



Emerging Markets:

A Review of Business and Legal Issues

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Articles:

- How to Become a Citizen-Centric Government by *Branko Žibret, Marko Derča and Nataša Miklič*
- The Principle of Proportionality in Polish Tax Law by *Michalina Aleksandra Duda*
- Legal aspects of political terrorism by *Tomasz Gulla*

Emerging Markets: A Review of Business and Legal Issues

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- Post merger integration program of SEE largest beverage producer (breweries, water, juice and soft drinks)
- Cost management, Productivity improvement program & Reorganization of a large SEE food producer
- S & A optimization program for the milk goods producer
- Restructuring and turn around program with implementation support of the largest regional construction company
- Post merger program for construction material production group
- Strategy development for construction steel frames and insulation board producer and construction operator
- Post merger integration program of engineering and oil drilling
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- Process optimization and productivity increase projects
- Organization and Transformation project for private and public sector
- IT Service Desk designs
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- Market research on natural gas for Slovenia and Croatia, growth strategy;
- Market research study for the Slovenian express market;
- Product proliferation and complexity reduction for a brewery and a distributor of beer, sparkling and still mineral water, soft drinks and syrup for beverage production as well as fruit processing, bottling and wholesale of mineral, spring water, non-alcoholic drinks and fruit juice in Slovenia;
- Market intelligence strategy, organic growth strategy, complexity reduction, product management and sales strategy in Slovenian manufacturing company for caravans and motorhomes

■ **Other references**

- Member of the ATK Government Practice team;
- White paper published within ATK Government Practice "How to Become a Citizen Centric Government";
- "Not for the Faint-Hearted" (article on real estate market in Slovenia published in Slovenian Newspaper "The Slovenia Times");
- Evaluating the Stock of Capital in Slovenia (Research paper in the Bank of Slovenia);
- Shaking Hands between the Japanese and the Slovenians – An Investigation into International Business Negotiations in Business-to-Business Relationship (Masters dissertation);
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“How to Become a Citizen-Centric Government”

AT. Kearney study of public institutions in Eastern Europe

Public institutions in Eastern Europe are beginning to focus on becoming more citizen-centric. Although the road ahead is long, many of these institutions are well on their way—optimizing decision-making processes, promoting change-management procedures, introducing accountability measures and monitoring the outcomes of their policies. The needs of citizens are being placed at the core of state policies as public institutions in Eastern Europe understand that putting their citizens first is among the best ways to cope with the challenges of globalization.

Every day Eastern European governments face the challenge of globalization, from aging populations and increased social needs to climate change. Low birth rates and high unemployment are putting a strain on state budgets, while mobility within the Eastern European region is hindered by national regulations and bureaucracy. As globalization brings progress, it is the obligation of individual states to manage all aspects of globalization for the benefit of their citizens.

Findings in the recent A.T. Kearney Citizen-Centric Government survey reveal that along with the unprecedented changes caused by globalization, one other trend is apparent—the increasing importance of citizens (see sidebar: *About the Study*). Citizens will benefit most from global progress or endure the impact of its adverse effects. Rapid changes demand quick responses from both the private and the public sectors. Future state policies must, therefore, consider the needs of their citizens among their highest priorities.

The Public Sector and Eastern Europe

Our findings suggest that the public sector in Eastern Europe has taken steps toward becoming citizen-centric, but there is still room for improvement compared to the best global performers. Some states—Slovenia for instance—are perfectly positioned to start closing this gap. In fact, the seven characteristics measured in the survey — organizational change,

leadership, performance management, swift operations, customer relationships, culture and sustainability—are valued higher in Eastern Europe than elsewhere in the world (see figure 1). Because democracy, human rights and basic freedoms are hard-won achievements of the post-cold-war era, survey respondents in Eastern Europe tend to value these characteristics more than their Western counterparts. In the West, these are considered basic standards of conduct rather than cherished goals that have yet to be achieved.

Figure 1
Seven characteristics of a citizen-centric government



Source: A.T. Kearney analysis

The legacy of socialism continues the perception of an inefficient public sector. The public sector is still regarded as having different, less optimal organizational principles than the private sector, changes are slow and individual goals and accountability are not high on management agendas. Customers are also regarded as secondary. Procedures and following established processes and policies take priority over meeting citizens' needs. In fact, Eastern Europe is underperforming in six of the seven characteristics of a customer-centric government (see figure 2).

Many of our survey respondents say motivation, respect for diversity and inclusiveness are common goals already present in their organizations. Their average performance actually exceeds the average performance of Western Europe. To a certain extent, a strong organizational culture and resistance to change can be explained by a strong legacy of the socialist past.

About the Study

A.T. Kearney's Citizen-Centric Government survey, a follow-on to our earlier Agile Government study conducted in Canada, Germany, Australia, the United States and New Zealand, was designed to ascertain the level of citizen-centric orientation of governments and public sector institutions in Eastern Europe. Questionnaires were sent to public institutions in Bulgaria, Croatia, the

Czech Republic, Hungary, Poland and Slovenia. Survey respondents represent some 150 institutions, including ministries, government agencies, inspectorates, public schools and universities and municipalities in various sectors, including education, finance, health, environment and economic.

The survey questionnaire focused on seven aspects of citizen-centric

governments—organizational change, leadership, performance management, operations, customer relationships, culture and values and sustainability. More than 280 variables were statistically analyzed to ascertain public sector trends in Eastern Europe. Results were compared to global data on public sector performance and benchmarked against best practices.

In their transition to liberal democracies and market economies. Eastern European countries have used the Internet and communications technology. By taking advantage of these technologies, many Eastern European governments have been able to "leap-frog" their global and Western European counterparts. They have also embraced the principles of sustainable development, although implementation is slow.

Strategies for Eastern Europe

The study reveals strengths and weaknesses in public organizations in Eastern Europe. While the results in some areas are comparable to the global average, there is still a long way to go before all organizations become more customer centric. The following outlines the characteristics of customer-centric governments and how well Eastern European governments perform compared to their Western counterparts. Figure 3 outlines the characteristics and strategies to achieve them.

1. Foster organizational change.

While Eastern European governments understand that organizational changes are necessary to answer the challenges of globalization, many process-oriented public institutions are still incapable of making fast decisions. However, as citizens' demand faster and more personal services, best practices from the private sector are taking hold in the public sector.

Citizen-centric public institutions earmark more resources to respond to new challenges and have more flexible, available financial resources. In addition, the processes of making use of these resources are less complex. In Eastern Europe, for example, best-practice public institutions introduce changes continually in order to increase efficiency and meet the changing needs of customers. All changes are planned in light of the institution's current capabilities. Although these institutions are decidedly more flexible and adaptable, when compared to global best practices, there is still room for improvement as changes could be introduced faster and with a clearer vision of organizational goals. The sectors within these public institutions still do not fully cooperate.

Figure 2
Eastern Europe is underperforming in six of the seven characteristics



Sources: A.T. Kearney Citizen-Centric Government survey; A.T. Kearney analysis
Note: The graph represents average results achieved in regions around the world based on the seven values of a citizen centric government

Figure 3
Strategies to build a customer-centric government

Characteristic	Strategies
Foster organizational change	<ul style="list-style-type: none"> • Use technology and support systems to provide more user-friendly services • Centralize customer data and standardize procedures and forms to reduce bureaucracy • Improve flexibility for quick and efficient decision making • Conduct surveys regularly to gain a better understanding of customers' needs
Cultivate leadership	<ul style="list-style-type: none"> • Respond quickly to changes citizens' demands • Communicate strategies through all levels of the organization to ensure everyone is working toward the same goals • Define responsibilities and accountabilities clearly • Involve more people in cooperative decision making to instill trust in decisions
Establish culture and values	<ul style="list-style-type: none"> • Define strategic organizational values that align with employees' expectations • Use motivational techniques to create an environment that promotes change • Employ team-building approaches to create a knowledge-based organization with shared values
Build customer relationships	<ul style="list-style-type: none"> • Respond quickly to changing customer needs • Employ customer relationship management (CRM) and conduct surveys to improve customer service • Develop customer-oriented products and services
Improve operations	<ul style="list-style-type: none"> • Deploy advanced technologies (e-administration, websites, mobile phones) to broaden communications channels • Standardize IT systems to reduce costs and complexity • Adopt more cost-effective channels (Internet, automated phone systems) to deliver services
Manage performance	<ul style="list-style-type: none"> • Use benchmarks and key performance indicators (KPIs) to measure efficiency and performance of processes • Establish remuneration system to reward top performers • Develop training programs to foster knowledge-based organizations
Support sustainability	<ul style="list-style-type: none"> • Bring together individuals, interest groups and non-government organizations to support sustainability • Promote "green" government by focusing on economic, social and environmental issues • Employ e-services and multi-channel communications to encourage sustainability

Sources: A.T. Kearney Citizen-Centric Government survey; A.T. Kearney analysis

In 2004, the Slovenian government changed the Administrative Procedure Act (article 139) to allow public officials to gather data from other public sources, saving the government €300,000 per year and citizens the time and effort of doing it themselves. In addition, simplifying the process of registering small enterprises saved €10.66 million and abolishing income tax forms saved €22.3 million¹.

2. Cultivate leadership.

Good management is a characteristic of citizen-centric institutions. Leaders provide a company vision, do the necessary long-term planning and monitor results. They employ cooperative leadership styles, constantly searching for new opportunities and viewing the

¹ Report on the performance of the program for reducing administrative challenges for 2007, http://www.mju.go.si/hc/si/novinarsko_sredisce/novica/article/12037/8374/?type=98 (July 2009).

organization as a totality of its needs, demands and opportunities. Mismanagement is the most common reason for failure of new projects.

In well-managed organizations, the overall vision and strategy are clearly defined and communicated as are personal goals for all employees. Cooperative and transparent leadership practices are slowly entering the public sector in some countries. Good leadership is one of the characteristics of "new public management" and a theme of many seminars and other educational events. The Slovenian Ministry of Justice, for example, decided to bring its management practices in line with the requirements of the ISO 9001:2000 standard. It necessitates that products consistently meet customer requirements and that organizations continually work to improve customer satisfaction.

In addition, our study finds that Slovenia and Eastern European countries are most likely to invest in customer service improvement initiatives. Figure 4 outlines all of the initiatives in which countries are more or less likely to invest.

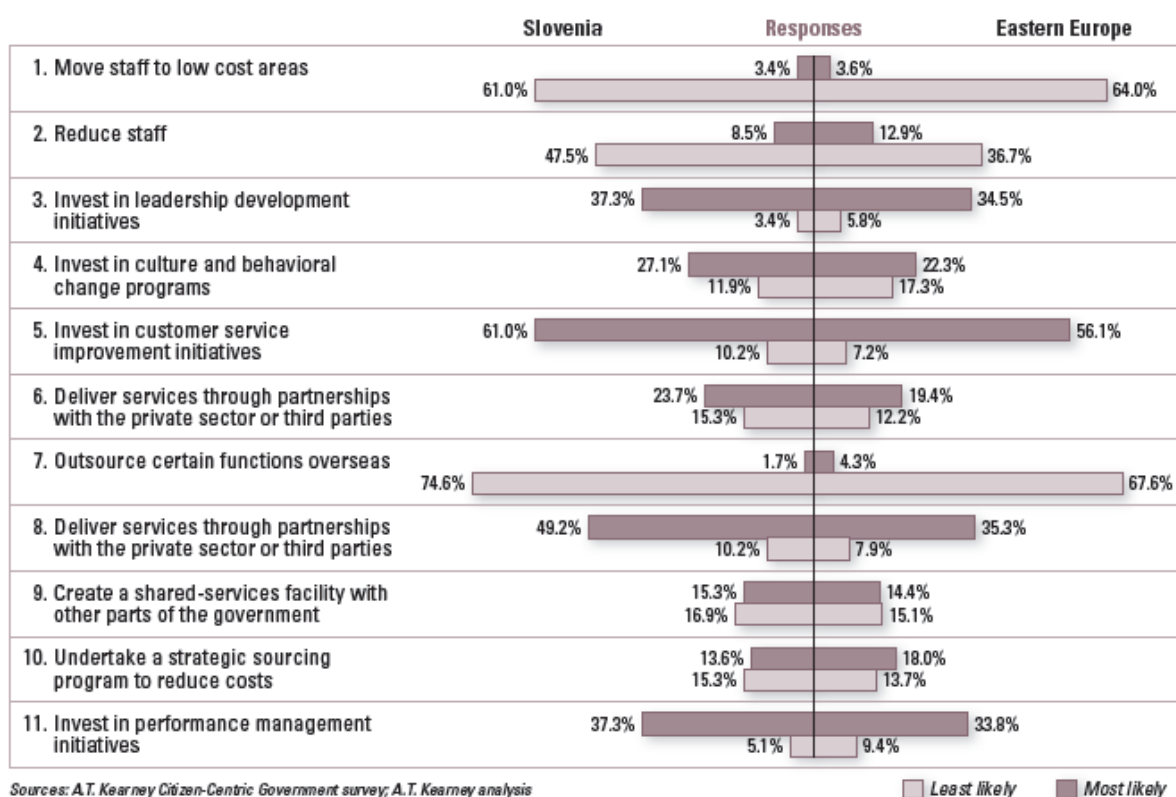
3. Establish culture and values.

Every organization has an inherent culture and value system. The public sector has developed its own set of values, which are evident in its practices, services and products. When organizational values coincide with personal values, it leads to positive attitudes, work satisfaction, loyalty and, consequentially, improved performance.

The principles of value-based management are increasingly being introduced into government human resources divisions, highlighting common values such as flexibility, responsibility, accountability and continuous learning. In a citizen-centric government, additional knowledge and skills are incorporated into the working style. While senior managers dictate the main strategy of the organization, it is the role of middle managers to interpret the strategy and guide the implementation within their areas of responsibility. They connect abstract goals to concrete actions and are responsible for hiring and rewarding employees.

Figure 4

Change initiatives that Eastern European countries are most likely to invest in



Sources: A.T. Kearney Citizen-Centric Government survey; A.T. Kearney analysis

Least likely Most likely

In Eastern Europe, best-practice organizations share common needs and values and also encourage mutual respect among colleagues. However, they still do not fully engage employees or promote a sense of belonging. Many institutions are stuck in an historical pattern that believes it is necessary to improve operations and meet current goals before moving on to more innovative ideas and concepts.

4. Build customer relationships.

Public institutions are becoming more aware of the need to improve customer relationships, using tools such as customer relationship management (CRM) to become more responsive to the needs of clients and delivering better service. As customers become a focal point, meeting their needs leads to business development and innovation.

On a practical level, CRM necessitates more unified and consolidated customer information and databases. Systems must be integrated and mutually compatible as data is available to all who have access to the database.

Public institutions in Eastern Europe tend to develop a more personal, one-to-one relationship with their customers—where customers are placed in the center of policy making and each delivery model adjusts to new policies. Globally, public institutions always walk a fine line between following the organizational rules and adapting them to meet clients' needs. When the difference between customer demands and existing rules looms large, there is a tendency to change the rules.

5. Improve operations.

Globalization has forced public institutions to reduce costs. Business has changed from personal face-to-face communications to electronic as people communicate via e-mails, Internet interfaces and virtual tax assistance. The more progressive the institution, the more it uses Internet technology to conduct business. The trend is now toward increasing interoperability of electronic communication devices from different areas as these save money and also increase customer satisfaction.

Public institutions in Eastern Europe understand that putting their citizens first is among the best ways to cope with the challenges of globalization.

A good example is the Slovenian project of e-government. It offers online information about all aspects of state bureaucracy and gives citizens access to different registries such as the judicial and land registry, insight into personal data, vehicle registration data and others. E-government also enables easier registration of businesses. Although the project is saving Slovenia €870,000 a year, insufficient IT support is a barrier to further development and growth opportunities.

6. Manage performance.

Performance management is another interesting area. In Eastern Europe, work performance is measured at the organizational level and indicators are adjusted as such. In global organizations, performance is measured at the work-group level and based on leading best practices. An interesting trend in best-practice Eastern European public institutions is that success is measured through societal value. Incentives also differ: global organizations offer non-monetary incentives and give high-performers more responsibility, while Eastern European public institutions mainly offer salary increases to their top performers.

7. Support sustainability.

Sustainability is one of the most important aspects of modern and citizen-centric public institutions. Organizations that are considered sustainable often involve the general public in decision-making processes and consider the environmental and social impact of their decisions. Such public institutions preserve the environment, save energy and promote healthy life styles, which have positive effects on the economy.

In Eastern Europe, sustainable development has increasingly become part of business practices in public institutions, and best performers take environmental concerns into consideration at all levels. Among our survey participants, many say they care how decisions and policies affect their local communities in terms of social justice, social exclusion, human rights and social relations. The Slovenian government has established a Council for Sustainable Development whose main task is to coordinate different sectors in achieving economic, social and environmental aspects of sustainability.

The Way Ahead

Governments that strive to be citizen-centric often begin by assessing their current situation from all aspects and gauging their performance against other public institutions. Depending on the gaps, there are various improvement strategies, all mentioned in this paper, that can help governments and other public institutions in their quest to become more citizen

centric. Those that successfully execute these projects will become more agile and better able to meet the ready new and changing demands of their citizens.

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“The Principle of Proportionality in Polish Tax Law”

§ 1. Introduction

Tax law is rightly regarded as being one of the most restrictive and ‘uncomfortable’ branches of law. The public interest dominates in the mutual relations between taxpayers and tax creditors and there is an element of authority in both substantive and adjective tax law. As a justification to such a state of things, the need to ensure optimal level of budgetary receipts is pointed out. It is yet acceptable, both in the doctrine and judicial decisions, that the balance of the budget, which is an element of the principle of rational financial policy in the state, is a value protected by the Constitution because it grants to subjects of public law their capacity to perform statutory and constitutional activities¹.

On the one hand, the ‘uncomfortability’ of tax law is seen in the fact that the state requires from tax debtors to perform tax duties with the highest diligence and accuracy. Yet on the other hand, it makes it admissible to interfere with the right of ownership and other property rights, and sometimes even with the personal rights. Because of the fact that in a democratic state ruled by law the exercise of public power, including the formation of tax duties, shall not lead to the violation of the inherent dignity of a person and the freedoms and rights arising from it, there must exist the principles of the legal supervision of the government’s activities². One of such principles is the principle of proportionality, which is understood as a requirement of a proper relation between the means and purpose. This principle is considered to be one of the fundamental legal institutions which aim is to control and measure the activities of the organs of

¹ See: W. Łączkowski, *Czy budżet państwa jest wartością konstytucyjną podlegającą ochronie Trybunału Konstytucyjnego*, [in:] *Konstytucja, ustroj, system finansowy państwa. Księga pamiątkowa ku czci prof. Natalii Gajl*, ed. T. Dębowska-Romanowska, A. Jankiewicz, Warszawa 1999, p. 285; J. Skórzewska, *Budżet, finanse publiczne jako wartość konstytucyjne*, [in:] *Prawo i Godność. Księga pamiątkowa w 70. rocznicę urodzin Profesora Wojciecha Łączkowskiego*, ed. S. Fundowicz, F. Rymarz, A. Gomułowicz, Lublin 2003, p. 229-240 and judicial decisions cited in the article.

² See: J. Małecki, *Obowiązek podatkowy a godność podatnika*, [in:] *Prawo i Godność. Księga pamiątkowa w 70. rocznicę urodzin Profesora Wojciecha Łączkowskiego*, ed. S. Fundowicz, F. Rymarz, A. Gomułowicz, Lublin 2003, p. 135-143.

public authority. Thus it is called the principle of matching, measurement, adequacy or the prohibition of excessive interference¹.

This paper is to present the influence of the principle of proportionality on the process of creation a general tax duty. The fundamental point of this attempt is that the particular constructions contained in tax regulation should be evaluated separately in context of this principle. For the simple reason that obligation to pay tax, instrumental duties and tax sanctions are the fundamental institutions of tax law, which have a number of distinguishing features, they have been chosen to be analyzed in this paper. Part I discussed the origin and concept of the principle of proportionality. It demonstrates that in the traditional approach the essence of this principle is formed by requirement of usefulness, necessity and prohibition of excessive interference. Part II examines the relation between the constitutional principle of proportionality and the obligation to comply with public duties, including payment of taxes. Part III reviews different opinions and judicial decisions about the admissibility itself and the scope of instrumental duties evaluation within the context of the principle of proportionality. The final part of the paper presents concepts on tax penalty provisions with special attention paid to so-called 'real' or 'repressive' tax sanction. It concluded that real tax sanctions are policy instruments that ought to be introduced and executed in conformity with the constitutional standards concerning the principle of proportionality.

§ 2. The concept and essence of the principle of proportionality

The principle of proportionality derives from German legal system, into which it was introduced at the end of the 19th century by the judicial decisions of the Prussian Supreme Administrative Court. At first it was treated as a principle binding the administrative bodies, and it was not earlier than after World War II when it was acknowledged as a rule of law binding also

¹ J. Zakolska, *Zasada proporcjonalności w orzecznictwie Trybunału Konstytucyjnego*, Warszawa 2008, p. 9.

the organs of the legislative authority¹. At present this principle is in force in legal systems of many states and in public international law. It is also recognized as one of the general principles of European law, and primarily as a principle, which has the greatest influence on the execution of European law and domestic law by the courts of the Member States².

In the traditional approach the essence of the principle of proportionality is formed by three requirements. The first one, is referred to in law doctrine, as a usefulness requirement of the means to the purpose. Pursuant to this regulation the means that limit the freedoms and rights of a person shall be efficient that means really useful in the achievement of the purpose set forth by the legislator. The second requirement is called the requirement of necessity and it means an obligation to apply the smallest limitation, which at the same time must be sufficient for the achievement of the set purpose. The third requirement, which is also referred to as the prohibition of excessive interference, comprises the essence of the principle of proportionality *sensu stricto*. Pursuant to this requirement, it is necessary to maintain the proportionality of a limitation and the purpose of a particular legal regulation³.

As far as Polish legal system is concerned, it is worth emphasizing that under the provisions of constitutional law, which were in force before the Constitution of the Republic of Poland of 2nd April 1997 became effective, the principle of proportionality was applied in the judicial decisions of the Constitutional Tribunal. At first the it was treated as an element of the principle of the public repose confidence in state and law.⁴ It was not earlier than in the verdict of 1996 when the principle was accepted as a separate composite element of a state ruled by

¹ K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę prawa człowieka w Konstytucji RP*, Kraków 1999, p. 140.

² D. Miąsik, *Zasada proporcjonalności w prawie wspólnotowym i jej zastosowanie przez sądy krajowe*, [in:] *Stosowanie prawa Unii Europejskiej przez sądy*, ed. A. Wróbel, Kraków 2005, p. 205-206.

³ See: J. Zakolska, op. cit., p. 17 and following. Comp. A. Walaszek-Pyziół, *Zasada proporcjonalności w orzecznictwie Trybunału Konstytucyjnego*, „Przegląd Ustawodawstwa Gospodarczego” 1995, vol. 1, p. 15-17.

⁴ See: wyrok Trybunału Konstytucyjnego z dnia 26 kwietnia 1995 r., sygn. akt K 11/94, <http://www.trybunal.gov.pl>.

law, and as an element of social justice¹. In the doctrine the necessity of creating indispensable conditions for a greater application of this principle in practice was also called for².

In the Constitution of the Republic of Poland of the 2nd April, 1997 a general clause was contained that was establishing limits, within which the interference of the state with the freedoms and rights of a person, is admissible. The principle of proportionality, which is now in force, stems from this clause. In the light of this provision limitations in the scope of the use of the constitutional freedoms and rights shall be established only by the statute, and only when they are necessary in a democratic state, for its security or public order, or for the protection of natural environment, health and public morals, or freedoms and rights of others³. A formal prerequisite, which is the principle of exclusivity of the statute for the normalization of a legal position of a person, in this case means not only an obligation to issue a legal act of an adequate legal rank, but also an order that it shall completely regulate all the questions that are of great importance from the perspective of the limitation upon the freedoms and rights that ensured by the Constitution⁴. The material prerequisites, in the form of a comprehensive list of the values justifying the interference of the state, convey, on the other hand, the concept of public interest as a general indicator of the limits of the freedoms and rights of a person⁵. But it seems that in this case the concept of public interest should not only be identified with state interest but rather with society interest as a whole. It should be also emphasized that in the mentioned provision there is also a principle, pursuant to which limitations upon the use of the constitutional freedoms and rights shall not violate their essence, which means that they cannot prevent individuals from exercising the aforementioned freedoms and rights.

¹ K. Wojtyczek, op. cit., p. 149.

² See: D. Kijowski, *Zasada adekwatności w prawie administracyjnym*, „Państwo i Prawo” 1990, vol. 4, p. 59-68.

³ Art. 31 ust. 3 Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Dz. U. z 1997 Nr 78, poz. 483 ze zm., cited as the Constitution of the Republic of Poland.

⁴ See: J. Zakolska, op. cit., p. 118.

⁵ L. Garlicki, *Przesłanki ograniczania konstytucyjnych praw i wolności (na tle orzecznictwa Trybunału Konstytucyjnego)*, „Państwo i Prawo” 2001, vol. 10, p. 12-13.

§ 3. The principle of proportionality in the process of creation of the main tax duty (duty to pay a tax)

Moving from the field of constitutional law to finance law one must admit that there might be some difficulty in transfer of the settlements concerning the principle of proportionality to tax law and the evaluation of particular constructions contained in tax regulations in the context of this principle. As it was mentioned before 'uncomfortability' of tax law is caused, on the one hand, by the necessity of performing tax duties, and on the other, by the permissibility of the interference of authorized bodies with the sphere of freedoms and rights of the subjects to tax law, which is a consequence of the mandatory form of a tax. As a result the analysis of how the principle of proportionality functions in tax law requires a separate consideration of this problem concerning: the duty to bear mandatory taxation, the instrumental tax duties, and specified legal institutions, which aim at forcing a taxpayer to fulfill those duties.

It is said that the essence of a tax duty lies in the fact that there is always an obligation of a particular behavior connected with a tax¹. It is general in character and means the necessity of bearing taxation as a consequence of realization of tax matter of fact (prawnopodatkowy stan faktyczny) determined in the tax bills². The fact that imposition of such a duty means interference with the property rights of a given subject, is not open to any doubts. The duty of tax payment not only limits a taxpayer's ability to be in funds, but it may also lead to the shrinkage of his assets by the loss of right of ownership and other property rights. In the course of exercising the financial power³, which among other things, is performed by the right to impose and collect taxes, a conflict of values, which are protected by the Constitution such as: freedom, ownership, the right of succession or freedom to undertake economic activity, with the right of a

¹ H. Dzwonkowski, *Obowiązek podatkowy a zobowiązanie podatkowe*, „Państwo i Prawo” 1999, vol. 2, p. 25.

² Art. 4 ustawy z dnia 29 sierpnia 1997 r. Ordynacja podatkowa, tekst jedn. Dz. U. z 2005 r. Nr 8, poz. 60 ze zm.

³ See: T. Dębowska-Romanowska, *Istota i treść władztwa finansowego – samowola finansowa (samowola podatkowa), restrykcje finansowe – zagadnienia pojęciowe*, [in:] *Konstytucja, ustroj, system finansowy państwa. Księga pamiątkowa ku czci prof. Natalii Gajl*, ed. T. Dębowska-Romanowska, A. Jankowicz, Warszawa 1999, p. 345-360.

public body to levy taxes and claim cash benefits that are used to finance common needs, is bound to emerge. Bearing in mind the above arguments, one may ask a question concerning the role of the principle of proportionality in finding the solution to the mentioned conflict of values.

In the judicial decisions of the Constitutional Tribunal an opinion that the duty of bearing public duties and responsibilities, including taxes, is not a limitation, to which applies the general constitutional clause establishing limits, within which the interference of the state with the freedoms and rights of a person is admissible, has been petrified. It is because by definition, public duties and responsibilities constitute a limitation upon the freedoms and rights of a person¹. In the opinion of the Tribunal, the fact that a legal regulation concerning tax duties is based on the Constitution means that its admissibility shall not be analyzed from the perspective of limitations upon the use of the constitutional freedoms and rights, but, on the one hand, from the perspective of relations between constitutional duties, and protection of the constitutional freedoms and rights on the other². According to the Tribunal, the provisions referring to the freedoms and rights of a person, express a creditor aspect for those subject to state authority in the same way as the provision, in compliance with which, every citizen is obliged to bear public burden and charges, expresses the principle of 'the constitutional debt'³. Because these are the two aspects of the constitutional status of a person to the state, the provisions that in a general way regulate relationships between the state and a person, including regulations of the principle of proportionality, shall be applicable to both of them⁴.

So far, in financial and legal publications, the problem of the role of the principle of proportionality in the process of creation of tax law, has not been much discussed about. However, it is emphasized that it is an important issue not only from the theoretical point of

¹ See: wyrok Trybunału Konstytucyjnego z dnia 11 grudnia 2001 r., sygn. akt SK 16/00; wyrok Trybunału Konstytucyjnego z dnia 22 maja 2002 r., sygn. akt K 6/02; wyrok Trybunału Konstytucyjnego z dnia 22 maja 2007 r., sygn. akt SK 36/06, <http://www.trybunal.gov.pl>.

² Wyrok Trybunału Konstytucyjnego z dnia 22 maja 2002 r., sygn. akt K 6/02, <http://www.trybunal.gov.pl>.

³ Wyrok Trybunału Konstytucyjnego z dnia 20 listopada 2002 r., sygn. akt K 41/02, <http://www.trybunal.gov.pl>.

⁴ Ibidem.

view, but most of all, from the practical one, because of the need to reconstruct the ideas and principles contained in the Constitution of the Republic of Poland in the light of the constitutional context¹.

It seems that an attempt to answer the question concerning the place and role of the principle of proportionality in finding the solution to the aforementioned conflict of constitutional values, has to be preceded by making a reference to the concept of a tax, which has been used in the doctrine and judicial decisions. From the normative perspective a tax, as a certain amount of cash benefits, is an 'object' to a duty arising from the essence of the relationship resulting from tax law (legal and tax relationship)². A tax, as the legal and political institution, constitutes a duty that is inherently related to the state. Because it is based on the state authority arising from the will of citizens, who waive to the state a part of their rights in order to protect common interests and satisfy common needs³. One should accept the opinion that burden of taxation constitutes, apart from other public and personal duties, a part of an institutionalized duty to participate in the costs of creation and operation of political community⁴. The concept of a duty, which is one of the two basic foundations of a democratic state ruled by law along with the concept of freedom, is given as a justification for the necessity of paying taxes⁵. One may

¹ See: T. Dębowska-Romanowska, *Pojęcie i znaczenie konstytucjonalizacji ustroju i systemu finansowego państwa. Znaczenie rozdziału X – Finanse publiczne, jako całości*, [in:] *Konstytucyjne uwarunkowania tworzenia i stosowania prawa finansowego i podatkowego. Materiały ze Zjazdu Katedr Prawa Finansowego i Prawa Podatkowego*, Białystok – Białowieża 11-13 stycznia 2009 r., typescript, p. 13-14.

² A. Kostecki, *Elementy konstrukcji instytucji podatku*, [in:] *System instytucji prawno-finansowych PRL, t. III, Instytucje budżetowe*, ed. M. Weralski, Wrocław 1985, p. 156.

³ See: C. Kosikowski, *Podatek jako instytucja ustrojowoprawna*, *Acta Universitatis Lodzensis. Folia Iuridica* 54, 1992, p. 18-19.

⁴ See: A. J. Menendez, *Justifying Taxes. Some Elements for a General Theory of Democratic Tax Law*, Dordrecht – Boston – London 2001, p. 123-124. Norms of tax law express the everyone's right to demand that the other members of the political community carry out their duties concerning the obligation to participate in the cost of operation of political community.

⁵ A. Gomułowicz, *Zasada zdolności płatniczej jako etyczny aksjomat procesu legislacyjnego*, [in:] *Prawo i Godność. Księga pamiątkowa w 70. rocznicę urodzin Profesora Wojciecha Łączkowskiego*, ed. S. Fundowicz, F. Rymarz, A. Gomułowicz, Lublin 2003, p. 115-116. Similar conclusions result from the analysis of the law doctrine with regard to the general justification of the necessity to pay taxes. Regardless of the assumed theory taxes are always treated as a separate quality while the obligation to comply with public duties is considered as an essential prerequisite for the operation of a state. See: O. Kayaalp, *The National Element in the Development of Fiscal Theory*, Chippenham – Eastbourne 2004, p. 139 – 147.

observe such a situation in Polish law, in which in the chapter of the Constitution of the Republic of Poland mostly containing duties of a person and citizen, there is a provision providing grounds for the imposition of a tax duty.

Taking into consideration the general conclusions, drawn from the doctrine, concerning the essence and origin of the institution of a tax, one may make an attempt to answer the question, if, under the provisions of the Constitution presently in force, there are legal foundations of exercising the principle of proportionality in imposing tax charges.

The constitutional basis for imposing a tax duty constitutes the provision, under which everybody is obliged to comply with his public duties and responsibilities, including the taxes, specified by the statute¹. From the formal and legal perspective, this provision ensures a statutory form of a fiscal regulation. From the material and legal perspective, it constitutes the principle of universality of taxation, which means that the duty of supporting the state, and also the society as a community, is imposed on everybody – not only on some, chosen persons. Comparing the contents of the adopted article with the provisions that establish such principles as: the principle of equality before the law, protection of ownership and the right of succession and freedom to undertake economic activity, and most of all, assuming that the Republic of Poland is a democratic state ruled by law, which exercises the principles of social justice, allows to acknowledge that from the material perspective, the Constitution of the Republic of Poland expresses the principles of economicalness of taxation and fair taxation².

The provision, under which imposing public duties is admissible, from the perspective of a subject to public law, constitutes the source of fiscal authority of the state and units of local governments, and at the same time it expresses the principle of tax necessity³. Fiscal authority

¹ Art. 84 of The Constitution of The Republic of Poland.

² See: A. Gomułowicz, *Zasada sprawiedliwości podatkowej a prawodawstwo podatkowe*, [in:] *W kręgu prawa podatkowego i finansów publicznych. Księga dedykowana Profesorowi Cezaremu Kosikowskiemu w 40-lecie pracy naukowej*, ed. H. Dzwonkowski, J. Głuchowski, A. Pomorska, J. Szolno-Koguc, Lublin 2005, p. 156 and A. Gomułowicz, *Zasada zdolności...*, s. 116. It is worth mentioning that the aforementioned freedoms and rights are not absolute in character and realization of norms in which they are expressed is gradable. Comp. T. Gizbert-Studnicki, *Konflikt dóbr i kolizja norm*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1989, vol. 1, p. 1-14.

³ See: R. Mastalski, *Tworzenie i stosowanie prawa podatkowego w zgodzie z Konstytucją*, [in:] *Konstytucyjne uwarunkowania tworzenia i stosowania prawa finansowego i podatkowego. Materiały ze*

is limited by the principle of legalism, which from the formal perspective means an obligation to respect special requirements concerning the procedure of imposing a tax and alternations in tax law¹. However, from the material perspective, it means that in the process of enactment and execution of tax law provisions, it is necessary to take into account the socially accepted values that are referred to in the Constitution.

The obligation to respect procedural requirements arising from the principle of a democratic state ruled by law, and the principles of decent legislation in particular, ensures the legal protection of private interests. Article 217 of the Constitution of the Republic of Poland is of special importance in this case because it not only determines the scope of statutory regulation of tax law, but indirectly defines also the essence of a tax duty². Considering the formal aspect of imposing taxes, it seems that if the Constitution provides for qualified requirements concerning tax legislation – by including, among other things, to the statutory regulations all the rules which influence the amount of tax burden – there is no need to refer to the general clause, according to which limitations upon the scope of execution of the constitutional freedoms and rights shall only be specified by the statute.

The problem of relationship between the duty of paying a tax in itself on the one hand and the protection of the freedoms and rights ensured by the Constitution on the other, is quite different. The provisions of the Constitution of the Republic of Poland hardly constitute the substantive limits of taxation³. And the opinion about the far-reaching freedom of the legislator to create revenues of the state, has been many times expressed both in the doctrine⁴ and in the

Zjazdu Katedr Prawa Finansowego i Prawa Podatkowego, Białystok – Białowieża 11-13 stycznia 2009 r., typescript, p. 26.

¹ See: J. Oniszczyk, *Podatki i inne daniny w orzecznictwie Trybunału Konstytucyjnego*, Warszawa 2001, p. 95 and following.

² H. Dzwonkowski, *Elementy konstrukcyjne podatku w świetle art. 217 Konstytucji*, „Glosa” 1999, vol. 6, p. 1. See: R. Zalewiałski, *Artykuł 217 Konstytucji RP w praktyce podatkowej*, [in:] *Księga jubileuszowa Profesora Marka Mazurkiewicza. Studia z dziedziny prawa finansowego, prawa konstytucyjnego i ochrony środowiska*, ed. R. Mastalski, Wrocław 2001, p. 333 and following.

³ T. Dębowska-Romanowska, *Pojęcie i znaczenie konstytucjonalizacji...*, p. 6.

⁴ Zob. R. Mastalski, *Tworzenie i stosowanie...*, p. 24-25; T. Dębowska-Romanowska, *Tendencje tworzenia regulacji prawnofinansowych i ich wpływ na rozumienie prawa organicznego (ustrojowego) w Polsce*, [in:] *W kręgu prawa podatkowego i finansów publicznych. Księga dedykowana Profesorowi Cezaremu Kosikowskiemu w 40-lecie pracy naukowej*, ed. H. Dzwonkowski, J. Głuchowski, A.

judicial decisions of the Constitutional Tribunal¹. If determination and imposition of tax charges is an indispensable element of the achievement of the economical and social purposes accepted by the political authorities, then from the legal perspective, there are not any grounds for evaluating the performance of these powers in relation to the requirements of usefulness, necessity and proportionality *sensu stricto*. The choice of taxation sources and establishment of its scope is the right of a representational authority. That is why usefulness and proportionality (in a limited sense) of the accepted resolutions shall only be evaluated from the political perspective. The fact that in modern states these duties show the institutional and normative aspects of the citizens' obligation to participate in the costs of a political community activity, gives reason for their necessity of complying with tax responsibilities.

Bearing in mind the aforementioned arguments, one ought to share the position of the Constitutional Tribunal, pursuant to which the duty of compliance with tax responsibilities is not a limitation, to which applies the general clause of the constitution establishing limits, within which the interference with the freedoms and rights of a person is admissible. Consequently, if the duty of compliance with mandatory and non-payable taxation charge to the public law body, is not understood in the provisions of the constitution as a limitation of the freedoms and rights, but as their "opposite"², then the imposition of taxes should not be evaluated in the context of the principle of proportionality. Of course it does not mean that the limits of taxation do not exist. The Constitution now in force not only determinates the freedoms and rights of a person and citizen very broadly, but also indicates that the source of these freedoms and rights is the inherent and inalienable dignity of the person³. In the doctrine and judicial decisions of the

Pomorska, J. Szołno-Koguc, Lublin 2005, p. 84-87; A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe*, Poznań 2000, p. 73.

¹ See: wyrok Trybunału Konstytucyjnego z dnia 12 stycznia 1995 r., sygn. akt K 12/94, published OTK 1995, vol. 1, item 27; wyrok Trybunału Konstytucyjnego z dnia 25 listopada 1997 r., sygn. akt K 26/97, published OTK ZU 1997, vol. 5-6, item. 64; wyrok Trybunału Konstytucyjnego z dnia 25 kwietnia 2001 r., sygn. akt K 13/01, published OTK ZU 2001, vol. 4, item 81.

² Term introduced by T. Dębowska-Romanowska. See: T. Dębowska-Romanowska, *Obliczenie podatku a gwarancje praw obywatelskich*, „Państwo i Prawo” 1998, vol. 7, p. 32.

³ Though the expression 'freedoms and rights of persons and citizens' applies to natural persons, the legal entities might be a subject of these freedoms and rights, provided that it is possible considering the nature of the given freedom or right. See: L. Garlicki, *Wolności i prawa jednostki w Konstytucji*

Constitutional Tribunal, dignity is understood in a broad sense, and it is also understood from the perspective of social and financial status of a person¹. As far as imposing public duties is concerned, it is expressed in the need to take into consideration the minimum of subsistence and the prohibition of imposing tax duties in such a way that they shall become the instrument of the property forfeiture². The limits of tax authority are also determined by the principles of freedom to undertake economic activity and also the principles of equity, economicalness and fairness of taxation³.

§ 4. The principle of proportionality in the process of creation of instrumental duties

There is no denying that the performance of tax duty, understood as an obligation to pay mandatory cash benefit connected with the event specified by the tax bill, means the interference with the property rights of a person. However, because of the arguments mentioned above, it shall not be analyzed as a limitation upon property rights, including the right of ownership. This being the case the next thing to be considered is whether the general principle of proportionality can be apply to instrumental tax duties.

It is a fact that even a potential tax duty may be the source of additional duties imposed on a taxpayer, such as: obligation to file a registration request, obligation to submit tax returns, summary information and other documents, obligation to make out invoices and bills, obligation to keep records and documents related to tax accounting until expiration of time limitation for the tax liability, obligation to submit oneself to tax control etc. They occur, for a given subject, as the

Rzeczypospolitej Polskiej z 1997 roku. Bilans pięciu lat, [in:] Pięć lat Konstytucji Rzeczypospolitej Polskiej, Warszawa 2002, p. 67-68.

¹ Ibidem, p. 63.

² See: wyrok Trybunału Konstytucyjnego z dnia 7 czerwca 1999 r., sygn. akt K 18/98, published OTK ZU 1999, vol. 5, item 95; wyrok Trybunału Konstytucyjnego z dnia 5 stycznia 1999 r., sygn. akt K 27/98, published OTK ZU 1999, vol. 1, item 1.

³ See: wyrok Trybunału Konstytucyjnego z dnia 7 czerwca 1999 r., sygn. akt K 18/98, published OTK ZU 1999, vol. 5, item 95; wyrok Trybunału Konstytucyjnego z dnia 22 października 2002 r., sygn. akt SK 39/01, published OTK ZU 2002, vol. 5, item 66; wyrok Trybunału Konstytucyjnego z dnia 4 maja 2004 r., sygn. akt K 8/03, published OTK ZU 2004, vol. 5, item 37.

consequence of the legal prerequisite for being taxed, and their main purpose is to determine and execute an amount due to taxes¹. That is why it is worth devoting some time to the problem of the extent and manner of imposing these duties, in the context of the freedoms and rights ensured by the Constitution.

In the judgment of the 16th April, 2002² the Constitutional Tribunal adjudicated on the conformity to the Constitution of the Republic of Poland of the tax bill provision on the inheritance and gift tax that bans a notary from performing specified notarial actions carried out in order to convey of things and property rights acquired by way of legacy, if the taxpayer has earlier failed to pay the conveyance tax or he has not been given a consent of the revenue office to convey, without paying the tax. In the opinion of the Tribunal the implementation of a duty, pursuant to which a taxpayer is obliged to supply documents confirming the tax payment, has been aimed at ensuring the efficiency of performance of the tax duty. The accusation of infringement of the principle of proportionality by the accepted provision is not justified in this case because 'the normative essence of the concept of ownership specified in the provisions of the Constitution as the point of reference, contains duties which arise from the duty of compliance with public responsibilities, without which it would be impossible to create a normative point of reference enabling security of these rights³.' It is worth noticing that in a judge's dissenting opinion, referred to the quoted decision, yet a different evaluation of the appealed provision was done⁴. It appears that the starting point for this evaluation was a clear distinction between the regulations concerning the scope of a tax duty *sensu stricto* and the regulations referring to the manner of performing this duty. Distinction of the provisions creating instrumental duties allows for a separate evaluation of these means in the context of the

¹ So far, tax doctrine has not managed to work out the unanimous position on the problem whether instrumental duties ought to be categorized as an element of substantive or procedural tax law. Comp. M. Liszewski, *Charakter prawny obowiązków instrumentalnych*, „Kwartalnik Prawa Podatkowego” 2000, vol. 2, p. 141; R. Mastalski, *Obowiązek podatkowy a zobowiązanie podatkowe*, [in:] *System instytucji prawno-finansowych PRL, t. III, Instytucje budżetowe*, ed. M. Weralski, Wrocław 1982, p. 206.

² Wyrok Trybunału Konstytucyjnego z dnia 16 kwietnia 2002 r., sygn. akt SK 23/01, <http://www.trybunal.gov.pl>.

³ Ibidem.

⁴ See: zdanie odrębne sędziego Andrzeja Mączyńskiego do wyroku TK z dnia 16 kwietnia 2002 r., w sprawie o sygn. SK 23/01.

principles of indispensability, usefulness and prohibition of excessive interference. The acceptance of the aforementioned assumption justifies the opinion that the adopted provision violates the principle of proportionality, first and foremost, because even without it, a tax duty in the inheritance and gift tax may be efficiently realized.

In the context of the principle of proportionality the question of instrumental duties evaluation admissibility is, in the judicial decisions, a much greater source of doubt than the concept of a tax duty *sensu stricto*. In the verdict of the 22nd May, 2007¹ the Constitutional Tribunal adjudicated that when the taxpayer is deprived of the right to deduct a tax calculated in the goods and services tax - in the situation when he has not had an actual possibility to perform one of the statutorily specified conditions for deduction, that is stating on the document, which confirms making a payment, the number and date of the issued invoice confirming the purchase of farm produce from a flat rate farmer – it violates the essence of the constitutional right of ownership. However, it should be emphasized that the subject of evaluation was, in this case, not a tax duty itself, in the scope of the goods and services tax, but the provision conditioning the admissibility of deduction to performing an additional duty in the scope of turnover documentation, which a taxpayer failed to perform in the situation of making a prepayment. According to the Tribunal the applied legal means was not indispensable because the purpose of its implementation, that is linking the payment made by the VAT taxpayer on the account of a flat rate farmer with the actual purchase of farm produce, may have been achieved by the other, less uncomfortable for the taxpayers, manners.

Interpretation, which is in accordance with the opinion stated in the justification to the above judgment, is contained in the verdict of the 19th September, 2006². The Constitutional Tribunal then decided that the relative freedom of the legislator to create state revenues comprises also the right to determine certain documentary duties, including the specification of

¹ Wyrok Trybunału Konstytucyjnego z dnia 22 maja 2007 r., sygn. akt SK 36/06, <http://www.trybunal.gov.pl>.

² Wyrok Trybunału Konstytucyjnego z dnia 19 września 2006r., sygn. akt K 7/05, <http://www.trybunal.gov.pl>.

a document that conditions the use of powers ensured by the statute¹. Yet it should take place in accordance with the requirements arising from the principle of proportionality, which means that imposing on the taxpayers duties of performing care acts that are too inconvenient for them, and are disproportionate to the benefits arising from their performance, is prohibited.

The judicial decisions mentioned above require some reflection. First, it should be emphasized that in the context of requirements arising from the principle of proportionality in relation to the instrumental duties evaluation admissibility, there prevails an opinion that this principle is justified because it binds the legislator, not only when limitations in the scope of the use of freedoms and rights ensured by the Constitution are being established, but also when the legislator imposes duties on subjects to its power. Secondly, it should be noticed that there is also an opinion concerning the necessity of distinction between the provisions, which impose payment of a tax duty, and regulations creating instrumental duties. Such an approach allows for a separate evaluation of the latter, in the context of the requirements of usefulness, necessity and proportionality *sensu stricto*, despite a made assumption that the duty of bearing taxes is not a limitation, to which applies a general clause of the Constitution setting the limits, within which the interference of the state with the freedoms and rights of a person is permissible.

Specification of a tax duty of a given subject leads to the formation of a fiscal legal relationship, within which a taxpayer is not only obliged to meet duties that are connected with performing activities aimed at establishment and fulfillment of his tax liability, but also a duty of being a subject to tax control. If a tax control is instituted, most of all it means for a taxpayer that he has to perform many duties witch aim is to allow the controlling authority to proceed with its actions. On the other hand, an efficient and smooth performance of controlling activities requires storing information about the subjects and facts of the case submitted to tax control. It undoubtedly creates a threat to the infringement of the taxpayer's freedoms and rights ensured

¹ In this judgment The Constitutional Tribunal adjudicated constitutionality of the provision of VAT act, pursuant to which these taxpayers who acquired passenger cars without the type approval certificate or a copy of the decision exempting from the obligation to obtain a type approval certificate were entitled to deduct only a part of the amount of input tax from the amount of output tax.

by the Constitution. It is worth emphasizing, however, that it does not only refer to the property rights, but to the personal rights as well.

In the verdict of the 13th February, 2001¹ the Constitutional Tribunal pronounced that the duty of a taxpayer, subjected to tax inspection, to make his communication media available to tax inspectors for free, is not directly connected with a tax duty, and in fact it leads to the situation when the citizen participates in the costs of public administration operations. In the same manner was evaluated the duty of a taxpayer to make for free copies of the documents chosen by the controlling body. According to the judgment of the Tribunal the aforementioned activities of the taxpayer are not indispensable for the efficient tax control. And the lack of setting the objective limits upon the mentioned duties shall be considered as an excessive interference, contradictory to the principle of proportionality.

Similar conclusions can be drawn from the verdict of the Constitutional Tribunal of the 20th June, 2005² which aimed at analyzing the provisions determining competences and operational rules of the tax intelligence. In the justification of the cited judicial decision the Constitutional Tribunal emphasized that the powers given to the tax intelligence interfere too much with the private life of a person, and that is why they must be subject to rigors arising from the principle of proportionality. It means that when the legislator creates a provision that interferes with a person's privacy, he limits the person's freedom of communication or the right of information autonomy. That is why he must take into account not only the principles of fine legislation but also the proportionality of applied means. It is not enough that these means 'are in favor for the assumed purposes, 'help to achieve them' or 'are convenient' for the authority. The accepted solutions must fulfill the requirements of necessity and proportionality *sensu stricto*.

The evaluation of some instruments that allow the tax administration bodies to control if the taxpayers comply with the performance of tax duties has arisen more doubts. In the verdict

¹ Wyrok Trybunału Konstytucyjnego z dnia 13 lutego 2001 r., sygn. akt K 19/99, <http://www.trybunal.gov.pl>.

² Wyrok Trybunału Konstytucyjnego z dnia 20 czerwca 2005 r., sygn. akt K 4/04, published OTK-A 2005, vol. 6, item 64.

of the 11th April, 2000¹ the Constitutional Tribunal decided that the provision authorizing the head of the revenue office to turn to a financial institution with a request to it to provide information concerning financial transactions of a taxpayer, confirms with the principle of protection of the freedoms and rights of a person ensured by the Constitution. Analyzing this provision under the Constitution, the Tribunal pronounced that it is only admissible for the head of the revenue office to turn to the bank with the request to disclose data included in bank secret, in the course of the tax proceedings, when it was impossible to explain justified doubts concerning the scope of a tax duty with the use of other available means of evidence; and if the head of the revenue office failed to use these special measures, it would incur losses to the State Treasury. Simultaneously the Tribunal stipulated that the use of the mentioned instrument requires respecting the principle of proportionality between the level of threat to the fiscal interest of the state and the constitutional obligation to protect private life of a person. It is worth mentioning, however, that in the dissenting opinion referring to the quoted judgment it is imputed that the evaluated provisions fail to perform the requirements of necessity and proportionality *sensu stricto* because they have not clearly state the reasons for interference with the sphere of bank secret, and they have not provide controlling procedures of this interference, which leads to the imposition of such a tax duty on a taxpayer that is disproportionate with the purpose of this regulation².

It may seem that so far the attitude of the Constitutional Tribunal to the problem of protection of the rights of taxpayers in the context of controlling powers of the fiscal administration bodies has been very balanced. On the one hand, the Tribunal accepts the assumption that the principle of universality of public responsibilities simultaneously expresses an obligation of the state to implement institutional guarantees which allow for the control of tax debtors. The Tribunal also admits that the legislator possesses objective freedom in creating instruments that aim at helping to perform this control. On the other hand, the Tribunal

¹ Wyrok Trybunału Konstytucyjnego z dnia 11 kwietnia 2000 r., sygn. akt K 15/98, published OTK 2000, vol. 3, item 86.

² See: zdania odrębne sędziów TK Andrzeja Mączyńskiego i Jadwigi Skórzewskiej-Łosiak do wyroku TK z dnia 11 kwietnia 2000 r., w sprawie o sygn. K 15/98.

emphasizes that the limits of statutory interference are marked by the principle of proportionality requirements, which means that the proper relationships between the constitutional values such as: the fiscal interest of the state and the freedoms and rights of a person have to be respected.

§ 5. The principle of proportionality in the process of imposing tax sanctions

Passing from tax duties to the legal instruments, which aim at forcing a person liable to tax to fulfill his duty it is important to note that in Poland, since the introduction of a new tax system in 1991 – 1993, most decisions about whether something is taxable and to what extent it should be taxed has been transferred to the taxpayers. The system of self assessment gives the taxpayers the opportunity to compute their own tax bills on the one hand and to avoid or even evade taxes on the other. When these circumstances are taken into consideration, it is beyond doubt that tax legislation must contain provisions that are aimed at penalizing illegal and undesirable activities. These legal instruments take different forms¹. Some of them are explicit and directly increase tax liability, other deteriorate taxpayer's financial situation indirectly – by attaching tax consequences to certain behaviour. Some are applied *ex lege*, other requires action of tax authorities. Nevertheless, the thing that has generated the most controversy, both in tax doctrine and judicial decisions, is the legal character of such instruments, with special attention paid to the problem whether these constructions can be considered as an element of tax liability.

Before going to the more detailed analysis of these instruments, it needs to be stated that the notion of tax sanction does not exist in field of legislative language. Not only does the tax legislation not define it, but also hardly uses it. In consequence sanction, as a legal phenomenon, ought to be examined from the perspective of a larger group of sanctions – legal sanctions. A realization of this idea provokes the further observation that legal sanction may be

¹ See: J. Orłowski, *Pojęcie i klasyfikacje sankcji w polskim prawie podatkowym*, „Studia Prawnoustrojowe” 2008, vol. 8, p. 113-133.

considered as an abstract formula constructed outside the statutory text¹. An important aspect of this formula is that it can be regarded either as a component of any given norm, separate norm or a model built independently from any of these concepts². However, for the simple reason that working out the notion of legal norm is beyond all question one of the major intellectual achievement of legal thought, it seems that there is no grounds for rejecting a traditional approach that designates sanction in the scope of the norm. The only thing that may be open to doubts, is the conventional character of these norms³. Nevertheless, on account of the general consensus about the translatability of certain theories on the structure of any given legal norm, one may assume that there is no need to precede analysis of sanction by adopting one of these theories. For this reason it may be said that legal sanction can be considered either as a separate 'sanctioning' norm or as a component part of it. In respect of each of these theories sanction as a legal phenomenon will possess a certain features in common. First, legal sanctions have formalized character in the sense that they are, as a rule, enacted by Parliament. Secondly, the only circumstance in which they can be imposed is a violation of legal

¹ See: M. Duda, *The Concept of Tax Sanction in Polish Tax Law*, „Review of Comparative Law” 2004, vol. IX, p. 138-143.

² According to the last theory in order to define sanction on the linguistic plane it is not necessary to adopt one of the known concepts of the structure of legal norm. See: J. Śmiałowski, *Pojęcie i analiza sankcji prawnej*, Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace Prawnicze, 1962, vol. 9, p. 263 and following.

³ Numerous disputes and misunderstandings considering the structure of legal norm and, in consequence, the notion of legal sanction result from the fact that the particular legal theorists who introduced a concept of legal norm were supporters of different philosophical standpoints. See: J. Lande, *Nauka o normie prawnej*, Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia, vol. III-1, Sectio G, 1956 and J. Lande, *Norma a zjawisko prawne. Rozważania nad podstawami teorii prawa na tle krytyki systemu Kelsena*, [in:] *Prace z dziedziny teorii prawa wydał prof. dr Władysław Jaworski*, Kraków 1925, p. 235 and following; A. Werner, *W przedmiocie struktury normy prawnej*, „Państwo i Prawo” 1959, vol. 12, p. 1005 and following; S. Grzybowski, *Wypowiedź normatywna i jej struktura formalna*, Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Rozprawy i Studia, vol. XXXIX, Kraków 1961, p. 5-6; Z. Ziemiński, *Problemy podstawowe prawoznawstwa*, Warszawa 1980, p. 159; J. Śmiałowski, W. Lang, A. Delorme, *Z zagadnień nauki o normie prawnej*, Warszawa 1961, p. 76; G. L. Seidler, *Teoria państwa i prawa. Część analityczna*, Kraków 1951, p. 39-44; S. Ehrlich, *Przyczynek do problematyki normy i stosunku prawnego*, „Państwo i Prawo” 1956, vol. 8-9, p. 389 and following; H. Rot, *Kilka uwag o strukturze normy prawnej*, „Państwo i Prawo” 1957, vol. 10, p. 654 and following; J. Kowalski, *Teoretyczne problemy normy i stosunku prawnego*, „Studia Prawnicze” 1973, vol. 37, p. 22; M. Smółka, *Spółeczne działanie sankcji prawnej*, Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia, vol. XXII, Sectio G, 1975, p. 77; W. Dziedziak, *Próba charakterystyki sankcji prawnych i moralnych*, Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia, vol. XXXIX-4, Sectio G, 1992, p. 34.

duties. Thirdly, sanctions always induce in the transgressor a situation, which is unfavorable in the relation to the previously existing one. The fundamental point about such situation is that it occurs as a result of transgression of the law and must be determined by legal rules¹.

Finally, it is important to stress that though sanctions are subjectively regarded as a punishment, there is no ground for regarding these two notions as being identical. For quite a long time legal literature has known the division between so-called repressive sanctions, enforcement sanctions and invalidity sanctions². With regard to this division it might be said that only some of the repressive sanctions can be considered equivalent with criminal punishment. On the other hand it should be remembered that the 'relation of sanction', 'relation of authority' is a characteristic feature not only for criminal norms, with the result being that a violation of a legal norm can lead to imposing a repressive sanction not only on the ground of criminal law³.

Moving on from the field of theory of law to tax law it must be admitted that there is a large number of publications which discussed certain tax penalty provisions, especially with regard to the goods and services tax. However, it is particularly difficult to arrive at satisfactory formulation of a tax sanction⁴. It is also worth mentioning that the notion of tax sanction is usually attached to a tax surcharge, while there are much more provisions which can be classified as tax sanctions⁵. These obviously vary from tax to tax.

¹ It is necessary to note that there are many unfavorable situations which are determined by law but do not result from violating any legal norms.

² See: G. L. Seidler, H. Groszyk, J. Mularczyk, A. Pieniążek, *Wstęp do nauki o państwie i prawie*, Lublin 2000, p. 116; M. Borucka-Arctowa, J. Woleński, *Wstęp do prawoznawstwa*, Kraków 1997, p. 77; S. Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2003, p. 118.

³ Comp. L. Lisiakiewicz, *O normie i stosunku prawnym karno-materiałnym*, w: *Studia z teorii prawa*, red. S. Ehrlich, Warszawa 1965, p. 374-375. See: D. Szumiąło-Kulczycka, *Prawo administracyjno-karne*, Kraków 2004.

⁴ See: E. Rogala, *Sankcje wobec podatników VAT*, „Przegląd Podatkowy” 1995, vol. 2, p. 18-21; J. Małecki, *Z problematyki sankcji podatkowych ze szczególnym uwzględnieniem podatku VAT*, [in:] *Księga pamiątkowa ku czci Profesora Apoloniusza Kosteckiego. Studia z dziedziny prawa podatkowego*, Toruń 1998, p. 155 and following; B. Brzeziński, *Wstęp do nauki prawa podatkowego*, Toruń 2003, p. 126; A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe*, Warszawa 2002, p. 172; A. Hanusz, *Charakter prawny dodatkowego zobowiązania podatkowego w podatku od towarów i usług*, „Przegląd Podatkowy” 2000, vol. 4, p. 6; H. Dzwonkowski, *Powstawanie i wymiar zobowiązań podatkowych*, Warszawa 2003, p. 453.

⁵ When considered from the standpoint of a modern Polish tax system, the problem of tax sanction arose in 1993 when the new turnover tax was introduced. Under the original VAT regulations those taxpayers who fail to keep correct sales records were penalised by imposing an additional amount of tax. It was

Although the notion of tax sanction does not exist in field of legislative language it is possible to indicate the main features of that phenomenon in the face of the above definition of legal sanction. In that view tax sanction might be characterized as an abstract formula based on a tax regulation but constructed outside the statutory text. Tax sanctions belong to a group of legal sanctions, which is why not only their forms must be determined in tax legislation, but also the only circumstance in which they can be imposed is a violation of legal duties. Tax sanctions might be applied as a result of a tax default or in consequence of infringement on other tax duties, such as an obligation to keep tax records, file a registration request or to submit tax returns¹.

The conception of tax sanction has one more important aspects – the extend of the unfavorable situation inducing in the transgressor. On that criterion rest the division between so-called ‘real’ or repressive tax sanctions and ‘apparent’ or enforcement tax sanctions². When the former has to result in increasing tax liability in relation to the previously existing one, the latter are necessary to implement a normal level of taxation. Consideration on the notion of repressive sanction has led to a numerous misunderstanding. It seems that there were due to the fact that the particular distinction depends entirely upon the existence of so-called ‘normal level of taxation’, which in turn can be specified only by means of the fiction that every tax has its ‘normal structure’³. The notion of ‘normal tax structure’ suffers from the further defect, that it occurs as a result of several complex factors such as: construction of any given tax, principles of taxation, rules governing deductions, valuation principles, relation between rights of the taxpayers and tax authorities etc.⁴ It is also worth mentioning that there are some tax sanctions

this anti-avoidance measure that has been widely acknowledges to be a tax sanction. Art. 27 ustawy z dnia 8 stycznia 1993 r. o podatku od towarów i usług oraz o podatku akcyzowym, Dz. U. Nr 11, poz. 50.

¹ See: M. Duda, *Z problematyki sankcji w prawie podatkowym ze szczególnym uwzględnieniem sankcji represyjnych w podatku od towarów i usług*, Gdańskie Studia Prawnicze. Studia Prawno-Finansowe, vol. XVI, 2007, ed. A. Drwiło, p. 246-255.

² See: A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe*, Warszawa 2002, p. 173-174; H. Dzwonkowski, *Konstytucyjność sankcji podatkowych*, „Monitor Podatkowy” 1999, vol. 3, p. 22-28.

³ Comp. E. M. Zolt, *Deterrence Via Taxation: A Critical Analysis of Tax Penalty Provisions*, “UCLA Law Review” December 1989, p. 3 and following.

⁴ Comp. W. Nykiel, *O potrzebie równowagi między uprawnieniami i obowiązkami podatnika i organów podatkowych*, „Prawo i Podatki” 2005, vol. 2, p. 25-28.

which have certain distinguishing features and it is beyond doubt that they increase the financial burden by imposing an obligation to pay additional amount of tax, as is the case with the default surcharge on the ground of the goods and services tax and most of sanctions which assume the form of higher tax rate¹. Nevertheless a large number of sanctions, such as denial of favored tax statuses, disallowance of tax credits or default interests can take both repressive and enforcement form, depending on the circumstances.

From the above facts it can be concluded that the fiscal instruments which aim at forcing taxpayers to fulfill their duties and penalizing illegal activities not always can be considered as an elements of tax. It should be stressed that some of them (the 'real' sanctions) result in the situation when taxpayers and sometimes even subjects that are not a party to a tax law relation², are obliged to bear additional financial burden. Nevertheless, the question whether such burden might be considered as an element of tax liability is still a source of considerable controversy³. It is also worth mentioning, that the problem has gained further significance from the interpretations offered by the Constitutional Court and the Court of Justice of the European Communities.

On the ground of the case adjudicated in 1998 the Constitutional Court decided that though it was possible to consider VAT sanctions nominally equivalent with tax, in fact they

¹ A clear example of the later kind of sanctions contains the Personal Income Tax Act, which declares that in some situations the individual is liable to tax at higher rate. First, with respect to income derived from undisclosed sources or income unmatched by the disclosed sources. Secondly, with respect to income from savings in more than one individual pension account. In both situations lump income tax shall be collected, accordingly in the amount of 75% of undisclosed income and 75% of income generated in each individual pension account. Art. 30 ust. 1 pkt 7 i 7a ustawy z dnia 26 lipca 1991 r. o podatku dochodowym od osób fizycznych, tekst jedn. Dz. U. z 2000 r. Nr 14, poz. 176 ze zm.

² A good example of a tax sanction that might be imposed not only upon a taxpayer contains the Act of The Goods and Services Tax. Pursuant to the regulation if a legal person, an organizational entity without legal personality or a natural person make out an invoice in which the amount of tax is stated, then they are obliged to pay that tax. Art. 108 ust. 1 ustawy z dnia 11 marca 2004 r. o podatku od towarów i usług, Dz. U. Nr 54, poz. 535 ze zm.

³ See: postanowienie Naczelnego Sądu Administracyjnego z dnia 10 lutego 2009 r., sygn. akt I FSK 1395/07; <http://orzeczenia.nsa.gov.pl>

were administrative sanctions¹. Similar conclusions can be drawn from the verdict of the Court of Justice of the European Communities of 15th January, 2009 which aimed at adjudicating the question whether VAT Directives rule out the possibility of imposing an obligation on a person liable to tax on goods and services to pay an additional amount of money². In the justification on the cited judicial decision the Court set out the essential characteristics of VAT and emphasized that an 'additional tax' does not have those characteristics. In the opinion of the Court suffice is to note, that it arises not from any transaction but from a declaration error and, in addition, that the amount thereof is not proportional to the price charged by the taxpayer.

Taking into consideration the general conclusions drawn from both the judicial decisions and tax doctrine one may share the opinion that a tax surcharge, as well as other forms of repressive tax sanctions, should be considered as a legal phenomenon separate and different from any given tax. It seems that these instruments create a new relation ('relation of sanction') between the taxpayer or another subject liable to bear burdens bound up with these institutions on the one hand, and the state or territorial self-government unit on the other. For these reasons tax sanctions should be evaluated separately in context of the principle of proportionality, which means that they cannot be analyzed in that regard as an element of the tax duty.

In the judicial decisions of the Constitutional Tribunal an opinion that the legislator, in the course of exercising the financial power, is empowered to introduce provisions which provide for

¹ Wyrok Trybunału Konstytucyjnego z dnia 29 kwietnia 1998r., sygn. akt K 17/97, published OTK 1998, vol. 3, item 30. An opinion that the 'additional amount of VAT' cannot be considered as a tax but as administrative sanction has been also expressed in other judicial decisions of the Constitutional Court, as well as administrative courts. See for example: wyroki Wojewódzkiego Sądu Administracyjnego w Gdańsku z dnia 17 stycznia 2008 r., sygn. akt I SA/Gd 650/07; SIP Lex nr 338749 oraz z dnia 19 lutego 2008 r., sygn. akt I SA/Gd 916/07, SIP Lex nr 465701; wyrok Wojewódzkiego Sądu Administracyjnego w Gliwicach z dnia 9 lutego 2009 r., sygn. akt III SA/GI 1041/08, SIP Lex nr 487239. However, it should be remembered that the opposite opinions are also quite often expressed. See for instance: wyrok Naczelnego Sądu Administracyjnego z dnia 6 marca 2003 r., sygn. akt I SA/Wr 3195/00, SIP Lex nr 101882; wyrok Wojewódzkiego Sądu Administracyjnego w Opolu z dnia 22 kwietnia 2005 r., sygn. akt I SA/Op 151/04, <http://orzeczenia.nsa.gov.pl>; wyrok Wojewódzkiego Sądu Administracyjnego w Lublinie z dnia 20 lutego 2008 r., sygn. akt I SA/Lu 794/07, <http://orzeczenia.nsa.gov.pl>.

² Wyrok Trybunału Sprawiedliwości z dnia 15 stycznia 2009 r., sygn. akt C 502/07, published „Przegląd Podatkowy” 2009, vol. 3, p. 47.

administrative sanctions has been petrified¹. The Tribunal has repeatedly emphasized that, pursuant to the Constitution, everyone shall observe the law of the Republic of Poland². In consequence there is a general consensus that, within the constitutional limits, the legislator has discretion to introduce tax penalty provisions. However, it does not mean that this discretion is absolute in character. The legislator is obliged to respect principles and values, which are protected by Constitution, first and foremost the principle of a democratic state ruled by law and the freedoms and rights of persons and citizens. According to the Tribunal in the process of imposing tax sanctions a number of rules must be taken into consideration, in particular the principle of equal rights and obligations and the principle of proportionality³.

The assessment of the proportionality of the regulations providing for tax sanction requires that the following issues be addressed. First, the usefulness of the norm, which means that the given sanction must be capable of producing effect intended by the legislator. Secondly, the norms which provide for the tax penalty should be indispensable for the protection of the public interest, in particular for ensuring compliance with tax law and providing the budget with the adequate revenues. Thirdly, the effects of the norms must be proportional to the burdens placed upon the person liable to tax or other subjects. It is also worth mentioning, that according to the Constitutional Tribunal and administrative courts one more issue ought to be taken into consideration in that regard. Pursuant to this requirement the degree to which a tax penalty provision deteriorates the taxpayer's financial situation should be proportionate to the scope of the infringement of a given tax norm. Imposing the tax sanction which is obviously disproportionate, irrational or incommensurately burdensome might determine the unconstitutionality thereof⁴. Moreover, it is important to stress, that when the provisions impose

¹ See: wyrok Trybunału Konstytucyjnego z dnia 12 stycznia 1999 r., sygn. akt P 2/98, published OTK ZU 1999, vol. 1, item 2; wyrok Trybunału Konstytucyjnego z dnia 18 kwietnia 2000 r., sygn. akt K 23/99, published OTK ZU 2000, vol. 3, item 89.

² Art. 83 of the Constitution of the Republic of Poland.

³ See: wyrok Trybunału Konstytucyjnego z dnia 30 listopada 2004 r., sygn. akt SK 31/04, <http://www.trybunal.gov.pl>; wyrok Trybunału Konstytucyjnego z dnia 4 września 2004 r., sygn. akt P 43/06, <http://www.trybunal.gov.pl>.

⁴ See: wyrok Trybunału Konstytucyjnego z dnia 30 listopada 2004 r., sygn. akt SK 31/04, <http://www.trybunal.gov.pl>; wyrok Naczelnego Sądu Administracyjnego z dnia 22 kwietnia 1998 r., sygn.

sanctions, especially operating *ex lege*, then both the prerequisites under these sanctions and the construction of them should be defined in an unambiguous manner.

§ 6. Conclusions

The principle of proportionality is an expression of a postulate, rooted deeply in the legal culture in Europe, which says about rational activities of state authorities. It is also an expression of the basic criterion for evaluating the admissibility of interference of these authorities with the rights of a person. The fact that this principle is contained in a separate provision of the Constitution of the Republic of Poland has undoubtedly raised its importance, and it constitutes a collateral security of maintaining the legal order and system of values, on which it was based. The content of the quoted judicial decisions of the Constitutional Tribunal implies that the importance of the principle of proportionality has risen in the scope of creating and executing rules of tax law. It arises from the fact that the fulfillment of a basic function of taxes, which is a fiscal function, must inevitably lead to the conflict of goods, valuable for a particular person, with the common good, which is the state budget or the budget of a local government unit. In such a situation the principle of proportionality is applied in two ways. The first of them concerns the problem of measuring to what extent it can be justified that a person sacrifices his interest to the state interest, which means how high tax burden should be so as not to interfere with the essence of the right of ownership. The second way constitutes an additional criterion of evaluation of instrumental and procedural duties which are imposed on subjects to tax law, and the scope of powers of the fiscal administration bodies.

From the perspective of the principle of proportionality, if we evaluate a tax duty, which is understood as a necessity of bearing unequivocal money consideration to a public law body, then in both: the doctrine and judicial decisions prevails a firm opinion that this duty should not

akt SA/Sz 453/97, SIP Lex nr 32784; wyrok Naczelnego Sądu Administracyjnego z dnia 3 listopada 1999 r., sygn. akt SA/Bk 1147/98, SIP Lex nr 39014.

be treated as a limitation of the freedoms and rights ensured by the Constitution. An obligation to bear public duties and responsibilities, including taxes, has a strong constitutional basis and, similarly to the freedoms and rights, is a factor, which constitutes the legal position of a person before the law.

In relation to the problem of instrumental duties the situation looks quite the opposite. First of all, it should be noticed that jurisdiction lacks in homogenous opinions in this matter. It seems to be a consequence of referring from different perspectives to the mentioned duties. Seeing instrumental duties as an expression of the main duty also means that they cannot be treated as limitations upon the freedoms and rights ensured by the constitution. However, accepting the assumption that a tax duty shall be distinguished from instrumental duties allows for a separate evaluation of the latter, in the context of the principle of proportionality. Taking into account the concept of a tax duty in Polish law, the second of the presented attitudes seems to be more legitimate. Tax bills are the source of instrumental duties. And the question of conformity of the provisions that establish these bills with the constitution shall not only be justified by the constitutional power to impose taxes whilst maintaining then required legislative standards. What is more, it should be remembered that if a taxpayer becomes a subject to a tax duty then he may have to perform some specified instrumental duties although the obligation to pay a tax will never occur.

From the perspective of the principle of proportionality, there are not any doubts, however, concerning the possibility of evaluation of the powers of fiscal administration bodies, which aim is to control if a taxpayer complies with a tax duty and to impose tax sanctions. In the decisions of the Constitutional Tribunal concerning the means of performing this control and penalizing illegal behavior, the following attitude is presented consistently – the freedoms and rights of a person and citizen are not absolute, and the evaluation of the provisions which limit them, should also take into consideration duties of a person contained in the Constitution. The use of means that lead to such limitations is possible, only under the condition that the requirements arising from the principle of proportionality are respected.

To conclude, it should be added that the acceptance of the principles of indispensability, necessity and prohibition of excessive interference in the process of creation of tax law should have a positive influence on the quality of the issued rules of law and lead to establishing only such standards, which will allow for an efficient performance of the accepted purposes, and at the same time not violate the freedoms and rights ensured by the Constitution.

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“Legal aspects of political terrorism”

The word "*terrorism*" (in Latin "*terrere*") stands for fear, a state of great concern, anxiety, panic, terror¹. The phenomenon of terrorism has already been known since ancient times.

At the beginning of AD the sect '*zealots*' acted on the area of present Israel, which in the years 1966-73 fought against the Roman occupation. They conducted a ruthless campaign of treacherous murders with the use of a dagger². According to Flavius the group was of revolutionary nature. However, in the Middle Ages and more precisely in the period from 1090 to 1272 there acted treacherous Muslims called assassins, who fought with the crusaders conquering the areas of present Iran and Syria. This Ismailite sect was founded by Hasan Ben Sabbah³.

The subsequent tumultuous period of the flourishing of terrorism was so-called "*reigns of terror*" during the dictatorship of the Jacobins in the years 1793-1794. From a historical point of view, many authors see the French Revolution as the moment in which there was a great change in values. The nineteenth century was already a period of terror attacks in the form of attempts on the life of the heads of states, for example, French president Sadi Camota in 1884, in 1887 Spanish Prime Minister Camorosa de Castillo and a year later a successful assassination of Elisabeth, the Empress of Austria. It should be noted that this was an internal terrorism, which in rare cases, went beyond the borders of one state. In the second half of the twentieth century there was a rapid development of terrorism, which changed into a menacing problem not in regional range but worldwide.

Terrorism during the Cold War was one of the ideological elements conducted mainly by the Soviet Union and the states of puppet strategy against the West⁴.

¹ W. Kopaliński, *Słownik wyrazów obcych i zwrotów obcojęzycznych*, Warszawa 1983, p. 423.

² B. Hołyst, *Psychologia kryminalistyczna*, Warszawa 2009, p. 327.

³ B. Hołyst, *Socjologia kryminalistyczna*, Warszawa 2007, p. 225.

⁴ See W. Grotowicz, *Terroryzm w Europie Zachodniej: w imię narodu i lepszej sprawy*, Warszawa 2000, p. 171-183.

It is the activity of terrorist groups such as the Red Brigades, Red Army Fraction, Japanese Red Army in the 70s and 80 that created the new threat in international range¹.

Taking into account the motivational aspect of terrorist acts we can distinguish between criminal, political and pathological terrorism (acts of terrorism committed by psychopaths, for example, Ted Kaczynski called "*Unabomber*"). Political terrorism is de facto "*a method of political struggle, strategy and practice of regarding the use of violence as the most effective way and also a measure of achieving certain political objectives associated with the desire to eliminate the quo status*"².

A political offender differs from other political offender – the ideology motivating political offenders should be taken into consideration. Lech Gardocki³, in one of his interviews described contemporary terrorist offenses as the ones not deserving lighter moral evaluation. At the same time, he pointed out that "*offenders who use political violence, especially of terrorist nature, have gradually been excluded from the notion of political offender*"⁴.

Analyzing political terrorism, we can distinguish between permanent features which determine the subject phenomenon. This includes:

- a) fear becomes a tool against the authority and society;
- b) violence and pageantry, which intensify the message of terrorists;
- c) fanaticism as a form of neglecting common values of, mainly human life
- d) direct use of violence as an act aimed directly at a specific person or group of people;
- e) terrorist action as a form of accomplishing one's own political objectives by secret groups or individuals;
- f) transformation of existing political relations corresponding to the objectives being closer or further determined by the terrorists⁵.

¹ See R. Barnas, *Terroryzm: od Asasynów do Osamy bin Ladena*, Wrocław 2001, p. 78-80.

² A. Antoszewski, *Leksykon politologii*, Wrocław 1996, p. 409.

³ Polish lawyer, professor of law and judge, since October 17, 1998 Chief Justice of the Supreme Court of Poland.

⁴ L. Gardocki, *Czy każde przestępstwo dyskwalifikuje*, „Rzeczpospolita” 12.06.2006

⁵ A. Pawłowski, *Terroryzm w Europie XIX-XX wieku*, Zielona Góra 1990.

In 1986, American experts determined terrorism as an *"unlawful use or a threat of the use of violence by groups, individuals or environments in political or social purposes, aiming to intimidate or force the authorities, groups or individuals to change their policy or practice"*¹.

By contrast, Tadeusz Hanausek defines terrorism as a *"planned, organized and often ideologically motivated and, in any case, with political background activity of individuals or groups aimed to force from the state authorities, society or individuals determined benefits, behaviors or attitudes. The activity is conducted in moderate forms and its aim is to win broad and most intimidate renown in public opinion and usually it involved the use of physical measures, which often infringe moral rights of outsiders i.e. those who did not express their negative attitude towards the terrorist act, its purpose or justification or even a certain ideology or perceptions"*². In this definition he does not restrict himself to indicate only violence or the threat of its use as the only elements of terrorist activity, but he also proposes other forms.

At this point I would like to refer to the theory of Wilkinson concerning the position of political terrorism in liberal societies³. In the study entitled *"Terrorism and the Liberal State"*, Wilkinson argued that democratic and liberal societies are more vulnerable to terrorist attacks than military hunts and single party dictatorships because of smaller potential of tools for preventing and combating political terrorism. This is due to the fact that that terrorists as citizens of democratic society make use of the same rights as ordinary citizens, in particular of constitutional guarantees against unjustified bugging, searching, limiting the freedom of travelling.

B. Hołyst⁴ distinguishes terrorism according to the subject of an activity between state and anti-state terrorism. As he points out, *"state terrorism consists in the procedure that the terrorist activity of a state and its bodies is conducted on the verge of the law and is illegal"*⁵. On

¹ J. Wójcik, *Terroryzm. Jak się bronić? Przeciwdziałanie finansowaniu terroryzmu*, „Gazeta Sądowa”, Listopad 2003.

² T. Hanausek, *Wybrane zagadnienia kryminalistycznej metodyki zwalczania terroryzmu, Terroryzm – aspekty prawno-międzynarodowe, kryminalistyczne i policyjne*, Poznań 1993, p. 83.

³ P. Wilkinson, *Terrorism and the Liberal State*, New York 1986.

⁴ Polish lawyer, professor of legal sciences with a specialty in crime detection, criminology, prevention, social prevention, suicidology, victimology, terrorism.

⁵ B. Hołyst, *Psychologia kryminalistyczna*, Warszawa 2009, p. 895-896.

On the other hand, the anti-state terrorism is directed to "*weaken or destruct the structures of the state*"¹ in order to implement its own national programme. It should be noted that intelligence agencies of different states, in particular during the Cold War, conducted secret operations by means of terrorist acts. Such a terrorism is a terrorist activity of a state and its bodies which is conducted on the verge of the law and is illegal².

A. Pawlowski shows also another division into individual and economic terrorism³. Individual terrorism is aimed at the individual's lives of specific persons or determined groups, while the economic terrorism is directed against economic relations, in particular great landowners.

R. Lemkin assumed that terrorism is "*an act of intimidating people through violent acts*"⁴. It is essential to quote the definition of A. Schmid, who receives recognition among other - "Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby - in contrast to assassination - the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat- and violence-based communication processes between terrorist (organization), (imperiled) victims, and main targets are used to manipulate the main target (audience/s), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought. Terrorism is a method of combat in which random or symbolic victims become targets of violence. Through the previous use of violence or the credible threat of violence, other members of a group are put in a state of chronic fear (terror). The victimization of the target is considered is meant to terrorize observers, which in turn creates an audience beyond the target of terror or the act of terrorism.

¹ Ibidem.

² See J. Barghothi, *International terrorism in historical perspective*, w: Comparative criminal justice: Traditional and Nontraditional Systems of Law and Control, Waveland 1996, p. 67.

³ See A. Pawłowski, *Typologia terroryzmu politycznego*, w: *Terroryzm polityczny*, Warszawa 1981, p. 94.

⁴ See R. Lemkin, *Terroryzm*, GSW 1935, no. 41, p. 561.

The purpose of terrorism is either to immobilize the target of terror in order to produce disorientation and or compliance, or to mobilize secondary targets of demand or targets of attention"¹. The above theory is an analysis of 109 definitions formulated before. However, K. Indeckci claims that this definition does not include violence against things². Others criticized this definition for using ambiguous phrases and too large range of the definition, which de facto makes its usefulness limited³.

Sandler and Enders proposed a definition, in which *"terrorism is the use or the threat of using extraordinary violence to accomplish political objectives by intimidating or causing panic aimed at wide audience"*⁴. The political objective of terrorism is primarily destabilization of the government policy.

We must realize that terrorism is a strategy enabling militarily weak groups to use violence against the world power and is more effective than the guerrilla war. The basis of this strategy is operational logistics system with low measures, even as far as equipment and supply are concerned.

The issue related to the lack of generally accepted definition of terrorism may have its grounds, inter alia, in the priorities and private interests of particular interested parties⁵. In the United States different government agencies have different definitions of terrorism⁶. The State Department uses the notion of terrorism regulated in the United States Code [22 U.S.C. § 2656f(d)], where terrorism is an intended and politically motivated violence against objectives excluded from the struggle by sub-national groups of offenders⁷.

¹ A. Schmid, *Political terrorism: a new guide to actors, authors, concepts, data bases, theories, & literature*, New Brunswick 2005, p. 28.

² See K. Indeckci, *Prawo karne wobec terroryzmu i aktu terrorystycznego*, Łódź 1998, p. 20.

³ See O. Malik, *Enough of the definition of terrorism*, Londyn 2000, p. 3.

⁴ T. Sandler, W. Enders, *An economic perspective on transnational terrorism*, European Journal of Political Economy 2004, no. 20, p. 301-316.

⁵ See L. Gaines, *Criminal Justice in Action*, Cengage Learning 2008, p. 525-526.

⁶ B. Hoffman, *Inside terrorism*, Columbia 2006, p. 33.

⁷ Report available at: http://www.law.cornell.edu/uscode/html/uscode22/usc_sec_22_00002656---f000-.html

Yet, Federal Bureau of Investigation (FBI) defines terrorism as an unlawful use of force or violence against persons or property to intimidate or force the government and civilians or its part in pursuit of political or social objectives¹.

Department of Homeland Security (DHS), established after the attacks on September 11, in its definition of terrorism focuses on attacks aimed at the infrastructure and key national resources., which can have serious social consequences².

By contrast, Department of Defense defines terrorism as an unlawful use of force or violence against persons or property so as to force the government or societies to achieve political, religious or ideological goals³.

I accept the current opinion that the notion of terrorism is undefined and, above all, deprived of the contents⁴.

To a large degree, terrorism in the political dimension depends on the media publicity and open access to the media in attacked countries, which leads to maximum impact at low cost⁵. In case of political censorship, this strategy has limited chances of victory. Nowadays, political terrorism is active globally through mass media, which causes shock and even fascination⁶.

Political terrorism is a theater, where a drama is put on the world stage. Violence, death, intimidation and fear are the components of the theater⁷. At this point I would like to quote the words of Brian Jenkins⁸ – *„Some governments are willing to stick the label of terrorism to all violent acts committed by their political opponents, whereas anti-government extremists often*

¹ P. Kratcoski, *Meeting the challenges of global terrorism: prevention, control, and recovery*, Lexington Books 2003, p. 7-8; http://www.fbi.gov/publications/terror/terrorism2002_2005.htm

² See Section 2 act 15 Homeland Security Act of 2002 (report available at http://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf).

³ B. Hoffman, *Inside terrorism*, Columbia 2006, p. 31 and 33.

⁴ See C. Gearty, *Terroryzm*, Warszawa 2001, p. 9.

⁵ See B. Hołyst, *Terroryzm*, t. 1, Warszawa 2009, p. 720.

⁶ See J. Montley, *U. S. Strategy to Counter Domestic Political Terrorism*, Darby 1993, p. 21.

⁷ Brian Jenkins stated that *„terrorism is a theatre”*, where terrorist attacks are planned in such a way so as to attract the attention of the media.

⁸ Brian Jenkins – former member of the Aviation Safety Commission and Safety at White House; adviser of the Terrorism National Commission; at present he is a terrorism and safety expert in RAND Corporation.

*claim to be victims of government terror. So, that what is called terrorism seems to depend on the point of view*¹. John Schreiber defines terrorism as politically motivated violence aimed at the innocent and used as a weapon against the state². An interesting definition was proposed by T. Thornton, who described the terrorist act as *"a symbolic act intended to boost the political behavior by means of beyond the standards measures including threats of using violence"*³.

Often, criminals enjoy the privilege of political asylum and/or impunity. We also realize the complexity of the idea of a political offense in the sense that almost any act can be interpreted as political and therefore a considerable number of common offences can be included in the category.

However, the problem in determining the political nature of the political terrorism no longer exists. In fact, political terrorism is always aimed at the state, regardless of whether in the external, internal or socio-ideological forms.

The nature of the element of common offense is always of, in the case of terrorism acts, particularly heinous and horrific nature as it is to play a specific role (to terrorize) in a terrorist method. And that is what makes terrorist offenses so specific⁴.

In addition, the specificity of terrorist offenses as opposed to politically motivated offences, lies in a characteristic *"mass intimidation, actions carried out on a large scale, maximum involvement and subversive organized crime"*⁵, achieved by elements of common offence. Their political nature has also certain features that distinguish them from politically motivated offences.

Many times, the violence acts in political struggle do not have to be automatically regarded as a sign of terrorist activity because it can be a revolution, uprising or even the

¹ B. Jenkins, *International terrorism: a new mode of conflict*, International Terrorism and World Security, Londyn 1975, p. 14.

² C. Coady, *Morality and political violence*, Cambridge 2008, p. 158.

³ B. McNair, *An introduction to political communication*, Routledge 2003, p. 181.

⁴ See S. Verma, *An Introduction to Public International Law*, Nowe Delhi 2004, p. 208.

⁵ See J. Lador-Lederer, *A Legal Approach to International Terrorism*, Israel Law Review No. 9, 1974, p. 201-202.

fulfillment of the state right to self-determination. Political motivation may cause some problems associated with preparing specific political programme pursued by terrorists.

Terrorist political strategy itself is aimed to exert pressure on the society, trying to subjugate the center of the power. Justification of such acts deserves particular condemnation.

The differentiation between the political offences and terrorist acts is not easy but it seems to be necessary due to, inter alia, different assessment of these two acts. A. Grzeskowiak argues that the issue of political offense contains complex legal structures, i.e. the dependence of the criminal law on politics, as well as the ideology of the power¹.

There is proposed differentiation between these offences on the basis of the analysis of the degree of the contents of political and criminal elements in a particular deed in order to determine the dominant factor². By contrast, proponents of the theory of superiority³ opt for balancing both elements on the basis of the assessment of the act, circumstances and conditions under which it was committed. R. Kubiak states that not only political objectives do decide the superiority of the political element, but also all the circumstances that characterize the act and the offender⁴.

K. Indeckci assumed that an important criterion distinguishing between both categories of offenses is the factor of intimidation⁵, which is a consequence of the action and the purpose of the offender. However, the political offense will not be in terrorist nature when:

"a) to a small extent it can create the state of intimidation;

b) relevant authority prevents the occurrence of the state of intimidation or the state is minimized, for example, by preventing the information about the act from appearing in the media;

¹ See A Grześkowiak, *Przestępstwa polityczne w systemach prawa karnego (selected issues)*, Iustitia civitatis fundamentum. Księga pamiątkowa ku czci Profesora Wiesława Chrzanowskiego, Lublin 2003, p. 695.

² See M. Cherif Bassiouni, *A policy-oriented inquiry into the different forms and manifestations of "international terrorism"*, Legal responses to international terrorism: U.S. procedural aspects, Martinus Nijhoff Publishers 1988, p. XXI.

³ The theory allows to assign political motives provided that the element of the motivation prevails in the criminal act

⁴ R. Kubiak, *Geneza i teorie przestępstwa politycznego*, Palestra 1984, z. 12, p. 11.

⁵ See K. Indeckci, *Prawo karne wobec terroryzmu i aktu terrorystycznego*, Łódź 1998, p. 20.

*c) is not committed for the purpose of intimidation.*¹

The evaluation of terrorist activities often refers to absolute values, however, in legal proceedings for classification of the act and the type of liability it is settled in situational context.²

From the point of view of the law, the development and frequency of terrorist acts - particularly after the attacks on September 11 – demonstrate a relatively new dilemma for the modern international criminal law, presenting a deceptive and paradoxical situation. On the one hand, terrorist offences are certainly offences of the political nature and can be defined as political ones and, thus not subjected to extradition. On the other hand, there is an ideological recognition and practical socio-legal necessity to remove them from the category because both the elements of political offences and common ones have different features in comparison to the elements of political offenses. A state, when confronted with a terror activity, seems to be poorly equipped to face it as it is faced with a balance between protecting individual's freedom and protecting the security of the whole community.

The solution to the situation contradicting itself can be the formulation of a legal definition of a political offence, which excludes some or all terrorist acts. This, however, by necessity implies the definition of terrorism, which will set the offense beyond the regime of a political offense. The legal consequence would be to de-politicize the idea of "*terrorist offense*" and to establish correlated legal sanctions in the internationally accepted way to allow to conduct a national repressive competition, which is being done now.

Of course, defining terrorism according to its purposes is de facto a compromise motivated by the political constraints that help de-politicize terrorist offences. Such segmentation covers in a better way specific aspects of the phenomenon of terrorism, although it cannot be so exhaustive as the general approach.

¹ K. Wiak, *Prawnokarne środki przeciwdziałania terroryzmowi*, Lublin 2009, p. 81.

² J. Utrat-Milecki, *Polityczność przestępstwa*, Warszawa 1997, p. 217-218.

Most of the conventions dealing with acts of terrorism, takes into account the principle *aut dedere, aut judicare*. Thus, the contracting states are obliged to extradite or (when they have reason to not to do it) to bring an accusation against a person committing offenses - but this is not obligatory¹.

To exclude a political attempt on the life of the head of a foreign state or a member of his family from the legal regime of political offences, in many treaties on extradition and national rights there was introduced the Belgian clause on the attacks of 1856². It defines "*an attempt on the life of the head of a foreign government or a member of his family when it takes the form of a murder, assassination or poisoning as a crime or an act related to the crime*"³.

The origin of this clause is linked to the regicide, which in most cases is actually a more complex political offense than terrorist offense - this is due to the fact that it does not always have a terrorist nature. It was introduced to the Belgian law, following the French application on extradition of the person who tried to assassinate Napoleon III. In fact it is one of the first initiatives undertaken to de-politicize political offences and to facilitate international legal and criminal cooperation. Moreover, the literature on this subject considers the fact that on the normative level it determined the form of terrorist activity and put it under international control⁴.

This clause is a factor which began the still dominating trend⁵. Multilateral international cooperation has been established, at least in relation to matters in which the interests of a specific group of people are incorporated. Indeed, most of these initiatives is related to the offences against internationally secured people⁶.

At present, we have seen a trend of de-politicisation of terrorist offenses and de facto treating them as common crimes, thereby creating a standard aimed to exclude such acts

¹ See J. Lador-Lederer, *International cooperation to suppress terrorism*, Londyn 1985, p. 143.

² See Z. Knypl, *Ekstradycja jako instytucja prawa międzynarodowego i wewnętrznego*, Warszawa 1975, p. 17.

³ F. Przetacznik, *Protection of officials of foreign states according to international law*, Haga 1983, p. 109.

⁴ B. Zlataric, *History of International Terrorism and its Control*, in: *International Terrorism and Political Crimes* no. 424, Springfield 1975, p. 476.

⁵ See I. Zanotti, *Extradition in multilateral treaties and conventions*, Boton 2006, p. 57.

⁶ See Organization of American States of 1971 and Convention on prevention and punishment of crimes against persons using international security, including diplomats, prepared in New York on 14 December 1973 – Poland signed it on 07.06.1974 and it came into force on 13.01.1983.

beyond the scope of the norms prohibiting extradition of political offenders. The discussed Belgian clause became a model for other legal acts concerning not only the extradition of offenders¹.

The solutions included in the international agreements concerning the way of combating terrorism are also directed to exclude from the political crime frame the acts of a political nature. Some States has implemented this clause also in fundamental law, for example, Spain in article 13, paragraph 3; Portugal - but here other forms of recognizing terrorist act authorizing extradition was used².

However, in the UN General Assembly Resolution No 51/210 of 17 December 1996 in order to facilitate extradition procedures it was recommended to exclude offenses related to terrorism being a danger for the security of people, irrespective of the motives used to justify the offences.³.

¹ See Journal of Laws of 1994 No. 70 position 307 – European convention on extradition prepared in Paris on 13 December 1957., Additional protocol to the above convention, prepared in Strasbourg on 15 October 1975 and second additional protocol to the above convention, prepared in Strasbourg on 17 March 1978 – Journal of Laws.

² Art. 33 act 3 of Constitution of Portugal – „*Extradition of the citizens of Portugal from the area of Portugal is allowed only (...) in the event of terrorism or international organized crime ...*” (article available at http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf).

³ Annex, point 6 – „*In this context, and while recognizing the sovereign rights of States in extradition matters, States are encouraged, when concluding or applying extradition agreements, not to regard as political offences excluded from the scope of those agreements offences connected with terrorism which endanger or represent a physical threat to the safety and security of persons, whatever the motives which may be invoked to justify them*” (article available at <http://www.un.org/documents/ga/res/51/a51r210.htm>).



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