters related to the restoration of Latvian statehood since 1990. The authors analyze the basic issues related to the Latvian constitutional system, especially the principle of the rule of law.

Słowa kluczowe: Łotwa, przywrócenie państwowości łotewskiej, konstytucjonalizm

Keywords: Latvia, the restoration of Latvian statehood since 1990, constitutionalism

Introduction

Estonia, Latvia and Lithuania are the three Baltic States. The Baltic countries[2], since they were incorporated into the Russian Empire in the 18th c., have shared a similar fate. Historically Latvia has had closer links with Estonia. Already since the end of the 12th c. gradual integration of Estonian and Latvian lands into the West European German/ Germanic cultural space began. At the time of Livonian Union (1435 – 1561), Estonian-Latvian lands also belonged to the family of Roman-Germanic law. The remaining significant difference between the two people is the language. The Estonian and Latvian languages belong to different language families. Communication on research level predominantly is conducted in German or English. Prior to World War II (1939) German dominated as the

1 Romāns Apsītis (*13 February 1939 – †February 2022) was a Latvian jurist and politician.

2 From the beginning of the 18th century until World War I (1914) the Baltic Lands / Governorates were understood as being the so-called three Baltic Governorates – Governorate of Estonia, Governorate of Livonia and Courland Governorate.

language of historical culture; however, following collapse of the USSR (1991) the English language has advanced as the leading language in international communication. Therefore this article has been prepared in English.

The aim of the article is to provide an insight into the course of restoring independence of the Republic of Latvia and into some aspects of restoring a democratic state governed by the rule of law. Restitution of the right to property of the former owners and their heirs is particularly highlighted among legal aspects.

1. Latvia's Declaration of Independence *(prof. Romans Apsītis)*

27 years have already passed since the Declaration of 4 May[3] was adopted. During this period a number of researchers, mainly lawyers and historians, have analysed the content and importance of this document.

The upheaval of the Latvian national awakening needed an acme – a point of culmination that would mark the path of people's longings and effort. At the time the people asked themselves: we must move forwards, there is no turning back, but how is all this going to end?

To a large extent the solution to the process was outlined by the election of the Supreme Council of the Latvian SSR on 18 March 1990. The election was won by supporters of the idea of Latvia's independence – candidates supported by the Latvian Popular Front and the Latvian National Independence Movement. They gained a qualified majority – two thirds from the total number of members of the Supreme Council. That was sufficient to amend the Constitution of the Latvian SSR. Although part of them formerly had been members of the Communist Party, it no longer was essential. Now they had come to stand beneath the red-white-red flag and without any doubt were ready to vote for the restoration of Latvia's independence. Therefore the orthodox communists hoped in vain that the formal affiliation of the elected deputies with the Communist Party would ensure outcome favourable to them.

The obligation to vote for Latvia's independence was determined by at least three factors: 1) the will of majority of the people, which was defined in the pre-election platform of the Latvian Popular Front; 2) the need to keep pace also this time with the two sisters-in-fate of Latvia – Lithuania and Estonia. Documents of constitutional importance regarding restoration of the state of Lithuania and Estonia, respectively, had been adopted in both neighbouring states already in March 1990; 3) the fact that the former Supreme Soviet of the Latvian SSR had adopted already two declarations on sovereignty: Declaration of 28 July 1989 on the Sovereignty of the State of Latvia, and Declaration of 15 February 1990 on the Issue of Independence of the State of Latvia. These two acts was the legal basis that had prepared the political decision to finally consent to restoration of independent statehood of

3 Deklarācijas par Latvijas neatkarības atjaunošanu [Declaration of the Restoration of Independence of the Republic of Latvia] (04.05.1990.), https://likumi.lv/doc.php?id=75539

Latvia. This had to be done by the newly elected Supreme Council.

To fulfil this historic mission, a document, legally and politically balanced and feasible to implement, had to be drafted, which would be adopted by the Supreme Council at one of its first sittings. The basic outlines of the new document became visible already on 22 March, when, apart from me, also the well-known lawyer and politologist Egils Levits, deputies Vilnis Eglājs and Valdis Birkavs gathered at the apartment of deputy Rolands Rikards for a short meeting with the apartment's owner. A number of ideas were born during this meeting. On the basis of them, on the following day Egils Levits had already prepared a draft of the document that later became the backbone of the Declaration.

At the same time the Board of the Latvian Popular Front set up a working group on issues of statehood, consisting of seven persons: R. Apsītis, V. Eglājs, A. Endziņš. T. Jundzis, A. Krastiņš and R. Rikards, deputies of the people of the Latvian SSR, as well as I. Bišers, the people's deputy of the USSR. I was confirmed as the head of the working group. I, in turn, selected 12 advisors, predominantly well-known Latvian lawyers – theoreticians and practitioners. Egils Levits contributed the most to the drafting of the Declaration. Professor Edgars Meļķisis and Gunārs Kusiņš also were quite actively involved. Other advisors, being very busy – mainly in their daily work, participated in drafting of the Declaration only episodically. Thus, 10 persons, referred to above, who actively participated in meetings of the working group up to 4 May, are to be considered as the main co-authors of the Declaration. Ruta Marjaša, who prepared translation of the Declaration's text into Russian, also joined the working group. It was very important politically.

Alongside lawyers, also representatives of exact sciences – deputies prof. Rolands Rikards and docent Vilnis Eglājs – successfully participated in the working group. They both had enviable national stance and ironclad logical thinking. All of that was very useful when dealing not only with legal, but also political issues. Each of the lawyers contributed in his own way. In particular, Andrejs Krastiņš, Tālavs Jundzis and Aivars Endziņš deserve to be mentioned. The latter at the time had been elected Secretary of the Party Organisation of the University of Latvia and therefore initially was more occupied with matters of splitting the Party. However, he helped us also at that time, by allocating premises to work in at the Party Committee of the University. The situation was quite peculiar, but we accepted this offer. The first meeting of the working group was held there already on 31 March.

The text of the Declaration was drafted, discussed, amended and supplemented in a democratic way. First of all it was done within the working group, following that – at the meetings of faction of the Popular Front, held at the large hall of the high-rise building of the Academy of Sciences. Anyone having anything to say was given the floor. Many people expressed valuable thoughts, for example, Anna Seile, Arnolds Bērzs, and Jānis Lagzdiņš. All of it had to be assessed and decided upon by voting.

Thus, in fact, the Declaration of Independence was created through shared work by the whole faction, through cooperation between representatives of various branches of

science and vocations. We continued working like this for approximately six weeks. In the beginning two variants of the draft Declaration were prepared – "the minimum variant" and "the maximum variant". "The maximum variant" was based upon Egils Levits' draft document of 23 March, but "the minimum variant" was created with his participation on 24 March, in the Old Town of Riga, at 24 Jauniela, where our working group discussed the draft Declaration of Independence following a sitting by the Board of the Association of Latvian Lawyers.

The two documents differed in the scope of political demands and the degree of radicalism. Whether to proceed with one or the other of documents to a large extent depended upon the political situation, in particular, Moscow's attitude towards Lithuania, which already on 11 March had adopted the rather radical Act on Restoring the State of Lithuania. However, already during the first discussion of the two documents on 28 March, the faction of Popular Front rejected "the minimum variant" and decided to take "the maximum variant" as the basis for the Declaration of Independence. However, it must be noted that the were also opponents to this decision. As the result of heated discussions and separate voting, as well as through debates of some alternative proposals, in some places "the maximum variant" was "mitigated".

In the wording of 9 April no **"transitional period"** for *de facto* restoration of the state power of the Republic of Latvia was envisaged. However, at the faction's meeting of 12 April a vote was taken to envisage such a period in the draft Declaration. Thus, in all following wordings of the draft document this "transitional period" was retained until adoption of the Declaration of Independence in its final wording on 4 May 1990.

It seems that the very idea that "a transitional period" was needed had occurred mainly under the influence of the Estonian example: on 30 March 1990 the Supreme Council of Estonia had adopted the Decisions on the Status of the Estonian State. The Decision declared restoration of the Estonian State, but at the same time defined "a transitional period" until constitutional institutions of the Estonian State were established.

It could be hoped that this would allow Estonia and Latvia to avoid the threatening economic blockade that Moscow had launched against Lithuania, after it had not envisaged any transitional period in its Act on Restoring the State of Lithuania of 11 March.

Of course, Para 5 regarding "a transitional period", included in the final version of our Declaration of Independence, was a compromise provision, the actual objective of which was to decrease the tension in relationship with Moscow. On the one hand, such a period was necessary also to prepare free and democratic election of the *Saeima* [the Parliament]. However, on the other hand, many understood this "transitional period" as gradual liberation from the superpower of the USSR, as a transition from "measured independence" to total independence. An interpretation like this collided with Article 1 of the reinstated *Satversme* [Constitution], pursuant to which "Latvia is an independent, democratic republic".

Later, after the Declaration was adopted, it became increasingly more obvious that the

content of Para 5 was an aliend body in the document and that it was necessary to get rid of it, the sooner the better. Thanks be to fate, the moment came rather soon: on 21 August 1991 the Supreme Council adopted the Constitutional Law "On the Statehood of the Republic of Latvia"[4], and Section 2 of this Law repealed Para 5 of the Declaration of 4 May.

The operative part of draft Resolution was prepared mainly on the basis of theses proposed by Egils Levits, whereas the rather extensive historical legal introductory part, "bringing into the world" of the basic text of the Preamble was entrusted to me, with additional help from colleagues. Here the focus was placed upon development of the independent State of Latvia since 18 November 1918, on the basis of the principle of *de iure* continuity and uninterrupted existence of the state.

The Preamble summarises the following: from the point of view of international law incorporation of the Republic of Latvia into the Soviet Union is invalid, and the Republic of Latvia continues existing *de iure* as a subject of international law, which is recognised by more than 50 countries of the world. Thus, Declaration of 4 May sets a very clear and logical aim – restoring the independent State of Latvia that was proclaimed on 18 November 1918, was internationally recognised in 1920 and in 1921 became a full member of the League of Nations.

Para 3 and Para 4 of the Declaration of 4 May also confirm restoration and existence of the first and only Republic, these paragraphs define the validity of the *Satversme*, adopted on 15 February 1922, throughout the territory of Latvia.

The Constitutional Law on the Statehood of the Republic of Latvia of 21 August 1991, as well as the fact that state institutions envisaged in the *Satversme* were reinstated and resumed their activities also fully confirmed the concept of state continuity.

The analysis of historical facts in the Preamble determined the content of the operative part of the Declaration. Para 1 of the Declaration is its legal point of departure and foundation stone. It provides: "To recognise the priority of fundamental principles of international law over national laws. To hold to be illegitimate the treaty between the USSR and Germany of 23 August 1939, and the consequent liquidation of independence of Latvia resulting from Soviet military aggression on 17 June 1940."

It must be noted that here the concept "fundamental principles of international law" denotes the main imperative norms of the system of international law – "*ius cogens*", which comprise generally recognised ideas and requirements with respect to legal behaviour of subjects of international law in their mutual relations. These fundamental principles are: sovereign equality and respecting the principles vested in sovereignty, abstaining from the use of force (power) and threats of using force, respecting the territorial integrity of a state, regulating international disputes and situations by measures of international law, abstaining from interference into domestic matters of a state, fair performance of international

4 Par Latvijas Republikas valstisko statusu [Law On the Statehood of the Republic of Latvia] (21.08.1991), https://likumi.lv/doc.php?id=69512

commitments, and other fundamental principles. I.e., those principles, which pursuant to theory of international law have higher legal force than the norms of national law. Thus, if the national legal norms (norms of "internal law" of one or another state) do not comply with the international legal norms that are mandatory to all states, "*ius cogens*" norms, then these national legal norms are illegal. Pursuant to this finding, both the agreement of 23 August 1939 (Molotov-Ribbentrop Pact) and actions of the USSR that followed from this agreement were illegitimate.

Para 1 of the Declaration is the basis for the Latvian official doctrine of state continuity regarding uninterrupted legal state continuity of the Republic of Latvia that was proclaimed on 18 November 1918.

Para 2 of the Declaration follows from Para 1 and emphasises the idea that the declaration "On Accession of Latvia to the Union of the Soviet Socialist Republics" of 21 July 1940 was imposed by the USSR and did not express the will of the Latvian people. Therefore it should be invalid as of the moment of adoption.

Para 3 and Para 4 of the Declaration constitute a united legal regulation with respect to the *Satversme* of the Republic of Latvia of 15 February 1922. At the time an opinion was heard that it was not quite clear why the so-called "constitutional somersault" had been necessary. I.e., first of all to state in Para 3 that the authority of the *Satversme* of 1922 was reinstated throughout the territory in Latvia, and then to note in Para 4 that "until the new wording of the *Satversme* is adopted to suspend… the *Satversme*, except for those Articles, which define the constitutional legal basis of the State of Latvia and which, pursuant to Article 77 of the *Satversme*, may be amended only through a national referendum." The answer could be as follows: in Para 3 we wanted to state that reinstatement of the *Satversme* of 1922 was our aim, however, since it was impossible to reach this aim immediately, we were moving towards it gradually, by reinstating, first of all, Articles 1, 2, 3 and 6.

Para 5 of the Declaration, as noted above, due to tactical considerations established "a transitional period" until the actual restoration of the sovereign state power of Latvia, thus, it would end upon convocation of the 5th *Saeima*.

Para 6 of the Declaration also was essentially a compromise, it provided that during "the transitional period" norms of the Constitution of the Latvian SSR and other legal provisions , insofar these were not incompatible with Articles 1, 2 , 3 and 6 of the *Satversme*, could be applied. However, this compromise was understandable and justifiable, because a legal vacuum was inadmissible. Moreover, Para 6 stipulated that "disputes over the applicability of laws shall be resolved by the Constitutional Court". Regretfully, a court named "Constitutional Court" was established only six and a half years later – in December 1996.

Para 7 of the Declaration envisaged constituting a committee that would elaborate a new wording of the *Satversme* that would comply with the political, economic and social state of Latvia at the time. It must be noted that at the time of drafting the Declaration the

opinion prevailed that the *Satversme* of 1922 had become hopelessly out-dated and should be significantly revised. This opinion complied with the understanding of democracy of the time. On 31 July 1990 the Supreme Council established a working group of 22 deputies for preparing the new draft of the *Satversme*. The working group was given the task to submit the draft to the Presidium of the Supreme Council by 1 January 1991. The task was not completed by this deadline, because work was hindered by conceptual uncertainties and growing protests by the deputies from the faction of the Popular Front against amendments to the *Satversme* of 1922 on principle. Finally it was decided not to amend the *Satversme*, but to prepare a draft "Basic Law for the Transitional Period". The draft was ready by 24 March 1991, and on 20 June of the same year it was adopted in the first reading. However, neither did this "offspring" of the effort (95 articles) gain true love. The Basic Law for the Transitional Period was crossed out by the attempted *coup d'état* of the USSR of 19 August 1991 and Article 1 of our Constitutional Law of 21 August, which provided that the statehood of the Republic of Latvia was defined by the *Satversme* of 15 February 1922. Thus, the course towards reinstatement of the *Satversme* in full was taken.

Para 8 of the Declaration guaranteed to citizens of Latvia and of other states, residing permanently in the territory of Latvia, social, economic and cultural rights, as well as political freedoms that complied with the generally recognised international human rights. Of course, this Paragraph had to be applied in the context of the Declaration of Latvia Joining International Documents on Issues of Human Rights (51 documents), which was adopted on the same day.

The final paragraph, Para 9, of the Declaration provides that relations between Latvia and the USSR are to built in accordance with the Peace Treaty between Latvia and Russia of 11 August 1920.

In general, Declaration of 4 May can be assessed as one of the most important acts of constitutional law for restoring the independent State of Latvia. It is a fundamental foundation stone, on the basis of which a free, independent, democratic State of Latvia governed by the rule of law gradually developed.

To gain as extensive as possible people's support for the idea of restoring Latvia's independence, on 21 April 1990 a meeting of People's Deputies of all Latvia was held in Riga, at the stadium "Daugava", with the participation of both newly-elected deputies of the Supreme Council and deputies from local councils of all levels. I was also among the speakers. We had decided that the content of the Declaration of Independence should not be retold in full, however, some of the most important theses should be mentioned and commented upon. This is what I did. I felt convincing support of those present. The results of voting were self-explanatory: from 8086 participants of the meeting, 8003 deputies had voted for the Appeal to Restore Latvia's Independence.[5]

5 Jundzis T. Tiesību reformas un to loma Latvijas neatkarības atjaunošanā [Legal Reforms and their Role in Restoring the Independence of Latvia]. Latvijas Vēstures Institūta Žurnāls, 1995, Nr.2, pp. 147 – 148

The end of April and the first days of May were spent in fine-tuning the text of the draft and looking for the optimum title of the document. It had to be taken into consideration that two declarations, thematically similar, but much weaker as to their content had already been adopted. Are we, indeed, going to adopt a third one? – It seemed that our document would mark a turning point in Latvia's history, therefore the title of the draft should embody something greater, nobler and more important. Such terms as "a constitutional act" and " a manifesto" were mentioned in debates. Others proposed using simpler titles, for example, "a law" or " a decree". Titles kept changing in each successive meeting. On 28 and 30 April we still had "Decree on Restoring the Independence of the Republic of Latvia", on 2 May – "Manifesto on Restoring the Independence of the Republic of Latvia", but just a day prior to its adoption – on 3 May we, nevertheless, agreed on the traditional title "Declaration on the Restoration of the Independence of the Republic of Latvia". Finally, the principle of logics won – the title should comply with the content of document.

On 29 April I gave one copy of the draft to Pauls Raudseps – a Latvian, who had been born in the USA, but had come to Riga to work in the Popular Front. I asked him to edit the English text of the document. He did a wonderful job of it.

On the same day I paid a visit to Marta Rudzīte, a well-known specialist of the Latvian language, a professor at the University. I asked her to check the text of the document from the perspective of the Latvian language. The professor was very moved by this opportunity to contribute to this draft document of historical importance. She suggested some corrections, which we accepted.

The newly elected Supreme Council convened on 3 May, at 11 a.m. Of course, the people expected that the Declaration of Independence would be adopted, however, the whole day was spent in dealing with urgent organisational issues. It could not be helped, the tellers of votes, the Committee of Mandates and the leading officials of the Supreme Council had to be elected first.

The morning of 4 May was tense and filled with expectations. When deputies convened for the morning session at 10 a.m. everyone understood that the decisive "battle" could be postponed no longer. It was obvious that this was not going to be an easy feat for us. In fact, without any kind of "warming up" the opposition started to be obstructive: discussions were replaced with endless tirades of questions and comments. It was clear that they were attempting to drag out the proceedings. However, the majority took over the initiative and we were approaching with greater certainty **the most important item – voting for the Declaration of Independence**. I was aware that I would have to go the podium soon to read out the text of this historical document.

All people were listening to me, therefore I tried to read the Declaration as expressively as I could – so that all listeners would understand the meaning and importance of this document. I felt wonderful: slightly anxious, but I also thrilled, being aware of the importance of the moment. Now I understand that such golden minutes will never reoccur in my life…

For the Declaration of Independence to gain legal force, it had to be adopted by the vote of at least two thirds of the total number of deputies (201). Thus, at least 134 votes were required. Are we going to get them? There were serious grounds to doubt it, because officially only 131 deputies belonged to the faction of the Popular Front. We set our hopes upon some independent deputies… The thorough, but rather prolonged and nervous counting of votes gave rise to intense emotions not only inside the building of the Supreme Council, but also outside it, where patriots of free Latvia had gathered. Each vote that was given in favour of the Declaration was greeted with laud ovations. At 19.0. people's manifestation on the bank-side of the Daugava had been scheduled, but the time within the meeting room dragged on torturously. And finally, the end: it was 19:20 on the clock, **138 deputies had voted for the restoration of independence of the Republic of Latvia!** People were overjoyed. We stood up and shook hands. Some embraced. The deputies of the Popular Front immediately went down to meet the people, where the wave of triumph rode high: flowers amidst the sea of people, flags, smiling faces, emotions, and tears of joy. Everything that had been locked away in people's hearts for fifty years now was given vent to… Our people, indeed, had deserved this moment long ago.

Upon adopting the Declaration of Independence on 4 May 1990 Latvia made a political decision to leave the Soviet Union. It chose to restore the Republic of Latvia of 18 November.

2. Restoration of a State Governed by the Rule of Law

(prof. Jānis Lazdiņš)

"Renouncing the Soviet law *per se*, in point of fact, could not change and initially did not change the understanding of law in Latvia. Transformation of legal thinking in Latvia proceeded gradually, simultaneously with integration into the European Union. In was of a particular importance in this process to understand not only the "letter" of law / a bill of law, but also the "spirit" of law /a bill of law. Thus, for example, situations occurred, when sources of law that complied with all requirements of a democratic society were construed from the standpoint of the Soviet law."[6] This is vividly described by Egils Levits[7]:

"At present the greatest problems in Latvia are not encountered on the level of legislation, but rather on the level of applying legal norms. With the legislation that is currently in force of Latvia – using Western methodology in applying it – in the majority of cases sufficiently satisfactory results could be achieved"[8] and

„[c]ivil servants experience great difficulties in applying abstractly worded legal norms, in understanding

6 Lazdiņš, J. Tendencies in the Development of Laws in the Republic of Latvia after the Renewal of Independence in 1990–1991. Journal of The University of Latvia. Law, Nr. 8, p. 45

7 The Judge of the European Court of Human Rights, and later – of the Court of Justice of the European Union

8 Lēbers, A. (ed.) Latvijas tiesību vēsture [Legal History of Latvia] (1914–2000). Autori [Authors]: Romans Apītis, Valdis Blūzma, Tālavs Jundzis, Jānis Lazdiņš, Egils Levits. Rīga: LU žurnāla „Latvijas Vēsture" fonds, 2000, p. 502

their meaning and abiding by the principles of administrative law of a judicial state – the principle of proportionality, the principle of legal certainty, and others. Human rights considerations, effectively, are not integrated into the legal practice of governance".[9]

Professor Sanita Osipova recalls the following:

"Department of Legal Theory and History at the Faculty of Law, University of Latvia, headed by professor Edgars Meļķisis (1929-2009,) played an important role in replacing the socialist legal doctrine with the understanding of law, typical of continental Europe. Now it is hard to comprehend all the work that professor Meļķisis initiated and completed in the 1990s to embody the understanding of the continental European Law in Latvia. The experience of continental Europe was adopted in close cooperation with German colleagues. The cooperation with the Faculty of Law of Münster University, the Federal Republic of Germany, deserves special mention, from the German side it was [at the time] managed by the rector, professor Wilfried Schlüter".[10]

To renounce Soviet legacy in legal science, the first step was taken upon the initiate of professor E. Meļķisis, and it was "[..] liberating the history of law from the perspective of Marxist-Leninist ideology. Professor Meļķisis dealt with this problem in the true spirit of German historical school [with the slogan] "*Zurück zu den Quellen!*"[11]."[12] Until now three books have been published comprising the sources of law of the Middle Ages[13], of the early the modern period[14] and of the State of Latvia[15]. The second step was "[..] creating a new theory of law, appropriate for a state of continental Europe, changing the understanding of the sources of law, introducing other sources of law alongside provisions of law, but, most importantly, developing understanding of general principles of law and their place in the hierarchy of legal norms".[16] The Constitutional Court of the Republic of Latvia

9 Ibid., p. 505

10 Interview with Professor Sanita Osipova. Materials of the Personal Archive of Jānis Lazdiņš [interview in the Latvian language].

11 Coing, H. Europäische Privatrecht (1800 bis 1914). 19. Jahrhundert. München: C. H. Beck'sche Verlagbuchhandlung, Bd. II. 1989, pp. 41–53; Schlosser, H. Grudzüge der Neueren Privatrechtsgeschichte. Rechtsentwicklungen im europäischen Kontext. 9. Auflage. Heidenberg: C. F. Müller, 2001, pp. 142–171; Doherty, M. Jurisprudence: the Philosophy of Law. Revision Workbook. Third edition. Holborn College: Old Bailey Press, 2004, 2006 (reprinted), pp. 129–132 and other.

12 Interview with Professor Sanita Osipova. Materials of the Personal Archive of Jānis Lazdiņš [interview in the Latvian language].

13 Meļķisis, E . (ed.) Latvijas tiesību avoti. Teksti un komentāri. 1. sējums. Seno paražu un Livonijas tiesību avoti 10. gs. – 16. gs. [Sources of Latvian Law. Texts and Commentaries. Volume 1. Ancient Common Law and Livonian Law]. Autori [Authors]: Jānis Lazdiņš, Sanita Osipova, Valdis Blūzma. Rīga: LU žurnāla "Latvijas vēsture" fonds, 1998.

14 Blūzma, V. (ed.) Latvijas tiesību avoti. Teksti un komentāri. 2. sējums. Poļu un zviedru laiku tiesību avoti (1561 – 1795) [Sources of Latvian Law. Texts and Commentaries. Volume 2. Sources of Law of the Polish and Swedish Times (1561 – 1795)]. Autori [Authors]: Romans Apsītis, Valdis Blūzma, Jānis Lazdiņš. Rīga: Rīga: Juridiskā koledža, 2006.

15 Lazdiņš, J. (ed.) Latvijas tiesību avoti. Valsts dibināšana – neatkarības atjaunošana. Dokumenti un komentāri. [Legal Sources of the Latvian State. Documents and Commentaries]. Autori [Authors]: Jānis Lazdiņš, Artūrs Kučs, Jānis Pleps, Gunārs Kusiņš. Rīga: Tiesu Namu Aģentūra, 2015.

16 Interview with Professor Sanita Osipova. Materials of the Personal Archive of Jānis Lazdiņš [interview in the Latvian language]. See also: Rezevska, D. Vispārējo tiesību principu nozīme un piemērošana [Meaning and application of the general principles of law]. Rīga: D. Rezevskas izd., 2015.

had a significant influence upon implementation of the general principles of law and transformation of the legal culture. The President of the Constitutional Court Aldis Laviņš (2014 – 2017) underscores the importance of the Constitutional Court in the development of legal thinking in the state of Latvia:

"The Constitutional Court has a significant role in the Latvian system of courts not only because it has been granted special jurisdiction – implementation of constitutional review, but mainly because it is driving the legal thinking in the state. The Constitutional Court, already with its first rulings, inspired Latvian lawyers to change their legal thinking and adopt understanding of law and methodology for applying it in conformity with the Western circle of law. The Constitutional Court, by consistently recognising in its rulings that Latvia's legal system is based upon the principles of democratic order, judicial and socially responsible state, has proceeded towards consolidating in Latvian society certainty about constitutional supremacy and the possibilities for every person to defend his fundamental rights and freedoms".[17]

The *Saeima* election held on 5 – 6 June 1993 was the first democratic election after an interruption of 62 years.[18] Already on 6 July the *Saeima* reinstated the Latvijas Republikas Satversme [Constitution of the Republic of Latvia, hereinafter – *Satversme*] in full, on 7 July the President of the State was elected, on 15 July – the 1 April 1925 law "Par Ministru kabineta iekārtu" [On the Structure of the Cabinet of Ministers] was restored (with amendments), and on 28 October – the law of 2 August 1923 "Par Valsts kontroli" [On the State Audit Office]. Thus, the operation of all four constitutional bodies referred to in *Satversme* was restored.[19]

Reinstating of the 28 January 1937 Latvian Civil Law (Latvijas Civillikums, hereinafter – the Civil Law) and the laws related to it, for example, "Land Register Law" (1937), "Law on Cheques and Bills of Exchange" (1938) in 1992 –1993[20] turned into one of the most significant events. The Civil Law in its time had been elaborated on the basis of Part III of the 12 November 1864 Private Law Codification of the Baltic Provinces[21] (hereinafter – Part III of PLCBP), taking into consideration recent trends in the continental European law. Part III of PLCBP, in turn, was created in the spirit of German historical school.[22]

Chapter 8 of the Satversme – "Fundamental Human Rights", adopted on 15

17 Interview with the Chairman of the Constitutional Court of the Republic of Latvia Aldis Laviņš. Materials of the Personal archive of Jānis Lazdiņš [interview in the Latvian language].

18 The situation was made even more complicated by the fact that at the moment of occupation, on 17 June 1940, Latvia no longer was a democratic sate (on 15 May 1934 anti-constitutional coup d'état was instigated. The principle of authoritarianism was established in public administration).

19 Lēbers, A. (ed.) Latvijas tiesību vēsture [Legal History of Latvia], pp. 493 – 494.

20 See more: Lazdiņš, J. Latvijas Republikas tiesību attīstības tendences pēc neatkarības atjaunošanas 1990.–1991. gadā, at: Latvijas Universitātes Žurnāls. Juridiskā zinātne, 2010, No. 1, pp. 58 – 59.

21 In German: Provincialrecht der Ostseegouvernements. Liv-, Est- und Curlaendishes Privatrecht. (III. Teil).

22 Schlosser, H. Grundzüge der neueren Privatrechtsgeschichte. Rechtsentwicklung im europäischen Kontext. 9., völlig neu bearbeitete und erweiterte Auflage. Heidenberg: C. F. Müller Verlag, 2001, p. 165.

October 1998[23], had an important role in ensuring human rights and developing new legal relationships. In assessing these additions, E. Levits and Mārtiņš Mits[24] wrote that they complied with classical political, civic and also social fundamental rights.[25] Hence, fundamental human rights in Latvia had also gained a constitutional shape.

It was impossible to renounce all Soviet laws immediately. There were a number of reasons to this:

1) it was impossible to draft anew and adopt within a few years all laws that ensured functioning of the State;

2) it was not expedient to restore all laws of the inter-war Latvia, because part of them had become out-dated.

A new dividing line in the process of renouncing the Soviet law was marked by the law of the Republic of Latvia Saeima (Parliament) of 15 October 1998 "On Terminating the Application of Legal Acts of the Latvian SSR".[26] Section 1 of the Law provided that all those laws of the Latvian SSR, as well as decisions by the Supreme Council of the Latvian SSR and decrees and decisions of its Presidium adopted prior to 4 May 1990 became invalid, except for:

1) *Latvijas Administratīvo pārkāpumu kodekss* [Latvian Administrative Violations Code];
2) *Latvijas Civilprocesa kodekss* [Latvian Civil Procedure Code];
3) *Latvijas Darba likumu kodekss* [Latvian Labour Law Code];
4) *Latvijas Krimināl*kodekss [Latvian Criminal Code];
5) *Latvijas Krimināl*procesa kodekss [Latvian Criminal Procedure Code];
6) *Latvijas Sodu izpildes kodekss* [Latvian Penal Code];
7) *Latvijas Republikas Valodu likums* [Language Law of the Republic of Latvia].

Thus, it was recognised that the existence of codifications created during the Soviet period (understandably, with additions and amendments) alongside drafting and adopting new laws was useful.

The "major" codifications of the Soviet law were renounced gradually. Looking at it from the today's perspective, one might say that this process was fast. Prior to accessing the EU or shorty afterwards the work on most important laws, according to branches of law, was concluded, these replaced the respective codifications of the Soviet law:

1) On 17 June 1998 *Krimināllikums*[27] [The Criminal Law] was adopted (the Law

23 Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922.), https://likumi.lv/ta/id/50292-grozijumi-latvijas-republikas-satversme

24 Currently a judge at the European Court of Human Rights

25 Levits, E. Piezīmes par Satversmes 8. nodaļu – Cilvēka pamattiesības [Notes on Chapter 8 of the Satversme – Fundamental Human Rights], at: Cilvēktiesību Žurnāls, No. 9–12, 2000, pp. 11–40; Mits, M. Satversme Eiropas Cilvēktiesību standartu kontekstā [The Satversme in the Context of European Human Rights Standards], at: Cilvēktiesību Žurnāls, No. 9–12, 2000, pp. 41–82.

26 Par Latvijas PSR normatīvo aktu piemērošanas izbeigšanu [On Terminating the Application of Legal Acts of the Latvian SSR] (15.10.1998), http://likumi.lv/doc.php?id=50429

27 Krimināllikums [The Criminal Law] (17.10.1998), http://likumi.lv/doc.php?id=88966%2520

entered into force on 1 April 1999);

2) On 14 October 1998 *Civilprocesa likums*[28] [Civil Procedure Law] was adopted (the law entered into force on 1 April 1999);
3) On 13 April 2000 *Komerclikums*[29] [The Commercial Law] was adopted (the law entered into force on 1 January 2002);
4) On 20 June 2001 *Darba likums*[30] [Labour Law] was adopted (the law entered into force on 1 June 2002);
5) On 25 October 2001 *Administratīvā procesa likums*[31] was adopted [Administrative Procedure Law] (the law entered into force on 1 February 2004);
6) On 21 April 2005 *Krimināprocesa likums*[32] [Criminal Procedure Law] was adopted (the law entered into force on 1 October 2005), etc.

With the so-called codification of major law/ bills of law coming into effect, in fact, the renouncing of the Soviet law was completed. On 1 May 2004 Latvia became an EU member state, and from then on the EU sources of law (general principles of law, regulations, directives, etc.) became directly applicable to Latvia, in compliance with the provisions of the transitional period.

In the restoration of a state governed by the rule of law restitution of the right to property to the former owners and their heirs (denationalisation of properties) plays a special role. Restitution of the right to property in Latvia was based upon the principles of justice, equality and legitimate expectation. This meant that the right to property of all former owners and their heirs was restituted, irrespectively of their current place of residence or citizenship. However, *status quo* and the public interests of the State were not ignored. Therefore the right to property was not restituted and former owners and their heirs had to reconcile themselves to being allocated an equal property or receiving compensation, if (for example):

1. a farm had been legally established on a former owner's land;
2. house property had legally become the property of a *bona fide* owner;
3. the object of property had already been privatised;
4. public roads had been built, bridges had been constructed, sports facilities of national importance had been installed, and in other similar cases.

The policy of denationalisation was oriented towards restoring the right to immoveable property. Restoration of the right to moveable property or compensation for it

28 Civilprocesa likums [Civil Procedure Law] (14.10.1998), http://www.likumi.lv/doc.php?id=50500

29 Komerclikums [The Commercial Law] (13.04.2000), http://www.likumi.lv/doc.php?id=5490

30 Darba likums [Labour Law] (20.06.2001), http://www.likumi.lv/doc.php?id=26019

31 Administratīvā procesa likums [Administrative Procedure Law], http://www.likumi.lv/doc.php?id=55567

32 Krimināprocesa likums [Criminal Procedure Law], http://www.likumi.lv/doc.php?id=107820

was an exception to the general procedure. Monetary deposits were not compensated at all.[33]

Regretfully, after more than 50 years of occupation, absolute restoration of historical justice in the field of property rights is not possible. Therefore, legal acts pertaining to denationalisation comprised the right of dissatisfied former owners to receive property of equal value instead of the nationalised property, or the right to receive compensation for irreclaimable property.[34]

Denationalisation of property, likewise, was a part of economic policy implemented by the State with the aim of transiting from the socialist planned economy to market economy. Thus, restituting the property right of former owners must be examined as an integral element in economic reforms of the state.

Conclusions

1. The Republic of Latvia was restored on the basis of the doctrine of state continuity. The restored *de facto* Republic of Latvia is not a new state, but an internationally recognised continuation of the State of Latvia, which existed between the wars.
2. Restitution of the right to property of the former owners and their heirs is to be examined as an obligation of a state governed by the rule of law.
3. Renouncing the Soviet law and returning to the family of continental European law in terms of time was a longer process than restoring the statehood of the Republic of Latvia.
4. In transition from a legal system of totalitarianism to a legal system of a democratic state not only the legal, but also psychological aspects must be taken into account. Due to psychological reasons, for a long period of time the legal norms, which met the requirements of a democratic state, were applied in accordance with Soviet legal thinking.
5. The denationalisation of nationalised property was the obligation of the Republic of Latvia as a democratic state governed by the rule of law.
6. Restitution of the right to property in Latvia was based upon the principles of justice, equality and legitimate expectation.

33 Lazdiņš, J. Besonderheiten des Erbrechts in Bezug auf die Entstaatlichung der Immobilien in Lettland in der neunziger Jahren, at: Judiciary and saciety between privacy and publicity. 8th Conference on Legal History in the Baltic Sea Area, 3rd-6th September 2015, Toruń. Reviewer: prof. dr. hab. Stanisław Salmonowicz. Toruń: Wydawnictwo naukowe uniwersytetu Mikołaja Kopernika, 2016, pp. 277 – 299; Lazdiņš, Jānis. Latvian Law. The historical development, at: Kerikmäe, T. Joamets, K., Pleps, J., Rodiņa, A., Berkmanas, T., Gruodytė. (ed.) The Law of the Baltic States. Cham: Springer, 2017, pp. 159 – 160.

34 Lazdiņš, Jānis. Aspects of the Denationalisation of Land Property in the Republic of Latvia after the Restoration of Independence de facto, at: Collection of Research Papers in Conjunction with the 6th International Scientific Conference of the Faculty of Law of the University of Latvia. Constitutional Values in Contemporary Legal Space II 16–17 November, 2016. Rīga: University of Latvia Press, pp. 32 – 44.

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CONSTITUTIONAL REFORMS IN EUROPE IN THE 20TH CENTURY AS A REPOSITORY OWWF LEGAL IDEAS[35].

Abstrakt: Artykuł niniejszy prezentuje rozważania estońskich prawników (badaczy) o prawie konstytucyjnym w Europie w XX w., ze szczególnym uwzględnieniem Polski, Węgier, Finladnii i Estonii. W tym zakresie zwrócono szczególną uwagę na współpracę ośrodków naukowych z tych czterech państw.

Abstract: This article presents the considerations of Estonian lawyers (researchers) on constitutional law in Europe in the 20th century, with particular emphasis on Poland, Hungary, Finland and Estonia. In this regard, special attention was paid to the cooperation of research centers from these four countries.

Słowa kluczowe: Estonia, Polska, Finlandia, Węgry, reformy konstytucyjne

Keywords: Estonia, Poland, Finland, Hungary, constitutionals reforms

There is no doubt that the final decades of the 20th century have changed the world significantly. For instance, for Eastern European researchers have new possibilities opened to move freely throughout the world in order to improve their studies. Also the increasingly globalizing world has given us new technical possibilities to communicate faster which, for instance, has given encouragement to cooperate in the fields of sciences, where previously there was no cooperation at all or it was rare. It is worth remembering that the 20th century began with high expectations for comparative law, and till the world wars we can see a sort of "triumph" of comparative law – first in Europe and then after the Second World War in the whole world. For me personally, the French historian Jacques Le Goff (1924-2014) has been a great example in my scientific work. He emphasized the knowledge of European history as one of the ways for the development of a new situation, where we (including the younger generation) are trying to move simultaneously in the past and on geographical

35 Tekst bazuje na artykule o tej samej nazwie z książki: 20 Years of New Constitutional Reforms in Eastern Europe. Eastern European Experience, Edited by Rein Müllerson, Gennadi N.Cebotarev, Peeter Järvelaid, Talllinn: Tallinn University Law School, 2015.

maps. I have already been applying this method to my research work now for two decades, and have to say that this has opened the opportunity not only to examine the constitutional development in Europe, but also to move around in different countries, communicating with local colleagues, which for me has increased the opportunities to understand the peculiarities in different constitutional developments, at the same time discovering many similarities in these processes. If we would take a look at the research of constitutional law made by scientists in Europe in the 20th century and the first decade of the 21st century, then we would notice a certain respect for the old traditions, which at the same time in some sense ignores one part of the ideas which influenced constitutional law to a rather great extent. Legal scientists have been characterized studying mostly so-called "doctrines of the winning ideologies" and casting aside the ideas which were developed by talented jurists in different periods, which remain for the majority of researchers into so-called "grey zone", for instance "in the final phase of the disappearing ages and which often due to the twists and turns of the history did not find its way in the constitutional practice." For instance, there is the most fascinating "sediment" of the ideas by the legal scientists who were working in different universities of the Russian Empire before the outbreak of the First World War and whose ideas, due to the subsequent regime changes, were meant never to be realized. Also for most researchers this has left a side to the discussion of the constitutional law from the period of disintegration of the Soviet Union (1985-1990), which actually gave output to the development of the national constitutions of independent states. For instance, the Constitution of the Russian Federation (1993) did not come from nothing, but it was the work of the legal scientists who were inspired by the "fruits" of the legal discussions of Perestroika. If nowadays European legal historians are preparing studies representing the history of the last one hundred years of the European state system, then the years 1991-1992 are analogous to a new beginning, which for today has already provided a long constitutional trial practice, which is waiting for the different legal scientists to look at this interesting material afresh and to use the methods of comparative law. When the post-World War I upheavals are sometimes referred as a group of countries, ranging from Finland to Turkey (from Helsinki to Istanbul)[36] ,then in this case if we are focusing in the last decades of the 20th century and the first decades of the 21st century, we could also speak about a certain group of countries ranging from Finland to Mongolia[37] (from Helsinki[38] to Ulan-Bator). In

36 Brauneder, Wilhelm. Staatsgründungen 1918. - Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Wien: Lang, 1999.

37 The Constitution of Mongolia was adopted in January 1992, with use of the examples of the constitutions of Europe, already in force, and considering the contemporary discussions, which at that time were taking place in Europe.

38 A new constitution of Finland was adopted in 1999 although it entered into force in 2000. In this context it is important that the discussion about the new Finnish Constitution reached a new level after the adoption of the Estonian Constitution in 1992. The Finnish constitution (in Finnish Suomen perustuslaki; Swedish Finlands grundlag) combines four constitutional laws – the Constitution Act of Finland (2000); the Parliament Act (1995); the Procedure of Parliament (2000) and the Act on the High Court of Impeachment (1995). The Constitution declares that Finland is a parliamentary republic. The official text of the constitution consists of 131 Sections, divided into 13 Chapters.

scientific research the collaboration between scientists could have a varying intensity, but the best results can always be achieved in the case if between colleagues from different countries there exists a really close and practical tie. It must be acknowledged that in recent years a very good working relationship among colleagues, who are focused on researching the constitutional law has developed between Tallinn University and Tyumen State University. This collaboration has led to this collection of articles, which hopefully gives colleagues from other countries an opportunity to think along with us about the developments of the constitutional law in our countries. Of course, we cannot turn back to a wider (more global) analysis of this topic, which should provide us with a good framework for our research so the following generations of researchers could better understand the times which were given to our generation for professional and personal fulfillment. Historians have long come to an understanding that no generation has ever been able to choose their time for living. But with our own actions, we can definitely make some contributions to this world for it to be a little better and therefore make it a better place to live.

The Historical Background of Hungarian-Finnish-Estonian Cooperation

If we take a look at the world map, it might seem that Estonia, Hungary and Finland are located far enough away from each other so as to exclude the opportunities for cooperation. But as our common history seems to prove, at different times it has been achievable. Hereby one should remember that on the wall of the main building of Tartu University is a plaque for Stephen Bathory, the former sovereign of these realms, bearing Hungarian blood. Historically our perception of cultural unity has greatly been based on a perception of linguistic affinities. From the cultural perspective, the self-definition of Finns, Hungarians and Estonians distinguishes themselves from the other nations. Already in the consciousness of our ancestors there was the understanding that our nations share something more than being neighbours or being a part of one or another empire at one time or another. This common feeling has been well described by Prof. Gabor Bereczki who after examining the research works of various Hungarian linguists came to the conclusion that Estonians and Finns,who are living somewhere far away, are culturally closer to Hungarians than the immediate neighbours. Therefore, the main role here has always been played by linguists, and the impact of their studies has been much wider. Most important has been attitude formation which later, with the new opportunities, has a pretty interesting history of any of the forms of cooperation. The jurisprudence is a fine example of that.

Cooperation between Polish and Estonian lawyers has a long and interesting history, which has not yet been exhaustively researched. In the 19th century and the beginning of the 20th century, the University of Tartu became the alma mater for many law students from

Poland, where they wrote their university theses and their first research papers. Between the two world wars, Estonian lawyers were constantly interested in the history of the Republic of Poland and the current legal system. The first Estonian law professors in Tartu (N. Maim, J. Uluots, A. Piip) had studied at the University of St. Petersburg under the Polish Leon Petrazycki (1867-1931), who was perhaps the most influenced by Jüri Uluots (1890-1945), who became the founder of the Estonian Constitution (1920) creator of the bill, as well as a professor of the history of Estonian law. There was great interest in Poland in Estonia, and in 1930 the book Poland was published, which included the works of legal historians. There was constant interest in Polish public law and especially in the Polish Constitution (Jüri Vilms, Konstantin Päts, Johannes Klesment and others). From 1945 to 1991, there was no very close cooperation between Polish and Estonian SSR lawyers, but some information was still exchanged. However, the interest in the Constitution of Poland and Estonia in 1937. Rein Marandi, a lawyer who worked in Sweden, became interested in the Constitution, whose works were published in Estonia after 1991.

Cooperation during the Interwar Period (1920-1940)

The beginning of university education dates back to the 17th century in all of the three countries (in Hungary the first university was established in 1635, in Finland 1640 and in Estonia 1632), but deeper scientific connections between Hungarian, Finnish and Estonian jurists began after the First World War. Of course we can't compare the length of the statehood of Hungary with Estonia and Finland, but it is obvious that after the First World War the three new republics shared quite similar problems. One should note that in the cooperation between these nations there has been a share of lucky coincidences, as the people who have natural premises to build a bridge between different nations step forward to the stage of history. After the First World War, both in Estonia and in Finland, but also in Hungary, there were many people in a position of power who shared a strong feeling of kinship between the Finnic peoples. For instance, the first President of Estonia. Konstantin Päts (1874-1956), who had received a law education from Tartu University, was a prominent supporter of the Pan-Uralic movement, who as a politician sensed the great importance of thecooperation between the Finno-Ugric peoples. It is worth remembering that at this point cooperation was also very specific, as during the Estonian War of Independence (1918-1920) the acting prime minister who also was fulfilling the duties of the Minister of War, Konstantin Päts, was among those politicians who sought help from Finland, receiving volunteers and material help at the most critical moments in 1918/1919. But at the same time Finno-Ugric cooperation was a part of Konstantin Päts' political programme, because even before his deportation to the Soviet Union in 1940, he drew up his political testament, which was secretly sent to the Finnish Ambassador in Tallinn, where Päts dreamed about the common state of Finland and Estonia could reach a common state in the future, as the two

countries are separated by a narrow gulf, but have close cultural ties. The authenticity of his political will has caused debates in academic circles[39] , but it is important to emphasize that as the leading political figure in his country he found the time and also the ambition to be the patron of the Finno-Ugric movement in Estonia (1925-1936 chairman of the Estonian-Finnish-Hungarian Union, Honorary Chairman from 1936). One should note that only his involvement would perhaps have not been sufficient, if this movement wouldn't have been backed by the strong cultural assumptions in Estonia. In the Finno-Ugric movement some very influential people from Hungary and Finland who ended up in Estonia also played important roles. When Estonia decided to restore Tartu University as an Estonian-language institution, which would serve the goals of Estonian culture, it initially encountered large problems. The university in Tartu had been established back in 1632 and since 1802 the university had functioned consistently till the outbreak of the First World War. Russian academic staff and students largely left to Russia, where they founded Voronezh University, the German occupation authorities supported the reopening of the University of Tartu, however, the reopened German language university didn't last long. Thus, in 1919, it had become quite obvious that the ambition to hold the Estonian language university needed at least initial help from the outside and high hopes were put on the scholars from different countries, who were to be expected to contribute to the upbringing of the Estonian speaking academic staff. Great help was provided by Finnish colleagues (especially in the humanities), but one of the most significant foreign professors was the Hungarian Istvan Csekey (1889-1963), whose role cannot be underestimated in the history of Estonian legal science as well in the Finno-Ugric cultural cooperation. I. Csekey's life is a good example of the Finno-Ugric cooperation. I.Csekey was elected with the support of Estonian law professors (J.Uluots, N.Maim, A.Piip) and he continued to work in Tartu University until 1931. I.Csekey's academic studies weredevoted to describing the development of Estonia's statehood, which after beingpublished in different languages were the first to introduce this issue abroad. After his return to Hungary in 1931, he became a law professor at the University of Szeged andlater rector of the same university.

As Tartu University celebrated its 300th anniversary in 1932, I.Csekey was awarded an honorary doctorate as gratitude for his work in Estonia. Besides him an honorary doctorate was granted to the acting rector of Tartu University, theologian Johan Kõpp and to the professor of legal history Jüri Uluots (1890-1945). One should note that J.Kõpp had been Uluots's religious education and Estonian language teacher in high school in Pärnu, helping him to find self-confidence to be an educated Estonian at a time when the school system before the First World War was still overwhelmingly in Russian. During 1920-1931

39 vt. Grabbi, Hellar. Neli presidenti. Mälestuslikud esseed. Tartu: Ilmamaa, 2014, pp. 47-56, Grabbi, Hellar. Pätsi kiri Soome saadikule juulis 1940. – Tuna, 2005, nr.1 , P. 58. Hellar Grabbi was the son of the Konstantin Päts's adjutant Colonel Grabbi, who claims that his mother personally had been delivering the last political will of Konstantin to the Finnish Embassy

Istvan Csekey personally greatly contributed to the Estonian legal science. In addition, everybody who studied law at the University of Tartu at that time gained a positive contact with Hungary and Hungarians, as I. Csekey was known as an outstanding figure in the Finno-Ugric movement, who found many followers in Estonia and Finland. In order to better understand his legacy in Estonian legal science it should be pointed out that during his time in Estonia, Tartu University was the only educational institution to prepare lawyers for the small nation. Here one should remark that while I.Csekey was working in Tartu, the legal faculty was the most popular among the university entrants (in the 1920s more than 2,000 students were matriculated, from the second half of the 1930s there was already a limit set to the number of law students by the university). Therefore, it is important here to remember that, even though many of Csekey's students didn't become lawyers, they had a much wider impact on Estonian culture, which in turn gave a certain energy potential, which even the Soviet regime wasn't able to erase from the memory in 1941-1991 when Finno-Ugric cooperation was, if not fully prohibited, then suppressed to the language and literature level. Istvan Csekey wasn't forgotten in Estonia, but it must be pointed out that his life and work after 1945 remained unknown for a long time. When in the 1970s and 1980s the author of this article was trying to find out something about Csekey's fate from Tartu University, unfortunately they didn't know much about the later period of his life. For instance, as for example in the three-volume history of the Tartu University (published in 1982), Istvan Csekey is listed as a foreign professor working in Tartu from 1919 to 1931. But about his biography we cannot find anything more than just only few dry facts[40].

The "restart" of the cooperation at the end of the 20th century and at the beginning of the 21st century

Cooperation between Hungarian and Estonian jurists The Golden Age of cooperation between Hungarian and Estonian jurists ended in 1931, when Istvan Csekey left Estonia for his homeland. The 1930s paved the way for a new generation, who might have developed close ties with their Hungarian colleagues. Estonian jurists were showing interest towards Hungary and Hungarian culture before the outbreak of the Second World War. For instance, the first female lecturer in the history of Tartu University, Vera Poska-Grünthal,3 wife of the vice president of the Estonian Supreme Court and fellow lecturer of the Tartu University Timotheus Grünthal. One might call Vera Poska-Grünthal a truly "international woman" because she had the honour to be among the founding members of the International Federation of Women Lawyers (IFWL). She was one of many Estonian jurists whose hopeful future prospects were broken by enforced exile during the Second World War. One of the most important scientific connections with Hungarian jurists was created at the end of the 1930s and during the Second World War, which probably

40 Tartu ülikooli ajalugu 1632-1982. Tallinn: Eesti Raamat, 1982, kd. 3 (1918-1982), P. 106.

determined the destiny of the "greatest star" of Estonian legal science. Estonia has had only one notable philosopher of law at the international level and the fact that he was looking for opportunities for self-realization with the help of his older Hungarian colleague, Julius Moor, was not just a mere coincidence. Ilmar Tammelo (1917-1982) later became a recognized legal philosopher, and if we look at his extensive scientific contacts, one might say that he was also able to find many contacts and cooperation opportunities from Finland (he also became a member of the Academy of Finland).

As after the Second World War all the official contacts between jurists were held under the tight control and supervision of Moscow,4 the direct contacts between Estonian and Hungarian scientists basically perished. Changed historical conditions in the early 1990s gave new opportunities for direct cooperation between Hungarian and Estonian jurists. In 1993 Estonian jurists had the opportunity to participate in a conference in Budapest, later the conference materials were published. One must also note that the Hungarian legal scholars attempted to find contacts in order to study the works of Ilmar Tammelo.6 This cooperation turned out to be fruitful and resulted in many different publications in different article collections published by Austrian colleagues.7

Cooperation between Finnish-Estonian jurists

The roots of the cooperation between Estonian and Finnish jurists date back to the period of national awakening in the 19th century, but in fact the visit of Finnish President Urho Kaleva Kekkonen in 1964 brought a new "awakening", as shipping traffic was established between Finland and Estonia, which in turn gave Finnish jurists a better opportunity to visit Estonia. But as access to foreigners was limited to the university town of Tartu due to large military installations on the one hand, and on the other hand the fact that the leaders of the legal faculty in Tartu were afraid of ties with "capitalist countries" because they weren't certain that after Khruschev's thaw there would not follow a period when the taps would be tightened again. Therefore, until 1990 the ties established between Estonian and Finnish jurists were mostly based on private initiative and largely depended on interest or lack of interest on the Finnish side. Professor Hannu Tapani Klami became one of the first Finnish legal scholars, who came to the Tartu University in 1988, shortly before the borders were opened.8

However, the presumptions for restoring the cooperation between Finnish and Estonian jurists definitely existed as many professors from the older generation whohad taken part in the Finno-Ugric movement (and some of them even still remembered the old Estonian student songs) were still working in the legal faculties of the Finnish universities. Estonian jurists started to receive active help from Finland.

Finnish colleagues invited Estonians to Finland and often visited Estonia themselves.

As people from Northern Estonia had been watching Finnish television for several decades before Estonia re-established its independence, the knowledge of the Finnish language was in fact very good among Northern Estonian jurists. This also allowed Estonian students to begin their law studies in the Finnish universities with various fellowships. Basically the language problem, which is still inherent in the teaching of foreign students, didn't exist in this case. English language courses in the Finnish universities at that time were still rather rare. In the 1990s Finns were making large investments in order to bring up a new generation of researchers and lecturers in training to raise the quality of teaching. The cooperation project of Finnish and Estonian jurists resulted in the Finnish-Estonian legal dictionary and a number of important educational materials and textbooks, which undoubtedly played a significant role in integrating the teaching of Estonian lawyers with contemporary Western European educational standards. There had also been a couple of linking points in the legal history of both countries, Finnish jurists had until 1917 received their education from the Imperial Alexander University of Finland (named after the emperor), as Estonian jurists had received their education from Tartu University, which at that time was also among the imperial universities. Secondly, during the Soviet Era in Estonia, at least in Tartu University to prepare lawyers (the period of study was five years at that time) there was an attempt to provide an education independently from the current politics by maintaining some of the old traditions. But the textbook projects began as the result of very good cooperation between the two countries legal historians. Thanks to the hard work of professor Heikki Ylikangas9 two influential textbooks were translated to Estonian from Finnish – his own textbook Miksi oikeus muuttuu osana? (Why does the law change?)10 and "Suomen oikeushistorian pääpiirteet" (The main features of the Finnish legal history),11 which was jointly written by different Finnish authors. What was the main importance ofn that? At least some of the subjects in the curriculum became easily comparable from now on. At this point it provided some confidence that during the process of restructuring the Estonian legal science was moving in the right direction. After the textbook project, Finnish colleagues offered assistance for the renewing process of Estonian legislation, but as honest neighbours, they warned Estonians, that the Finnish legal system is unique and because of its history perhaps suitable only for Finland, and because of the different historical traditions might not be "innovative" for their southern neighbour. Until now, it's not entirely clear why Germany began to "take care" of the Estonian legislative system, while Finns were helping to carry out the judiciary reforms during the modernization processes of the Estonian legal system, which gave many other interesting effects. Finnish jurists had for a long time been keeping a very conservative line and until the Estonian reforms conservative attitudes towards their own justice system had been dominant in Finland. The innovation of the 21st century behind the Finnish legal system (including the new Finnish Constitution) was to some extent

influenced by the experience of their Estonian neighbours, which with its reforms from the Finnish point of view had played the role of the catalyst. In the 21st century, Finland has developed an educational system for doctoral students, which involves all the legal faculties in Finland and provides the opportunity to take in jurists from abroad. But if one is looking for the positive effects of how Finns came to this marvellous system, at least a small part was played by the cooperation of the Finnish-Estonian jurists (especially the cooperation between legal historians) which, besides cooperation between lecturers, also included the joint preparation program (the particularly intense period was 1992-1997) student (incl. doctoral students). Today, we can find many positive outcomes of this program, in the form of colleagues developed from this project, for instance the professor of comparative legal history of the Helsinki University, Heikki Pihlajamäki, and in Estonia there are many jurists and legal historians who received positive impulses for their further development. The joint conferences of the Baltic legal historians, organized by professor Hans Hattenhauer, basically became the cornerstone for cooperation between the legal historians in the Baltic Sea region in 1997, mostly thanks to the Finnish-Estonian cooperation (Pia Letto Vanamo - Peter Järvelaid). At this point, the normal cooperation was complicated by the poor material situation of the Estonian side and the inability of Germans to overcome their financial bureaucracy. The only sponsor, the foundation of the Nordic Council of Ministers, wasn't willing to cover the costs of the German colleagues. From a historical perspective it's good to know that cooperation between the Finnish-Estonian legal historians became a "seed" for the cooperation of the legal historians in the entire Baltic Sea region as whole. One should note that in changing times (and with changing leaders) cooperation might not be persistent in the longer term. Any kind of good cooperation definitely requires a great "dose" of charisma of its leading figures.

Finnish-Estonian legal historians' cooperation most certainly left a positive mark in the form of mutual publications12 and also in the emergence of some new research directions in Finland. Cooperation with Estonia gave the opportunity to begin to research the history of the Royal Court of Tartu (Hovrätt, the highest judicial body in Sweden), the results of which one day hopefully will see the light as the monograph by Heikki Pihlajamäkki. This period also saw intensive mutual introduction of literature in both countries as well as in third countries.13

The cooperation between Hungarian and Estonian legal historians

The cooperation between Hungarian and Estonian legal historians began in the early 1990s, as well as on other occasions from the personal contacts between the legal historians of both countries. The beginning could be dated back to 1991, when the then rector of Kiel University (Christian-Albrechts-Universität zu Kiel) Professor Hans Hattenhuer started

a project, which was planned to help the legal historians from Eastern Europe14 to open the gates of the Western European "treasuries" of legal science, which due to the twists of history had been closed to them for more than half century. So it happened that in the autumn term 1991 in Hattenhauer's office met legal historians from three countries (Hungary, Estonia and Slovakia), who together had received fellowships to do research work in Kiel University. Together with Josef Klimko15 from Bratislava, Slovakia, Estonian Peeter Järvelaid from Tartu and Hungarian Mezey Barna from Budapest became colleagues and friends during their time in Kiel. One should remark that between two legal historians who had completely different research topics in Germany could begin mutual cooperation only thanks to the "seed" which more than 60 years before was planted by Professor Csekey. Fortunately there did still exist a historical continuity, because Peeter Järvelaid had received his knowledge about the work of Csekey from Professor Leo Leesment (1902-1986),16 who had been able to listen the lectures of the Hungarian professor in his time as a student and postgraduate and had the honour to know him personally. The Conference of the German Legal Historians (Deutsche Rechtshistorikertag) became the development factor for the cooperation between legal historians from Estonia, Hungary and Finland, as a regular meeting place,17 where especially Hungarian historians had been traditionally active participants. Sadly, the support of Estonians and Finns wasn't sufficient so the Hungarian colleagues were not able to keep alive the cooperation between Central European legal historians, where they were planning to involve besides Austrians legal historians from the neighbouring countries, but from Finland and Estonia as well. Undoubtedly the cooperation initiated by the Hungarians had positive outcomes[41]. For instance on 18-21 September 2003 in Tallinn the first meeting of Estonian and Hungarian legal historians was held, which was supported by the Hungarian Embassy and the Hungarian Cultural Institute[42]. The meeting was entitled "The statehood of Finno-Ugric nations", which in future could help to involve other Finno-Ugric nations[43].

The first conference in 2003 continued the earlier research topics, which had reached to the comparative studies. Therefore the conference subtopic – the development patterns in Estonia and Hungary from the second half of the 19th century to the beginning of the 20th century – seemed to have a great future in case of mutual research cooperation.

41 Järvelaid, Peeter. Kesk-Euroopa õigusajaloolaste kokkusaamisel Ungaris. – Eesti Jurist, 1992, nr. 6, lk. 160-164.

42 The Estonian-Hungarian legal historian's conference was organized by the head of the Hungarian Institute Dr
Urmas Bereczki, Prof. Peeter Järvelaid from the Nord Academy and the Learned Estonian Society. The conference was held in the building of the Estonian Academy of Sciences (Kohtu 6)

43 In the context of Finno-Ugric statehood we could only speak about the Estonians, Finns and Hungarians. But other Finno-Ugric nations would deserve scientific study as well.

In 2003, Dr Andras Bereczki21 presented a paper on the reflections of national politics of Finland and Estonia in Hungary during the interwar period, which might offer opportunities for (comparative) in-depth-studies. Also thetopics concerning national minorities remain topical, regardless from the chosen aspects (comparative, historical or concerning the present time). At this background, Dr. Bereczki's example – who interestingly approached his topic through the works of Istvan Csekey (The minority policies of Estonia in the interwar period in the lifework of Istvan Csekey). The comparative studies of Estonian, Finnish and Hungarian statehood ought to be a topic which should inspire different generations of our legal historians in the future. One should not be frightened by the cooperation of Baltic historians, which resulted in the joint history textbook, which didn't satisfy the authors, but undoubtedly provided Estonian historians with the experience of making their national history understandable outside of their own culture space. From the grounds of present experience, we should begin with the public law (already in 2003 we were trying to find common ground with Professor Gabor Mathe[44] "Theinstitutional development of nomocracy in Hungary"), there is also much potential in comparative studies of the private law before the year 1864 (cooperation with professor Maria Homoki-Nagy "The codification of the Hungarian private law in the 19th century"), also historical comparison in the field of 19th century penal law might give interesting results (Barna Mezey "The trends in the development in Hungarian penal law, in the 18th-19th century")[45]. Very prospective could become comparison in the procedural law and court system, beginning from the comparison with the Russian Empire from 1864 and with Estonia after 1889. Playing an important role inthis field on the Estonian side as an active partner in cooperation has been the archivist of the Supreme Court, Toomas Anepaio (The development of the procedural law in Estonia, in 19th-20th century). Clearly in the near future the study of the development of the constitutions, including the historical and comparative studies (incl. the end of the 20th century and 21st century) will become topical. In 2003, thistopic was approached through the person of Istvan Csekey and his studies of the Estonian Constitution (Professor Jozsef Ruszoly "Istvan Csekey and Hungarian Constitution" and Professor Peeter Järvelaid "Istvan Csekey in the legal culture of Estonia"). Therefore we might say that the advancement of the cooperation between the Estonian, Finnish and Hungarian legal historians so far could be continued in the same way, investing more resources to our cooperation[46] and involving our students, who will succeed us in the future.

44 Professor Mathe was at that time also the head of the Hungarian Lawyers Association and working as the professor of legal history in different Hungarian Universities.

45 Dr Georg Ambach (1952-2006)(„Kriminaalõiguse kodifikatsioon Eestis 20. sajandil.") is now deceased, but his study was also published in Hungary. See: Ambach, Georg. Die strafrechtliche Entwicklung der Republik Estland in der ersten Seite des zwanzigen Jahrhunderts. Budapest : [Eötvös Loránd Universität], 2005. - 17 p. (Rechtsgeschichtliche Vorträge, 34.).

46 Hungarian-Finnish-Estonian cooperation has been underfunded because, at the political level, the Finno-Ugric movement is perhaps even considered to be old-fashioned.

The Institutional Presumption for the cooperation between the Hungarian, Estonian and Finnish jurists

In 2013 the visit of the Rector of the Eötvös Lorįnd University, Barna Mezey to Estonia, took place where he visited Tallinn University in order to discuss the opportunities for closer cooperation between Estonian and Hungarian scientists. Within the framework of the present cooperation, the cooperation between Hungarian, Estonian and Finnish jurists was discussed. In Eötvös Lorįnd University in Budapest, in the Faculty of Law in Helsinki and in Tallinn University Law School are the chairs of comparative law, which in the future could become the basis for the cooperation network. It would involve the exchange of students and lecturers (incl. so-called Ringvorlesung – the series of lectures by different speakers held commonly in Helsinki, Budapest and Tallinn), establishment of virtual access to the libraries of the partner universities, but also the mutual help to replenish the libraries with the newest literature on the law of the Finno-Ugric nations. Among other things would be thereplenishment of the libraries posteriorly with the literature published in each mother tongue. This problem didn't exist in the inter-war period. Should the new generations be poorer than their predecessors? Now is the appropriate moment when for instance Tallinn University would be ready to take in a highly qualified colleague from Finland or Hungary (on the assumption that the subject would be comparable and in English). If we would be able to create in Tallinn the conditions that here would be working simultaneously Hungarian and Finnish lecturers, we might be sure that this would have a positive effect on the staffing of the chair.

Possible Future Scenarios

There are many scenarios that could happen in the future. The most positive would be if we could reach to solutions which would work as tripartite cooperation. The second scenario would be that the cooperation would proceed within the present frameworks, led by persons, who have a long experience and who could involve their Finno-Ugric colleagues as the third side. The year 2014 will mark 125 years from the birth of Istvan Csekey (1889-1963) and with this occasion it would be great to link the publication of a respective anthology. For this the groundwork has been done both in Estonia and Hungary[47], but it still lacks the final decision on its publication. In theconference of 2008 and the meeting of 2013 the preliminary structure of the commemorative book of Istvan Csekey was outlined. Because he had big personal merits in establishment of Finno-Ugric cooperation, the book should be based on the main stages of his life. Hungarian colleagues could focus on the early (childhood, university studies and work as a lawyer before being elected to become professor

47 In Hungary the life of I. Csekey has been studied by Jozsef Ruszoly (University of Szeged), as well by Dr. Andras Bereczki in Budapest.

of Tartu University) and later stages of his life (his work in Szeged as professor and rector, and also his Pecs period). These parts would include the overview of the Hungarian history (incl. legal history and about the universities, where he worked and studied), which would cover the chapters connected with his personality and beorientated to him as a person. Professor Peeter Järvelaid is currently finishing theoverview of his life in Estonia and a similar overview about Tartu University and itsfaculty of law. As his work wasn't limited with legal science, but involved also history, literature and the Finno-Ugric movement, we have the overview of his role inreflecting the minority policies of Estonia and Finland during the interwar period in Hungary by Dr Andras Bereczki and here we could add more overviews, taking in new authors from Estonia, Finland and Hungary.

A new stage in Estonian-Polish legal cooperation began after 1985. One of the first contacts was made by legal historian Peeter Järvelaid, who in 1989. internship at the Faculty of Law of the University of Torun. Since 1992, Prof. Peeter Järvelaid (for example, the theme of restitution). After 1994, Prof. Prof. Tomasz Giaro, who was working in Germany at the time (MPI für europäische Rechtsgeschichte, Frankfurt am Main). In the 21st century, the lawyers of Uniwersytet Warszawski have become an active partner of cooperation.

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UNWORTHINESS OF INHERITANCE IN UKRAINIAN SUCCESSION LAW

Abstract: The purpose of the article is to show the brief historical evolution institution of unworthiness of inheritance in Ukrainian succession law and also present the modern face of this institution in Ukrainian civil code. The paper distinguishes three historical periods in the context of institution of unworthiness: imperial law period before 1917, soviet law period and time of new codification after Ukraine declare independence. The article presents main traditional issues for the unworthiness of inheritance: grounds of unworthiness in Ukrainian law (situation, when the heir may be considered as unworthy), list of persons can't be a heir because of some circumstances, the role of court in the formal process of recognition a heir as unworthy.

Niegodność dziedziczenia w ukraińskim prawie spadkowym

Abstrakt: Głównym celem artykułu jest pokazanie krótkiej historycznej ewolucji instytucji uznania za niegodnego w ukraińskim prawie spadkowym oraz ukazanie współczesnego kształtu tej instytucji w ukraińskim Kodeksie cywilnym. Opracowanie wyróżnia trzy okresy historyczne w świetle instytucji niegodności: okres prawa imperialnego przed 1917 rokiem, okres prawa radzieckiego oraz czas nowej kodyfikacji po ogłoszeniu przez Ukrainę niepodległości. Artykuł poddaje analizie główne tradycyjne zagadnienia podnoszone w odniesieniu do niegodności dziedziczenia: podstawy niegodności w ukraińskim prawie (stany faktyczne, kiedy spadkobierca może być rozpatrywany jako niegodny), spis osób mogących być uznanymi za niegodne na podstawie określonych przesłanek, rolę sądu w formalnym postępowaniu o uznanie spadkobiercy za niegodnego.

Słowa kluczowe: niegodność dziedziczenia, ukraińskie prawo spadkowe, Kodeks cywilny Ukrainy, uznanie spadkobiercy za niegodnego, rola sądu

Keywords: unworthiness of inheritance, Ukrainian succession law, civil code of Ukraine, recognition a heir as unworthy, role of court

Wstęp

Obecnie w doktrynie polskiej można zaobserwować ożywienie zainteresowania instytucją niegodności dziedziczenia ze względu na uchwaloną nowelizację polskiego Kodeksu cywilnego, która dotyka owej problematyki[48]. Siłą rzeczy pojawia się potrzeba porównania kształtu tej instytucji z rozwiązaniami w bliskich jurysdykcjach, zwłaszcza z ustawodawstwem sąsiadującej z nami Ukrainy. Ponadto przemieszczenie ludności ukraińskiej wskutek wojny również przemawia za głębszym sięgnięcie do prawa ukraińskiego, które wciąż jest mało znane zagranicznym kręgom cywilistycznym.

Instytucja niegodności dziedziczenia ma stosunkowo krótką historię w prawie ukraińskim w porównaniu z innymi instytucjami prawa spadkowego, jeśli chodzi o obowiązywanie przepisów prawa cywilnego wprost stanowiących o wyłączeniu spadkobierców od dziedziczenia ze względów moralnych czy etycznych. Dlatego omawiając niegodność dziedziczenia w prawie ukraińskim w historycznym ujęciu, zwrócę uwagę tylko na niektóre kwestie, które mogą być zaliczone z punktu widzenia współczesnej teorii prawa cywilnego do tej problematyki.

Instytucja niegodności w prawie Imperium Rosyjskiego

W prawie spadkowym Imperium Rosyjskiego nie istniała sformalizowana instytucja niegodności dziedziczenia. Ustawodawstwo cywilne nie zawierało przepisów stanowiących o usunięciu spadkobierców od dziedziczenia, dla przykładu ze względu na zabójstwo czy próbę zabójstwa spadkodawcy. Art. 1107 tomu X Zwodu Praw stanowił tylko, że „osoby pozbawione wszystkich praw stanu nie mogą dziedziczyć”[49]. Takie postanowienie dotyczyło dziedziczenia zarówno ustawowego, jak i testamentowego. Ze względu na to w ówczesnej doktrynie można spotkać się z poglądem, że prawo spadkowe w Imperium Rosyjskiego, mimo braku przepisów o niegodności spadkobierców w porównaniu z prawem krajów Europy, w praktyce osiąga podobne rezultaty. Podkreślano zwłaszcza, że zabójstwo spadkodawcy czy jakiekolwiek inne ciężkie przestępstwo przeciwko jego czci czy wolności, samo przez się powoduje pozbawienie winnego spadkobiercy (czy przestępcy niebędącego ani spadkobiercą ustawowym, ani testamentowym) wszystkich praw stanu. Z kolei jednym ze skutków takiego pozbawienia wszystkich praw będzie niemożliwość dojścia do dziedziczenia[50]. Oczywiście, w razie zabójstwa spadkodawcy przez spadkobierców z praktycznego punktu widzenia nie miało znaczenia, czy spadkobiercy będą uznani za niegodnych, czy pozbawieni wszystkich

48 Ustawa z dnia 28 lipca 2023 r. o zmianie ustawy – Kodeks cywilny oraz niektórych innych ustaw, Dz.U. 2023 poz. 1615.

49 I. Tiutriumow, Zakony Graždanskije s razjasnienijami prawitielstwujuszciego sienata i kommientarijami russkich juristow. Tom III Kniga triecja, Moskwa 2004, s. 212.

50 Graždanskoje Uloženije. Proekt. Tom II Kniga cietwiortaja. Nasledstwiennoje prawo, red. I. Tiutriumow, SPb. 1910, s. 5.

praw stanu. W każdym razie nieuczciwi spadkobiercy będą wyłączeni od dziedziczenia. Tym niemniej, taki stan rzeczy nie uwzględniał szeregu możliwych do zaistnienia sytuacji, kiedy spadkobierca faktycznie wpłynął na przykład na kształtowanie treści testamentu, nie popełniając jednocześnie żadnego ciężkiego przestępstwa mogącego skutkować pozbawieniem wszystkich praw stanu.

Dostrzegając taki stan rzeczy, w Projekcie Cywilnego Ułożenia (Kodeksu) Imperium Rosyjskiego przewidywano wprowadzenie „klasycznej" instytucji niegodności w prawie spadkowym, na wzór prawa europejskiego. Zgodnie z art. 1346 Projektu nie miały prawa dziedziczyć osoby skazane na podstawie art. 29 Kodeksu karnego (chodziło o karę zesłania, katorgi czy śmierci), jeśli otwarcie spadku nastąpiło po uprawomocnieniu się wyroku czy zezwolenia na wykonanie wyroku. Skazani jednak nie byli pozbawiani prawa do dziedziczenia na podstawie testamentu[51]. Natomiast zgodnie z art. 1347 Projektu od dziedziczenia wyłączano:

- osoby, które świadomie pozbawiły spadkodawcę życia czy wyrządziły mu takie uszkodzenie ciała, wskutek którego spadkodawca do samej swojej śmierci nie miał możliwości sporządzenia albo odwołania testamentu;
- osoby, które doprowadziły spadkodawcę, stosując przemoc czy oszukując, do sporządzenia albo odwołania testamentu, osoby, które przeszkodziły spadkodawcy w ten sam sposób w sporządzeniu albo odwołaniu testamentu, osoby, które sfałszowały, ukryły bądź zniszczyły testament spadkodawcy, który był sporządzony na rzecz innych osób, oraz osoby, które sfałszowały albo zmieniły testament[52].

Art. 1350 Projektu stanowił, że wyłączonych od dziedziczenia poczytuje się za zmarłych przed otwarciem spadku[53]. Jednak spadkobierca nie mógł być wyłączony, jeżeli spadkodawca mu przebaczył (art. 1351 Projektu). Ten przepis nie precyzował, jak należy rozumieć przebaczenie spadkodawcy ani w jakiej formie powinno ono nastąpić. Ze względu na to, że Projekt nigdy nie stał się prawem obowiązującym, trudno powiedzieć, w jakim kierunku poszłaby praktyka. Przedrewolucyjna doktryna dostrzegała, że niegodność dziedziczenia może być ukształtowana w dwojaki sposób. Czyli niegodność mogłaby następować *ex lege*, w razie zaistnienia określonych w ustawie przesłanek albo dla uznania za niegodnego niezbędnym byłoby wytoczenie powództwa i wydanie orzeczenia przez sąd. Kodyfikatorzy stali na tym stanowisku, chociaż zostało podkreślone, że „powództwa o uznanie spadkobiercy za niegodnego mogą sprzyjać zacietrzewieniu stosunków rodzinnych, jeśli nie będą stosowane pewne środki dla ich ograniczenia"[54]. Zatem według art. 1348 Projektu odsunięcie od dziedziczenia mogło nastąpić tylko na podstawie pozwu tych osób, do których przeszedłby spadek w razie nieistnienia spadkobiercy niegodnego. Taki pozew mógł być wniesiony do

51 Graždanskoje Uloženije.., s. 4.

52 Graždanskoje Uloženije.., s. 5.

53 Graždanskoje Uloženije.., s. 7.

54 Zob. uzasadnienie komisji kodyfikacyjnej: Graždanskoje Uloženije.., s. 7.

sądu w ciągu roku od chwili otrzymania przez powoda informacji o okolicznościach dających prawo żądania usunięcia niegodnych spadkobierców, ale w każdym razie nie później niż w ciągu dziesięciu lat od otwarcia spadku i tylko za życia niegodnego spadkobiercy[55]. Komisja kodyfikacyjna była bowiem zdania, że „byłoby niesprawiedliwe dopuszczenie wytoczenia takiego powództwa przez spadkobierców niegodnej osoby po jej śmierci, ponieważ obowiązek ponoszenia odpowiedzialności za przestępcze działanie, poza sferą odpowiedzialności za szkodę wyrządzoną przestępstwem, powinien być rozpatrywany jako obowiązek ściśle związany z osobą przestępcy i nie może on w jakiejkolwiek części obciążać spadkobierców do momentu, w którym zostanie wytoczone powództwo, ponieważ od tej chwili osobiste prawa i obowiązki nabywają charakteru dziedziczności"[56]. Innymi słowy, jeśli za życia spadkobiercy niegodnego zostanie wytoczone powództwo o uznanie go za niegodnego, po czym on umrze, sąd w dalszym ciągu będzie mógł orzec o niegodności, co będzie miało skutki dla dziedziców spadkobiercy niegodnego.

Projekt przewidywał także w art. 1349, że w razie, kiedy usunięty spadkobierca, zanim został uznany za niegodnego, nabył majątek spadkowy, to odpowiada on przed pozostałymi spadkobiercami co do zwrotu majątku spadkowego i odszkodowania poniesionych strat na takich samych zasadach jak właściciel działający w złej wierze[57].

Instytucja niegodności w prawie radzieckim

Mimo takich postanowień Projektu i poparcia większości doktryny dla wprowadzenia instytucji niegodności do ustawodawstwa, pierwszy kodeks URSR nie zawierał żadnego przepisu regulującego uznanie spadkobiercy za niegodnego[58]. Można śmiało twierdzić, że prawo radzieckie pod tym względem było mniej rozwinięte niż nawet obowiązujące prawo w Imperium Rosyjskim, nie mówiąc o postępowych, jak na owe czasy, przepisach Projektu. W doktrynie przyjmowało się, że mimo braku przepisów, rodzice pozbawieni praw rodzicielskich za uchylenie się od wykonywania obowiązków rodzicielskich nie mogą dziedziczyć[59]. Ponadto na praktykę każdej republiki związkowej wywarło wpływ Postanowienie plenum Sądu Najwyższego Rosyjskiej Socjalistycznej Federacyjnej Republiki Radzieckiej z dnia 7 czerwca 1926 roku[60]. W Postanowieniu w sposób jednoznaczny zostało wskazane, że „świadome i podlegające karze zgodnie z Kodeksem karnym zabójstwo spadkodawcy pozbawia spadkobiercę, który dokonał zabójstwa, prawa do dziedziczenia

55 Graždanskoje Uloženije.., s. 6.

56 Zob. uzasadnienie komisji kodyfikacyjnej: Graždanskoje Uloženije.., s. 4.

57 Graždanskoje Uloženije.., s. 7.

58 Zob. Graždanskij Kodeks U.S.S.R., Harkow 1923.

59 Por. np. W. Serebrowskij, Izbrannyje trudy po nasledstwennomu i strahowomu prawu, Moskwa 2003, s. 58.

60 Zob. Graždanskij Kodeks RSFSR. Oficyalnyj tekst s izmienienijami na 1 ijula 1950 g. i s priłożenijem postatiejno sistiematizirowannych matieriałow, Moskwa 1950, s. 261.

majątku zabitego”[61]. Odwołując się do tego orzeczenia, ówcześni autorzy zawsze wskazywali, że dziedziczenie przez zabójcę po zabitym było sprzeczne z zasadami współżycia socjalistycznego. Pokreślić należy, że brak przepisów o niegodności nie był uważany za zaniechanie ustawodawcy, ponieważ orzeczenie z 1926 r. właściwie było jedynym cytowanym w całej literaturze prawa spadkowego, nawet po drugiej wojnie światowej[62].

Bez względu na pasywność doktryny w tej kwestii, ustawodawca radziecki w drugim k.c. URSR wprowadził sformalizowaną instytucję niegodności spadkobierców. Nie wchodząc w niepotrzebne dla celów danego opracowania szczegóły, należy wspomnieć, że kodeksy cywilne poszczególnych republik radzieckich istotnie różniły się między sobą w tej kwestii. Nie było więc jednej przemyślanej koncepcji instytucji niegodności dziedziczenia na poziomie władz ogólnoradzieckich (tym bardziej nie było przepisów obowiązkowych do wprowadzenia w każdej republice).

Zgodnie z pierwszym akapitem art. 528 k.c. URSR „nie mają prawa dziedziczyć ani według ustawy, ani według testamentu osoby, które umyślnie pozbawiły spadkodawcę życia albo któregokolwiek ze spadkobierców czy dokonały zamachu na ich życie”[63]. Taka redakcja przepisu przyniosła wiele wątpliwości, chociaż w zasadzie można mówić o sformalizowaniu w ustawie dotychczasowej praktyki orzeczniczej. Przede wszystkim nie było do końca jasne, czy stwierdzenie niegodności powinno nastąpić w drodze wydania orzeczenia, czy *ex lege*. Jak się wydaje, chodziło o niegodność *ex lege*, ponieważ nie został ustanowiony krąg osób mających prawo wytoczenia powództwa z żądaniem uznania spadkobiercy za niegodnego. Nie było zatem potrzebne wydanie orzeczenia o charakterze konstytutywnym. Jednak w części komentarzy podkreślano, że wina spadkobierców niegodnych „powinna być ustalona na podstawie wyroku”[64]. Jak się wydaje, nie chodziło o wydanie orzeczenia o charakterze konstytutywnym, lecz o stwierdzenie faktu popełnienia przestępstwa. Inni zaś wprost wskazywali, że w razie ustalenia faktu popełnienia przestępstwa w wyroku procedura sądowa co do uznania za niegodnego jest zbędna, ponieważ nie ma sporu co do faktu niegodności[65]. Zatem w razie istnienia na przykład wyroku skazującego niegodnego spadkobiercy za próbę zabójstwa spadkodawcy notariusz mógł pominąć niegodnego spadkobiercę przy wydawaniu świadectwa o prawie do spadku, nie czekając na osobne postanowienie sądu w tej kwestii. Nie było też przepisów o skutkach przebaczenia udzielonego przez spadkodawcę niegodnemu spadkobiercy. Doktryna przyjmowała, że „jeśli spadkodawca testuje na rzecz spadkobiercy, który przed tym dokonał czynów dających podstawę postawić pytanie o jego odsunięcie od spadku, to należy uważać, że spadkodawca przebacza temu spadkobiercy

61 Graždanskij Kodeks RSFSR. Oficyalnyj…, s. 261.

62 Taką opinię wypowiedzieli B. Antimonow oraz K. Grawe w 1955 r.: B.S. Antimonow, K.A Grawe, Sowietskoje nasledstwennoje prawo, Moskwa 1955, s. 70.

63 Cywilnyj kodeks Ukrajinskoji RSR. Zatwerdżenyj Zakonom Ukrajinskoji RSR wid 18 lypnia 1963 r., Widomosti Werhownoji Rady Ukrajinskoji RSR, 1963, No.30, art. 528.

64 Zob. Cywilnyj kodeks Ukrajińskoji RSR Naukowo – praktycznyj komentarij, red. O.N. Jakymenka, M.J. Baru, M.W. Gordona, Kijew 1971, s. 508.

65 Zob. P.S. Nikitiuk, Nasledstwiennoje prawo i nasledstwennyj proces, Kiszeniow 1973, s. 57.

i chce, żeby otrzymał on spadek"[66]. Z art. 528 k.c. URSR nie wynikało wprost, że osoba winna fałszowania testamentu powinna być odsunięta od spadku, chociaż taka rozszerzona interpretacja była postulowana przez część doktryny[67].

Ponadto art. 528 k.c. URSR stanowił, że „nie mają prawa zostać spadkobiercami według ustawy rodzice po dzieciach, co do których zostali oni pozbawieni praw rodzicielskich i nie odzyskali tych tych praw na moment otwarcia spadku, oraz rodzice i pełnoletnie dzieci, którzy uporczywie uchylali się od wykonywania ciążących na nich zgodnie z ustawą obowiązków co do utrzymania spadkodawcy, jeśli te okoliczności zostały potwierdzone w sądzie"[68]. Art. 528 k.c. URSR był stosowany do spadkobierców, ale także zapisobierców i osób mających prawo do części obowiązkowej w spadku[69] (ostatni według prawa ukraińskiego też są spadkobiercami).

Instytucja niegodności w prawie ukraińskim

Nowy Kodeks cywilny Ukrainy poświęcił problematyce niegodności spadkobiercy więcej uwagi niż prawo radzieckie. Dana instytucja została uregulowana w art. 1224 k.c.U. składającym się z sześciu części. Wspólną cechą z prawem radzieckim jest to, że ponownie nie został określony krąg osób mających prawo wystąpienia z żądaniem uznania spadkobiercy za niegodnego. Dlatego nie sposób zgodzić się z S. Fursą, że „należy sądzić, że inicjować rozpatrzenie pytania o pozbawieniu prawa do dziedziczenia mogą osoby zainteresowane, a mianowicie: spadkobiercy, zapisobiercy, wykonawca testamentu"[70]. Nie ulega wątpliwości, że w praktyce akurat wymienione przez S. Fursę podmioty zazwyczaj domagają się uznania spadkobiercy za niegodnego, chociaż nie zawsze. Ale ustawa ani nie ustanawia spisu osób mogących żądać uznania spadkobiercy za niegodnego, ani nawet nie wskazuje, że takie prawo należne jest każdemu, kto ma w tym interes prawny. Zatem na tle prawa ukraińskiego nie można mówić, do kogo takie prawo należy.

Użycie w większości części art. 1224 k.c.U. zwrotów typu „nie mają prawa do dziedziczenia" skłania do wniosku, że spadkobierca jest niegodnym *ex lege* bez potrzeby wydania orzeczenia o charakterze konstytutywnym. Jednak głębsza analiza art. 1224 k.c.U. może prowadzić do spostrzeżenia, że takie stanowisko będzie trafne tylko w odniesieniu do większości, nie zaś wszystkich sytuacji, przewidzianych tym przepisem. Należy więc rozpatrzyć po kolei wszystkie przypadki uznania za niegodnego przewidziane w ustawie.

Zgodnie cz. 1 art. 1224 k.c.U. „nie mają prawa do dziedziczenia osoby, które

66 Cywilnyj kodeks Ukrajińskoji RSR Naukowo…, s. 509, tak samo P.S. Nikitiuk, Nasledstwiennoje…, s. 56.

67 Zob. M. Gordon [w:] Cywilnyj kodeks Ukrajińskoji RSR Naukowo…, s. 509.

68 Cywilnyj kodeks Ukrajinskoji RSR. Zatwerdżenyj Zakonom Ukrajinskoji RSR wid 18 lypnia 1963 r., Widomosti Werhownoji Rady Ukrajinskoji RSR, 1963, No.30, art. 528.

69 M. Gordon [w:] Cywilnyj kodeks Ukrajińskoji RSR Naukowo…, s. 509.

70 S. Fursa [w:] Cywilnyj kodeks Ukrajiny: Naukowo – praktycznyj komentar: u 2 cz. Cz. 2. red. J.M. Szewczenko, Kyjiw 2004, s.797.

umyślnie pozbawiły życia spadkodawcę czy kogokolwiek z ewentualnych spadkobierców albo dokonały zamachu na ich życie”[71]. Takie sformułowanie jednoznacznie powinno być rozpatrywane jako wyłączenie osoby, która dokonała wyżej wymienionych czynów, od dziedziczenia na podstawie ustawy. Należy zgodzić się z W. Wasylczenką, że „osoba, która jest winna dokonania umyślnego przestępstwa, które spowodowało śmierć spadkodawcy, ulega wyłączeniu od dziedziczenia bez względu na to, czy działała, mając na celu otrzymanie spadku, czy jej czyny były spowodowane innymi przyczynami (zemsta, zazdrość, z motywów chuligańskich etc.)”[72]. Rzeczywiście, ustanawiając taką regułę, ustawodawca kierował się względami moralnymi, że przestępca nie może wzbogacić się niejako za pomocą swojego czynu przestępczego. Przy czym nie ma znaczenia, czy rzeczywiście chodziło o dojście do spadku. Nie jest zatem prawidłowe dalsze stwierdzenie W. Wasylczenki, że „istotne jest, żeby takie czyny sprzyjały powołaniu osoby do dziedziczenia albo zwiększały jej udział w spadku”[73]. Ustawa nie wymaga takich przesłanek dla uznania za niegodnego.

W literaturze można spotkać się z dwiema odmiennymi interpretacjami pojęcia „umyślne pozbawienie życia”. Pierwsza, zawężająca interpretacja wychodzi z założenia, że w tej kwestii należy odwoływać się do Kodeksu karnego Ukrainy. Zatem pojęcie „umyślne pozbawienie życia” obejmuje przestępstwa wymienione w Kodeksie karnym jako umyślne: umyślne pozbawienie życia (art. 115 k.k.U.), umyślne zabójstwo dokonane w stanie silnego niepokoju (art. 116 k.k.U.), umyślne zabójstwo przez matkę swojego nowo narodzonego dziecka (art. 117 k.k.U.), umyślne zabójstwo dokonane przy przekroczeniu granic obrony koniecznej (art. 118 k.k.U.) etc. Jednak nie będzie umyślnym zabójstwem w świetle cz. 1 art. 1221 k.c.U. umyślne zadanie ciężkich cielesnych uszkodzeń, które spowodowało śmierć poszkodowanego (cz. 2 art. 121 k.k.U.)[74].

Odmienny pogląd wyraził J. Zaika, jednocześnie zdając sobie sprawę, że większość doktryny trzyma się wyżej opisanych poglądów. Z dezaprobatą wskazał on tytułem przykładu, iż syn, który pobił matkę i ojca na śmierć i w świetle prawa karnego może być skazany nawet na piętnaście lat pozbawienia wolności, może mimo wszystko dziedziczyć po rodzicach. Dlatego zdaniem J. Zaika w takich sytuacjach też należy uznawać spadkobierców za niegodnych, ponieważ przestępstwo nie może być sposobem nabycia prawa własności. Co więcej, autor nawet stwierdził, że „jakiekolwiek przestępstwo przeciwko spadkodawcy powinno pozbawiać spadkobiercę prawa do spadku”[75]. Moim zdaniem takie stanowisko wyraźnie wykracza poza ramy zakreślone przez samego ustawodawcę. Na gruncie prawa spadkowego, czy szerzej prawa cywilnego, uznanie za niegodnego jest dość ciężką sankcją

71 Cywilnyj kodeks Ukrajiny wid 16 sicznia 2003 r. N 435 – IV, Widomosti Werchownoji Rady, 2003, NN 40 – 44, art.1224.

72 W. Wasylczenko, Komentar ta postatejni materiały do zakonodawstwa Ukrajiny pro spadkuwannia, Harkiw 2007, s. 20.

73 W. Wasylczenko, Komentar ta postatejni…, s. 20.

74 A. Jarema, W. Karabań, W. Krywenko, W. Rotań, Naukowo – praktycznyj komentar do cywilnogo zakonodawstwa Ukrajiny, Kyjiw 2006, s. 780.

75 J. Zaika, Stanowlennia i rozwytok spadkowogo prawa w Ukrajini, Kyjiw 2004, s. 208 – 209.

dotykającą określonych podmiotów w razie zaistnienia odpowiednich przesłanek. Nie może być więc żadnej rozszerzającej wykładni tych przepisów, nawet jeśli w świetle prawa karnego popełniony czyn spotyka się z surową sankcją. Pod tym względem między prawem karnym a prawem cywilnym mogą być rozbieżności w ocenie tego samego zdarzenia.

W każdym razie nie może być uznany za niegodnego spadkobierca, który popełnił względem spadkodawcy nieumyślne przestępstwo. Na przykład, syn przez pomyłkę na polowaniu we mgle zastrzelił ojca z broni używanej podczas polowań. Taki spadkobierca będzie dziedziczył na zasadach ogólnych.

W myśl cz. 1 art. 15 k.k.U. pod usiłowaniem należy rozumieć przestępstwo polegające na dokonaniu przez osobę umyślnego czynu (działania czy zaniechania), bezpośrednio skierowanego na dokonanie przestępstwa przewidzianego przez odpowiedni artykuł części szczegółowej tego Kodeksu, jeśli zamierzone przestępstwo nie zostało do końca zrealizowane z przyczyn niezależnych od woli osoby[76]. Jednak samo przygotowanie do popełnienia przestępstwa nie może być podstawą odsunięcia od dziedziczenia[77].

Drugi akapit cz. 1 art. 1224 k.c.U. po raz pierwszy w historii prawa ukraińskiego uregulował wyraźnie skutki przebaczenia przez spadkodawcę. Wskazuje się, iż „postanowienia akapitu pierwszego tej części nie stosuje się wobec osoby, która dokonała takiego zamachu, jeśli spadkodawca, wiedząc o tym, mimo to ustanowił ją swoim spadkobiercą według testamentu"[78]. Ten przepis dość rygorystycznie podszedł do kwestii przebaczenia niegodnemu spadkobiercy. Z literalnego brzmienia tej normy wynika bowiem, że swojego przebaczenia spadkodawca nie może udzielić w innej formie, na przykład zostawić pisemnego oświadczenia o przebaczeniu spadkodawcy. Należy zgodzić się z Z. Romowską, iż „jeśli testament został sporządzony do chwili dokonania zamachu, to popełnienie zamachu na życie spadkodawcy jest bezwarunkową podstawą dla bezskuteczności[79] testamentu nawet wtedy, gdy spadkodawca miał realną możliwość odwołania testamentu, ale nie uczynił tego. Otóż milczenie spadkodawcy – ofiary przestępstwa – nie oznacza legalizacji testamentu"[80]. W kontekście wypowiedzi Z. Romowskiej, pod legalizacją testamentu należy rozumieć odzyskanie siły prawnej przez testament wskutek dorozumianego przebaczenia przez spadkodawcę. Należy zgodzić się z tym poglądem. Jeśli spadkodawca chce jednak, żeby powołany w sporządzonym wcześniej testamencie przestępca dziedziczył, to powinien on

76 Kryminalnyj kodeks Ukrajiny, Widomosti Werchownoji Rady 2001, nr 25-26, art. 15.

77 A. Jarema, W. Karabań, W. Krywenko, W. Rotań, Naukowo – praktycznyj komentar…, s. 781.

78 Cywilnyj kodeks Ukrajiny wid 16 sicznia 2003 r. N 435 – IV, Widomosti Werchownoji Rady, 2003, NN 40 – 44, art.1224.

79 W stosunku do testamentu Z. Romowska używa trudno przetłumaczalnego ukraińskiego słowa „nieczynny". W dosłownym tłumaczeniu chodzi o testament „niedziałający" czy „niewywierający skutków". Prawdopodobnie najbliższym odpowiednikiem w języku polskim jest termin „testament bezskuteczny", chociaż akurat ta kategoria wad czynności prawnych nie jest w cywilistyce ukraińskiej ani rozwinięta, ani szerzej używana.

80 Z. Romowska [w:] Naukowo – praktycznyj komentar Cywilnego kodeksu Ukrajiny, red. W. M. Kossaka, Kyjiw 2004, s. 911. Takie stanowisko poparła S. Fursa [w:] Cywilnyj kodeks Ukrajiny: Naukowo…, s.797.

sporządzić jeszcze jeden testament, czy co najmniej pozostawić klarowną wzmiankę w nowo sporządzonym testamencie, że poprzedni testament nie ulega zmianie.

Zgodnie cz. 2 art. 1224 k.c.U. „nie mają prawa do dziedziczenia osoby, które umyślnie przeszkadzały spadkodawcy sporządzić testament, wnieść do niego zmiany albo odwołać testament, a tym samym sprzyjały powstaniu prawa do dziedziczenia u nich samych czy innych osób albo sprzyjały zwiększeniu ich udziału w spadku".[81] Dla zastosowania tego przepisu powinny być spełnione łącznie następujące przesłanki:

- działanie powinno być tylko umyślne;
- działanie powinno mieć na celu uniemożliwienie sporządzenia testamentu, wniesienia do niego zmian czy jego odwołania;
- wyżej wymienione działania muszą w konsekwencji doprowadzić do zmian w porządku dziedziczenia.

Analiza tego przepisu pozwala na stwierdzenie, że jeśli na przykład syn spadkodawcy, będąc jedynym spadkobiercą ustawowym, będzie próbował zniszczyć po śmierci spadkodawcy sporządzony testament, żeby nie dopuścić do dziedziczenia razem ze sobą dalekiego krewnego, nie można go uznać za niegodnego. Zatem nie sposób zgodzić się z J. Zaiką, że „podstawą dla uznania za niegodnego jest jego zachowanie nie tylko do otwarcia spadku, czyli do i po sporządzeniu testamentu, ale i po otwarciu spadku"[82]. Fałszowanie testamentu po śmierci spadkodawcy przez spadkobierców nie może doprowadzić do odsunięcia ich od spadku. *De lege ferenda* słuszne byłoby znowelizowanie tej normy, żeby jakiekolwiek fałszowanie czy próby ukrycia testamentu uruchamiały instytucję niegodności w prawie spadkowym.

Komentując cz. 2 art. 1224 k.c.U. E. Riabokoń stwierdził, iż „bez względu na to, że cz. 2 komentowanego artykułu bezpośrednio nie wymaga potwierdzenia dokonania zabronionych czynów spadkobiercy w postępowaniu sądowym, tylko orzeczenie sądowe może być legalną podstawą dla ustanowienia faktu ich umyślnego dokonania, i jako skutek – odsunięcia spadkobiercy od dziedziczenia"[83]. Taki pogląd zdaje się popierać też E. Charytonow, ogólnie twierdząc, że „wskazane okoliczności zostają potwierdzone przez złożenie do notariusza kopii orzeczenia sądowego"[84]. Moim zdaniem takie poglądy nie znajdują oparcia w ustawodawstwie. Nie ulega wątpliwości, że w takiego typu sytuacjach częstotliwość zwracania się do sądów jest dość wysoka. Ale powstaje pytanie: czy notariusz może na podstawie jakichkolwiek innych dowodów pominąć niegodziwego spadkobiercę i wydać świadectwo o prawie do spadku pozostałym spadkobiercom? Jak się wydaje, taka sytuacja może zaistnieć. W każdym razie w sądzie będą ustalane tylko pewne fakty

81 Cywilnyj kodeks Ukrajiny wid 16 sicznia 2003 r. N 435 – IV, Widomosti Werchownoji Rady, 2003, NN 40 – 44, art.1224.

82 J. Zaika, Stanowlennia i rozwytok…, s. 211.

83 Naukowo – praktycznyj komentar cywilnego kodeksu Ukrajiny u dwoch tomach, T. 2, red. O. Dzera, N. Kuzniecowa, W. Łuc, Kyjiw 2005, s. 971 - 972.

84 Cywilnyj kodeks Ukrajiny: Naukowo – praktycznyj komentarz, red. rozrobnykiw projektu Cywilnego kodeksu Ukrajiny, Kyjiw 2004, s. 821.

świadczące o niegodności spadkodawcy, nie będzie zaś rozważana kwestia, czy należy uznać kogoś za niegodnego. Jeśli zostały spełnione określone w ustawie przesłanki, spadkobierca *ex lege* staje się niegodny.

Cz. 1 i cz. 2 art. 1224 k.c.U. dotyczyła spadkobierców tak ustawowych, jak i powołanych do dziedziczenia na podstawie ustawy.

Według cz. 3 art. 1224 k.c.U. „nie mają prawa do dziedziczenia na podstawie ustawy rodzice po dziecku, co do którego zostali oni pozbawieni praw rodzicielskich i ich prawa nie zostały przywrócone na czas otwarcia spadku"[85]. Zgodnie cz. 1 art. 164 Kodeksu rodzinnego Ukrainy matka albo ojciec mogą być pozbawieni praw rodzicielskich na podstawie orzeczenia sądowego. Przykładowo w art. 164 k.r.U. zostały wyliczone podstawy pozbawienia praw rodzicielskich:

- jeśli rodzice nie zabrali dziecka z domu rodzicielskiego albo innego zakładu ochrony zdrowia bez ważnego powodu i w ciągu sześciu miesięcy nie przejawili troski wobec dziecka;
- jeśli rodzice uchylają się od wywiązania się z swoich obowiązków co do wychowania dziecka lub zdobycia wykształcenia średniego;
- jeśli rodzice okrutnie zachowują się wobec dziecka;
- w razie, gdy rodzice są nałogowymi narkomanami lub alkoholikami;
- jeśli rodzice dopuszczają się jakichkolwiek typów eksploatacji dziecka, zmuszają je do żebrania czy włóczęgostwa;
- w razie, gdy rodzice zostali skazani za popełnienie umyślnego czynu zabronionego o charakterze kryminalnym przeciwko dziecku[86].

Matka albo ojciec mogą być pozbawieni praw rodzicielskich wobec wszystkich swoich dzieci albo któregokolwiek z nich (cz. 3 art. 164 k.r.U.).

Art. 169 k.r.U. przewiduje możliwość wznowienia praw rodzicielskich, jeśli osoba pozbawiona tych praw zwróciła się do sądu z pozwem. Wznowienie praw rodzicielskich nie jest możliwe, jeśli dziecko zostało przysposobione i przysposobienie nie zostało rozwiązane albo uznane za nieważne. Wznowienie praw rodzicielskich nie jest możliwe, jeśli na czas rozpatrzenia sprawy przez sąd dziecko osiągnęło pełnoletność[87].

Zgodnie z drugim akapitem cz. 3 art. 1224 k.c.U. „nie mają prawa do dziedziczenia na podstawie ustawy rodzice (przysposabiający) oraz pełnoletnie dzieci (przysposobieni) oraz inne osoby, które uchylały się od wykonania obowiązku co do utrzymania spadkodawcy, jeśli ta okoliczność została ustalona przez sąd"[88]. W tym przepisie chodzi o powstały wcześniej

85 Cywilnyj kodeks Ukrajiny wid 16 sicznia 2003 r. N 435 – IV, Widomosti Werchownoji Rady, 2003, NN 40 – 44, art.1224.

86 Simejnyj kodeks Ukrajiny wid 10.01.2002, Widomosti Werhownoji Rady Ukrajiny wid 31 trawnia 2002, nr 21 – 22. art. 164.

87 Simejnyj kodeks Ukrajiny wid 10.01.2002, Widomosti Werhownoji Rady Ukrajiny wid 31 trawnia 2002, nr 21 – 22. art. 169.

88 Cywilnyj kodeks Ukrajiny wid 16 sicznia 2003 r. N 435 – IV, Widomosti Werchownoji Rady, 2003, NN 40 – 44, art.1224.

na podstawie innych przepisów obowiązek co do utrzymania spadkodawcy, na przykład obowiązek alimentacyjny. Mogą być przedstawione różne dowody, że osoba nie wywiązuje się z ciążącego na niej obowiązku, ale w każdym razie powinno to być ustalone przez sąd.

Zgodnie z cz. 4 art. 1224 k.c.U. „nie mają prawa do dziedziczenia według ustawy jedna po drugiej osoby, między którymi związek małżeński jest nieważny albo uznany za taki na podstawie orzeczenia sądowego. Jeśli związek małżeński został uznany za nieważny po śmierci małżonka, to małżonkowi, który przeżył pierwszego i nie wiedział, i nie mógł wiedzieć o przeszkodach do rejestracji związku małżeńskiego, sąd może przyznać prawo do dziedziczenia części zmarłego małżonka w majątku, jaki był przez nich nabyty podczas małżeństwa”[89]. Należy wskazać, że w prawie ukraińskim związek małżeński może być nieważny z mocy samej ustawy, jak również może być uznany za nieważny na podstawie orzeczenia sądowego. Na przykład, zgodnie z cz. 1–3 art. 39 k.r.U. nieważny jest związek małżeński zawarty z osobą, która jednocześnie przebywa w innym związku małżeńskim, związek małżeński między krewnymi w linii prostej oraz rodzeństwem, związek małżeński zawarty z osobą niezdolną do czynności prawnych[90]. Według cz. 4 art. 39 k.r.U. „na wniosek osoby zainteresowanej organ państwowej rejestracji aktów stanu cywilnego anuluje wpis w aktach dotyczący ślubu, zarejestrowanego z osobami wymienionymi w częściach 1–3 tego artykułu”[91]. Zatem zainteresowana osoba może dostarczyć do notariusza, przed którym trwa postępowanie spadkowe, zaświadczenie z urzędu stanu cywilnego o anulowaniu wpisu o ślubie, co automatycznie pociąga wyłączenie od dziedziczenia osoby, która przebywała w nieważnym związku małżeńskim.

Z kolei są sytuacje, kiedy sąd uznaje związek małżeński za nieważny, oraz stany faktyczne, kiedy sąd może uznać związek małżeński za nieważny. W myśl cz. 1–2 art. 40 k.r.U. sąd uznaje związek małżeński za nieważny, jeśli został on zawarty bez swobodnego wyrażenia zgody przez kobietę lub mężczyznę oraz w razie fikcyjności małżeństwa[92]. Jednak zgodnie z cz. 3 art. 40 k.r.U. sąd nie może unieważnić związku małżeńskiego, jeśli w chwili rozpatrzenia sprawy zniknęły okoliczności, jakie świadczyły o braku zgody osoby na zawarcie małżeństwa albo niechęci osoby co do utworzenia rodziny[93]. Innymi słowy, jeśli okaże się, że zmuszony groźbami i silną presją rodzinną do zawarcia związku małżeńskiego mężczyzna później zmienił zdanie i zgodził się stworzyć rodzinę, to sąd nie ma prawa unieważnić małżeństwa i tym samym pozbawić określonych osób prawa do dziedziczenia.

89 Cywilnyj kodeks Ukrajiny wid 16 sicznia 2003 r. N 435 – IV, Widomosti Werchownoji Rady, 2003, NN 40 – 44, art.1224.

90 Simejnyj kodeks Ukrajiny wid 10.01.2002, Widomosti Werhownoji Rady Ukrajiny wid 31 trawnia 2002, nr 21 – 22. art. 39.

91 Simejnyj kodeks Ukrajiny wid 10.01.2002, Widomosti Werhownoji Rady Ukrajiny wid 31 trawnia 2002, nr 21 – 22. art. 39.

92 Simejnyj kodeks Ukrajiny wid 10.01.2002, Widomosti Werhownoji Rady Ukrajiny wid 31 trawnia 2002, nr 21 – 22. art. 40.

93 Simejnyj kodeks Ukrajiny wid 10.01.2002, Widomosti Werhownoji Rady Ukrajiny wid 31 trawnia 2002, nr 21 – 22. art. 40.

Z cz. 1 art. 41 k.r.U. wynika, że związek małżeński może być unieważniony na mocy orzeczenia sądowego, jeśli został on zawarty:

- między przysposabiającym i przysposobionym przez niego dzieckiem z naruszeniem ustanowionych przez ustawę wymogów;
- między kuzynem a kuzynką; między ciocią, wujkiem a siostrzeńcem (siostrzenicą), bratankiem (bratanicą);
- z osobą, która nie osiągnęła wieku niezbędnego do zawarcia związku małżeńskiego i której nie było przyznane prawo do zawarcia związku małżeńskiego;
- z osobą, która ukrywa swoją ciężką chorobę albo chorobę zagrażającą małżonkowi lub ich potomkom[94].

Przy tym związek małżeński nie może być unieważniony, jeśli osoby wymienione wyżej w pierwszych trzech punktach mają dzieci bądź małżonka jest w ciąży, albo jeśli osoba w chwili rozpatrzenia sprawy przez sąd już osiągnęła niezbędny do zawarcia związku małżeńskiego wiek (cz. 3 art. 41 k.r.U.). Cz. 2 art. 41 k.r.U. nakazuje sądowi przy rozpatrzeniu takiego typu spraw badać, w jakim stopniu prawa osoby zostały naruszone zawarciem związku małżeńskiego zagrożonego nieważnością, a ponadto trwałość wspólnego zamieszkania małżonków, charakter ich relacji oraz inne okoliczności mające istotne znaczenie[95].

Trzeba nadmienić, że zgodnie z art. 48 k.r.U. w razie rejestracji związku małżeńskiego pod nieobecność narzeczonego lub (albo) narzeczonej związek małżeński poczytuje się za niezawarty[96]. Taki „związek małżeński" w ogóle nie może wywierać żadnych skutków w dziedzinie prawa spadkowego.

Należy zwrócić szczególną uwagę, że zgodnie z wyżej cytowaną częścią 4 art. 1224 k.c.U. w razie uznania związku małżeńskiego za nieważny po śmierci małżonka, drugiemu małżonkowi, który nie wiedział i nie mógł wiedzieć o przeszkodach do rejestracji związku małżeńskiego, sąd może przyznać **prawo do dziedziczenia tylko części zmarłego małżonka w majątku wspólnym**. Chodzi o część majątku, który był przez małżonków nabyty podczas trwania związku małżeńskiego. Innymi słowy, sąd nie może przywrócić małżonkowi „będącemu w dobrej wierze" wszystkich praw spadkowych, jakie miałby małżonek z nieunieważnionego związku małżeńskiego. Oczywiście, chodzi tu tylko o dziedziczenie ustawowe, unieważnienie małżeństwa nie ma żadnego wpływu na ważność sporządzonego wcześniej testamentu. Sąd więc ma prawo przywrócić po unieważnieniu małżeństwa małżonkowi będącemu w dobrej wierze prawo dziedziczenia udziału zmarłego małżonka we wspólnym majątku. Z kolei do dziedziczenia majątku odrębnego zmarłego dojdą inni spadkobiercy ustawowi albo żyjący małżonek na podstawie testamentu.

94 Simejnyj kodeks Ukrajiny wid 10.01.2002, Widomosti Werhownoji Rady Ukrajiny wid 31 trawnia 2002, nr 21 – 22. art. 40.

95 Zob. Simejnyj kodeks Ukrajiny wid 10.01.2002, Widomosti Werhownoji Rady Ukrajiny wid 31 trawnia 2002, nr 21 – 22. art. 41.

96 Simejnyj kodeks Ukrajiny wid 10.01.2002, Widomosti Werhownoji Rady Ukrajiny wid 31 trawnia 2002, nr 21 – 22. art. 48.

Wyłom od ogólnej konstrukcji art. 1224 k.c.U. stanowi cz. 5 tego przepisu. „Na mocy orzeczenia sądu osoba może być wyłączona od prawa dziedziczenia według ustawy, jeśli zostanie ustalone, że uchylała się ona od udzielenia pomocy spadkodawcy, który ze względu na podeszły wiek, ciężką chorobę albo kalectwo znajdował się w stanie bezradności”[97]. Ten przepis mówi o spadkobiercach w ogóle, nie tylko o osobach, na których ciążył jakikolwiek ustawowy obowiązek udzielania pomocy spadkodawcy. Chodzi więc o faktyczną możliwość spadkobierców do wspierania spadkodawcy w ciężkiej życiowej chwili, bez względu na rozmaite relacje rodzinne. Prawdopodobnie ustawodawca nie chciał dopuścić do zaistnienia moralnie wątpliwych sytuacji, kiedy np. mieszkający obok krewny nie odwiedza umierającego spadkodawcy, zaś troszczą się o niego sąsiedzi. Nie ulega wątpliwości, że sąd powinien zbadać, czy spadkobierca miał możliwość pomóc spadkodawcy – wiedział o jego sytuacji życiowej, dysponował odpowiednimi środkami, nie miał innych, ważniejszych obowiązków etc.

Jednoznaczne sformułowania cz. 5 art. 1224 k.c.U. umożliwiają stwierdzenie, że orzeczenie sądowe jest konstytutywne, nie mamy więc do czynienia z niegodnością *ex lege*. Należy zgodzić się z E. Riabokoniem, iż „nawet w sytuacji ustalenia w postępowaniu sądowym okoliczności określonych w cz. 5, odsunięcie osoby od dziedziczenia jest wyłączną prerogatywą sądu. Prawdopodobnie takie rozstrzygnięcie spowodowane jest trudnością jednoznacznej interpretacji terminów: „uchylenie się od udzielenia pomocy spadkodawcy”, „ciężka choroba” oraz „bezradny stan spadkodawcy”[98].

W literaturze został wypowiedziany pogląd, z którym można się zgodzić, że art. 1224 k.c.U. mówi ogólnie o „niegodnych osobach”, dlatego jego normę teoretycznie dałoby się zastosować także do osób prawnych. Jednak rozpatrzenie poszczególnych postanowień tego artykułu pod kątem możliwości uznania osoby prawnej za niegodną dziedziczenia rodzi przeszkody nie do pokonania. Na przykład, osoba prawna nie może zawierać małżeństwa ani popełniać przestępstw[99].

Zgodnie z cz. 6 art. 1224 postanowienia o niegodności obejmują wszystkich spadkobierców, łącznie z osobami mającymi prawo do części obowiązkowej i osobami, na rzecz których został uczyniony zapis[100].

Ustawa nie reguluje losu spadku, otrzymanego przez spadkobierców później uznanych za niegodnych. W literaturze panuje przekonanie, że w takiej sytuacji stosuje się ogólne przepisy o nabyciu i przechowywaniu mienia bez dostatecznej podstawy prawnej[101]. Wierzycielami w takim zobowiązaniu będą pozostali spadkobiercy.

97 Cywilnyj kodeks Ukrajiny wid 16 sicznia 2003 r. N 435 – IV, Widomosti Werchownoji Rady, 2003, NN 40 – 44, art.1224.

98 E. Riabokoń [w:] Naukowo – praktycznyj komentar cywilnego kodeksu Ukrajiny u dwoch tomach, T. 2, red. O. Dzera, N. Kuzniecowa, W. Łuc, Kyjiw 2005, s. 972.

99 E. Riabokoń [w:] Naukowo – praktycznyj komentar…, s. 972 - 973.

100 Cywilnyj kodeks Ukrajiny wid 16 sicznia 2003 r. N 435 – IV, Widomosti Werchownoji Rady, 2003, NN 40 – 44, art.1224.

101 Zob. W. Wasylczenko, Komentar ta postatejni…, s. 20, E. Riabokoń [w:] Naukowo – praktycznyj komentar…, s. 973

Podsumowując, należy wskazać, że ustawodawstwo ukraińskie zawiera dość skomplikowany system uznania spadkobiercy za niegodnego, niemający jednolitego charakteru (szczególnie w kwestii roli orzeczenia sądowego). Oczywiste jest, że jego funkcjonowanie jest obliczone na współudział w szeroko rozumianym postępowaniu spadkowym nie tylko sądów, lecz także organów notarialnych. Na tych ostatnich spoczywa w większości sytuacji realizacja decyzji o uznaniu spadkobiercy za niegodnego.

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UDZIAŁ KOBIET W SPRAWOWANIU WŁADZY W ORGANACH JEDNOSTEK SAMORZĄDU TERYTORIALNEGO W POLSCE (CZĘŚĆ I)

Abstrakt

Artykuł podejmuje temat równego i sprawiedliwego udziału kobiet w sprawowaniu władzy w organach jednostek samorządu terytorialnego w Polsce. Udział kobiet w sprawowaniu władzy, a także równe możliwości wpływania na projektowane polityki publiczne są bowiem zagadnieniami, które mają fundamentalne znaczenie dla prawidłowego funkcjonowania demokratycznego państwa prawa.

Słowa kluczowe: Zasada równości, organy władzy publicznej, organy jednostek samorządu terytorialnego

Abstract

The article deals with the topic of equal and equitable participation of women in the exercise of power in the bodies of local government units in Poland. Indeed, women's participation in the exercise of power, as well as equal opportunities to influence the designed public policies, are issues that are fundamental to the proper functioning of a democratic state of law.

Keywords: Principle of equality, public authorities, local government organs

Wstęp

Udział kobiet w sprawowaniu władzy związany jest bezpośrednio z uzyskiwaniem przez nie prawa wyborczego zarówno czynnego jak i biernego. Prawo to, choć ma wielowiekową tradycję w stosunku do mężczyzn, zostało w zasadzie sformalizowane w stosunku do kobiet niewiele ponad sto lat temu. Walka o te prawa, ma za sobą smutną i krwawą historię, która jednak zakończyła się sukcesem.

Pierwszym formalnym aktem, który zwracał uwagę na prawa kobiet, była pochodząca z 1791r. „Deklaracja praw kobiety i obywatelki (fr. Déclaration des droits de la femme et de la citoyenne)". Jej autorką była francuska pisarka, feministka i abolicjonistka Olympe de Gouges, fr. Olympe de Gouges[102]. Autorka manifestu, który zadedykowała królowej Marii Antoninie, zawarła w nim, nowatorskie jak na owe czasy postulaty: - równouprawnienia kobiet i mężczyzn, - egzystencjalnej niezależności kobiet od mężczyzn, - równego podziału obowiązków, ale także czynnego i biernego prawa wyborczego. Ten ostatni aspekt został wprost wyrażony w art. 6 Deklaracji, i stanowił, iż *„Art. 6. Prawo musi być wyrazem woli ogółu; wszyscy obywatele muszą uczestniczyć osobiście lub przez swoich przedstawicieli w jego tworzeniu; musi być jednakowe dla wszystkich: wszyscy obywatele, będąc równi w jego oczach, muszą być jednakowo uprawnieni do wszelkich godności, miejsc i stanowisk publicznych, stosownie do swoich zdolności i bez innego rozróżnienia niż to, które wynika z ich cnót i talentów"*[103]. I choć autorka tych słów została, za swoje poglądy ścięta na gilotynie 3 listopada 1793r., to dziś z pewnością jest postrzegana jako pierwsza bohaterka walki o prawa wyborcze kobiet.

Choć w samej Francji kobiety uzyskały bierne i czynne prawo wyborcze dopiero w 1944r.[104] to idea zapoczątkowana podczas rewolucji francuskiej przeniosła się na inne kraje. Liderem w tym zakresie były przede wszystkim ówczesne Stany Zjednoczone, gdzie niektóre stany (np. Massachusetts, New Hampshire) przyznawały kobietą prawa wyborcze jeszcze przed wojną secesyjną np. kobiety mogły głosować New Jersey od 1790 do 1807 r. (pod warunkiem, że spełniły wymóg posiadania majątku bez względu na kolor skóry. Jednakże należy pamiętać, że w owym czasie kobiety zamężne nie mogły posiadać majątku, a tym samym nie mogły głosować).

102 Szerzej na temat życia Olympe de Gouges, zobacz K. Lewandowska i R. Michalski „Olympe de Gouges – zapomniana heroini rewolucji francuskiej" Sztuka i Dokumentacja nr 19 (2018) s. 97-107.

103 Article 6. La loi doit être l'expression de la volonté générale ; toutes les Citoyennes et Citoyens doivent concourir personnellement ou par leurs représentants, à sa formation ; elle doit être la même pour tous : toutes les Citoyennes et tous les Citoyens, étant égaux à ses yeux, doivent être également admissibles à toutes dignités, places et emplois publics, selon leurs capacités, et sans autres distinctions que celles de leurs vertus et de leurs talents.

104 Ordonnance portant organisation des Pouvoirs publics en France après la libération, 21 avril 1944. Archives nationales A//1902. Francja była jednym z pierwszych krajów, które wprowadziły powszechne prawo wyborcze dla mężczyzn, prawo to nie zostało rozszerzone na kobiety aż do 1944 roku. Rozporządzeniem z 21 kwietnia 1944 r. wydanym przez Rząd Tymczasowy generała de Gaulle'a w Algierze kobiety wreszcie stały się wyborcami podobnie jak mężczyźni. Rok później, 29 kwietnia 1945 r., zagłosowały po raz pierwszy. A 21 października 1945 r. 33 kobiety zostały wybrane do pierwszego Zgromadzenia Konstytucyjnego.

Przyjęta w roku 1789 Konstytucja Stanów Zjednoczonych, przyznała stanom prawo do ustalania wymogów dotyczących głosowania i spowodowała, iż większość stanów ograniczało to prawo do posiadania majątku lub płacenia podatków przez białych mężczyzn. Początkowym efektem takiej regulacji było odebranie kobietom prawa wyborczego w stanach, w których je wcześniej wprowadzono np. we wspomnianym powyżej New Jersey (1807r.)[105]. W kolejnej dekadzie, wobec nasilających się głosów kobiet o przywrócenie lub zapewnienie czynnego i biernego prawa wyborczego, niektóre stany podjęły takie działania. I tak w 1838r. stan Kentucky, uchwalił obowiązujące w tym stanie prawo wyborcze dla kobiet, które były „głową rodziny"[106]. Na mocy tego prawa kobietą zezwolono na udział w wyborach na obszarach wiejskich, w których to podejmowano decyzje z w zakresie podatków i edukacji. Jednakże rozwiązanie to nie było powszechne, a przyjęta 9 lipca 1968r. czternasta poprawka do Konstytucji Stanów Zjednoczonych w zakresie prawa wyborczego, wprost wskazała w § 2, iż prawo to przysługuje jedynie mającym ukończone 21 lat mężczyznom[107].

Pierwszym stanem który, bez ograniczeń przyznał kobietom prawo wyborcze do głosowania we wszystkich wyborach i sprawowania wszelkich urzędów publicznych było Terytorium Wyoming, które 10 grudnia 1869r. przyjęło Ustawę Rady nr 70 z 1869 r. o przyznaniu kobietom z Terytorium Wyoming prawa do głosowania i sprawowania urzędów (uchwalona przez Radę i Izbę Reprezentantów Terytorium Wyoming)[108]. Ustawa ta znana jako *Women's Suffrage Act*, składała się z dwóch punktów, z których pierwszy stanowił iż: *„Każda kobieta w wieku dwudziestu jeden lat, zamieszkała na tym Terytorium, może oddać swój głos w każdych wyborach, które odbędą się zgodnie z tamtejszym prawem. Jej prawa do głosowania i sprawowania urzędu będą takie same, jak prawa wyborców, zgodnie z prawem wyborczym tego Terytorium"*. A drugi wprowadzał stosowanie powyższej ustawy od dnia jej ogłoszenia.

Faktyczny problem głosowania przez kobiety w Sanach Zjednoczonych ostatecznie został zakończony dopiero, w 1920r[109]. gdy przyjęto XIX poprawką do Konstytucji, która to

105 Judith Apter Klinghoffer, Lois Elkis, (1992). „'The Petticoat Electors': Women's Suffrage in New Jersey, 1776-1807". Journal of the Early Republic. 12 (2): 159–193.

106 "An Act to establish a system of Common Schools in the State of Kentucky" Chap. 898". Acts of the General Assembly of the Commonwealth of Kentucky. Frankfort, KY: A.G. Hodges State Printer. December 1837. s. 282.

107 „§2. Liczba mandatów do Izby Reprezentantów zostaje rozdzielona między poszczególne stany odpowiednio do liczby mieszkańców, przy uwzględnieniu wszystkich mieszkańców stanu, z wyjątkiem nie opodatkowanych Indian. Jednak zmniejszeniu ulega podstawa ustalenia reprezentacji tych stanów, w których przy wyborze elektorów dla wyboru prezydenta lub wiceprezydenta albo przy wyborach reprezentantów do Kongresu albo stanowych urzędników władzy wykonawczej lub sądowniczej, albo członków ciała ustawodawczego jakakolwiek część męskiej ludności stanu, pomimo ukończenia dwudziestu jeden lat i posiadania obywatelstwa Stanów Zjednoczonych, pozbawiona jest praw wyborczych albo w jakiejkolwiek mierze ograniczona w tych prawach z innych względów, niż udział w buncie lub popełnienie innego przestępstwa; zmniejszenie reprezentacji następuje w takim stosunku, w jakim liczba upośledzonych obywateli płci męskiej pozostaje do ogólnej liczby męskich obywateli tego stanu, mających ukończone dwadzieścia jeden lat". www.sejm.gov.pl

108 1869 Council Bill 70, the Women Suffrage Act. https://gowyld.libguides.com/wyomingwomenssuffrage/legislation

109 Poprawka formalnie została ratyfikowana przez 36 stanów, co było wymogiem ważności dla jej wprowadzenia, i obowiązywała od 18 sierpnia 1920r.

stanowiła iż: *„Stany Zjednoczone ani którykolwiek ze stanów nie może obywateli Stanów Zjednoczonych pozbawić praw wyborczych ani ograniczyć ich ze względu na płeć”*[110].

Przełom XIX i XX wieku to okres, w którym prawa wyborcze dla kobiet są przyznawane w wielu Państwach na świecie[111] jak i w Europie. Pierwszym krajem, który w Europie wprowadził prawa wyborcze dla kobiet była Finlandia. Kobiety uzyskały w tym kraju prawa wyborcze w 1906 r.[112]

W Polsce kobiety uzyskały prawa wyborcze w 1918r. na podstawie Dekretu o ordynacji wyborczej do Sejmu Ustawodawczego z dnia 28 listopada 1918r[113]. W art. 1 dekret ten stanowił, iż *„Wyborcą do Sejmu jest każdy obywatel państwa bez różnicy płci, który do dnia ogłoszenia wyborów ukończył 21 lat”* zaś w art. 7 odnosił się do biernego prawa wyborczego i stanowił *„Wybieralni do Sejmu są wszyscy obywatele-(lki) państwa, posiadający czynne prawo wyborcze, niezależnie od miejsca zamieszkania, jak również wojskowi”*. Postanowienia Dekretu zostały utrzymane w mocy w przepisach Konstytucji z dnia 17 marca 1921 r[114]. Pierwsze wybory na podstawie ordynacji wyborczej z 1918r. odbyły się 26 stycznia 1919 r. Ówczesne kandydatki w zasadzie nie stworzyły jednej listy wyborczej, przykładowo w okręgu warszawskim kobiety kandydatki do Sejmu przyłączały się do różnych akcji wyborczych, ich nazwiska znalazły się na liście nr. 1 – Stronnictwa Niezawisłości Narodowej oraz liście nr. 2 – Polskiej Partii Socjalistycznej. Wyjątkiem była lista nr. 13 stworzona przez Izę Moszczyńską-Rzepecką[115].

Pierwsze posiedzenie nowo wybranego Sejmu tzw. Sejmu Ustawodawczego odbyło się 10 lutego 1919 r. w jego skład weszło 291[116] posłów i posłanek w tym osiem kobiet(!), w gronie tym znalazły się: Gabriela Balicka, Jadwiga Dziubińska, Irena Kosmowska, Maria Moczydłowska, Zofia Moraczewska, Anna Piasecka, Zofia Sokolnicka i Franciszka Wilczkowiakowa. Ich reprezentacja była zatem marginalna. Marszałek J. Piłsudski, otwierając pierwsze obrady Sejmu, swoje wystąpienie rozpoczął od słów: *„Panowie posłowie!”*, zakończył zaś: *„Życząc panom powodzenia w ich trudnej i odpowiedzialnej pracy, ogłaszam pierwszy Sejm wolnej i zjednoczonej Rzeczypospolitej Polskiej za otwarty i powołuję najstarszego z panów, posła Ferdynanda Radziwiłła do objęcia tymczasowego przewodnictwa”*.

Nie umniejszając samej treści i znaczenia wystąpienia marszałka J. Piłsudskiego,

110 Tłumaczenie tekstu ze strony www.sejm.gov.pl

111 Wyspa Man (korona brytyjska) w 1881r. Nowa Zelandia (czynne prawo wyborcze) w 1893r. (bierne prawo wyborcze przyznano) w 1919r. W Australii w 1902r.W Rosji prawa wyborcze kobiety uzyskały po rewolucji lutowej w 1917r.

112 W Norwegii prawa wyborcze wprowadzono w 1913 r., w Danii i Islandii w 1915 r. Dania i Islandia , w Estonii w 1917 r. Estonia, w 1918 r. na Łotwie i w Niemczech, w Wielkiej Brytanii w 1928 r. Jako ostatnie w Europie kobiety otrzymały prawa wyborcze w Liechtensteinie w 1984 r. W 2015r. prawa wyborcze uzyskały też kobiety w Arabii Saudyjskiej.

113 Dz.U. z 1918r. Nr 18, poz. 46.

114 Dz.U. z 1921r. Nr 44, poz. 267

115 Iza Moszczyńska-Rzepecka (1864-1941) była działaczką społeczną i feministką. Była inicjatorką i założycielką Ligi Kobiet. Wydała broszurę dla rodziców „Jak rozmawiać z dzieckiem o kwestiach drażliwych” tj. pierwszą książki w Polsce odnoszącą się do edukacji seksualnej dzieci.

116 W wyniku wyborów uzupełniających liczba posłów i posłanek w pierwszym Sejmie ustawodawczym liczyła ostatecznie 432 osoby. Liczba kobiet nie uległa zwiększeniu.

którego walor historyczny nie budzi jakichkolwiek wątpliwości, nie można jednak oprzeć się wrażeniu, że kobiety we współczesnym Marszałkowi świecie nie były postrzegane, nawet te, które były posłankami, na równi z mężczyznami.

W odniesieniu do składu Sejmu z roku 1919, i w oparciu o współczesne narzędzia statystyczne jesteśmy w stanie stwierdzić, iż w pierwszym składzie Sejmu Ustawodawczego – **współczynnik feminizacji wynosił 2,71**[117]. Jest to najprostszy miernik jaki możemy z ówczesnych danych wyliczyć bez posiadania danych szczegółowych (takich np. jak liczba kobiet biorących udział w wyborach, liczba kobiet pracujących, liczba kobiet z wyższym wykształceniem), które w owym czasie nie były gromadzone w sposób systematyczny i całościowy. Dana ta jednak wskazuje, iż początek „istnienia" kobiet w polityce wydaje się dramatycznie niski.

Współcześnie zasada równości i powiązany z nią zakaz dyskryminacji ze względu na płeć są fundamentami polskiego porządku konstytucyjnego. "(…) Art. 32 Konstytucji stanowi, że wszyscy są wobec prawa równi i mają prawo do równego traktowania przez władze publiczne. Nikt nie może być dyskryminowany w życiu politycznym, społecznym lub gospodarczym z jakiejkolwiek przyczyny[118]. Zasada równości jest normą konstytucyjną skierowaną do wszystkich organów władzy publicznej – obowiązuje zarówno te podmioty, które tworzą prawo, jak i te które je stosują. Ma ona uniwersalny charakter, który rozciąga się na sfery życia politycznego, społecznego jak i gospodarczego. Tworzy także szczególnego rodzaju prawo podmiotowe do równego traktowania[119]. Zasada równości pozostaje w ścisłym związku z zasadą sprawiedliwości społecznej (art. 2 Konstytucji RP) – obie zasady wzajemnie na siebie oddziałują. Z jednej strony, zasada równości nakazuje traktować w podobny sposób te podmioty, które charakteryzują się daną cechą relewantną, z drugiej – dopuszcza różnicowanie ich sytuacji prawnej, jeśli pozostawałoby to zgodne ze społecznym poczuciem sprawiedliwości[120]. Postanowienia art. 32 Konstytucji – w kontekście płci – rozwija i precyzuje art. 33 wskazując, że kobiety i mężczyźni mają w Rzeczypospolitej Polskiej równe prawa w życiu rodzinnym, politycznym, społecznym i gospodarczym, w szczególności zaś w obszarach: prawa do kształcenia, zatrudnienia i awansów, do jednakowego wynagradzania za pracę jednakowej wartości, do zabezpieczenia społecznego oraz do zajmowania stanowisk, pełnienia funkcji oraz uzyskiwania godności publicznych i odznaczeń. Orzecznictwo Trybunału Konstytucyjnego wskazuje, że konstytucyjnej zasady równości nie należy rozumieć jako nakazu stosowania jednakowych norm prawnych w stosunku do wszystkich podmiotów. Równe traktowanie oznacza traktowanie grup

117 Współczynnik feminizacji (ang. feminisation rate) służy do przedstawienia struktury płci, czyli liczby kobiet przypadającej na 100 mężczyzn. Matematycznie jest to stosunek liczby kobiet do liczby mężczyzn pomnożony przez 100.

118 Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Dz. U. z 1997 Nr 78 poz. 483 z późn. Zm.

119 Postanowienie Trybunału Konstytucyjnego z dnia 24 października 2001 r., sygn. akt SK 10/01, OTK 2001/7/225

120 Wyrok Trybunału Konstytucyjnego z dnia 24 lutego 1999 r., sygn. akt SK. 4/98, Dz.U z 1999 Nr 21 poz. 196.

podmiotów charakteryzujących się daną „cechą relewantną" – w analizowanym przypadku płcią – według jednakowej miary, bez zróżnicowań dyskryminujących, jak i faworyzujących. Warto jednak wskazać, że zasada równości nie ma charakteru absolutnego, a w pewnych sytuacjach zróżnicowanie sytuacji prawnej kobiet i mężczyzn jest dopuszczalne lub wręcz wskazane. Potwierdzają to również przepisy ratyfikowanych przez Polskę umów międzynarodowych oraz prawa unijnego – w wybranych sytuacjach stanowienie szczególnych regulacji dla kobiet lub mężczyzn, w celu zniwelowania faktycznych nierówności pomiędzy przedstawicielami obu płci, jest dopuszczalne jako tzw. uprzywilejowanie wyrównawcze[121]. Jest bezsporne, że konkretne regulacje ustanawiające takie rozwiązania nie mogą być traktowane jako sprzeczne z Konstytucją, o ile są racjonalnie uzasadnione, proporcjonalne i związane z innymi wartościami, zasadami i normami konstytucyjnymi[122]"[123].

„ (…) W odniesieniu do ustawodawstwa krajowego wskazać należy, że prace nad przyjęciem regulacji, której celem było wspieranie udziału kobiet w życiu politycznym zainicjował w 2010 r. Obywatelski Komitet inicjatywy ustawodawczej „Czas na kobiety", przedkładając projekt ustawy przewidującej wprowadzenie parytetu płci na listach kandydatów ubiegających się o mandat posła Parlamentu Europejskiego, radnego, posła Sejmu RP[124]. W toku prac legislacyjnych postulat ten uległ znaczącej zmianie – parytet płci zastąpiono mechanizmem kwotowym, tj. wymogiem zamieszczenia na liście wyborczej nie mniej niż 35% przedstawicieli obu płci. Ostatecznie, ustawę w takim kształcie uchwalono podczas 82. posiedzenia Sejmu w dniu 5 stycznia 2011 r., a Prezydent RP podpisał ją 31 stycznia 2011 r. Przepisy dotyczące kwot na listach kandydatów wprowadzono także do Kodeksu wyborczego[125], który w chwili wejścia tj. 1 sierpnia 2011 r., zastąpił dotychczasowe przepisy regulujące wybory do Sejmu i do Senatu, wybory Prezydenta RP, wybory do Parlamentu Europejskiego oraz wybory organów jednostek samorządu terytorialnego. Wprowadzony w 2011 r. mechanizm kwotowy jest obecnie jedynym rozwiązaniem ustawowym, które – uniemożliwiając rejestrację list wyborczych obejmujących wyłącznie kandydatów płci męskiej – przeciwdziała wykluczeniu kobiet ze sfery życia politycznego. Uwagę zwraca jednak, że jest to instrument o ograniczonej skuteczności, który nie reguluje kwestii przyznawania kobietom określonych miejsc na liście lub naprzemiennego umieszczania kandydatek i kandydatów na zasadzie suwaka. To poważny brak, który

121 Wyrok TK z 15.07.2010 r., sygn. akt K 63/07, OTK 2010, nr 6, poz. 60.

122 Wyrok TK z 22.02.2005 r., sygn. akt K 10/04, OTK 2005, nr 2, poz. 17.

123 Cyt. za Kwoty i co dalej? Udział kobiet w życiu politycznym w Polsce. Analiza i zalecenia, BIULETYN RZECZNIKA PRAW OBYWATELSKICH 2020, nr 6 Zasada Równego Traktowania. Prawo i praktyka, nr 31, Warszawa 2020 ISSN 0860-7958, s .8-9.

124 Obywatelski projekt ustawy o zmianie ustawy – Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej i Senatu Rzeczypospolitej Polskiej, ustawy – Ordynacja wyborcza do rad gmin, rad powiatów i sejmików województw oraz ustawy – Ordynacja wyborcza do Parlamentu Europejskiego, w związku z wprowadzeniem parytetu płci na listach kandydatów (druk nr 2713), dostępny pod adresem: http://orka.sejm.gov.pl/proc6.nsf/ opisy/2713.htm

125 Ustawa z dnia 5 stycznia 2011 r. – Przepisy wprowadzające ustawę – Kodeks wyborczy, Dz. U. Nr 21, poz. 113.

sprawia, że równościowy potencjał tej regulacji nie jest w pełni wykorzystany. Rzecznik Praw Obywatelskich – jako niezależny organ ds. równego traktowania – wielokrotnie zwracał uwagę na pilną potrzebę podjęcia bardziej zdecydowanych działań na rzecz równych szans kobiet w procesie wyborczym[126].(…)"[127]

„(…) Dokumentem międzynarodowym o kluczowym znaczeniu dla przeciwdziałania dyskryminacji kobiet w życiu politycznym jest Konwencja w sprawie likwidacji wszelkich form dyskryminacji kobiet (dalej: CEDAW)[128], która ustanowiła nowe standardy w tym obszarze. W pierwszej kolejności, CEDAW zobowiązała państwa strony do podjęcia wszelkich stosownych kroków, aby zlikwidować dyskryminację kobiet, rozumianą jako wszelkie zróżnicowanie, wyłączenie lub ograniczenie ze względu na płeć, których konsekwencją jest uszczuplenie albo uniemożliwienie kobietom przyznania, realizacji bądź korzystania na równi z mężczyznami z praw człowieka oraz podstawowych wolności w dziedzinach życia politycznego, gospodarczego, społecznego, kulturalnego, obywatelskiego i innych (art. 1). Zobowiązanie to w odniesieniu do życia politycznego i publicznego zdefiniowano wieloaspektowo. Obejmuje ono m.in. stworzenie warunków do korzystania na równi z mężczyznami z prawa głosowania we wszystkich wyborach i referendach publicznych oraz wybieralności do wszelkich organów wybieranych powszechnie. Kobiety i mężczyźni powinni mieć równe możliwości uczestniczenia w kształtowaniu polityki państwa i jej realizacji, w tym w sferze międzynarodowej, zajmowania stanowisk publicznych i wykonywania wszelkich funkcji publicznych na wszystkich szczeblach zarządzania, jak również działania w organizacjach pozarządowych i stowarzyszeniach zajmujących się sprawami publicznymi i politycznymi państwa (art. 7 i 8 CEDAW). Konwencja akcentuje także kwestię faktycznej realizacji praw, zobowiązując sygnatariuszy do podjęcia wszelkich stosownych kroków, w tym ustawodawczych, dla zapewnienia pełnego rozwoju i awansu kobiet w celu zagwarantowania im posiadania i wykonywania praw człowieka oraz podstawowych wolności na zasadach równości z mężczyznami, w tym wskazując na potrzebę wprowadzenia przez państwa strony tymczasowych zarządzeń szczególnych, zmierzających do przyspieszenia faktycznej równości mężczyzn i kobiet (art. 3 i 4 CEDAW). W 1997 r. ww. obowiązki państw sygnatariuszy CEDAW doprecyzowano w Zaleceniu ogólnym nr 23 „Kobiety w życiu politycznym i publicznym". Komitet CEDAW wskazał wtedy, że osiągniecie stanu równości w znaczeniu formalnym (de iure) i faktycznym (de facto) może wymagać przyjęcia szczególnych środków tymczasowych np. w postaci specjalnych środków

126 Zob. przywołane wyżej wystąpienie RPO do Pełnomocnika Rządu do spraw Równego Traktowania w sprawie biernego prawa wyborczego kobiet z dnia 8 marca 2019 r.

127 Cyt. za Kwoty i co dalej? Udział kobiet w życiu politycznym w Polsce. Analiza i zalecenia, BIULETYN RZECZNIKA PRAW OBYWATELSKICH 2020, nr 6 Zasada Równego Traktowania. Prawo i praktyka, nr 31, Warszawa 2020 ISSN 0860-7958, s .9-10.

128 Przyjęta przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 18 grudnia 1979 r., Dz.U. z 1982 Nr 10, poz. 71.

wsparcia i instrumentów, które wzmacniałyby partycypację polityczną kobiet[129]. W 2014 r. Komitet CEDAW taką konkretną rekomendację przekazał Polsce uznając, że działania władz polskich są w tym obszarze nadal niewystarczające – po analizie sprawozdań okresowych rządu Komitet uznał, że konieczne jest uzupełnienie funkcjonującego w Polsce mechanizmu kwotowego o system naprzemiennego umieszczania kandydatów na liście wyborczej (tzw. metoda suwaka) i stworzenie kompleksowej strategii zwalczania zjawiska niedostatecznej reprezentacji kobiet w polityce[130]. (…)"[131]

Czy jednak na pewno stan ten uległ zmianie we współczesnej Polsce? I czy aktualnie możemy pochwalić się większym wskaźnikiem udziału kobiet w sprawowaniu władzy, zwłaszcza w odniesieniu do samorządu terytorialnego?

129 Zob. pkt 15, dostępne pod adresem: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_4736_E.pdf. Zob. również General recommendation No. 5: Temporary special measures i General recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures).

130 Concluding observations on the combined seventh and eighth periodic reports of Poland, CEDAW/C/POL/ CO/7-8, s. 21 i 29.

131 Cyt. za Kwoty i co dalej? Udział kobiet w życiu politycznym w Polsce. Analiza i zalecenia, BIULETYN RZECZNIKA PRAW OBYWATELSKICH 2020, nr 6 Zasada Równego Traktowania. Prawo i praktyka, nr 31, Warszawa 2020 ISSN 0860-7958, s .11-12.

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CHILD IN POLISH CRIMINAL PROCEEDINGS

Abstrakt: Artykuł niniejszy zawiera opis oraz analizę podstawowych informacji z zakresu statusu dziecka w polskim postępowaniu karnym, wraz z omówieniem wybranych zagadnień z zakresu polskiego prawa karnego materialnego oraz orzecznictwa sądowego.

Abstract: Both juvenile delinquency and the fact of crimes committed to the detriment of a child or in his presence, which makes him a witness of the event, should cause reflection in the field of law, the operation of authorities and mechanisms to prevent demoralization of minors. In the Constitution of the Republic of Poland, the Polish Penal Code and the Polish Code of Criminal Procedure, there is a visible tendency to protect the rights and interests of juvenile crime victims, perpetrators and witnesses. This is no different for other legislation. This is a very positive signal, showing the legislator's awareness of the need to adapt the nature of certain activities, change their formalism when applied to children.

When a child is a victim of crime, law enforcement and the judiciary have a duty to adjust their behavior so as not to traumatize them again. This is manifested, among others, in that a minor should be interviewed in friendly conditions, by persons specially trained to work with children. People involved in related activities dealing with a minor victim of crime should be characterized by special empathy and understanding and competence so as to protect the child from the phenomenon of the so-called secondary victimization. The same applies to minor witnesses of crimes - it should be borne in mind that the fact of indirect participation in the act of crime can certainly cause long-term psychological trauma.

In a situation where a child is the perpetrator of a crime, it should be remembered that his psyche and value system are still in the development phase. Therefore, criminal proceedings in relation to juveniles should be conducted differently than in the case of adults. Punishment is primarily to raise a young man. Many experts recommend the use of alternative methods of conflict resolution, such as mediation, where there is a chance that the juvenile offender will „meet the victim face to face" outside the court process and understand their point of view.

Key words: law, child, criminal trial, defendant, victim, witness, minor, Polish criminal trial

The reaction of society to the fact of committing a crime seems to be natural in the form of indignation, surprise, shock. This should be accompanied by reflection on what should change - outdated procedures, the prevailing insensitivity, the operation of individual organs. Criminal law as well as procedural regulations should, in such cases, take into account the best interests of the child, its rights and interests.

It should be noted that Polish legislation has not formulated a uniform and obvious definition of a child. The dictionary of the Polish language indicates that it is "*man from birth to adolescence*"[132]. In turn, in the Act of June 6, 1997, the Penal Code, the legislator regulated that "*a juvenile is a perpetrator who at the time of committing the prohibited act was under 21 years old and at the time of adjudication in the first instance was 24 years old*"[133]. However, first of all, one should bear in mind Art. 72 of the Constitution of the Republic of Poland, which reads: "*The Republic of Poland shall ensure the protection of children's rights*"[134]. Therefore, it is worth paying attention to both small, incapable of perceiving reality in a proper way, who have to face the severity and complexity of the criminal process, so completely different from the world of fairy tales, good characters and role models, but also people in their teenage years and in the so-called growth and development phase. They also, despite a relative transition of cognitive development, may experience ignorance and lack of understanding of regulations, fears or a sense of loneliness.

A child can play three roles in the criminal procedure – be a witness of an event, be accused of committing a prohibited act or become its victim. In many cases, the child's statutory representative acts for the child - "*if the injured party is a minor (...), his/her rights are exercised by the statutory representative (...)*"[135] (Article 51 § 2 of the Code of Criminal Procedure) and "*if the accused is a minor (...), his/her representative statutory (...) may take any procedural steps in favor of him, and above all, lodge appeals, submit motions and appoint a defense lawyer*"[136] (Article 76 of the Code of Criminal Procedure). However, some cases require his direct participation in the trial.

A child as a witness in a criminal trial

According to Art. 177 of the Act of June 6, 1997, the Code of Criminal Procedure, any person summoned by a procedural authority in this capacity is a witness. The legislator did not exclude the possibility of interrogating minors for circumstances constituting features

132 Dictionary of the Polish language, PWN, https://sjp.pwn.pl/slowniki/dziecko.html (access: June 26, 2023).

133 Act of June 6, 1997. Penal Code, Journal of Laws 2022.1138, i.e. of 2022.05.30

134 Constitution of the Republic of Poland of April 2, 1997, Journal of Laws 1997.78.483 of 1997.07.16

135 Act of June 6, 1997 Code of Criminal Procedure, Journal of Laws 2022.1375, i.e. of 2022.06.30

136 Act of June 6, 1997 Code of Criminal Procedure, Journal of Laws 2022.1375, i.e. of 2022.06.30

of a criminal event. It should be emphasized that the interrogation of witnesses, regardless of their age, should first of all enable them to express themselves freely. Then the witness presents everything that is known to him in the case and seems to be important to him. Pursuant to the judgment of the Court of Appeal in Kraków of March 27, 2018 in the case at reference number II AKa 162/17, "*freedom of expression within the meaning of Art. 171 § 7 k.p.k. it means the lack of coercion in the sphere of the will of man, as well as the lack of disturbance of his consciousness. It is the possibility for the interrogated person to decide, in accordance with his own will, about the content of his statement, when no external factor hinders the formulation of this statement. Lack of freedom of expression occurs when, during the interrogation, there are conditions that causethat when formulating his statement, the interrogated person takes into account other circumstances accompanying the interrogation, and thus the evidence statement is not only an expression of his will, because it is hampered by these circumstances or he is in a state in which he cannot control his will*"[137]. Therefore, it is crucial that the interview is accompanied by appropriate conditions. Providing them seems to be extremely important, but also extremely difficult when taking testimonies from children. The same applies, of course, to the explanations of the suspected and accused minor and the victim of a crime.

It is worth emphasizing that, in criminal cases, a witness has the right to refuse to testify or to refuse to answer a question in criminal cases. The witness should be duly instructed about his rights. However, lawyers handling cases involving children (e.g. representing them or volunteering in foundations dealing with interventions in cases of child abuse) indicate that excessive formalism and quoting rules from articles only terrify children. Therefore, the scope of his powers and the effects of using them should be presented to them in an accessible way, taking into account the level of their mental development and the ability to correctly perceive reality and the consequences of their choices. The Court of Human Rights in its judgment of June 22, 2021 in the case of R.B v. Estonia (ref. 22597/16) stated that *"(...) in practice, it is recognized that when questioning a witness who is a child and advising him of his rights and obligations, his age and degree of maturity should be taken into account"*[138] .

Considering the issue of minor witnesses, it is impossible not to mention Art. 185 b of the Code of Criminal Procedure. It protects the interests of interrogated children and adolescents[139]. So, interrogations in matters for crimes committed with the use of violence or unlawful threat, or in the case of crimes against sexual freedom and decency, or against the family and care of a witness (or victim), who at the time of this procedural act was under

137 Judgment of the Court of Appeal in Kraków of March 27, 2018, II AKa 162/17, https://https-sip-lex-pl.pulpit.uksw.edu.pl/#/jurisprudence/522708271/1/ii-a-ka-162-17-swoboda-wypowiedzi-w-rozumieniu-art-171-7-k-p-k-wyrok-sadu-apelacyjnego-w-krakowie?cm=URELATIONS (access: June 26, 2023).

138 Judgment of the European Court of Human Rights of 22 June 2021, 22597/16, https://https-sip-lex-pl.pulpit.uksw.edu.pl/#/jurisprudence/523282827/1/22597-16-zakaz-nieludzkiego-i-ponizajacego-traktowania-prawo-do-poszanowania-zycia-prywatnego...?cm=URELATIONS (access: June 28, 2023).

139 Dariusz Świecki, Code of Criminal Procedure. Jurisprudence, https://https-sip-lex pl.pulpit.uksw.edu.pl/#/monograph/369509322/412778/swiecki-dariusz-red-kodeks-postepowania-karnego-orzecznictwo?cm=URELATIONS (access: June 28, 2023).

the age of 15, is carried out under a special procedure. First, statements from such a person are taken only when they "*may be relevant to the resolution of the case*"[140] . An expert psychologist is present during the testimony. In addition, the hearing does not take place in a courtroom, as is the case with standard interrogations. These can be appropriately adapted rooms in the court building (so-called friendly interview rooms) or outside the court, e.g. in foundations. Such a procedure serves to reduce the formalism of the interrogation and to create appropriate conditions for the child to testify. This is especially important in cases in which the defendant is a person close to the child, who can influence the child or a person whose presence could affect the child's truthfulness, mental state and cooperation with the authorities. Interviewers should be guided by the objective of preventing double victimisation. As Kamil Federowicz points out, "*after committing a prohibited act, harm may be stimulated over time, or even caused by various factors not directly inherent in the criminal act. An example that perfectly illustrates such cases may be the social and media reaction to the act, manifested, for example, by excessive interest, disclosure of the details of the act, allowing the victim or witness to be identified, contact with the criminal proceedings authorities, their inadequate reaction to the nature of the act and the characteristics of the person participating in the act , participating in procedural activities in which the person must report the act and in which the offender may also participate. The indicated examples define and illustrate the concept of secondary victimization, which is used to define situations in which the victim of a crime suffers another (secondary) harm*"[141]. It can certainly affect the victim, but also a child who witnessed a traumatic, brutal event that leaves a permanent mark on his psyche.

A child as a defendant in a criminal trial

In the first quarter of 2023, the Spokesperson of the Polish Police Commander-in-Chief reported that last year the number of crimes committed by juveniles amounted to 18,505. The reasons for this may be many - from growing up in a pathological environment, to lack of role models, mental problems, susceptibility to the influence of demoralizing factors or the fall of authority. This is, of course, a certain simplification, because behind each case there is a number of conditions, experiences, situational systems, which contributed to the juvenile's violation of the law. As a result, the child may become a passive party to the process - the defendant. It is worth emphasizing, however, that the provisions of the Penal Code apply to persons who, at the time of committing the prohibited act, were over 17 years of age. Exceptionally, a minor after turning 15 years of age may be subject to criminal liability if he/she committed one of the acts enumerated in Art. 10 §2 of the Criminal Code, with reservation that the circumstances of the case and the degree of its development, "*its properties and personal conditions speak for it, in particular if the previously applied educational or*

140 Act of June 6, 1997 Code of Criminal Procedure, Journal of Laws 2022.1375, i.e. of 2022.06.30

141 Kamil Federowicz, Interrogation of minors and victims of sexual crimes, https://https-sip-lex-pl.pulpit.uksw.edu.pl/#/monograph/369468621/423812/federowicz-kamil-przesluchanie-maloletnich-i-ofiar-przestepstw-seksualnych?cm=URELATIONS (access: June 28, 2023).

corrective measures turned out to be ineffective"[142]. Otherwise, juveniles breaking the law are under the jurisdiction of the family courts.

With regard to activities undertaken by a juvenile as an accused, it should be noted that on the basis of Art. 76 of the Code of Criminal Procedure, its statutory representative (usually a parent) may take action in its favor in the course of the proceedings. This does not mean that the accused becomes *de facto* "passive" in the sense of exercising the right to defence. Ryszard Stefanski rightly points out that that "*undertaking procedural actions by a statutory representative or actual guardian does not deprive the accused of the possibility of performing these actions independently*"[143]. In addition, if during the proceedings the accused has reached full capacity to legal actions, it is not possible to take further actions on his behalf by his parents or guardian. The purpose of introducing the regulation concerning the performance of activities by the statutory representative of a person charged in criminal proceedings was probably the conviction that a person at such a young age should not be left alone in the face of the complexities of the process. This intention of the legislator is also evidenced by the introduction of the institution of obligatory defence, e.g. in relation to people, who are under 18 years of age. This is important because, following the position of the Polish Supreme Court expressed in the judgment of September 3, 2015, in case no. V KK 249/15, it should be emphasized that "*failure to appoint a public defender for the accused by the court before which the case is pending, if the accused does not have a defender of his choice, despite the fact that the accused was a minor at the time of the act, constitutes a gross violation of article 79 § 1 point 1 of the Code of Criminal Procedure, which is an absolute cause for appeal specified in Art. 439 § 1 point 10 k.p.k.*"[144] .

In the context of a juvenile accused, it is extremely important to pay attention to Art. 54 of the Polish Penal Code. The main directive for imposing punishment on a juvenile is educational function, not the repressive one. If the perpetrator was under the age of 18 at the time the crime was committed, the court may not sentence him to life imprisonment. Moreover, Art. 23 of the Code of Criminal Procedure states that "*in the case of a crime committed to the detriment of a minor, in cooperation with a minor or in circumstances that may indicate the minor's demoralization or of a scandalous impact on him, the court, and in the preparatory proceedings the prosecutor, notifies the family court in order to consider the measures provided for in the provisions on proceedings in juvenile cases and in the Family and Guardianship Code*"[145]. However, this regulation does not mean that the

142 Act of June 6, 1997. Penal Code, Journal of Laws 2022.1138, i.e. of 2022.05.30

143 Ryszard Stefański, Stanisław Zabłocki, Jacek Kosonoga, Jerzy Skorupka, Code of Criminal Procedure. Volume I. Commentary on Art. 1-166, https://https-sip lexpl.pulpit.uksw.edu.pl/#/commentary/587741147/538587/stefanski-ryszard-a-red-zablocki-stanislaw-red-kodeks-postepowania-karnego-tom-i-komentarz-do-art...?cm=URELATIONS (access: June 28, 2023).

144 Judgment of the Supreme Court of September 3, 2015, V KK 249/15, https://https-sip-lex-pl.pulpit.uksw.edu.pl/#/jurisprudence/521878232/1/v-kk-249-15-obligatoryjna-obrona-nieletniego-sprawcy-czynu-karalnego-przeciwko-ktoremu-wszczeto...?cm=URELATIONS (access: June 28, 2023).

145 Act of June 6, 1997 Code of Criminal Procedure, Journal of Laws 2022.1375, i.e. of 2022.06.30

perpetrator at a young age should be treated leniently[146]. An interesting case in this regard is presented by the Court of Appeal in Warsaw in the judgment of January 25, 2021, in the case with reference number II AKa 207/20: "*M.G. was very young, juvenile, at the time of the act (20 years old), but the defendant's previous criminal record, way of life, in an environment that avoided work, using alcohol and other intoxicants, with tendencies to «clean up» in the city, spoke in favor of imposing a penalty 2 years and 6 months, similar to the upper statutory risk under Art. 158 § 1 k.k. (up to 3 years of imprisonment). He had previously been convicted of an offense under Art. 190 § 1 k.k. threatening to burn down a restaurant. The court then imposed a fine on the offender. Less than a year after the first crime and about half a year after the sentence, M.G. brutally beat a homeless man with a minor, clearly indicating that this is a way of punishing people who move to the city. Therefore, there is no doubt that M. G. is a demoralized person with a bad attitude towards people whom he considers less valuable and strangers. The way he acts shows ruthlessness and lack of empathy*"[147]. There can be no situation where juvenile delinquency is marginalised. This is a serious problem which should be the subject of public discussion, researches and an element of the state's crime-fighting policy. Each punishment should be individualized. However, excessive leniency and leniency of the penal measures applied to young offenders may lead to failure to achieve the objectives of the proceedings, and even to the spread of demoralization and recidivism. Criminal law should primarily shape desirable attitudes among citizens, but also protect the system of values adopted in society and ensure that the state opposes violations of the legal order and imposes a fair penalty on behalf of the victims.

A child as a victim in a criminal trial

Undoubtedly, every situation in which a child appears as a victim in a trial should alert the relevant authorities and services, as well as sensitize every citizen to situations that may turn out to have the most far-reaching consequences. It is often pointed out that there is a "conspiracy of silence" in Polish society - relatives, neighbors, teachers and social workers do not react to the harm of a child. There are three types of intervention that can be undertaken for the benefit of an abused child - civil intervention, Blue Card and criminal intervention. It should be emphasized that criminal intervention may result from a social obligation (Article 304 of the Polish Code of Criminal Procedure) or from a legal obligation, regulated in Art. 240 of the Polish Penal Code – in this case, failure to notify the relevant authorities of a committed crime becomes a crime in itself. This applies to crimes involving causing grievous bodily harm, taking advantage of helplessness or insanity, sexual abuse of

146 Judgment of the Court of Appeal in Poznań of November 8, 2022, II AKa 161/20, judgment of the Court of Appeal in Poznań of April 13, 2022, II AKa 151/21 (access: LEX, June 28, 2023).

147 Judgment of the Court of Appeal in Warsaw of January 25, 2021, II AKa 207/20, https://https-sip-lex-pl.pulpit.uksw.edu.pl/#/jurisprudence/523253960/1/ii-a-ka-207-20-przyklad-wymiaru-kary-mlodocianemu-za-pobicie-wyrok-sadu-apelacyjnego-w-warszawie?cm=URELATIONS (accessed: June 28, 2023).

a minor under 15 years of age, and gang rape, incest, rape with particular cruelty, or rape of a person under 15 years of age.

According to Art. 51 § 2 of the Code of Criminal Procedure, a minor victim in the process is represented by his legal representative. However, it should be borne in mind that in accordance with the judgment of the District Court in Szczecin of May 25, 2022 on at reference number act IV Ka 1522/21 "*statutory representative provided for in art. 51 § 2 k.p.k. nor the person under whose care a minor victim remains, may not exercise the rights of the victim in a criminal trial, if the person closest to the legal representative or the person having custody of the minor is accused of committing a crime to the detriment of the minor*"[148]. Thus, a child cannot be represented by the other parent who has been accused of committing an act to its detriment. This principle applies already at the *in rem* stage. The Supreme Court indicated that otherwise it can lead to situations in which one of the parents, entitled to exercise rights as a legal representative, could both neglect the steps necessary to protect the interests of the injured minors and, on the contrary, use the position of their legal representative for the sake of a conflict between the parents[149]. The child may also act by proxy.

The Polish Code of Criminal Procedure and other generally applicable legal acts provide the juvenile victim with several specific rights, e.g. the right to be duly informed[150], the right to be heard (providing a child who is capable of forming certain judgments and views on a given subject and expressing them the opportunity to express his or her opinion on a matter to which they are a party), ensuring a special procedure and rules for the interrogation (similarly as in the case of a minor witness).

Conclusions

It is impossible not to say that any role in the process must be played by the child, it is a difficult and sometimes traumatic experience for him/her. Of course, the most shocking fact is that some juveniles have to face the harm that happened to them, sometimes from the person they trust, the closest one. This experience is certainly not facilitated by the need to go through the procedures and elements of the criminal trial, which, although it provides for a fairly wide scope of protection and counteracting secondary victimization,

148 Judgment of the District Court in Szczecin of May 25, 2022, IV Ka 1522/21, https://https-sip-lex-pl.pulpit.uksw.edu.pl/#/jurisprudence/523445722/1/iv-ka-1522-21-niedopuszczalnosc-reprezentowania-pokrzywdzonego-dziecka-przez-rodzica-osobe-bliska...?cm=URELATIONS (access: June 29, 2023).

149 Decision of the Supreme Court of September 30, 2015, I KZP 8/15, https://https-sip-lex-pl.pulpit.uksw.edu.pl/#/jurisprudence/521891661/1/i-kzp-8-15-stosowanie-zakazu-reprezentacji-maloletnich-pokrzywdzonych-przez-ich-rodzica-rowniez...?cm=URELATIONS (access: June 29, 2023).

150 Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L.2016.132.1 of 2016.05.21, https://https-sip-lex-pl.pulpit.uksw.edu.pl/#/act/68641868/2050297/dyrektywa-2016-800-w-sprawie-gwarancji-procesowych-dla-dzieci-bedacych-podejrzanymi lub...?keyword=dyrektywa%202016~2F800&cm=SFIRST (access: June 29, 2023).

in many cases, due to its characteristics, requires the direct participation of the injured party. Witnessing a criminal event, and then having to be interrogated on this occasion, is also associated with strong emotions and the inevitability of going through the "cold" formalism of the trial. The last of the procedural roles, the role of the defendant, evokes a lot of controversy. On the one hand, we should agree that the criminal process replaces the retaliation of the victim and the society. Therefore, the perpetrator who made the choice himself should be punished. However, it is not always the case that the behavior of a juvenile suspect, and then the defendant, results solely from his will. In this situation, the courts have to weigh many interests and make an extremely difficult decision regarding the imposition of a penalty. There is a chance for self-reflection of the accused and an attempt to change his behaviour, habits and value system.

The provisions on the protection of the rights and interests of the child during the criminal trial are also visible in the legislation of other countries, not only those strictly European. For example, the Turkish Code of Criminal Procedure assumes that a witness, due to his age, may not understand the importance of an oath when giving evidence. The Turkish Code provides for the special importance of a minor's attorney or his legal representative. In the Russian Code of Criminal Procedure, as if in the provisions themselves, the purpose of special regulations in relation to children is indicated, by referring to the "*protection of the rights and legitimate interests*" of juveniles.

In conclusion, the trial authorities should be particularly careful in cases involving children. Each of the persons performing procedural activities or taking part in them must be characterized by empathy, patience, understanding and care for the well-being of the minors.

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5. Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L.2016.132.1 of 2016.05.21
6. Federowicz Kamil, *Interrogation of minors and victims of sexual crimes*
7. Judgment of the Court of Appeal in Kraków of March 27, 2018, II AKa 162/17
8. Judgment of the Court of Appeal in Poznań of April 13, 2022, II AKa 151/21

9. Judgment of the Court of Appeal in Poznań of November 8, 2022, II AKa 161/20
10. Judgment of the Court of Appeal in Warsaw of January 25, 2021, II AKa 207/20
11. Judgment of the District Court in Szczecin of May 25, 2022, IV Ka 1522/21
12. Judgment of the European Court of Human Rights of 22 June 2021, 22597/16
13. Judgment of the Supreme Court of September 3, 2015, V KK 249/15
14. PWN, *Dictionary of the Polish language*
15. Stefański Ryszard, Zabłocki Stanisław, Kosonoga Jacek, Skorupka Jerzy, *Code of Criminal Procedure. Volume I. Commentary on Art. 1-166*
16. Świecki Dariusz, *Code of Criminal Procedure. Jurisprudence*

Anna Dąbkowska

ISLAMIC INVESTMENT FUNDS

Abstract:

The creation of money was a milestone for the development of financial institutions, whose main objective was to link together those who had superfluous funds with those who lacked them. Financial institutions have played an essential role in the economy of any community by collecting cash from customers, rendering fiduciary services, granting loans, and investing this wealth.

As per *S.F. Habib: "The concept of modern Islamic finance emerged in the mid-20th century with Asian and Arab Muslim-majority countries gaining independence from Western colonial powers, searching for their own identity and being inspired by Islamic economics distinct from both the Western capitalist and Eastern socialist models"*.[151] The system of Islamic finance in question is derived from the concepts of Islamic economics, whose fundamentals are underpinned by the profit-and-loss sharing models of *mudarabah* and *musharakah*, or joint ventures as well as partnerships. Therefore, at the beginning of the 20th century, several religious scholars in Egypt, India, Pakistan, Malaysia, and Indonesia got down and started reconsidering the *Shariah* rulings that applied to the financial aspects of a Muslim's life. The scholars tried to find a solution to reconcile the *Shariah* prohibition on interest, or *Riba*, with existing conventional banking.

Law, and more specifically religious law, holds great importance in Muslim culture. Islam presents guiding principles and establishes a core set of rules for all aspects of human life, including the economic aspect. This is referred to as ***"Shariah"***, which literally means the way to a watering place. It symbolizes the path not only leading to *Allah* but also the path shown by *Allah*, the Creator Himself, through His Messenger, *Prophet Mohammed*.[152] The significance of this path lies in its role as a means to achieve unity with God and ascribing religious value to all activities associated with human life. Muslims believe that Shariah is the

151 S.F. Habib, Fundamentals of Islamic Finance and banking, Wiley 2018, O'Reilly 2018.

152 B. Kettel, Introduction to Islamic Banking and Finance, John Wiley & Son 2011, p. 33, https://www.proquest.com/docview/2131396160/bookReader?accountid=26466&ppg=33 access: 9.07.2023).

key to emancipation from subjection to others because there is none greater than *Allah*.[153]

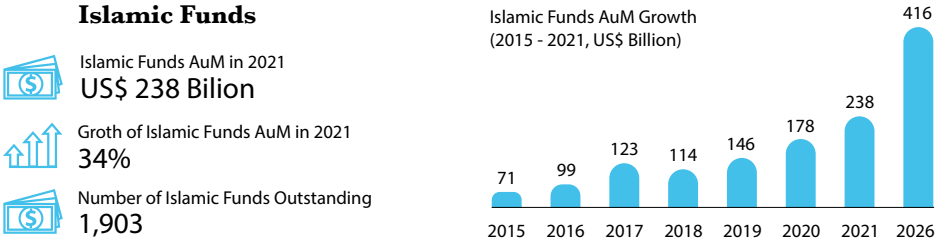
The presenting article dwells on Shariah-complaint Investment Funds. It aims to explain the structure of the financial institutions as well as to describe the most vital features which differ from the conventional, well-known Western solutions. As the main approach, in the article there has been used a legal comparative method.

Key words: Islamic Investmen Funds, Ijara, Murabaha, Musharakah, Funds, Shariah, Ethical Investment

Overview

The Islamic funds industry, which, according to *Islamic Finance Development Report 2022*, is the third largest sector of Islamic Financial Market, experienced impressive growth of 34% in 2021, reaching a total value of USD 238 billion in assets under management.[154] Following this report Islamic Funds' assets are projected to increase from USD 238 billion in 2021 to USD 416 billion in 2026. In 2021 the total number of Islamic funds outstanding was 1, 903.[155]

However, compared to the banking and Sukuk[156] sectors, it is worth noticing that the presence of Islamic funds is still not as widespread. In fact, a significant 81% of the total global Islamic funds can be attributed to just three countries: Iran, Saudi Arabia, and Malaysia.[157] The largest asset classes within the industry were money market and equity, although exchange traded funds gained popularity and began to emerge in various countries.



153 K. Sadowa, A. Kuriata, Rozwój kultury prawnej islamu – wprowadzenie do tematyki, p. 211, http://www.repozytorium.uni.wroc.pl/Content/65438/013_Sadowa_K_Kuriata_A_Rozwoj_kultury_prawnej_islamu_wprowadzenie_do_tematyki.pdf (access: 9.07.2023).

154 ICD, Refinity Islamic Finance Development Report 2022. Embracing change, p. 6, https://icd-ps.org/uploads/files/ICD%20Refinitiv%20ifdi-report-20221669878247_1582.pdf (access: 9.07.2023).

155 See: Figure 1.1.

156 To read more about sukuk, please refer to section 3.2, point d) in the current Chapter.

157 See: Figure 1.1.

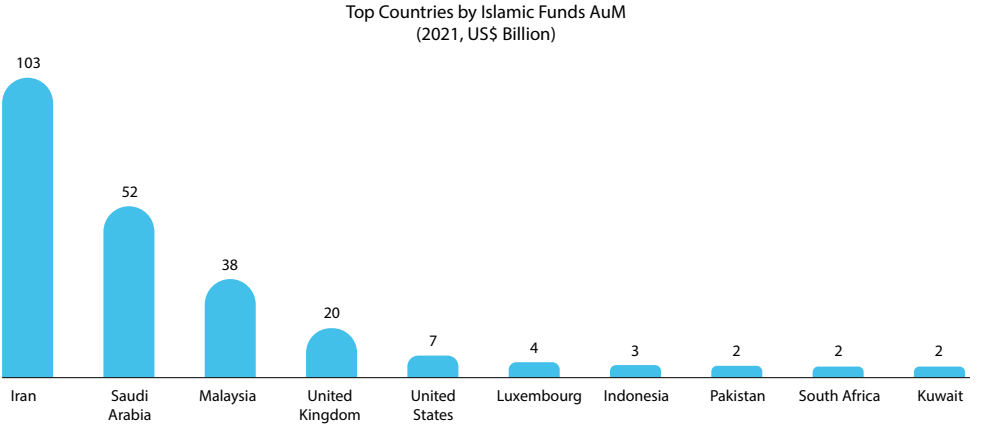


Figure 1.1: Islamic Funds data
source: ICD, Refinity Islamic Finance Development Report 2022. Embracing change, p. 50, https://icd-ps.org/uploads/files/ICD%20Refinitiv%20ifdi-report-20221669878247_1582.pdf (access: 9.07.2023).

Similar to Sukuk, Environmental, Social, and Governance Funds made significant strides in the development of Islamic finance in 2021. A noteworthy milestone was Malaysia's Employee Provident Fund, which holds substantial Islamic funds, announcing its commitment to becoming a sustainable investor. The EPF aims to have a fully ESG-compliant portfolio by 2030 and a climate-neutral portfolio by 2050. This announcement was seen as a positive development within the industry.[158]

Definition

Similar to the West, in order to standardize the banking and financial sector in the Muslim world and ensure compliance with religious principles, specialized international institutions have been established. Their objective is to foster market unity and establish a cohesive framework for the functioning of this sector across the region. One of them is Accounting and Auditing Organization for Islamic Financial Institutions which created a set of *Shariah*-complaint financial accounting standards, among others, for Islamic Investment Funds.[159]

158 ICC, Islamic Finance…, p. 6.

159 The AAOIFI Shariah standards are widely recognized and mandated as regulatory requirements in several countries and jurisdictions, including Bahrain, Jordan, Kyrgyz Republic, Mauritius, Nigeria, Qatar, Qatar International Financial Centre (QIFC), Oman, Pakistan, Sudan, Syria, United Arab Emirates, and Yemen. These standards are not only followed by regulatory institutions but also by various entities such as Shariah consultancies, auditing firms, Takaful/insurance companies, non-banking finance companies, capital market institutions, educational/training institutions, Shariah scholars, and professionals globally. Additionally, some countries have developed their own national standards based on the AAOIFI Shariah standards, while others have recommended them as guidelines in their jurisdictions. Overall, the AAOIFI Shariah standards have a significant impact on the Islamic finance industry worldwide.

The AAOIFI in Financial Accounting Standard No. (14) defined Investment Funds as followed: *Funds are investment vehicles, which are financially independent of the institutions that established them. Funds take the form of equal participating shares/units, which represent the shareholders'/ unit holders' share of the assets and entitlement to profits or losses. […] Because funds are a form of collective investment that continues throughout their terms, the rights and duties of participants are defined and restricted by the common interest since they relate to third parties' rights. As such, in cases where the fund is managed on the basis of agency, the shareholders/unit holders will waive their right to management, redemption or liquidation, except in accordance with the limitations and conditions set out in the statutes and by-laws.*[160]

An investment fund is typically categorized as a "Collective Investment Scheme". The specific terminology and classification of these funds may vary depending on their origin and domicile, including designations such as mutual funds, investment funds, or other alternative names. Providing a better illustration of this, in the United States, investment vehicles are commonly referred to as mutual funds. Conversely, in the United Kingdom and other countries like Malaysia, South Africa, and Indonesia, the term unit trust is more prevalent.[161]

Unit trusts may be described as distinct entities that employ a trust structure separate from that of a mutual fund company. The trustee acts on behalf of the beneficiaries, typically investors, and appoints professional fund managers to oversee the investments on behalf of the beneficiaries. Apart from investing in commercial paper, unit trusts may also allocate funds to other assets, including real estate.[162]

Conversely, according to ISRA[163], Investment Funds that are set up within the legal framework of the European Union are commonly referred to as Undertakings for Collective Investment in Transferable Securities. While UCITS are obliged to adhere to EU regulations, they are also subject to the regulations of the specific country in which they are domiciled. The appeal of UCITS lies in their adherence to stringent regulatory standards and investor protection requirements. As a result, UCITS have become increasingly attractive to international investors and are experiencing growing popularity in various

160 AAOIFI, Financial Accounting Standard No. (14). Investment Funds, p. 525 https://aaoifi.com/themencode-pdf-viewer-sc/?lang=en&tnc_pvfw=ZmlsZT1odHRwczovL2Fhb2lmaS5j-b20vd3AtY29udGVudC91cGxvYWRzLzIwMjMvMDEvRmluYW5jaWFsLUFjY291bnRpbmctU3RhbmRhcmQt-MTQtSW52ZXN0bWVudC1GdW5kcy5wZGYmc2V0dGluZ3M9MDAxMDAwMTExMDAwMDAxMTEwMCZsYW-5nPWVuLVVT#page=&zoom=&pagemode=none (access: 5.07.2023).

161 COMEC, Islamic Fund Management, 2018, p. 12, https://sbb.gov.tr/wp-content/uploads/2019/06/Islamic-und-Management.pdf (access: 9.07.2023).

162 COMEC, Islamic Fund…, p. 12.

163 ISRA, Islamic capital markets: Principles and practices, Kuala Lumpur: International Shari'ah Research Academy for Islamic Finance and Securities Commission Malaysia 2015, http://irep.iium.edu.my/47192/2/Islamic_Capital_Markets-Principles_%26_Practices.pdf (access: 5.07.2023), p. 525.

regions, including Asia, Africa, and Latin America.

On the other hand, Islamic Financial Services Board[164] in January 2009 released *"Guiding Principles on Governance for Islamic Collective Investment Schemes"* under the series number IFSB 6[165]. In the FAQs on abovementioned standards, there has been completely defined the ICIS as: *any financial scheme which, fundamentally meets all the following terms and conditions:*

- *Investors pool their capital contributions in a fund (whether that fund is in a separate legal entity or is held pursuant to a contractual arrangement) by subscribing to units or shares of equal value as claims of investors' ownership to the undivided assets of the fund (which can consist of financial or non-financial assets), and give rise to the right or obligation to share in the profits or losses derived from the assets;*
- *The fund must be established and managed in accordance with Sharī'ah rules and principles.*
- *ICIS is separately and financially accountable from the managing institutions because it has its own asset-and-liabilities profile.*[166]

In that regard, with reference to *S. Archer and R.A.A. Karim, Shariah*-compliant ICIS encompasses equity funds, commodities funds, and Islamic real estate investment trusts.[167] The following section provides more detailed information on variable types of Islamic Funds distinguished by Islamic doctrine as well as International Islamic Organizations.

Types of Islamic Funds[168]

1. Forms of Collective Investment Scheme

The IFSB in FAQs on IFSB 6 recognizes the various possible forms of ICIS as:

- ***open-ended funds,*** *that will redeem their units or shares, whether on a continuous basis or periodically;*
- ***closed-end funds,*** *whether those units or shares are tradable (in regulated or unregulated securities market) or untradable;*
- ***a unit investment trust,*** *whether on a contractual model or that of a European UCITS*

164 Islamic Financial Services Board - the international standard-setting organization aims to promote and strengthen the stability and integrity of the Islamic financial services industry. It achieves this by issuing comprehensive global prudential standards and guiding principles that cover various sectors within the industry. These sectors include banking, capital markets and insurance. The organization's main goal is to establish a solid framework that ensures the soundness and credibility of Islamic financial services globally.

165 IFSB, Guiding Principles on Governance for Islamic Collective Investment Schemes, https://www.ifsb.org/published.php (access: 9.07.2023).

166 IFSB, FAQs on IFSB 6, Guiding Principles on Governance for Islamic Collective Investment Schemes, p. 1, https://www.ifsb.org/published_faq.php (access: 9.07.2023).

167 S. Archer and R.A.A. Karim, Islamic Capital Markets and Products: Managing Capital and Liquidity Requirements under Basel III, Wiley 2017, p. 71, https://ebookcentral.proquest.com/lib/unilu-ebooks/reader.action?docID=5108552&ppg=87 (access: 5.07.2023).

168 The following section discusses only selected types of investment funds.

model;

- ***an individual fund,*** *or an umbrella fund that comprises various sub-funds; or*
- ***a profit-sharing investment account*** *(whether restricted or unrestricted), which is* pooled in the form of a CIS and whereby each of the investment account holders (IAH) participate equally in income (whether profit or loss) and is generally governed by the same terms and conditions. [169]

However, the IFSB indicated unambiguously that from the scope of the ICIS shall be excluded respectively:

- *funds that are not pooled in the form of ICIS;*
- *funds established by Islamic insurance/Takāful operators (if they are attached to any Islamic insurance/Takāful policy such as retirement or education plans that are irredeemable until a certain period of maturity), as they constitute a different segment of the Islamic financial services industry and will be addressed by the IFSB in specific standards for Islamic insurance/ Takāful operators;*
- *pension funds, as they are arguably a different species from ordinary CIS; and*
- *investment accounts that are not divided into units or shares.170*

2.Types of Funds Distinguished by Investment Portfolio

A. Islamic Equity Fund

According to *F. Karbani*, Equity Funds are one of the most popular type of funds and represents around 51 % of total *Shariah*-compliant Funds.[171] Mostly their amounts are invested in the joint stock companies' shares as well as equity-related instruments.[172]

Instead of investing directly in the company, investors who participate in investment funds share the market risk associated with the performance of a diversified portfolio of stocks across different sectors. This risk is distributed among the unit holders of the funds, spreading the potential impact of market fluctuations across a larger pool of investors. By pooling their investments together, unit holders collectively bear the risk and benefit from the overall performance of the portfolio, rather than being exposed to the risk of individual stocks or sectors. This helps to diversify and mitigate the impact of any one stock or sector

169 IFSB, FAQs …, p. 2.

170 IFSB, FAQs…, p. 2.

171 F. Karbani, Mastering Islamic Finance, Pearson Education Limited 2015, O'Reilly 2015 9.07.2023).

172 M.Y. Wanjala, S.J. Chibololo, H.Y. Akasi, I.R. Omukaba, Islamic Investment Funds, International Journal of Thesis Projects and Dissertations 2022, Vol. 10, No. 1, p. 23, https://www.researchpublish.com/upload/book/ISLAMIC%20INVESTMENT-07022022-4.pdf (access: 9.07.2023).

underperforming, providing a more balanced approach to investment risk.

According to *Islamic Management Fund*[173] they can be further divided in two sub-categories:

- **Growth Fund**, which is a type of investment fund that holds a diversified portfolio of stocks with the objective of achieving capital appreciation. These funds primarily focus on investing in growth stocks, which are stocks of companies expected to experience higher-than-average growth rates compared to the overall stock market. Growth stocks can be sourced from both small-cap and large-cap companies.
- **Equity Income Fund**, which is an investment fund that primarily invests in stocks that generate income for unit holders in the form of dividends. These funds aim to provide regular dividend payments to investors by investing in stocks of companies that have a history of distributing dividends.

The primary source of profits in investment funds is typically generated through capital gains, which occur when the fund purchases shares and sells them at a higher price. Additionally, profits can be earned through dividends distributed by the companies in which the fund invests.

In Islamic funds, strict adherence to *Shariah* principles is followed. If a company's main business activities are deemed unlawful according to *Shariah*, it is not permissible for an Islamic fund to purchase, hold, or sell its shares. This restriction is in place to avoid direct involvement in activities that are prohibited according to Islamic principles. The objective is to ensure that the investments made by the fund align with *Shariah* guidelines and ethical standards. As a result, criteria for assessing Shariah compliance have become well-established and widely accepted, leading to the development of major stock exchange indices consisting of equities meeting the Shariah criteria, such as the Dow Jones Islamic Market Index and the FTSE Shariah Global Equity Index.[174] By utilizing these indices, investors and fund managers can access a universe of stocks that have undergone rigorous screening to ensure their compliance with Sharia principles. This helps facilitate the investment process for those seeking Sharia-compliant investment opportunities and contributes to the growth and development of the Islamic finance industry.[175]

F. Karbani stressed that one aspect of determining *Shariah* compliance is the industry

173 COMEC, Islamic Fund…, p. 17.

174 M.Y. Wanjala, S.J. Chibololo, H.Y. Akasi, I.R. Omukaba, Islamic Investment…, p. 23.

175 F. Karbani, Mastering Islamic Finance, Pearson Education Limited 2015, O'Reilly 2015

screen, which evaluates the nature of the company's business activities. Companies involved in industries prohibited by *Shariah*, such as alcohol, pork-related products, gambling, and pornography, are not eligible for *Shariah*-compliant investments. For instance, the Dow Jones Islamic Market Index excludes companies operating in sectors like alcohol, pork-related products, conventional financial services, entertainment, tobacco, weapons, and defense.

Moreover, the other aspect is the financial screen. *F. Karbani* explained that in the current investment landscape, it is challenging to find companies that are fully *Shariah*-compliant in all aspects. While some companies may operate in *Shariah*-compliant industries, the majority will have some involvement in interest-based transactions, such as interest-based borrowings or earning interest on funds held in conventional bank accounts. Striving for complete compliance, Islamic funds aim to minimize such involvement in interest-based activities and adopt alternative financial arrangements that adhere to *Shariah* principles.[176] That is why the main *Shariah* scholars allow investment in equities with these "impurities" only when they are below the certain thresholds.

B. Commodity Fund

According to the *Islamic Finance and Wealth Management Report 2021*, Commodity Funds represented approximately 23.2% of the Islamic Funds Universe in 2021.[177] Islamic commodities funds, also known as *Shariah*-compliant commodities funds, are investment funds that adhere to Islamic principles in their investment strategies and operations whit a focus on halal commodities. These funds include commodities such as gold, silver, agricultural products, and other natural resources that meet the ethical and legal requirements of *Shariah*.

Islamic commodities funds strictly follow the guidelines established by *Shariah* law, which prohibits certain activities such as speculation, interest-based transactions, and investments in non-compliant industries. For instance, the price of the underlying commodity must be clearly described and communicated to all parties involved in the transaction.[178]

In addition to the general principles of *Shariah* compliance, Islamic commodities funds also adhere to specific guidelines related to the trading and ownership of commodities. They may avoid certain types of *futures* contracts or *options* that involve excessive uncertainty *(Gharar)* or gambling-like elements *(Maysir)*. Ensuring compliance with these rules is vital for maintaining the fund's *Shariah* compliance status.

In that regard, *M.Y. Wanjala, S.J. Chibololo, H.Y. Akasi, I.R. Omukaba* in *Islamic Investment*

176 F. Karbani, Mastering Islamic Finance, Pearson Education Limited 2015, O'Reiily 2015

177 Alpen Capital and Alpen Asset Advosors, Islamic Finance and Wealth Management Report 2021, p. 33, https://argaamplus.s3.amazonaws.com/86f171a0-dcdc-4a26-b7f1-35345c16f250.pdf (access: 9.07.2023).

178 S. Archer and R.A.A. Karim, Islamic Capital…, p. 75.

Funds[179] illustrated this correlation as follows:

- Ownership requirement: The seller must own the commodity at the time of sale. Short selling, where a person sells a commodity before actually owning it, is not permissible in *Shariah.*
- Prohibition of forward sales: Generally, forward sales are not allowed in *Shariah*, except in specific cases such as *salaam* (prepaid sale) and *istisna* (manufacturing contract). These exceptions have specific conditions and must be executed in accordance with *Shariah* guidelines.
- Compliance with halal criteria: The commodities being traded must be *halal*, meaning they must be permissible according to Islamic principles. Dealing in prohibited items such as alcohol, pork, or other forbidden materials is not allowed.
- Possession requirement: The seller must have physical or constructive possession of the commodity they intend to sell. This means that the seller should have ownership or control over the commodity, including the transfer of risk to the purchaser.
- Fixed and known price: The price of the commodity must be fixed and known to both parties at the time of the transaction. Uncertainty in the price or linking the price to uncertain events renders the sale invalid in *Shariah*.

Islamic commodities funds offer an investment option for individuals and institutions who wish to align their investments with Islamic principles while participating in the commodities market. These funds strive to provide investors with exposure to the potential returns and diversification benefits of commodities, all while adhering to the ethical and religious requirements of Islamic finance.

C. Money Market Fund

Islamic money market funds are investment funds that operate in accordance with Shariah principles and prioritize short-term, low-risk investment opportunities in the money market. The money market encompasses highly liquid financial instruments with short maturities, including Treasury bills, commercial papers, and certificates of deposit.180

The objective of Islamic money market funds is to offer investors a *halal* and secure investment option for their short-term liquidity requirements while adhering to the principles of Islamic finance. These funds invest in *Shariah*-compliant money market instruments and

179 M.Y. Wanjala, S.J. Chibololo, H.Y. Akasi, I.R. Omukaba, Islamic Investment…, p. 25.

180 A. Omar, M. Abduh and R. Sukmana, Fundamentals…, p. 150, https://ebookcentral.proquest.com/lib/unilu-ebooks/reader.action?docID=1129728&ppg=157 (access: 9.07.2023).

implement investment strategies that align with *Shariah* guidelines.

Key characteristics of Islamic money market funds include:

- *Shariah* compliance: The fund's investments and operations are in line with the principles of Islamic finance, avoiding interest-based transactions *(riba)* and prohibited activities.
- Short-term investments: Islamic money market funds primarily invest in short-term, low-risk instruments with high liquidity and short maturities, ensuring preservation of capital and easy access to funds.181
- Diversification: Funds diversify their holdings by investing in a range of money market instruments issued by reputable entities to mitigate risk and enhance liquidity.182 This type of funds in general have lower risk than Islamic equity and Sukuk funds.183
- Stable returns: The primary objective of Islamic money market funds is to provide stable and competitive returns in line with prevailing money market rates.184

Islamic money market funds serve as an alternative for investors seeking short-term investment options that adhere to *Shariah* principles. These funds offer liquidity, capital preservation, and a halal investment avenue for individuals, corporations, and institutions with surplus funds in the short term. They provide an opportunity to invest in a manner that is in line with Islamic principles while also offering the benefits of liquidity and capital protection.

D. Sukuk or Fixed-Income Fund

Sukuk funds are specifically designed for the Islamic Financial Market and invest in Islamic fixed-income securities, namely Sukuk.

Sukuk, known also as Islamic bonds, are financial instruments that adhere to the principles of Islamic finance. They represent ownership interests in underlying assets or projects and are structured to avoid interest-based *(riba)* transactions prohibited in Islamic finance.[185]

In the publication Fundamentals of *Isamic Money and Capital Market* there has been

181 A. Omar, M. Abduh and R. Sukmana, Fundamentals of…, p. 150.

182 COMEC, Islamic Fund…, p. 18.

183 N. Kamso, Investing in…, p. 96.

184 COMEC, Islamic Fund…, p. 18.

185 P. Zolfaghari, An Introduction to Islamic Securities (Sukuk), p. 5, https://www.jur.uu.se/digitalAssets/563/c_563862-l_3-k_wps2017-2.pdf (access: 9.07.2023).

explained that Sukuk may be categorized into several types basing on the Sukuk issuer.[186] So that the Authors of abovementioned publication distinguished as follow: *"[…] government sukuk, issued by the government, municipal sukuk issued by the municipalities, and corporate sukuk issued by the corporations. Other than based on the issuer, sukuk funds can also be based on the maturity of the sukuk such as short, intermediate, and long term. Moreover, it can be also based on whether it is issued domestically or if it is foreign sukuk".*[187]

Sukuk funds offer investors a *Shariah*-compliant investment option that aligns with their ethical and religious beliefs. These funds provide exposure to the growing sukuk market, offering opportunities for income generation and potential capital growth. Investors can participate in the Sukuk market through sukuk funds, benefitting from professional management, diversification, and adherence to *Shariah* principles.

E. Islamic Hybrid Funds

Islamic hybrid funds, also known as mixed funds, are a specific type of Islamic mutual funds that combine investments in sukuk, Islamic stock, and Islamic money-market instruments.[188] The portfolio of these funds is composed of varying proportions of subscriptions allocated to different types of investments, such as equities, leasing, and commodities.[189] In the article *"Islamic Investment Funds"*, Authors explained as follows: *In this case if the tangible assets of the Fund are more than 51% while the liquidity and debts are less than 50% the units of the fund may be negotiable. However, if the proportion of liquidity and debts exceeds 50%, its units cannot be traded according to the majority of the contemporary scholars. In this case the Fund must be a closed-end Fund.*[190]

Moreover, mixed mutual funds are investment vehicles that allocate their portfolios across both equity and debt securities, without including specific fixed-income or equity mutual funds. The allocation ratio between equity and debt securities in a mixed mutual fund determines the risk category and investment period. The specific number of shares held within the mutual fund's portfolio influences these factors.[191] By combining both equity and debt securities, mixed mutual funds offer investors a diversified investment strategy. The allocation between these asset classes can be adjusted based on market conditions,

186 A. Omar, M. Abduh and R. Sukmana, Fundamentals of…, p. 149.

187 A. Omar, M. Abduh and R. Sukmana, Fundamentals of…, p. 149.

188 A. Omar, M. Abduh and R. Sukmana, Fundamentals of…, p. 149.

189 M.Y. Wanjala, S.J. Chibololo, H.Y. Akasi, I.R. Omukaba, Islamic Investment…, p. 26.

190 M.Y. Wanjala, S.J. Chibololo, H.Y. Akasi, I.R. Omukaba, Islamic Investment…, p. 26.

191 E. and E, Aveliasari, Islamic and conventional mutual funds performance by return and risk adjusted performance, Jurnal Akuntansi dan Keuangan Islam 2023, Vol. 11, No. 1, p. 83, https://doi.org/10.35836/jakis.v11i1.403 (access: 9.07.2023).

investment goals, and risk tolerance. The ratio of equity to debt securities will determine the overall risk profile of the fund, with a higher allocation to equities typically associated with higher risk and potential returns, and a higher allocation to debt securities generally associated with lower risk and more stable income.

The specific number of shares held in the mutual fund's portfolio reflects the individual holdings of the fund and contributes to the overall performance and composition of the fund. This number can change as the fund manager makes investment decisions and adjusts the portfolio based on market trends and investment objectives.

It's important for investors to carefully consider their investment goals, risk tolerance, and investment time horizon when selecting mixed mutual funds, as the allocation between equity and debt securities will impact the fund's performance and potential returns.

F. Islamic Real Estate Investment Trust

Real Estate Investment Trusts were introduced as an investment option to provide diversification in real estate portfolios for investors who may have limited capital. For instance, the Securities Commission of Malaysia defines IREIT as follows: *"an investment vehicle that proposes to invest at least 50% of its total assets in real estate, whether through direct ownership or through a single purpose company whose principal asset comprise real asset."*[192]

REITs offer investors an indirect way to participate in the real estate market without the need to directly acquire properties.[193] Investors who own units of a REIT essentially purchase a stake in a professionally managed portfolio of real estate assets. This portfolio generates income through property rentals, leases, and sales. The generated income is then distributed to the REIT on a regular basis. Investors in the REIT may receive returns in the form of dividends or capital gains over the duration of their asset holding. [194] REITs operate similarly to mutual funds, as they function under a collective investment scheme where multiple investors pool their funds together for various investment purposes.[195]

192 Definition cited in: Z. Zainuddin,N. Nordin, Adressing Governance Issue in Islamic Real Estate Invetsment (I-REITs): a case study for OIC County - Malaysia, IJIB 2016, Vol. 1., No. 1, p. 61, https://core.ac.uk/download/pdf/78487802.pdf (access: 9.07.2023).

193 E.A. Al-Haija, M. Syed, Islamic real estate investment trust: comparative study between emirates Islamic REIT UAE and Al Salam Islamic REIT Malaysia, Journal of Islamic Accounting and Business Research 2021,
Vol. 12, No. 6, p. 904, https://www-emerald-com.proxy.bnl.lu/insight/content/doi/10.1108/JIABR-09-2020-0273/full/pdf?title=islamic-real-estate-investment-trust-comparative-study-between-emirates-islamic-reit-uae-and-al-salam-islamic-reit-malaysia (access: 9.07.2023).

194 A.W. Dusuki, Practice and Prospect of Islamic Real Estate Investment Trusts (I-REITs) in Malaysian Islamic Capital Market, p. 27, https://ibtra.com/pdf/journal/v6_n2_article2.pdf (access: 7.07.2023).

195 E.A. Al-Haija, M. Syed, Islamic real…, p. 904.

The funds collected by REITs are utilized for the acquisition, maintenance, and sale of real estate properties, including commercial buildings, hospitals, shopping malls, apartment complexes, villas, and other commercial or residential assets.[196] By investing in REITs, individuals can gain ownership in a diversified portfolio of high-quality, illiquid properties that may be challenging to access directly.

IREITs, as described by *E.A. Al-Haija* and *M. Syed*, IREITs share a similar purpose and structure to conventional REITs. The key distinction is that IREITs adhere to Shariah principles in their investment activities. This involves a pooled investment by individuals, known as unitholders, who contribute funds for the acquisition of real estate properties. IREITs operate under the governance of *Shariah* principles to ensure compliance with Islamic finance guidelines. *Shariah* boards or committees provide oversight to monitor and validate the *Shariah* compliance of the fund's operations.[197]

3. Some Specific Types of Islamic Funds

A. Ijarah Fund

Ijara Funds are investment funds that operate based on the principles of *Ijara*, which is a form of Islamic lease or rental agreement. These funds provide investors with an opportunity to invest in assets such as real estate, vehicles, or equipment while adhering to *Shariah* principles.[198]

The structure of *Ijara* Funds involves the fund acquiring and owning assets and leasing them to lessees. The lessees pay periodic rental payments to the fund, which generates income for the investors. The fund acts as the lessor, while the lessee benefits from the use of the assets without taking ownership. It is important that the rental is fixed and known to both parties from the date of entering into the contract.[199]

In the context of *Ijara* Funds, the fund retains ownership of the assets while charging rentals to the users or lessees. These rental payments serve as the primary source of income for the fund, which is distributed proportionately among the subscribers or investors. To evidence their ownership and entitlement to a share of the income, each subscriber is issued a certificate.[200]

These certificates, commonly referred to as "Sukuk" in traditional Islamic

196 COMEC, Islamic Fund…, p. 18.

197 E.A. Al-Haija, M. Syed, Islamic real…, p. 905.

198 COMEC, Islamic Fund…, p. 20.

199 N. Kamaso, Investing…, p. 101.

200 M.Y. Wanjala, S.J. Chibololo, H.Y. Akasi, I.R. Omukaba, Islamic Investment…, p. 26.

jurisprudence, represent the subscriber's proportionate ownership in the leased assets and their entitlement to the pro rata share of the income generated by the fund. The use of the term "Sukuk" for these certificates aligns with the recognized terminology in Islamic finance and serves as a means of formalizing the investor's ownership rights.[201]

By issuing sukuk certificates, *Ijara* Funds provide investors with a tangible representation of their ownership and share in the income generated from the leased assets. These certificates ensure transparency, clarity, and legal recognition of the investor's rights within the fund's structure.

In the article *"Islamic Investment Funds"*[202] there has been distinguished basic Shariah principles, typical for the Ijara (lease) arrangements. There may be summarized as follows:

- Usufruct and Timing: The leased assets must provide usufruct, meaning the right to use and derive benefit from the assets. Rental payments should only be charged from the time when the usufruct is transferred to the lessee, indicating when the lessee gains access and begins utilizing the assets.
- Permissible Use: The leased assets must be of a nature that allows for *halal* (permissible) use. This means that the assets should not be involved in activities or purposes that are prohibited by *Shariah* principles.
- Lessor's Responsibilities: The lessor, who owns the assets, is responsible for all the obligations and liabilities associated with asset ownership. This includes maintenance, repairs, insurance, and other responsibilities typically associated with ownership.
- Fixed Rental: The rental amount payable by the lessee must be fixed and agreed upon by the parties at the beginning of the contract. The rental amount should be known and clearly stated in the contract, providing transparency and certainty for both parties.

These principles aim to ensure fairness, clarity, and adherence to *Shariah* principles in *Ijara* arrangements. They emphasize the proper use of assets, clear understanding of rental terms, and the transfer of responsibilities from the lessor to the lessee during the lease period. By following these principles, *Ijara* contracts can be structured in a manner that complies with Islamic finance guidelines and promotes transparency and mutual understanding between the parties involved.

201 M.Y. Wanjala, S.J. Chibololo, H.Y. Akasi, I.R. Omukaba, Islamic Investment…, p. 26.

202 M.Y. Wanjala, S.J. Chibololo, H.Y. Akasi, I.R. Omukaba, Islamic Investment…, p. 25.

B. Murabaha Fund

A *Murabaha* fund is an investment fund that operates based on the principle of *Murabaha*, which is a form of Islamic financing. *Murabaha* involves the sale of goods at a cost plus an agreed-upon profit margin, where the buyer knows the cost and the profit markup upfront.[203]

In the context of a *Murabaha* fund, the fund acts as the seller of goods to investors. The fund acquires assets or commodities and then sells them to investors on the basis of deferred payment at an agreed margin of profit added to the cost.

In other words, according to *Islamic Banking & Finance: Principles and Practices*[204], the *Murabaha* fund combines the surplus funds from various investors, which are then used to purchase different commodities, assets, or goods with the intention of reselling them at a markup with deferred payment. The profits in this fund are generated through the markup, which is the difference between the purchase price and the sale price including the profit margin. This difference represents the gross profit. After deducting the fund management fee, the remaining net profit is shared between the fund manager and the investor(s), particularly in the case of *Mudaraba*. The distribution of the investor's profit share is based on their respective shareholding in the fund.

In that regard, it is worth highlighting another issue. The *Murabaha* fund and commodity fund may appear similar, but there are key differences between them. In a commodity fund, goods are sold, and payment is received immediately without any deferred payment. On the other hand, in a *Murabaha* fund, goods are also sold on the spot, but the payment is deferred and received in future installments. Additionally, in a commodity fund, the fund manager is not required to disclose the profit margin and actual cost of the commodities to the customer. In contrast, in a *Murabaha* fund, it is mandatory for the fund manager to disclose the actual cost of the goods and the profit margin to the customer or end-user.[205]

According to *Islamic Banking & Finance: Principles and Practices,* there may be indicated some specific *Shariah* guidelines for the *Murabaha* fund, as follows[206]:

- The goods being sold must be owned by the seller at the time of sale.
- Only *halal* goods are permissible, prohibiting commodities like wines and pork.

203 M.Y. Wanjala, S.J. Chibololo, H.Y. Akasi, I.R. Omukaba, Islamic Investment…, p. 25.

204 Marifa Academy, Islamic…, p. 156.

205 Marifa Academy, Islamic…, p. 156.

206 Marifa Academy, Islamic…, p. 156.

- The price of goods must be fixed and known to the parties.
- The seller must disclose the profit margin to the purchaser.
- Delivery of goods should take place immediately.
- Payment can be deferred or made in installments.
- The certificates of this fund are non-negotiable.

C. Hajj Fund

The *Hajj* Fund, also known as the *Hajj* Savings Scheme or *Hajj* Investment Fund, is a financial program designed to assist Muslims in saving and investing funds specifically for the purpose of performing the *Hajj* pilgrimage.[207] The *Hajj* is one of the five pillars of Islam and is a significant religious obligation for Muslims who are financially and physically capable.

This type of fund entails collecting, managing as well as investing the savings of individuals who wish to undertake a pilgrimage to Mecca. The fund serves as a platform for individuals to save money over a period of time, enabling them to meet the financial requirements associated with performing the *Hajj*.[208]

By participating in the *Hajj* Fund, individuals are able to accumulate the necessary funds gradually and in a structured manner, which helps them avoid financial hardships and ensure a smooth journey for their pilgrimage to Mecca. The *Hajj* Fund serves as a mechanism to support and facilitate individuals in fulfilling their religious obligation of performing the *Hajj* in a financially responsible and organized manner.

D. Waaf Fund

The *Waqf* Fund, also known as the *Waqf* Investment Fund, is a financial vehicle established to manage and invest in waqf assets. *Waqf* is an Islamic endowment or charitable trust where the dedicated assets, such as properties, land, or funds, are set aside for charitable or social purposes in perpetuity.[209]

The *Waqf* Fund operates by pooling and managing these dedicated assets to generate returns and maximize their social impact. The fund's primary objective is to preserve and grow the *waqf* assets while ensuring they are utilized in accordance with the objectives set by

207 COMEC, Islamic Fund…, p. 20.

208 Al Baraka, Haj Investment Scheme, https://www.albaraka.co.za/products/haj-investment-scheme (access: 9.07.2023).

209 COMEC, Islamic Fund…, p. 20.

the *waqf* founder or donor.[210]

4. Structuring a Shariah-Compliant Fund

First of all, creating an Islamic Fund involves additional considerations and requirements compared to establishing a conventional fund. Islamic funds are designed to operate in accordance with *Shariah* principles, which govern the permissible and prohibited activities in Islamic finance. As such, the establishment process involves adhering to specific guidelines and ensuring compliance with Islamic principles.

In that regard, fulfilling the requirements and ensuring compliance with Shariah principles is crucial to gaining investors' confidence in the fund's structure. Islamic investors seek investment opportunities that align with their ethical and religious beliefs, and they place great importance on the *Shariah* compliance of financial products and services.

According to *Islamic Fund Management*[211] brochure, some of the key requirement that make setting up an Islamic fund more intricate are as follows:

- *Shariah* board/advisor: It is a collegial body composed of jurists who are appointed by a public or private institution to ensure compliance with legal and ethical Islamic principles in financial transactions and operations. The board consists of Islamic scholars or jurists who possess expertise in Islamic law *(Shariah)* and its application to various aspects of finance and business. Moreover, the primary objective of a *Shariah* board is to provide guidance and oversight to ensure that the institution's activities, products, and services adhere to *Shariah* principles. This includes assessing the permissibility and compliance of transactions, contracts, investments, and business practices in accordance with Islamic law. The authority and decisions of a *Shariah* board are binding on the institution they serve.[212]
- *Shariah* audit/review: An annual audit or review is an essential practice in Islamic funds to ensure ongoing compliance with *Shariah* principles. This exercise is conducted to assess the fund's activities, investments, and operations, and it can be carried out by either the *Shariah* board/advisor or a recognized and qualified third party. The purpose of the audit or review is to verify and validate the fund's adherence to *Shariah* guidelines and to provide assurance to investors regarding its

210 Islamic Relief Worldwide, What is waqf and how does it work?, https://islamic-relief.org/news/what-is-waqf-and-how-does-it-work/ (access: 9.07.2023).

211 COMEC, Islamic Fund…, p. 20.

212 ALFI, Islamic Funds. Collection of best practices for setting-up and servicing Islamic funds, https://www.yumpu.com/en/document/view/29394768/islamic-funds-collection-of-best-practices-for-setting-up-and-alfi#google_vignette (access: 9.07.2023).

compliance.[213]

- *Shariah*-compliant investment: This type of funds may invest only in *Shariah*-compliant assets as well as portfolios, which went through a screening process.
- *Shariah* screening: It is a process in Islamic finance that evaluates the compliance of financial products and investments with *Shariah* principles. It involves excluding activities that are prohibited in Islam, such as interest-based transactions, gambling, and involvement in prohibited goods or services. *Shariah* screening also considers ethical business practices, financial ratios, and is overseen by a *Shariah* board. Ongoing monitoring ensures continued compliance, helping investors identify *Shariah*-compliant opportunities and maintain the integrity of Islamic finance.[214]
- Purification of income: In Islamic funds it is a process that ensures compliance with *Shariah* principles. It involves identifying and removing income generated from non-compliant activities, such as interest-based transactions or prohibited goods and services. The impure income is calculated as a proportion of the total fund's income and is then donated or disposed of in a way that benefits charitable causes. The remaining purified income, which comes from permissible sources, is distributed to the investors. This purification process maintains the integrity of the fund, aligns with ethical principles, and ensures that investors receive returns that are free from impermissible elements.[215]
- Custody: In Islamic funds it involves ensuring that the assets are held in compliance with *Shariah* principles. This can be achieved by placing the assets in non-interest-bearing accounts or utilizing *Shariah*-compliant repos. The custody arrangements are reviewed by the *Shariah* board to verify their compliance. Transparent documentation is maintained to provide clarity to investors. By adhering to *Shariah* guidelines in custody, Islamic funds maintain the integrity of their assets and offer investors' confidence in the *Shariah* compliance of their investments.[216]

5. Shariah Contracts and Their Significance in Islamic Fund Management

According to *Investment Fund Management* Authors, various *Shariah*-compliant contracts are involved in Islamic fund management.[217] These contracts include:

213 R. Muhammad, Shariah governance for Islamic banking: What can be learnt from Malaysia?, https://journal.uii.ac.id/CIMAE/article/view/11935 (access: 9.07.2023).

214 N.L. Adam, N.A. Bakar, Shariah Screening for Compliance: A survey, https://ir.uitm.edu.my/id/eprint/30362/1/30362.pdf (access: 9.07.2023).

215 A. Omar, M. Abduh, R. Sukmana, Fundamentals of …, p. 143.

216 COMEC, Islamic Fund…, p. 29.

217 COMEC, Islamic Fund…, p. 29.

- *Musharakah* contract: This is a partnership contract established between the unit holders (investors) who contribute capital to the fund and agree to share the profits based on their capital contributions or agreed profit-sharing ratios.[218]
- *Murabaha* contract: This is a cost-plus financing contract where the fund purchases an asset and sells it to the investor at a higher price, including an agreed-upon profit margin. The payment can be made in installments or on a deferred basis.[219]
- *Bay'* contract: This a sale contract occurs between the unit holders and the fund manager, usually through sellers or distributors, and is typically settled in cash. The unit price in a unit trust fund is determined based on the manager's forward selling or buying price at the next valuation point, upon the receipt of a purchase or redemption request. Valuation is conducted at the end of the business day.[220]
- *Wakalah* contract: Under this agency contract, the unit holders appoint the fund manager as their agent to carry out purchase or redemption orders on their behalf. The unit holders act as the principal, the fund manager acts as the agent, and the purpose of the agency is to facilitate unit purchases or redemptions. Additionally, the unit holders may appoint a trustee to act as a custodian for the fund's assets on their behalf.[221]
- *Wadi'ah yad damanah* (safekeeping with guarantee) contract: This contract comes into play when the unit holders deposit their investments with the trustee. The unit holders are the owners of the units, the trustee serves as the custodian, and the assets of the fund, including money and other investments, are held as property by the trustee.[222]

In that regard, these various *Shariah*-compliant contracts establish the legal relationships and obligations between the different parties involved in Islamic fund management, ensuring compliance with *Shariah* principles. They provide a framework for conducting business activities in accordance with Islamic finance guidelines, promoting transparency, fairness, and adherence to ethical standards. By entering into these contracts, the rights and responsibilities of each party are clearly defined, fostering trust and confidence in the management of Islamic funds.

6. Regulatory Issue on Shariah-Compliant Funds

Islamic Fund Management operates within a unique framework that incorporates

218 Marifa Academy, Islamic…, p. 50.
219 Marifa Academy, Islamic…, p. 41.
220 COMEC, Islamic Fund…, p. 29.
221 Marifa Academy, Islamic…, p. 64.
222 COMEC, Islamic Fund…, p. 29.

Shariah principles and adheres to ethical and religious guidelines. While the industry continues to grow, it also faces specific challenges and key issues that require attention.

First of all, regulation of the asset management industry, specifically funds, varies significantly across different jurisdictions in the GCC and the Far East. In comparison to developed markets, regulatory frameworks in these regions are generally weaker. While there have been improvements in the regulatory environment, several jurisdictions still lack adequate regulation. This can expose the industry and investors to unnecessary risks, including reputational risk and the risk of *Shariah* non-compliance. Instances of financial difficulties or accusations of non-compliance with *Shariah* by IFIs could have a significant impact on the nascent Islamic finance industry, potentially undermining its existence.

Insufficient regulation also affects market confidence and hinders industry development. Therefore, further regulation of the fund management industry is crucial to enhance the maturity and growth of this emerging segment of Islamic finance. Clear and enabling regulations, accompanied by strong market supervision, are essential. However, efforts to standardize IFIs are being made by institutions such as the IFSB or AAOIFI.

Secondly, transparency and disclosure are particularly lacking in the Islamic investment industry, as opposed to Islamic banking. However, this lack of regulation and disclosure is not the fault of the Islamic finance industry itself. The rapid growth of these funds has occurred without adequate scrutiny. According to the Authors of *Islamic Investment Funds*[223], some measures should be taken to reduce information asymmetry between Islamic investment funds and investors and enhance their confidence. One key approach is to improve the transparency and disclosure of information related to Islamic investment funds. As institutional investors, Islamic investment funds should adopt an open approach to their investment processes, providing investors with real and accurate information. This transparency allows investors to understand how the funds are managed and provides insight into the potential and actual financial performance of their invested capital.

Moreover, *Islamic Finance Development Report 2022* showed the gap in the human capital in Islamic fund industry.[224] As the industry continues to grow and develop, the demand for qualified professionals in this sector is expected to increase. This differs from the conventional fund management industry, which has access to a global talent pool and is not as susceptible to staffing risks. The ability to attract and retain talented individuals is considered a competitive advantage for institutions operating in Islamic finance. Offering attractive financial incentives, a conducive work environment, and growth opportunities are

223 M.Y. Wanjala, S.J. Chibololo, H.Y. Akasi, I.R. Omukaba, Islamic Investment…, p. 30.

224 ICD, Refinity Islamic…, p. 20.

important factors in retaining qualified staff, who may be tempted to switch jobs for better prospects. The expertise of these professionals is crucial in ensuring that Islamic products can match the standards set by their conventional counterparts.

Conclusions

The implementation of *Shariah* law in the financial sector of Muslim countries has had significant implications. *Shariah*-compliant finance, also known as Islamic finance, operates on the principles of fairness, transparency, and avoidance of interest-based transactions. This system prohibits *riba* and promotes profit-sharing and asset-backed transactions. It aims to align financial activities with Islamic ethical values. The adoption of *Shariah* law in the financial sector has facilitated the growth of Islamic banking and finance, providing Muslims with access to financial services that align with their religious beliefs. It has also led to the development of innovative financial products and institutions.

Islamic investment vehicles such as Sukuk, Islamic mutual funds, and Islamic equity funds, have gained prominence in the global financial sector, leaving a significant impact. These vehicles adhere to the principles of *Shariah* law, which prohibits investments in certain industries such as alcohol, gambling, and conventional financial institutions. The growth of Islamic investment vehicles has diversified the global financial landscape, providing an alternative avenue for ethical and socially responsible investment. It has attracted both Muslim and non-Muslim investors seeking opportunities that align with their values. The issuance of Sukuk, in particular, has mobilized capital for infrastructure projects and government financing in various countries, contributing to economic development.

Furthermore, the impact of Islamic investment vehicles extends beyond Muslim-majority countries, as global financial institutions have established Islamic finance divisions to cater to the increasing demand. This has led to cross-border collaborations and the development of innovative financial products and services. Overall, Islamic investment vehicles have introduced a unique dimension to the global financial sector, fostering greater diversity and promoting ethical and responsible investment practices. Their continued growth and evolution have the potential to contribute to a more sustainable and inclusive global financial system.

However, challenges remain in ensuring consistent interpretation and application of *Shariah* principles, and further efforts are needed to enhance regulation, standardization, and education in this domain. While the implementation of *Shariah* law in the financial sector of Muslim countries has shown progress, there are several challenges that need to be addressed. Firstly, there is a lack of uniformity and consensus among scholars regarding the

interpretation of Shariah principles, leading to inconsistencies in practices across different jurisdictions. Secondly, the complex nature of Islamic financial transactions requires specialized expertise, both from a legal and financial perspective, which is currently limited in many regions. Thirdly, the integration of Islamic finance with the global financial system poses challenges, as conventional financial frameworks often do not fully accommodate *Shariah*-compliant structures. Fourthly, the development of standardized regulatory frameworks for Islamic finance is still in progress, which affects the harmonization of practices and investor confidence. Lastly, educating the public and raising awareness about the principles and benefits of Islamic finance remains a challenge, hindering its wider adoption and understanding.

Therefore, the implementation of *Shariah* law in the financial sector of Muslim countries has sparked debates and discussions regarding its impact and effectiveness. While *Shariah*-compliant finance aims to uphold fairness and transparency, there are differing opinions on whether it fully achieves these objectives. The prohibition of interest-based transactions has prompted the development of alternative financial structures, but there are concerns about the practicality and profitability of such models. Additionally, ensuring consistent interpretation and application of *Shariah* principles across jurisdictions has proven to be a challenge, leading to inconsistencies in practices and regulations. The need for improved regulation, standardization, and education in the Islamic finance sector is acknowledged, but finding a unified approach remains a complex task. Ultimately, the ongoing evolution of *Shariah*-based financial systems requires continued assessment and refinement to address these challenges effectively.

Nevertheless, the implementation of *Shariah* law in the financial sector of Muslim countries has brought about positive transformations. *Shariah*-compliant finance has provided an alternative banking system that aligns with the religious beliefs of Muslims, allowing them to access financial services without compromising their values. This has created a sense of inclusivity and empowerment within the Muslim community. Furthermore, the emphasis on profit-sharing and asset-backed transactions has fostered a more equitable distribution of wealth and encouraged responsible investment practices. The growth of Islamic banking and finance has stimulated economic development in Muslim-majority nations, attracting foreign investment and contributing to job creation. Additionally, the development of innovative financial products and institutions specific to *Shariah* principles has promoted financial diversity and spurred competition within the industry. Overall, despite the challenges, the implementation of *Shariah* law in the financial sector has brought about significant positive changes, paving the way for a more inclusive and ethically-driven financial landscape.

As a result, the future of *Shariah*-compliant finance looks promising, with increasing demand for ethical investment options. Standardization and regulation efforts are expected to strengthen, providing greater consistency and investor confidence. Technological advancements and integration into the global financial system are likely to drive further growth and accessibility in the Islamic finance industry.

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SOWIECCY HISTORYCY PRAWA I PROBLEM REFORM PIOTRA WIELKIEGO. RECENZJA KSIĄŻKI MICHAIŁA A. KISIELJEWA O BORYSIE I. SYROMJATNIKOWIE

Киселев Михаил Александрович, *«Регулярное» государство Петра I в сталинской России: Судьбы историков права в контексте научных и идеологических баталий советского времени*, СПб.: Нестор История, 2020, 432 с.

W 2020 r. nakładem rosyjskiego wydawnictwa "Nestor-Historia", przy współpracy Instytutu Historii i Archeologii Uralskiego Oddziału Rosyjskiej Akademii Nauk[225], została opublikowana monografia rosyjskiego historyka Michaiła Aleksandrowicza Kisieljewa pt. „<<Regularne>> państwo Piotra I w stalinowskiej Rosji. Losy historyków prawa w kontekście naukowych oraz ideologicznych batalii czasów sowieckich"[226]. Książka ta, licząca czterysta trzydzieści dwie strony, składa się ze: wstępu, jedenastu rozdziałów, podsumowania, dwóch załączników, bibliografii, indeksu osobowego oraz spisu źródeł zamieszczonych w książce ilustracji (w tym m.in. zdjęć). Praca jest oparta na licznych materiałach archiwalnych wprowadzonych po raz pierwszy do obiegu naukowego.

Książka dotyczy biografii rosyjskiego i sowieckiego uczonego, historyka państwa i prawa, działacza społecznego i politycznego, Borysa Iwanowicza Syromjatnikowa (ros. Борис Иванович Сыромятников)[227]. Kisieljew skupia się jednak na karierze tego uczonego w sowieckiej Rosji, a głównie, w stalinowskiej Rosji. Punktem kulminacyjnym jego narracji jest omówienie książki Syromjatnikowa pt. „<<Regularne>> państwo Piotra Pierwszego i jego ideologia. Cz. 1"[228], która została opublikowana w 1943 r., i która spotkała się

225 Институт истории и археологии Уральского отделения Российской Академии Наук.

226 М.А. Киселев, *«Регулярное» государство Петра I в сталинской России: Судьбы историков права в контексте научных и идеологических баталий советского времени,* СПб.: Нестор История, 2020.

227 Borys Iwanowicz Syromjatnikow żył w latach 1874 – 1947. Absolwent Wydziału Prawa Uniwersytetu Moskiewskiego.

228 Б.И. Сыромятников, *«Регулярное» государство Петра Первого и его идеология.* Ч. 1. — М.—Л., 1943.

z krytyką części środowiska sowieckich historyków oraz historyków państwa i prawa. Według Syromjatnikowa bowiem Piotr I oparł swoje reformy na absolutystycznych europejskich/zachodnioeuropejskich wzorcach ustrojowych (m.in. niemieckich), próbując zbudować w Rosji policyjną monarchię absolutną. Ta polityka miała mieć charakter antyfeudalny i antyszlachecki, co było przejawem dążeń do modernizacji poprzez „oświeconą przemoc". Problem jednak w tym, że dążenia Piotra I oraz jego ideologia zmian znacznie wyprzedzały panujące w Rosji stosunki społeczne i gospodarcze. Dodatkowo, sama recepcja modelu absolutystycznego, który w części Europy zaczął wschodzić w stadium rozkładu, miała załamać się po śmierci Piotr I. W konsekwencji doprowadzić miało to do tzw. reakcji szlacheckiej. To wszystko sprawiało, że część reform tego władcy nie osiągnęło swoich skutków. Istotne jest to, że Syromjatnikow wskazał, że ideologia w procesie przebudowy państwa może być siłą górującą nad ekonomicznymi i społecznymi założeniami funkcjonowania danej rzeczywistości społeczno-politycznej i państwowej.

Stwierdzenia takie wywołały jednak krytykę ze strony części sowieckiego (stalinowskiego) środowiska historyków i historyków prawa. Zarzucono Syromjatnikowi, że w rzeczywistości przedstawił państwo Piotra I jako państwo ponadklasowe, co było absolutnie sprzeczne z naukami Marksa, Engelsa, Lenina i Stalina. Co ważne, negatywnie odebrano również tezy o zupełnej recepcji modelu absolutnego z Europy. W tym kontekście uznano, że Syromjatnikow błędnie pominął rodzime rozwiązania i warunki.

Ta charakterystyka badań Syromjatnikowa oraz dyskusja o nich w latach 40. XX w. przedstawiona jest na tle rozwoju sowieckiej nauki prawa, a zwłaszcza badań nad historią państwa i prawa. Kisiejew opisuje przy tym innych badaczy z sowieckiej Akademii Nauk, a także relacje panujące pomiędzy Syromjatnikowem a Andriejem Januarewiczem Wyszynskim.

Mimo, że głównym przedmiotem rozważań autora jest kariera Syromjatnikowa w sowieckiej Rosji, to pierwszy rozdział książki dotyczy prac i poglądów tego uczonego przed przewrotem bolszewickim. W tej części pracy interesujące są informacje o działalności Syromjatnikowa w czasie rewolucji lutowej 1917 r. Dzięki obszernym cytatom z artykułów oraz broszur, które w tym czasie napisał i wydał Syromjatnikow, można prześledzić ewolucję intelektualną, polityczną oraz naukową tego badacza. Z jednej strony Syromjatnikow był zwolennikiem ewolucji i budowy w Rosji państwa prawa. Widząc jednak problemy z realizacją takiego modelu ustrojowego w Rosji po 1905 r., zwracał on uwagę, że takie działania reformatorskie powinny być poprzedzone szerokimi procesami edukacyjnymi wśród ludności Rosji. W czasie rewolucji lutowej popierał on Rząd Tymczasowy oraz zdecydowanie krytykował bolszewizm. Co ważne, bolszewizm uważał nie za rezultat przebiegu demokratycznej rewolucji lutowej 1917 r., ale jako produkt carskiego reżimu. Według niego: „samodzierżawne państwo na przestrzeni wielu wieków trzymało lud rosyjski w surowej szkole bezprawia", co spowodowało, że w „oczach ludu rząd jawił się jako zła i wroga siła". Dlatego wśród ludności Rosji miało rozwijać się otwarte nieposzanowanie

każdego prawa i władzy. Oznaczało to więc, że ludność Rosji zaczęła przejawiać postawy anarchistyczne. W związku z tym fakt rewolucji w czasie wojny oraz w warunkach, kiedy stary reżim pozostawił miliony niepiśmiennych mas, uważał za wielką tragedię Rosji, a ją samą jako niegotową do realizacji ustroju socjalistycznego. W warunkach 1917 r. w sposób zdecydowany popierał Rząd Tymczasowy, zachęcał go do prowadzenia bezwzględnej, twardej polityki, a także prowadzenia „wojny do zwycięskiego końca". W tej ostatniej kwestii zakładał on konieczność zwycięstwa rywalizacji Rosji z Niemcami. Sam przewrót bolszewicki Syromjatniow przyjął jako wyraz regresu. Z drugiej strony, wszystko to uznał za konsekwencje polityki caratu, przejawiającej się zapóźnieniem rozwoju społecznego Rosji.

Taka percepcja stosunków w tym państwie przed 1917 r. i w czasie rewolucji 1917 r. stała się jedną z przyczyn akceptacji, lub właściwiej, tolerancji dla rządów bolszewickich, chociaż w pierwszych latach, nie oznaczało to ich poparcia. W tak brutalnej, nowej, porewolucyjnej, ale i skomplikowanej rzeczywistości Syromjatnikow chciał po prostu prowadzić, a właściwie, kontynuować swoją działalność edukacyjno-oświatową. W tym znaczeniu pomagało mu socjologiczne podejście w badaniu procesów ustrojowych w Rosji, gdyż mogło to współistnieć z nowym, ale i obowiązkowym, w bolszewickim podejściem badawczym opartym na marksizmie.

Pozycja Kisieljowa to obowiązkowa lektura dla wszystkich zainteresowanych dziejami badań nad historią państwa i prawa w sowieckiej Rosji, a zwłaszcza w okresie stalinowskim. W tym sensie to również pozycja aktualna, pozwalająca zrozumieć procesy w ramach których politycy, szczególnie w ustrojach autorytarnych oraz totalitarnych, dążą do narzucenia nauce swoich ideologii oraz zadań politycznych i państwowych. W konsekwencji nauka, jako działalność polegająca dążeniu i poszukiwaniu prawdy, staje się działalnością polegającą na realizacji wytycznych polityków. Recenzowana książka jest więc również studium o nauce w państwie totalitarnym.