



# Emerging Markets:

## A Review of Business and Legal Issues

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### Articles:

- ❖ **Ukrainian Agricompanies Seek Alternatives on Warsaw Stock Exchange** *by Olena Kibenko*
- ❖ **The Improvisation of Legal Interpretation and Comparative Law Through the Lens of a Legal English Class** *by Lisa Matuska*
- ❖ **Footprints on the Road to Green Business** *by Rajna Buncic*
- ❖ **Non-governmental organizations as participants in international relations** *by Hanna Rosiak*
- ❖ **The effect of the Commissioner for Human Rights of the Council of Europe in transforming the justice system in the countries of Central and Eastern Europe** *by Marta Osypowicz*
- ❖ **Promotion of terrorism in a scope of the Council of Europe Convention on the Prevention of Terrorism 2006** *by Tomasz Gulla*
- ❖ **Views of the Nobility from the Lubelskie Province on the functioning of the Permanent Council** *by Waldemar Bednaruk*



# Emerging Markets: A Review of Business and Legal Issues

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## CONTENTS

### **Articles:**

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Ukrainian Agricompanies Seek Alternatives on Warsaw Stock Exchange <i>by Olena Kibenko</i>	4
<hr/>	
The Improvisation of Legal Interpretation and Comparative Law Through the Lens of a Legal English Class <i>by Lisa Matuska</i>	13
<hr/>	
Footprints on the Road to Green Business <i>by Rajna Buncic</i>	24
<hr/>	
Non-governmental organizations as participants in international relations <i>by Hanna Rosiak</i>	32
<hr/>	
The effect of the Commissioner for Human Rights of the Council of Europe in transforming the justice system in the countries of Central and Eastern Europe <i>by Marta Osypowicz</i>	48
<hr/>	
Promotion of terrorism in a scope of the Council of Europe Convention on the Prevention of Terrorism 2006 <i>by Tomasz Gulla</i>	70
<hr/>	
Views of the Nobility from the Lubelskie Province on the functioning of the Permanent Council <i>by Waldemar Bednaruk</i>	87

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## **“Ukrainian Agricompanies Seek Alternatives on Warsaw Stock Exchange”**

The financial crisis and the high cost of loan capital at the country's commercial banks have forced Ukrainian companies to seek alternative sources of funds. National and foreign experts reasonably name foreign and international capital markets as such an alternative. We already have some examples of successful stocks placements by major Ukrainian agribusinesses on foreign platforms. MHP, Kernel and Astarta are just some of them.. And, while before the recession placement on foreign stock exchanges was exclusively the prerogative of some top-ranking Ukrainian companies, today more and more small and medium-sized businesses are turning their eyes to foreign capital markets.

It is clear that the main platforms of the foreign stock exchanges are closed for such companies. Meanwhile, many stock exchanges arranged alternative trading platforms, which may be a location for mid-sized companies to place their financial instruments. The Warsaw Stock Exchange (WSE) is one of them and experts quite often consider it among the most accessible and attractive for Ukrainian companies. In recent years, the WSE has also reasonably been regarded as one of the European leaders from the perspective of capitalization and trade volume.

### **WSE alternative trading platforms**

The WSE currently offers issuers the following two alternative trading platforms: NewConnect, which has been functioning since 30 September 2007, and is meant for placement of private equity instruments (shares, depository receipts, and options); and Catalyst<sup>1</sup>, which was established on 30 October 2009 as a market for accommodation of debt instruments issues — mainly corporate and municipal bonds.

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<sup>1</sup> Catalyst involves 4 trade platforms. Two of them are operated by the WSE (regulated market and alternative trading system) and two BondSpot markets (regulated market and alternative trading system). This article deals with the alternative trading systems of the Catalyst platform.

Both trading platforms are quite attractive for issuers. Firstly, the platforms regulations do not prescribe qualified requirements to them and their financial instruments. In particular, in order to be traded on the main platform there is a requirement that a company's capitalization cannot be less than EUR 10 million. At the same time, NewConnect Trading Regulations do not contain capitalization requirements, and the minimum value of placement on the Catalyst is EUR 400,000. Secondly, to get access to the main trading platform a company must present accounting reports for the last three years. The rules of NewConnect and Catalyst do not specify such a requirement for private placement, and, therefore, even start-uppers may pursue investments through these platforms.

Placement procedures of the alternative trading platforms are much easier, less expensive and time-consuming. This relates especially to private placements. While an IPO on the main trading platform takes usually more than 1 year, an IPO on an alternative trading platform takes 6-9 months, and 2-3 months are necessary to place private equity instruments via private placement. Furthermore, expenses for placement on WSE alternative platforms are even incomparable with those for placement on the AIM at the London Stock Exchange.

Quite often placement on an alternative trading platform is considered a pre-IPO stage. In March 2010 NewConnect introduced a specific rank for some companies of the market. The rank is named NewConnect Lead. Its aim is to promote those companies, which have the best chance of getting listed on the main platform of the WSE. Public companies that have been operating at least 1 year and with capitalization of at least EUR 5 million will fall within NewConnect Lead rank. In addition, such companies should strictly comply with information disclosure requirements.

A principal weak point of alternative platforms is the investors and the volume of funds that may be attracted. NewConnect turnover in 2009 was 1162 million zloty (USD 407 million) and the majority of investors (89%) are individuals. Nevertheless, pension funds, with 37% share of the turnover, are the most active investors. In 2009 the number of foreign investors did not exceed 1% but their share in annual turnover of the market increased to 35%. The Czech Republic, followed by Great Britain and Germany, is the leader among non-residents. Catalyst,

set up in the fall of 2009, accommodated 9 issues of municipal bonds and 26 issues of corporate bond issues by the end of the year. Total annual turnover at Catalyst was 5.1 billion zloty (USD 1.76 billion).

### **Choice of financial instruments**

When deciding on a financial instrument that will be placed on a stock exchange, Ukrainian issuers should carefully consider the restrictions imposed by current Ukrainian legislation. In particular, the *On Securities and Stock Market Act of Ukraine* requires that an issuer obtain a permit from the State Commission of Ukraine on Securities and Stock Market to place its securities abroad.

The procedure for obtaining such a permit is governed by the Temporary Regulations *On the Procedure of Granting Permits to Circulation of Shares and Bonds of Ukrainian Companies Abroad*, approved by the Commission Resolution No.36 of 17 October 1997. These Regulations are obsolete and contain requirements that are impossible to comply with. Thus, Ukrainian companies do not have an opportunity to directly place their shares/bonds on foreign capital markets and instead apply one of the following models:

- Establishment of a holding company in an EU country (Cyprus, Great Britain and Netherlands are among the most popular jurisdictions), assignment of Ukraine-based assets to a holding company, and subsequent placement of shares/bonds issued by the holding;
- Deposition of shares of Ukrainian companies in a foreign bank and placement of depositary receipts, issued by this bank.

Under the NewConnect rules, depositary receipts are officially permitted for trading. However, Polish investors are not inclined to rely upon such instruments, and since they form the majority of investors on NewConnect, depositary receipts have not yet been traded on NewConnect or on the main WSE platform. Thus, a Ukrainian issuer willing to have its instruments traded on the NewConnect can actually do it only via a foreign SPV.

## **Introduction to trading on NewConnect**

The basic document that regulates admission and turnover of financial instruments on NewConnect is the Alternative Trading System Rules adopted by the Resolution of the WSE S.A. Management Board No.147/2007 of 1 March 2007.

Financial instruments can be introduced for trade on the NewConnect under the following terms:

- 1) an issuer is a company limited by shares;
- 2) an information document has been prepared by the issuer in accordance with the requirements specified in Annex 1 to the Rules;
- 3) there are no restrictions in effect upon circulation of the issuer's instruments (restrictions imply the preemptive rights, any clearance of instruments purchase or sale);
- 4) the issuer is not under a bankruptcy or winding-up procedure;
- 5) the issuer agreed to cooperate with an authorized advisor (in case of private placement), and after introduction to trading with a market animator/maker.

The issuer himself chooses the authorized advisor which, as law or audit firm, or a financial advisor. The main task of the authorized advisor is to prepare the information document, provide the issuer with comprehensive support for placement of the instruments, and to assist during the post-placement period (ensuring the issuer meets the requirements of the NewConnect, including information disclosure requirements). The period of cooperation with the authorized advisor must be no less than one year starting from the introduction date.

The function of the market animator/market maker covers supporting the financial instrument liquidity. It should be noted that in addition to the authorized advisor and market maker/animator, the issuer needs to retain a number of other advisors, who may substantially influence the placement success (lawyers, auditors, investment advisors and PR agencies, etc.)



## **Placement on NewConnect**

Placement of financial instruments on the NewConnect can be public or private. If the offer is directed to not more than 99 investors, then the placement shall be deemed private. Public placement is directed to an unlimited number of investors.

The private placement procedure covers the following stages:

- 1) Restructuring of the issuer (if needed);
- 2) Making to an agreement with the authorized advisor;
- 3) General Meeting of the issuer decides on the flotation and placement of financial instruments on NewConnect via private placement;
- 4) Performance of financial and legal due diligence;
- 5) Preparation of the Information Document by the authorized advisor;
- 6) Registration of the instrument with the National Depository;
- 7) Filing the application for introduction of the instruments to the WSE;
- 8) Approval of the Information Document by the WSE (within 5 business days) and making the decision on introduction;
- 9) Publication of the Information Document on the WSE's website;
- 10) Making an agreement with the market animator/maker;
- 11) Filing the application for determining the first trading date;
- 12) The first trading date is set by the WSE.

The procedure of public placement is in general almost the same. The main difference is that the company has to prepare the prospectus, which has to be approved by a competent national regulating authority.

## **Introduction to Catalyst**

Introduction to trading on Catalyst is regulated by the Catalyst Market Rules, approved by the Resolution of the WSE S.A. Management Board No.408/2009 of 3 September 2009. The procedure is almost similar to the NewConnect procedure.

## **Applicable laws**

A company, planning to trade its instruments on foreign capital markets, should consider that all the relations involved shall be subject to the laws of at least 3 jurisdictions: 1) Ukraine; 2) the jurisdiction, where the holding company is incorporated; and 3) Poland.

Thus, when choosing a legal advisor and auditor, the issuer should give preference to international companies with focusing relevant jurisdictions or to the having partnership relations with law or audit firms, working in the relevant jurisdictions (that is, the so-called “best friends” system).

## **Legal due diligence**

Legal due diligence is not among the obligatory terms for introduction to the NewConnect. However, to ensure success of instruments placement issuers (especially non-residents) should follow the “best practice” standards, which require the report on legal due diligence to be in place.

While drafting due diligence report, a legal advisor should consider possible requirements/recommendations of the authorized advisor as to the scope and structure of the report. This is especially important due to the fact that information from the report serves as background for the Information Document.

Due diligence is, as a rule, divided into two stages: 1) initial due diligence, aimed at revealing existing risks and problems of the business; and 2) subsequent due diligence, which is meant to check if the risks and problems revealed on the initial stage have been eliminated.

## **Structuring of holding and restrictions of Ukrainian laws**

When structuring an SPV holding, business owners should pay special attention to all the organization formalities, especially to the restrictions, provided by Ukrainian legislation. In some cases it may be mandatory to obtain some permit documents (licenses of the National Bank of Ukraine for investment abroad, preliminary opinions and concentration permits of the Antimonopoly Committee of Ukraine, etc.) from the Ukrainian authorities.

To avoid obtaining NBU licenses at the stage of a holding company's establishment nominal shareholders are frequently involved. Subsequently, business owners may either continue using nominal shareholders or become shareholders themselves. The last option may cause the necessity to obtain a license as well. However, this depends on the mechanism (purchase-and-sale or deed of gift) applied to formalize assignment of shares from the nominees to the business owners.

As a rule, some of the transactions involved in the business structuring process presuppose obtaining the preliminary opinions of the AMCU and, if any, concentration permits. In practice this may take a lot of time.

## **Information disclosure**

### ***NewConnect rules***

Under the NewConnect rules the issuer is obliged to disclose current information, which is information on any circumstances or events that may have a significant influence on business, property or the financial situation of the issuer, or could, in the issuer's opinion, significantly affect the price or value of the financial instruments, and periodical information (an annual report and quarterly reports). Current information shall be disclosed within 24 hours after the circumstances that fall within the current information occurred.

Quarterly reports are to be filed not later than 45 days after the end of a reporting quarter and the annual report — not later than 6 months after the end of the year.

After filing, financial reports should immediately be placed on the website. The report should be printed, signed and kept by the issuer for 3 years.

### ***Catalyst rules***

Catalyst information disclosure rules are less detailed. Issuers are obliged to disclose current information. However, unlike the NewConnect rules, the Catalyst rules do not provide a list of information, which may affect the issuer's status and on every



occasion the decision as to whether or not to refer the information to current is at the issuer's discretion.

### **First signs**

AGROLIGA GROUP (Kharkov) is the first Ukrainian issuer that has officially announced its intention to enter the NewConnect platform, as well as being the first mid-sized company planning to attract investments on the WSE. In the past only such major Ukrainian agricultural companies as Astarta and Kernel traded the ifinancialal instruments on the main WSE platform.

# Lisa Matuska

**Author:** Lisa Matuska is a Polish-American from Tampa, Florida. She is an English language instructor, radio journalist, and aspiring law student. Lisa just completed a four-month internship in the criminal court in Wroclaw organized in conjunction with Wroclaw University's School of American Law and the Chicago Kent College of Law. Here she shadowed a judge and taught English classes to Polish judges.

In 2004 Lisa left warm, sunny Florida to study Journalism and International Studies at Northwestern University in Evanston, Illinois. She spent the summer of 2005 studying Polish at the Jagiellonian University in Krakow.

In 2006 Lisa spent five months in the Latin American country of Bolivia conducting independent research on indigenous land rights.

While studying at Northwestern, Lisa worked as a reporter at Chicago Public Radio covering religion, health and education.

She has worked in the fields of youth literacy development, ESL education, and youth employment counseling in Chicago. In her spare time Lisa enjoys playing football (soccer in the US), listening to music and dancing.

## **”The Improvisation of Legal Interpretation and Comparative Law Through the Lens of a Legal English Class”**

The Supreme Court Justice Oliver Wendell Holmes Jr. wrote, “the life of the law has not been logic, it has been experience”. As I began my four-month internship at the regional court in Wroclaw, shadowing Judge Edyta Sielicka and teaching English to a group of judges, the situation seemed illogical. I studied journalism and international studies in university. Besides a few undergraduate legal classes, the law to me was simply a fascinating subject and potential career. On top of that, as a first-generation Polish-American my Polish language skills were limited to conversations with family and friends back home. My knowledge of Polish “legalese” was completely nonexistent.

On the 3<sup>rd</sup> floor of the regional court building in Wroclaw I began teaching English to a group of 8-10 judges. The level of English spoken in class was quite high so the curriculum was based on discussions and debates. What surprised me most from our conversations and explorations into legal issues was the difficulties and nuances in comparing legal systems. It’s difficult to try to compare the structure of America’s common law system, which is based on case law and precedent, with the Polish continental system, based on civil and criminal codes. Yet it’s in legal opinions, arguments, appeals and even language classrooms, that it becomes easier to make these comparisons and expose some unexpected insights into a country’s legal system.

In this article I hope to show how the dialogical structure of my English classes helped to spark lively and unique debate on legal issues, specifically free speech in the United States and Poland. I will demonstrate how discussion and critical debate were important to not only expand my students’ knowledge and comfort of English, but to develop an analysis of comparative law based on history and experience rather than rules and logic.



## **Legal English Curriculum**

I was tasked with teaching Advanced Legal English, and while this subject might come with standard curriculum topics and a set vocabulary at some language schools, I was coming at it from scratch. But I had two great resources to draw from, the first being my previous job teaching literacy to youth in Chicago. I was the coordinator of literacy program for elementary students and I noticed that students can easily open a book and read it, but only when they are asked to explain their thoughts on the story are they challenged. The effort and creativity of improvised speech is where literacy skills are expanded. Similarly, I think this is the difference between learning a new language from a textbook curriculum and actually developing fluency in a language. The critical moment is the few minutes or seconds in which a speaker generates a response or an opinion without translation. That time decreases as language skills improve.

It turned out that the pairing of the English language lessons with a discussion of legal topics was ideal because of the importance of wording in both subjects. As we will see later, a slight change in one word or the context around a word can alter an existing law significantly. Thus when defining unknown words in class, especially in judicial opinions, we would find the dictionary definition and pair that with the legal situation and context in which it was used. Words became more than just a dictionary definition. They became connected to a situation or process.

My second resource was a book titled “Pedagogy of the Oppressed” by Paulo Freire. He talks about the weaknesses in treating education as a “banking” process where a teacher imparts to the students “motionless” and “static” knowledge that is irrelevant to the cultural experiences and identities of the students themselves. I had not come to this class to fill these judges with the precious knowledge that only I possessed. I came to create a dialogue and space for learning. Freire writes, “Knowledge emerges only through invention and re-invention, through the restless, impatient continuing, hopeful inquiry human beings pursue in the world, with the world, and with each other” (Freire, *Pedagogy of the Oppressed*). As a legal novice myself, I was also coming to learn. We met as a class twice a week with different experiences and our goals were to

share, discuss and debate in the English language. My role was to facilitate and foster this dialogue and correct or improve language mistakes when they arise.

The course objectives were as follows:

1. **Increase exposure to English in a conversational and professional setting.** While the judges already had advanced levels of English, they said the opportunity to practice and challenge their English skills outside of vacations and movies was rare. Furthermore the opportunity to spend an hour and a half forming opinions and arguments in English is even harder to find.
2. **Introduce and discuss issues in modern American law.** This included reading news articles and discussing more controversial or dynamic issues in the American legal landscape.
3. **Compare the US legal system with the Polish and emerging Polish/EU legal systems.** This area was perhaps the most uncharted and unfamiliar territory for me, and where I hoped, through discussion and research, we could all learn the most.

We formulated these objectives together, yet some judges who were preparing for European conferences or meetings with foreign judges had more specific goals. For example, one woman was to attend a European Union legal conference about Gender Equality and Gender Law in the EU. With her we worked on describing and discussing this issue in Poland and understanding the debates in the EU regarding gender equality, harassment, parental leave in the workforce, and equal pay.

When brainstorming for specific class topics, whether they be American law or European law, I once again drew from my undergraduate experiences, specifically from a class called “Law and Ethics of Journalism”. Craig LaMay, an assistant professor at Northwestern University’s Medill School of Journalism, taught this class when I was in my last year at Medill. He was lecturing to a group of journalism students, but the style of teaching was very different than any other class I’d taken. It was taught like a law class and this meant presenting cases, like

puzzles, and asking us to figure them out. I noticed this same style when sitting in on lectures given by professors from the Kent College of Law at Wroclaw University's School of American Law. Professors Edward Carter and Richard Warner, who taught criminal law and contract law respectively, would introduce case scenarios and students were asked to determine the outcome of the cases, using mostly logic.

## **The First Amendment**

*"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."*

In my law and ethics class we discussed many cases involving the First Amendment and free speech, cases which can rarely be solved by simple logic or by turning to a previous case. These cases were usually complex and controversial and often reached the Supreme Court where the judges' opinions- both concurring and dissenting- became the most telling interpretations of the legal issues behind the case. Two cases we talked about in detail were landmark cases in setting the precedent for subsequent First Amendment and free speech decisions in US courts. These cases are *Dennis v United States* and *Brandenburg v Ohio*.

In 1951 Eugene Dennis, the general secretary of the Communist Party of the United States, had been convicted of conspiring to "organize as the Communist Party, a group of persons to teach and advocate the overthrow and destruction of the Government of the United States by force and violence..." as well as advocating the "necessity" to carry out this act (*Dennis v United States* No. 336). Dennis was first convicted in a district court, then the



conviction was affirmed by the Second Court of Appeals and was granted the *writ of certiorari*<sup>1</sup> and went to the Supreme Court. In the United States in 1951, during the country's "Red Scare" where black lists were being made of suspected communist sympathizers, it was no surprise that the highest court in the country upheld the decision in a 6-2 vote.

Of the eight judges, the six that voted to uphold the conviction claimed that Dennis' actions -organizing to advocate the overthrow of the US government- violated the Smith Act and passed the court's "clear and present danger" test<sup>2</sup>. The majority opinion written by Justice C.J. Vinson stated that, although the speech was not yet published, (the members had simply met to organized the printing of materials) the eventual result constituted a clear and present danger and the preemptive actions were, therefore, unprotected by the First Amendment.

In his dissenting opinion, Justice Hugo Black pointed out that the current social and political climate of the country led the majority of the high court to "water down" the First Amendment and inappropriately apply the "clear and present danger" test.

*"These petitioners were not charged with an attempt to overthrow the Government.... The charge was that they agreed to assemble and to talk and publish certain ideas at a later date: the indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids.... There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment*

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<sup>1</sup> The writ of certiorari is a document asking the Supreme Court to review the decision of a lower court. It includes a list of the parties, a statement of the facts of the case, the legal questions presented for review, and arguments as to why the Court should grant the writ. <http://www.techlawjournal.com/>

<sup>2</sup> A test put forth in *Schenk v United States* by Justice Oliver Wendell Holmes Jr. "It requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result therefrom."

*liberties to the high preferred place where they belong in a free society.” (Dennis v United States No. 336, Douglas, J, Dissenting Opinions)*

In class we went over this case quickly with an understanding that Black’s opinion foreshadowed the idea that the “clear and present danger” test was insufficient because it was too vague.

The language needed sharpening and this happened in the next case, *Brandenburg v Ohio*. In 1964 Clarence Brandenburg, the leader of a Ku Klux Klan group in Ohio was charged with advocating violence under an Ohio criminal statute. The charge came after a local TV station taped a group meeting on a private farm showing members burning a cross, yelling, carrying weapons and making speeches referencing “revenge” that would be taken out on certain groups of people including black people and Jewish people. Brandenburg was identified on the tape and his speech also referenced a march that would happen in support of these ideas.

The case was appealed all the way to the Supreme Court. The question for the nine judges in 1964, as well as for my class of Polish judges in 2010, was this: Given the preceding cases, including *Dennis v United States*, was the wording of the reasons for Brandenburg’s conviction too vague to justify what might be an infringement on his First Amendment rights? Was the “clear and present danger” test sufficient in determining if the suppression of speech is constitutional or not?

First we split up into two groups, one group to arguing that the decision made by the lower courts should be upheld, the other to arguing that it should be reversed. Just like the law classes I had experienced, the result was unknown to my students. This was another logic puzzle. The two that argued it should be upheld had a strong argument: that there was certainly a clear and present danger to Jewish people and black people who might live in the area and could be victims of violence by excited and riled-up supporters. Furthermore, these people had weapons. Those who were arguing to reverse the decision said it was too abstract. They argued that there was no plan for a violent rebellion, but rather an idea to march on Washington, and that the reference to a possibility was not specific enough to mean violence was certain to occur.

Then we dropped the roles and I asked the judges this question: If they were US Supreme Court judges in this case how would they rule? The first woman (who was previously on the uphold side) said she would reverse the decision because it is too abstract. She said after the Dennis trial the court was already leaning toward allowing speech if it was too vague and that there should be a high possibility of violence to justify a stop to the speech. I assumed that all the answers would be similar, especially since the final decision by the Supreme Court judges in 1964 was 9-0 to reverse the decision. However, the second man said he personally would uphold the ruling. His main reason was that “people have the right to live without fear” and in some cases this is more important than the right to free speech. When explaining his reason he immediately began to reference fascism and the danger in letting this type of hate speech continue. He said the case reminded him of an instance when Hitler himself was accused of hate speech but nothing was done in light of his right to free speech. The other two female judges had similar answers: uphold the decision. They all referenced the historical dangers of not curbing fascist or hate speech early. The first woman admitted her initial answer was from the perspective of an American judge. Her personal opinion, as a Polish judge, would be to uphold the decision.

The actual decision by the Supreme Court was unanimous to reverse the ruling. The majority opinion laid the ground work for a new rule: that for speech to be suppressed it should be “directed at inciting or producing imminent lawless action,” and be “likely to produce such action” (*Brandenburg v Ohio* No 492), which they concluded was not the case in *Brandenburg v Ohio*.

In teaching a principle like free speech, I assumed the logic of the law would be standard and universal. But logic fails when experiences differ. I followed the same logic used by the Supreme Court justices at that time: how the controversial and vague wording of the Dennis case led to a more specific definition of dangerous speech. But the logic of one of the Polish judges, the priority of having the “freedom to live without fear” was a logic I couldn’t follow. As a white, middle-class female in America, I have not experienced what it is like to live with this kind of fear. Perhaps this is a reason for America’s staunch defense of “individual freedoms”.

In America in 1964, and today, the First Amendment protects even the most violent, fascist hate speech as long as it's not "inciting" or leading to "imminent" violence. In contrast, Article 13 of the Polish constitution prohibits the existence of any organizations or parties promoting totalitarianism, Nazism, fascism and communism. Article 256 of the criminal code makes it a crime, punishable with up to 2 years in prison, for promoting a fascist or totalitarian system of state. Historically, burning the American flag, as well as using the image in many other positive and negative contexts, is protected speech under the First Amendment. In the Polish penal code Article 137 criminalizes anyone who insults, damages or destroys the Polish flag or any other "national symbol".

### **Logic vs. Experience**

Making these general comparisons on how a country's history affects its legal framework begs for research and details that are beyond the scope of this article. The recent histories of Poland and the United States, to a lesser extent, have led to rapid changes in attitudes and legal policies, which proved to be topics of growing and healthy debate in my classes.

But sticking to my American ways, I will bring the debate back down to two individuals: Oliver Wendell Holmes Jr. and me. In preparing to apply to law schools in the United States, I am studying for the Law School Admissions Test (LSAT), which is almost completely based on logic puzzles and reasoning. When I would finish teaching my class my head would be reeling from convoluted discussion involving questions of cultural identity, progress and tradition. Then I would open my LSAT book and force myself ignore the whole world and all the thoughts in my head, and focus on a 100-word question on a white piece of paper.

Then I thought of Oliver Wendell Holmes Jr., who favored experience and eloquent legal writing over dry logic. He served on the Supreme Court for 30 years from 1902- 1932 and was known as "The Great Dissenter". His obituary in the New York Times states that many of the views he wrote in his dissenting opinions later became molded into the law. His quote, which began this article, explains a lot about the class I taught on free speech.

“The life of the law is not logic, it is experience.”

The quote continues:

*“ The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy avowed or unconscious, even with the prejudices which judges share with their follow-men, have had a great deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”* (Holmes, The Common Law)

The story of Poland's development, periods under Austrian, Russian and German occupation, among others, as well as almost 50 years under a communist government, has shaped the codes and legal traditions. Furthermore these traditions now face integration into the growing European Union and its established legal standards. Similarly, the United States has a history of revolutionary attitudes, slavery, and steady flows of immigrant communities that have shaped its constitution and legislation both at the federal and state level.

Yet, I can now say from experience that it's not the concrete laws that shape these legal systems. An increase in codes, statutes and rules based on logical theorems or legal theories doesn't necessarily lead to quicker and more just legal decisions. The logic of the law is the tip of the iceberg. Calculations with clear answers that I can circle in on my LSAT exam are great. But the legal judgment of a judge, weather it be a Supreme Court justice or a judge in Wroclaw's regional court, involves interpretation, creativity and, dare I say, improvisation.

My legal English class in Wroclaw was an apt analogy for this improvisation. A language learner can read, memorize and recite to perfection. However, the capacity to learn new words, how to define them, and to use them, expands when you are speaking without preparation, or improvising. Similarly, a student in my class described a judge's decision-making process like this: first you go to the codes. If those fail, you look to logic. If that fails you turn to the existing laws. If those fail then one must make an improvised judgment, an opinion, based on experience.

It's in this creation where legal words and their meanings are expanded and placed in a social context based on history and experience.



## Rajna Buncic

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After her undergraduate studies, Rajna Buncic assisted in conducting an ongoing capital market research for the Partners for Financial Stability Program, founded by USAID in Warsaw. She also did an internship in the Front Office of the Central Bank of Bosnia and Herzegovina. For almost a full decade, through her work in several local NGOs and UNICEF she contributed generously to a range of post-war projects, covering issues from social activism and democracy to HIV/AIDS. She is an alumna of AIESEC, the largest student organization in the World.

In the released paper, she goes a bit further pure finance, the world of her professional interest, by sharing with us some of her thoughts on the urging environmental crisis and greening as a related framework for business action.

## **"Footprints on the Road to Green Business"**

### **Introduction**

In his book "Transforming the Corporation" Allen White envisions: "Whereas scale, growth and profit-maximization were previously viewed as intrinsic goods and core goals of the corporation, the new corporation marches to a whole different set of principles; namely, those serving the public interest, sustainability, equity, participation and respect for the rights of human beings. Corporate forms a rich pluralism conforming to global norms that govern business conduct regardless of place, sector or scale."<sup>1</sup> On the road to transform, corporations, however, are not required to give up their profits. They are required to think about the environmental context within they perform and act accordingly. Profit - it comes next...

### **Footprint 1: Tail and Toss of a Coin**

The scale of problem hardly can be captured through the frequently used collocation 'the environmental *risk*'. What we are speaking of is the environmental *crisis*.

Apart from many other crises, namely financial, the environmental crises will not, unfortunately, turn into the environmental boom. No one will eventually truly benefit from it. One should not, however, argue that there is no room for action. Both courses of action.

It is plausible that a human will not stabilize weather, will not bring back all species lost, will not patch ozone depletion, will not clean up the Earth from waste nor will find new resources of drinkable water. Human kind has been already suffered severely from a range of health problems caused by the environmental degradation and food contamination. Dangerous climate change is happening simultaneously, leaving the Earth metamorphosed. Satellite data<sup>2</sup> - a comparison of Arctic *sea* ice concentrations over a 24-year period, between 1979 and 2003 - faithfully illustrate not just the past, but also the future of our planet. Weather forecasts have

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<sup>1</sup> White A.L. (2006), *Transforming the Corporation*, Great Transition Initiative, Tellus Institute, p. 10

<sup>2</sup> <http://www.nasa.gov/centers/goddard/news/topstory/2003/1023esuice.html>, as of December 23, 2009

become altogether unpredictable, just like the weather itself. Insurance industry has invested billions of dollars solely in the earthquake prediction software that performed disappointingly.

The authors of the book "Natural Capitalism"<sup>1</sup> (1999) warned that one-third of the planet's resources, its 'natural wealth', had been consumed just over the three decades, starting early 70s. It is frightening that the U.S. alone, which has 5% of the world's population, consumes a third of the world's resources<sup>2</sup> and creates a third of the world's waste<sup>3</sup>. If all the people in the World lived life of an average American, we would need five planets to replace the one we have.<sup>4</sup> Moreover, the U.S. industry has reported a release of *cca.* two million tones of toxic chemicals through its facilities, including federal ones, in 2007.<sup>5</sup>

As Evernden<sup>6</sup> (1985) suggested that the environmental crisis is not simply something we can examine and resolve. We are the environmental crisis. It is not the overnight risk of a borrower.

The vicious consumption–production–globalization circle with, not a man, but man's desires in a central role, seems to be alpha and omega of the puzzle.

In order to satisfy infinite desires of a man, production turned into overproduction and consumption into overconsumption. The third world economies, where multinational corporations have relocated or expanded their manufacturing processes, are primary devoted to providing the developed world markets with the final goods, since the goods are often too expensive for those who produce them - impoverished workers in the production chain. By

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<sup>1</sup> Hawken P., Lovins A. and Lovins L.H. (1999), *Natural Capitalism*, Little Brown and Company, p. 4

<sup>2</sup> [http://en.wikipedia.org/wiki/World\\_energy\\_resources\\_and\\_consumption](http://en.wikipedia.org/wiki/World_energy_resources_and_consumption), as of January 3, 2010

<sup>3</sup> Miller (1998) quoted in *Global Environmental Issues*, Willey, by Harris F. (2004), p. 247.

<sup>4</sup> [http://www.footprintnetwork.org/en/index.php/GFN/page/basics\\_introduction/](http://www.footprintnetwork.org/en/index.php/GFN/page/basics_introduction/), as of January 3, 2010. This is also to remind us on a tremendously unequal distribution of all resources (food, drinkable water, energy, etc.) and services (health, education, infrastructure, etc.) over the planet. While on one side of World people are obese and buy weight loss supplements, on the other they starve to death. Almost half the world, that is over three billion people, lives on less than \$2.50 per day. (World Bank Development Indicators Report 2008, p. 89)

<sup>5</sup> [http://www.epa.gov/tri/tridata/tri08/national\\_analysis/index.htm](http://www.epa.gov/tri/tridata/tri08/national_analysis/index.htm), as of January 3, 2010

<sup>6</sup> Evernden, N. (1985), *The Natural Alien*, Toronto: University of Toronto Press, p. 128

shifting production, not just developed economies low the cost of their products, but also reduce the pressure on domestic natural resources, and thus shift the burden to developing world.

Nonetheless, many have witnessed the positive impacts of production expansion to the third countries. To some extent, the know-how is inherited to the third world, and there is nothing more valuable than the knowledge. *Tantum possumus, quantum scimus*. A well-know case of Nike or a more recent child labor incident of Primark<sup>1</sup> remind us, however, that a moral and ethic framework of action is frequently put aside. After many subsidiaries in the third countries have been closed down due to the lack of capital to maintain business ongoing or the business purpose accomplished, thousands of employees have been left jobless and the vast areas now look like rubbish dumps. Consequently, globalization has started being viewed through prism of Pareto efficiency – it is impossible to make one party better off without making the other one worse off, rather than as win-win strategy. Moreover, Muhammad Yunus, a Nobel laureate and an advocate of "social business" concept, stressed that in world of "economical imperialism" clear game rules must be set out in order to leave room for everyone to develop.<sup>2</sup>

## **Footprint 2: Road Map**

A vast number of actions have been undertaken on environmental issues since the birth of Greenpeace. Some significant institutional efforts to understand the climate change have been done through Intergovernmental Panel on Climate Change (IPCC), but actions on the puzzle have been carried out through also UN Charter, WTO, International Labor Organization, and International Chamber of Commerce. The most concerted international community attempt to address the issue was through the Kyoto Protocol in 1997. The renunciation of the Protocol by the United States, one of the hugest world's polluters, however, showed that the mechanism of

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<sup>1</sup> [http://news.bbc.co.uk/2/hi/uk\\_news/magazine/7468927.stm](http://news.bbc.co.uk/2/hi/uk_news/magazine/7468927.stm), as of January 3, 2010

<sup>2</sup> Muhammad Yunus: Lifting People Worldwide out of Poverty, an interview for Knowledge at Wharton, <http://knowledge.wharton.upenn.edu/article.cfm?articleid=2243>, as of December 23, 2009

international trade sanctions, such the one in the Montreal Protocol on ozone-depleting gases, should be imposed if we want the protocols are complied.<sup>1</sup>

Within his 'Global Compact' initiative UN Secretary General Kofi Annan once has called on the multinational corporations to work together in the realization and promotion of human rights, better working conditions and protection of the environment.<sup>2</sup> It is clear that those issues, preventing further ecological overshoot among, cannot be deal with if all stakeholders are not involved. And, "[...] corporations are doing most of the destroying"<sup>3</sup>.

Corporate culture, hence, has a profound influence in treating the question.<sup>4</sup> What is important for a corporation will eventually model an operational policy, strategic plans and environmental practices. Given the fact corporations are led by individuals, any action seems to be in the hands of individuals, driven by their personal awareness of the problem, awareness which is firmly determined by the society. If environment is "not a problem of the company" none actions and initiatives are likely to be done. The issue is also altogether omitted from the course of action because of the costs. Any financial management textbook recalls "maximizing shareholder value is the vital goal of a corporation", and costs do not really work towards this goal.

The two main types of costs should be distinguished here. The first are externalities. Cost of air and water pollution caused by production, cost of recycling waste, cost of health care and medical treatment of persons vulnerable to environmental changes (pollution and climate change, eg. asthmatics) is not included in the price of final goods. They are "externalized" to third parties, and goods are still competitive on the marketplace. The second group of costs that should be taken into account is technology replacement costs. In order to protect environment

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<sup>1</sup> Stiglitz J. E., (2006), *Making globalization work*, W. W. Norton, p. 176

<sup>2</sup> Homann K., Koslowski P. and Luetge C. (2007) *Globalisation and business ethics - (Law, ethics and economics)*, Ashgate e-Book, p. 3 - 4

<sup>3</sup> Speth J. G. (2008), *The bridge at the edge of the world: capitalism, the environment, and crossing from crisis to sustainability*, Yale University Press, p. 132, 157

<sup>4</sup> Howard-Grenville J.A. (2007), *Corporate culture and environmental practice: making change at a high-technology manufacturer*, Edward Elgar, p. 138

many firms should start with substituting their old technologies with the new, sustainable technologies. It is not in the interest of a company to do so, however, due to the fact that any replacements rise enormous, long-run costs. Moreover, finding sufficient funds to finance such a replacement is not easy in the time of crisis.

Legal framework is, thus, necessary if new technologies are to be introduced and adopted and a new market price system established. Unfortunately, increased corporate influence over the governments internationally and powerful lobbying prevented the implementation of a coherent policy in the past. Besides, the extent of global financial and economic crisis is such that many elements of innovation systems are being affected and may be severely compromised. Lower R&D spending, loss of human capital, lower risk taking and weaker international diffusion of technology are some of the examples.<sup>1</sup> At the same time, the developing world is less capable both economically and technologically to make all needed adaptations.

### **Footprint 3: Think Globally – Do Business Green**

Hundreds of new or modified products and services launched into the marketplace are an indicator of a man's exponentially increasing need for "best suit" goods. Man has become dominantly materialistic being, and his consumption has been perceived to be a driving force of economic growth and prosperity. Nevertheless, a comprehensive study of life satisfaction has revealed that the life satisfaction index remains unaffected by significant increase of GDP per capita in the last few decades.<sup>2</sup> "The more, the better" principle seem not to count when the true human well-being is questioned. This remark gives us an intuition: we do not need to consume more, but to consume better. In the spirit of positive change for environment, one can add "to consume green".

Green consumerism goes far beyond producing and consuming "green" goods. It is philosophy of living which emphasizes balanced interaction between men and the nature. It does

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<sup>1</sup> Chandra V. et al. (2009), *Innovation and Growth – Chasing a moving frontier*, OECD - WB, p. 135

<sup>2</sup>Speth J. G. (2008), p. 165



not neglect economic growth, which can surely be achieved in the green world - the world that is consistent with environmental preservation, where the economy is eco-friendly, goods are toxic-free, where productivity of recourse used is improved and waste discharged reduced (or even "zero waste" concept applied), where renewable, solar and wind energies are used - if appropriately guided by regulations. One initiative proposed establishing the umbrella organization – the World Environmental Organization, but the United States objected again.

The future of green consumerism and thus green business is promising for at least three key reasons. First, positive impacts of green business are championed all over the world. A growing awareness of destructive environmental changes leads to fierce criticism of all environment-non-friendly businesses. The expansion and even the existence of many such businesses will be, sooner or later, constrained by the mounting pressure from activists, governments and other interest groups. Second, as a consequence, the number of consumers that is switching to green products is ascending rapidly, despite of a higher price of green products compared to non-green substitutes. Their consumer behavior is shaped by their comprehensive approach to a sustainable living. They care about holistic health, buy organic food, use energy-efficient devices, consume toxic-free products, insist on "extended producer's responsibility", take part in environmental and better-living initiatives. Third, following the recent example of the Obama's administration, many governments and grant-givers are starting to support strategically green business within their nations and internationally. Moreover, corporate social responsibility and corporate governance in general nowadays are essentially important in investment decision making of many investors who look forward to taking part in the green growth.

Hence, the new corporate power is hidden in a corporate greening. The author of "The bridge at the edge of the world: capitalism, the environment, and crossing from crisis to sustainability", James Gustav Speth argue that "[c]orporate greening is thus driven by green consumerism; by lenders, investors, and insurers worried about risks both environmental and financial; by the blame and shame campaigns of NGOs; by existing

government regulation and the prospect of future regulation at home and abroad; by sales opportunities opened up by new green products and technology; and by the general need to improve corporate standing as good citizens."<sup>1</sup>

Therefore, on the road to succeed corporations should be driven by green motivation, which brings the ultimate solution to the problem in question. Since we all are the in charge of business growth, through both demand and supply, and environment protection my very last note goes like this: next time you book your EasyJet flight make sure you feature it with the carbon offsetting option!!!

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<sup>1</sup> Ibidem, p. 176

# Hanna Rosiak

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Ms. Rosiak specialized in International and European Law. She wrote her Master's thesis on international NGOs. During her studies, she actively participated in faculty competitions, as well as international conferences. She is an active volunteer of the Jan Nowak-Jeziorański College of Eastern Europe.

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## **“Non-governmental organizations as participants in international relations”**

### **Pluralization of the international scene**

Up until recently the prevailing opinion in the world of science and politics was that states were solely responsible for shaping the international system. The role and importance of states, as actors and participants in international relations, were considered as decidedly dominant and left no doubt as to the position of the other actors in the system. However, since the mid-twentieth century that certainty began to waver and fall. In scientific debates, the thesis on the absolute government on the international arena by countries has been subjected to the general criticism. How T. Łoś-Nowak finds, although the role of states in the international system has not changed for over four hundred years, yet their position on the international stage, as well as the possibility of fully autonomous activity in the global politics has slightly been weakening<sup>1</sup>.

The progressive pluralization of the international scene, consisting in the recognition of non-state actors as full participants, has not just earned competitors for states, but has also resulted in arrival of more potential partners for international cooperation. Thus, the phenomenon has indubitably a positive connotation.

### **The concept of international organization**

Representatives of both legal science and the science of international relations agree that the most important partners, as well as competitors for states have become undoubtedly international organizations. International law does not contain a norm which establishes the binding definition of the discussed entity. Also in the literature there is no generally accepted formula. However, for the purpose of teaching many different definitions of international organizations have been formulated, as well as conducted a variety of classifications.

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<sup>1</sup> Łoś-Nowak, T. (2004). *Organizations in international relations: the essence, mechanics, scope*. Wrocław. 17 p.

R. Bierzanek and J. Symonides define international organizations as communities of either countries, or other legal entities (usually national unions or associations) or natural persons from different countries, established to carry out tasks defined in a statute <sup>1</sup>.

J. Barcik and T. Srogosz, in more general terms, define the entity as a formal structure constituted through an international agreement, concluded between member states, which has determined goals, established in the common interest of the members <sup>2</sup>.

J. Białocerkiewicz presents the expanded definition of an international organization as a community (union) of countries or national law entities, coming from different countries, established to continuously carry out tasks specified in a founding document, being an international agreement (a statute, a constitution) within the meaning of the Vienna Convention on the Law of Treaties of May 23, 1969, or a private law agreement <sup>3</sup>.

As already stated, international organizations have been subjected to many different classifications. Following T. Łoś-Nowak, there should be pointed out what determines the difficulties of formulating a single binding definition of these entities: they do not form a homogeneous group in terms of the subjective, as well as objective composition, range of activity, manners of affecting non-state international relations participants, and how they are organized and operating <sup>4</sup>. Hence the authors, taking various criteria into account, divide international organizations into many groups.

And so, because of the international legal status of their members <sup>5</sup>, international organizations may be divided into governmental and non-governmental. Taking into account the criterion of the territorial scope of activity <sup>6</sup>, universal and regional organizations can be distinguished. J. Menkes and A. Wasilkowski indicate other criteria, which determine creation of regional (group) organizations, referring to the criterion of acceptable range of membership;

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<sup>1</sup> Bierzanek, R., Symonides, J. (2004). *Public international law*. Warszawa. 285 p.

<sup>2</sup> Barcik, J., Srogosz, T. (2007). *Public international law*. Warszawa. 139 p.

<sup>3</sup> Białocerkiewicz, J. (2005). *Public international law: draft of a lecture*. Olsztyn. 369 p.

<sup>4</sup> Łoś-Nowak, T. *Organizations...*, *op. cit.*, 36 p.

<sup>5</sup> *Ibidem*, 36 p.

<sup>6</sup> Bierzanek, R., Symonides, J., *Public...*, *op. cit.*, 286 p.

common system of values; economic and social system; historical/personal or ethnic, religious, political criterion.

The authors also refer to the criterion of sustainability, distinguishing between temporary organizations, among which they recognize regular meetings and temporary alliances, and permanent organizations. As another criterion, J. Menkes and A. Wasilkowski indicate the possibility of accession to an intergovernmental organization, differentiating open, half-closed and closed organizations. Based on the sphere of activity, the authors divide between organizations performing general or special functions.

According to the main domain of activity, the authors highlight political organizations, among which they distinguish organizations of collective security, maintaining peace, peaceful settlement of disputes and also alliances, as well as non-political organizations, divided into technical, financial, economic and judicial institutions.

As the last of relevant criteria, J. Menkes and A. Wasilkowski indicate the criterion of organization's competences, distinguishing on its basis international integration organizations, intergovernmental coordination organizations and intergovernmental regulatory organizations<sup>1</sup>.

Undoubtedly the most significant of presented divisions is, in principle disjoint, the separation of organizations into international governmental organizations (IGOs) and international non-governmental organizations (INGOs).

Definitions of both types of international organizations are presented by Z. M. Doliwa-Klepacki. He describes IGO as a relatively permanent (firm) relationship of sovereign states formed as a result of an international agreement, with permanent bodies, provided with certain competences, specified in the agreement, functioning to achieve common goals. Whereas NGO was defined as an organized association of a relatively permanent nature, usually arising under the act of a private agreement character (but rarely under an international agreement), whose members are exclusively or primarily natural persons, unions of persons, as well as legal persons (or two or three such elements together) from at least three states (occasionally also governments

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<sup>1</sup> Menkes, J., Wasilkowski, A. (2006). *International organizations: institutional law*. Warszawa. 64 et seq. pp.



or other authorities, acting in a capacity of subjects of civil law), which have their own permanent bodies, whose activity is of an international character <sup>1</sup>.

Following J. Menkes and A. Wasilkowski, there should be highlighted that the basis of discussed division is formulated jointly category of legal regime of the establishment act and members of the organization. The roots of this division lie in the past. It is reflected in the provisions of the Charter of the United Nations and contracts, when the synonym of interstate institutions was the intergovernmental organizations. Membership in an organization was treated as equivalent to the representation of a state. Further, this representation has been the exclusive domain of the executive. For some time now this ceased to be unambiguous. Examples of this "disorder" can be found even among the United Nations Specialized Agencies. This can be illustrated with the case of the International Labour Organization, whose members by virtue of Article 1.2 of the ILO Constitution are states, but representatives of a state in bodies are: government delegates, representatives of entrepreneurs and representatives of workers (Article 3.1)<sup>2</sup>.

Examples of international governmental organizations include the United Nations (UN), which was founded and operates under the Charter of the United Nations, North Atlantic Treaty Organization (NATO), Organization of African Unity (OAU) or the Organization of American States (OAS). Whereas typical examples of international NGOs are Amnesty International (AI), the International Olympic Committee (IOC), International Red Cross or Greenpeace.

### **The concept and history of shaping the international non-governmental organizations (INGOs)**

Focusing on international non-governmental organizations, firstly there should be indicated that the term NGO itself is a legal term, functioning in international law through its expression in the Article 71 of the Charter of the United Nations, which states:

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<sup>1</sup> Doliwa-Klepacki, Z.M. (1999). *Encyclopedia of international organizations*. Warszawa. 14, 18 pp.

<sup>2</sup> Menkes, J., Wasilkowski, A. *International...*, *op. cit.*, 66 p.

*“The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.”*

It is worth pointing out that NGOs were not only present, but also actively participating in the founding conference of the United Nations (UN) in San Francisco in 1945, materially affecting the conclusion of the relevant provisions in the Charter of the United Nations <sup>1</sup>.

Whereas in its resolution the UN Economic and Social Council already in 1950 formulated a negative definition of an international non-governmental organization, stating:

*“Non-governmental organizations are organizations that are active in an international relations sphere, which have not been founded by an international treaty.”*<sup>2</sup>

Going back in time to the beginnings of non-governmental organizations, it should be extended even to the Middle Ages, designating churches and religious communities as an ideological organizations, having relatively the longest and richest history. They have been already at that time taking over tasks, in undertaking which states were not interested. These organizations were engaging in helping those who were unable to support themselves - the poor, disabled or for some reason excluded from society.<sup>3</sup> Many of them are also today actively working in the international arena, while maintaining significance. By influencing the views of its members, who lives in different countries, but also by organizing all kinds of social and political actions, mainly engaging in the struggle for peace and human rights, churches and religious associations actively participate in shaping the international stage.

Certainly the greatest significance in international relations among this group of actors should be attributed to the Catholic Church. It derives its origins from established in modern

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<sup>1</sup> Kuźniar, R. (2008). *Human rights: law, institutions, international relations*. Warszawa. 260 p.

<sup>2</sup> Resolution 288 (X) of Economic and Social Council on February 27, 1950 [after: Łoś-Nowak, T. *Organizations...*, *op. cit.*, 36 p.].

<sup>3</sup> Kuźniar, R. *Human...*, *op. cit.*, 261 p.

Europe Christian Church – universal, uniting people around common values. As suggested by J. Menkes and A. Wasilkowski, the Church was the first social organization in the history, which has rejected as a criterion of membership "natural" bonds between people (such as a family, racial or linguistic unity, position in a social structure, type of profession or occupation, or neighborly intimacy). It was a union that was shaping close internal bond by a reference to the value system – professed and represented. It may be even stated that the creation of the Church as a formula for interpersonal cooperation was an important element in the transition "*from nature to culture*"<sup>1</sup>. At present, the Catholic Holy See, headed by the Pope, is a widely recognized subject of international law, with highly esteemed opinion among the most influential world powers.

Next to the Church, further should be mentioned Christian religious orders, as historical entities being also of importance in the international arena. The best known religious orders should include the Society of Jesus, the Knights Templar or the Teutonic Knights. An example of the most influential religious order is the Sovereign Military Order of Malta – founded in the Middle Ages, and until today actively working in the field of humanitarian aid. This entity, as noted by R. Bierzanek and J. Symonides, is aspiring to the attributes of subjectivity of international law and maintains diplomatic relations with certain countries <sup>2</sup>.

Following J. Menkes and A. Wasilkowski, there should be indicated other entities of a corporate nature, which are prototypes of non-governmental organizations. Such entity of an international character was created in Middle Ages Hanseatic League, merchant's trading corporation. These organizations united merchants on the basis of the nature of their professional activity. The task of those institutions was to represent and take care of the interests of their members.

Following presented trail of thoughts, also guilds cannot be omitted. They were self-regulatory organizations of craft, of a social and professional character, which united artisans of

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<sup>1</sup> Menkes, J., Wasilkowski, A. *International...*, *op. cit.*, 256 p.

<sup>2</sup> Bierzanek, R., Symonides, J. *Public...*, *op. cit.*, 299 p.

one or several related occupations. And although they have not produced strictly corporate bonds, guilds cooperated, in order to mutually support their members.

The authors also stress the importance of professional communities of teachers and university students (*universitas magistrorum et scholarium*), which not until the beginning of sixteenth century have lost their independent right to establish universities. Furthermore, these communities were characterized by judicial authority, exercised in universities, based on the dual competence - territorial and subjective <sup>1</sup>.

The process of shaping corporate structures has been hampered as a result of the growing importance of the state. State power began to reach deeper and deeper, extending its range into a broader scope of issues. It took over the duties of all kinds of organizations, undertaking care of its citizens and ensuring their security. Restricting the right of representation of its members, the state took away from the first corporations the privilege of presence in international trade. For a long period of time it has become the sole actor on the international stage. The issue of a relatively stable importance of the Catholic Church has already been mentioned earlier.

Only at the turn of the nineteenth century began to form organizations of a corporate character, re-taking over from the state tasks from the non-political areas. Together with the emergence of modern state systems, organizations started to appear, whose aim was to criticize governments for actions detrimental to human rights on the one hand, and on the other – to exert organized pressure on parliaments and governments in order to shape (adopt, amend) law and practice in compliance with human rights – not only civil but also political or social.<sup>2</sup>

It is difficult to precisely define which of the international NGOs was created first. Following T. Łoś-Nowak, as one of the organizations formed at the earliest should be indicated the Universal Society of Ophthalmology (1861), the International Association for Social Science (1862) and the International Council of Nurses (1899). In 1892 the International Peace Bureau was founded, whereas in June 1894 - International Olympic Committee. Slowly, in

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<sup>1</sup> Menkes, J., Wasilkowski, A. *International...*, *op. cit.*, 257 p.

<sup>2</sup> Sottas, E. (1996). *Les Organisations Non Gouvernementales (ONG): Organisations Dépassées ou Modèles d'Intégration Sociale*. International Geneva Yearbook [after: Kuźniar, R. *Human...*, *op. cit.*, 261 p.].

the process of establishing institutional forms of international cooperation, there have been appearing the organizations that exceeded the pragmatic and technical message. In the motivational layer there can be found ideas of the humanization of international relations, protection of common cultural heritage, and, finally, pacifistic aspirations.

It is accepted that in the years 1864 - 1914 467 non-governmental organizations were established. Their number increased to 1,038 yet before the outbreak of World War II. Currently their number is estimated at around 4830.<sup>1</sup>

### **The fundamental distinguishing features of international NGOs**

Reflecting on the essence of international NGOs, their nature and the basic functions they are to perform, the basic feature should be discussed, already indicated in the name of that entity itself - *non-governmental*. Creation of a name based on the negation highlighted the contrast to the organizations established by governments. The foundation of form of these institutions is the absence of the state in their structure. Though international, NGOs are created solely or primarily by individuals, associations of persons or legal entities. As noted by Z. M. Doliwa-Klepacki in the above-mentioned definition, even if a member of NGO is a government or other public authority, it acts in a capacity of subject of civil law.

However, J. Menkes and A. Wasilkowski represent a different opinion, holding that non-governmental character of organizations does not depend on their member roster. According to the authors, members of these entities can be natural persons, as well as legal persons under national law or other international organizations (both governmental and non-governmental), and also the state itself. The authors give an example of the International Union for Conservation of Nature, which includes, in addition to states, also government agencies, political and economic intergovernmental organizations and NGOs.<sup>2</sup> Nevertheless it should be recognized, that membership in these organizations is essentially non-governmental.

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<sup>1</sup> Łoś-Nowak, T. *Organizations...*, *op. cit.*, 27 et seq. pp.

<sup>2</sup> Menkes, J., Wasilkowski, A. *International...*, *op. cit.*, 255 p.

Also an important feature regarding membership is its openness. According to the UN General Assembly Resolution of 1968, international non-governmental organizations must be open to interested parties. Under the provisions of the Act it is forbidden to create closed-membership organizations.<sup>1</sup>

Focusing on the international non-governmental organizations, it should be noted that the feature of internationality should express itself in the international composition of the organization, which should include at least three countries, as well as in the subject of its activity, including issues of international character.<sup>2</sup>

Another feature determining the nature of NGOs is a character of an act, which is a foundation of their creation and activity. According to the above-cited negative definition of discussed entity, set out in the resolution of Economic and Social Council, a non-governmental organization is not established under an international agreement. Also Z. M. Doliwa-Klepacki defines this act as having the nature of private agreement, granting international agreements in this regard marginal importance. Establishment and activities of NGOs is based on the internal acts, such as statutes or regulations, with which members agree to comply voluntarily. Hence, they are created, as indicated by W. Czapliński and A. Wyrozumska, under the domestic law of a specific country, which means that from a formal point of view their legal status is the same as that of internal organizations of that state<sup>3</sup>.

The property logically resulting from the non-state membership is ideological independence of NGOs from the governmental influence.<sup>4</sup> Those entities have developed their position in the international arena as independent participants, acting side by side with both states and intergovernmental organizations, sometimes adopting the function of competitors to these institutions. This is emphasized by J. Menkes and A. Wasilkowski, who indicate the

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<sup>1</sup> Resolution 1296 (XLIV) of United Nations General Assembly on May 23, 1968 [after: Łoś-Nowak, T. *Organizations...*, *op. cit.*, 36p.].

<sup>2</sup> Kowalski, P. (2000). *Significance of non-governmental organizations in international human rights protection*. [in:] *Protection of human rights worldwide*. Wiśniewski, L. Bydgoszcz, Poznań. 232 p.

<sup>3</sup> Czapliński, W., Wyrozumska, A. (1999). *International public law: system issues*. Warszawa. 314 p.

<sup>4</sup> Ripinsky, S., van den Bossche, P. (2007). *NGO involvement in international organizations*. London. 6 p.



relation to the state as a defining feature of NGOs. As a confirmation, the authors consider Article 34 of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, which recognizes organizations' right to bring an individual action to the European Court of Human Rights for infringement of rights enshrined in the Convention or in the protocols.<sup>1</sup> Whereas A.-K. Lindblom freedom from the governmental influence understands also as the avoidance of performing public functions by discussed organizations<sup>2</sup>.

It is not a distinctive attribute of NGOs the fact that organizations have their own permanent organs. This feature, obvious from the point of view of the efficient functioning, brings these actors near the intergovernmental organizations. As noted by T. Łoś-Nowak, similarly to government agencies non-governmental organizations have secretariats, which are working permanently, held sessions and have defined decision-making structures<sup>3</sup>.

Whereas clearly distinguishing factor is that non-governmental organizations are not oriented towards profit (*non-profit making entities*)<sup>4</sup>. Money should serve for these institutions only as a measure – income, which can be achieved through their own activities, is not divided among members, but allocated for the achievement of the organization's goals. However, as indicated by B. Mikołajczyk, this requirement is not widely recognized - given the lack of generally applicable definition, the author gives an example of the definition of NGO by the OECD (Organization for Economic Cooperation and Development), which considers for the institution also profit-generating organizations, foundations, educational institutions, churches and other religious groups and missions, hospitals and medical organizations, professional associations and organizations. Also the WTO (World Trade Organization) includes to NGOs

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<sup>1</sup> Menkes, J., Wasilkowski, A. *International...*, *op. cit.*, 255 p.

<sup>2</sup> Lindblom, A.-K. (2005). *Non-governmental organisations in international law*. Cambridge. 52 p.

<sup>3</sup> Łoś-Nowak, T. *Organizations...*, *op. cit.*, 37 p.

<sup>4</sup> Evans, G., Newham, J. (1990). *The Dictionary of World Politics*. New York. 190 p. [after: Łoś-Nowak, T. *Organizations...*, *op. cit.*, 37 p.].

any non-state entities, not just consumer groups or ecological organizations, but also pressure groups, corporations and trade associations.<sup>1</sup>

Also characteristic for NGOs is that they cannot be created as political parties. A feature, which distinguishes them from the latter, is the lack of aspiration to gain political power.<sup>2</sup>

Ripinsky S. and P. van den Bossche also acknowledge as one of the fundamental qualities characterizing non-governmental organizations the general principle to base their actions on the applicable law. The authors consider this feature to be particularly important in today's reality, allowing excluding from the circle of those institutions terrorists or organized crime groups.<sup>3</sup> Whereas A.-K. Lindblom stresses that the feature of non-governmental organizations is not to use nor promote violence, as well as having no relations to any crime activity.<sup>4</sup>

### **Basic types of non-governmental organizations**

Classification of non-governmental organizations can be made on the basis of various criteria, highlighting the numerous features of these institutions. Recalling the division of international organizations, presented by J. Menkes and A. Wasilkowski, there may be indicated the criterion, adopted by the authors, of the main domain of activity, by which NGOs can be divided into human rights organizations, into which the authors include abolitionist, as well as feminist organizations, institutions representing or acting on behalf of minorities – national, ethnic and religious – and humanitarian NGOs. Whereas next to the human rights organizations, the authors name environmental, professional and political organizations, among which they distinguish pacifist and syndicalist organizations, as well as political internationals.<sup>5</sup>

S. Ripinsky and P. van den Bossche present a classification characterized by three criteria. As the first, the authors indicate a division based on the fundamental goals, sphere of

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<sup>1</sup> Mikołajczyk, B. (2006). *Non-governmental organizations – active participant in international relations*. *Miscellanea Iuridica*, 8. 143 p.

<sup>2</sup> Kuźniar, R. *Human...*, *op. cit.*, 261 p.

<sup>3</sup> Ripinsky, S., van den Bossche, P. *NGO...*, *op. cit.*, 6 p.

<sup>4</sup> Lindblom, A.-K. *Non-governmental...*, *op. cit.*, 52 p.

<sup>5</sup> Menkes, J., Wasilkowski, A. *International...*, *op. cit.*, 77 p.

interests or motives. On that basis, there can be distinguished economic and industrial non-governmental organizations, public interest organizations, professional communities, trade unions, religious groups, scientific organizations and the like – all of which have specific spheres of interest, in the pursued direction.

As the second, S. Ripinsky and P. van den Bossche specify the criterion of the sphere of activity, thereby distinguishing local, national or international organizations.

Considering type of activity as the third criterion, the authors distinguish non-governmental organizations undertaking operational activities or consisting in the service performance, and organizations operating on the principle of advocacy, support and conducting campaigns for a particular purpose. The above discussed distinction is also based on a different scale of acting - operational activities are focused on setting narrower goals, achieved directly through undertaken actions, whereas campaigns are aimed at a wider spectrum of impact, trying to indirectly affect the specific political system. Occasionally organizations combine both types of action.<sup>1</sup>

Also worth quoting is the division of international NGOs presented by T. Łoś-Nowak, based on the criterion of reference point for activity. As such, the author distinguishes, giving examples, environmental organizations (International Association for Ecology, Citizens of the Earth, Greenpeace) and pacifist organizations (International Peace Bureau, International Confederation for Disarmament and Peace, World Peace Council), human rights organizations (International Committee of the Red Cross, Amnesty International, International Commission of Jurists), cultural cooperation organizations (World Federation of International Music Competitions, International Academy of Ceramics, International Association of Art Critics), as well as scientific and technical cooperation organizations (International Union of Architects, International Ocean Institute) and religious organizations (Young Men's Christian Association, Salvation Army, Association of World Buddhist).<sup>2</sup>

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<sup>1</sup> Ripinsky, S., van den Bossche, P. *NGO...*, *op. cit.*, 8 p.

<sup>2</sup> Łoś-Nowak, T. *Organizations...*, *op. cit.*, 393 et seq. pp.

### **The essence of international non-governmental organizations - role and functions**

Very good, in my opinion, the nature of non-governmental organizations reflects the term used by M. Nowicki - "*watch dog*" organizations. NGOs are organizations that specialize in looking at the fingers of those who exercise power, and make sure that these people did what they ought to and did not do with us what they must not.<sup>1</sup>

The author also explains superbly the nature of non-governmental organizations' activity, the meaning of their existence in the era of democracy and rule of majority, indicating the reason for their creation and development. Majority, if equipped with unlimited power, would be dangerous to any of us because it is often indifferent to the problems of minorities, and sometimes even hostile towards them. For this reason, among others, the concept of human rights, which limit state authority, is very important in countries where the rule of majority is exercised. People unite because of these minority characteristics, in order to better care for their own interests, but also in order to protect themselves from the oblivion or a blow, a hit by those who exercise power.

Often there is introduced the term: *grass roots activity*. It is said that people unite because of these minority characteristics in thousands or tens of thousands of formations, groups, organizations. And each of them is weak, when looking at itself. If there are many – they intertwine their roots. And a specific "social turf" is produced – difficult to tear, flexible, protecting an individual against a blow from the authorities.<sup>2</sup>

Reflecting on the role of these institutions, there should be indicated the analysis carried out by S. Ripinsky and P. van den Bossche, where they highlight that NGOs organize and mobilize network structures, gather information about local conditions and exert pressure both within countries and internationally. The organizations can serve as a source of information and technical expertise on specific topics, they can provoke the activity of society, mobilize both

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<sup>1</sup> Nowicki, M. (1998). *Human rights and non-governmental organizations*. [in:] Universalism of human rights.

Concept and reality in countries of non-European culture. Tomala, K. Materials from the conference. Warszawa, May 18 – 19, 1998, 154 – 155 pp.

<sup>2</sup> *Ibidem*, 154 – 155 pp.

private individuals and groups to undertake political activity and / or monitor the conduct of governments and legal persons. They impact political discourses, introduce issues to consider both in the state and international arena, strive for participation in decision-making process and creation of new standards, as well as in their implementation.

The authors note that all these non-governmental organizations' activities require them to cooperate with international intergovernmental organizations that constitute the forum, on which NGOs can deliver their demands and exert pressure on governments. This cooperation can take different forms, consisting of participation in political discussions, co-organization of ventures, or controlling the fulfillment of commitments that state assumed on the international arena.<sup>1</sup>

The ability of exerting pressure on the states is the strongest activity of non-governmental organizations. Touching upon issues often inconvenient for countries, they draw to them the public opinion's attention. They throw light on threats and problems, which governments often prefer not to discuss. As rightly noted by T. Łoś-Nowak, this is an extremely significant aspect of the activity of these institutions, as for the most modern states it is an important issue how they are perceived in an international environment. Being aware of that, NGOs can "extort" from them certain behaviors, consistent with the held views. These views are aimed at protecting values that are regarded as generally accepted by the international community - countries that ignore these values, expose themselves to the isolation in international relations, or risk finding themselves outside the international community. In this way, NGOs are able to create specific patterns of behavior in an international environment. The states reckon with their image being built in this environment, because it creates its reliability and credibility as a partner in joint ventures. As noted by C. Tomuschat, among the factors affecting governments' compliance with their international obligations, NGOs occupy a leading position<sup>2</sup>.

And although, as noted by T. Łoś-Nowak, despite that NGOs do not have at their disposal sufficiently effective instruments of influencing state participants in international relations and their importance in comparison with other governmental organizations is certainly

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<sup>1</sup> Ripinsky, S., van den Bossche, P. *NGO...*, *op. cit.*, 9 et seq. pp.

<sup>2</sup> Tomuschat, C. (2003). *Human Rights. Between Idealism and Realism*. Oxford. 240 p.

underestimated, indisputable is the thesis that these entities become a permanent part of the global network of international organizations.<sup>1</sup>

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<sup>1</sup> Łoś-Nowak, T. *Organizations...*, *op. cit.*, 36 et seq. pp.

## Marta Osypowicz

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## **“The effect of the Commissioner for Human Rights of the Council of Europe in transforming the justice system in the countries of Central and Eastern Europe”**

The Office of the Commissioner for Human Rights was established in 1999 as an independent institution within the Council of Europe. Its mission was to promote the awareness of human rights, provide support for national human rights organizations, to identify shortcomings in the practice of human rights and promote respect for human rights in all member states<sup>1</sup>.

The initiative to create the Office of Commissioner for Human Rights of the Council of Europe emerged in parallel with the idea of creating a unified tribunal in the Council of Europe. The Convention on Human Rights and Fundamental Freedoms in addition to compiling a catalog of rights and civil and political freedoms created a system for monitoring the compliance by states to the obligations of the convention<sup>2</sup>.

The proposal to establish the Office of Commissioner for Human Rights was presented to the Council of Europe on January 14, 1996 by the Finnish President Martti Ahtisaari. In his speech to the parliamentary assembly, he said that creating such an institution - *the European Ombudsman*<sup>3</sup> - would shorten the waiting time to process complaints in Strasbourg and it would raise a sense of availability of human rights to European citizens through the wise use of the instruments available to the Council of Europe<sup>4</sup>. The speech raised the relationship between the commissioner and the national *ombudsmen*. whether in terms of creating institutions that would be the crowning achievement of the national system of ombudsmen, or rather the functions for

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<sup>1</sup> Parliamentary Assembly, Fourth part of the 2005 Ordinary Session, *Information bulletin for plenary sessions*, Strasbourg, 03-07 October 2005, s. 5.

<sup>2</sup> *Europejski Trybunał Praw Człowieka Geneza historyczna, Organizacja i procedura*, Dokument Informacyjny wydany przez Kanclerza Europejskiego Trybunału Praw Człowieka, wrzesień 2003, s. 1-2, [www.echr.coe.int](http://www.echr.coe.int)

<sup>3</sup> J. Jaskiernia, *Zgromadzenie Parlamentarne Rady Europy*, Warszawa 2000, s. 255.

<sup>4</sup> Report on the Activities of the Council of Europe 1998, Strasbourg 1999, s. 136.



the commissioner that would be out in direct relationship to the tasks of the member states<sup>1</sup>, The Committee of Ministers of the Council of Europe insisted that the commissioner's office would be a non-judicial institution and clearly separated from the other judicial institutions in order to avoid duplication of effort<sup>2</sup>.

The Committee of Ministers of the Council of Europe in its 104 meeting in Budapest on May 7<sup>th</sup>, 1999 decided to create the institution of the Commissioner for Human Rights. The Commissioner for Human Rights began his work on January 1<sup>st</sup>, 2000. The creation of this institution was a major step forward for international human rights protection. The fields of interest of the Commissioner for Human Rights is very broad. In accordance with Resolution 99 (50), the Human Rights Commissioner of the Council of Europe:

- is a non-judicial institution, seeking to promote education on human rights, awareness of the importance of human rights and respect for these rights.
- must respect the competences of inspection bodies established under the convention or other instruments of the Council of Europe.
- not consider individual complaints.
- performs its function independently and impartially.
- Promotes the education and the awareness of human rights in member states, promotes a genuine respect for and full enjoyment of human rights in member states, advises and provides information on the protection and of human rights, prevents the violation of human rights, cooperates with national institutions dealing with human rights in member states and, where such institutions do not exist the commissioner encourages their creation.
- supports activities in the field of human rights carried out by national *ombudsmen* or similar institutions, shows loopholes in the in laws of member states that do not comply

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<sup>1</sup>J. Jaskiernia , *Komisarz Praw Człowieka Rady Europy – nowa instytucja międzynarodowej ochrony praw człowieka*, Państwo i Prawo, 1999, z. 11, s. 9-10

<sup>2</sup>Committee of Ministers , Opinion of the CDDH, *Draft terms of reference of the Council of Europe Commissioner for Human Rights*, Strasbourg 1998, Doc. 8196.

with the standards of human rights guaranteed by the Council of Europe, supports the efficient implementation of human rights standards by member states and helps them in eliminating any shortcomings.

- if he deems necessary, the commissioner writes a report on a specific issue to the Committee of Ministers or the Parliamentary Assembly. The Committee of Ministers and the Parliamentary Assembly respond to the report ensuring the compliance with the Council of Europe human rights standards<sup>1</sup>.
- reports annually to the Committee of Ministers and the Parliamentary Assembly and cooperates with other international institutions promoting and protecting human rights, while avoiding duplication of activities<sup>7</sup>.

The Human Rights Commissioner is elected by the Parliamentary Assembly with a majority of votes from a list of three candidates drawn up by the Committee of Ministers. Member states may submit candidatures by letter addressed to the Secretary-General. Candidates must be nationals of a member state of the Council of Europe and be individuals of outstanding standing and with good ethics and recognized competence in the field of human rights. They must be also known for their commitment to European values and having the necessary authority to effectively carry out all the tasks entrusted to them<sup>2</sup>.

On September 21, 1999, A. Gil-Robles was the first commissioner for Human Rights. He served until the 31 March, 2006<sup>3</sup>. The current commissioner is Thomas Hammarberg and was

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<sup>1</sup> Rada Europy, Komitet Ministrów, *Rezolucja (99) 50 w Sprawie Komisarza Praw Człowieka Rady Europy*, Budapeszt, 7 maja 1999 r.

<sup>2</sup> J. Symonides, *Ewolucja systemu ochrony praw człowieka w Europie*, [w:] *Rada Europy a przemiany demokratyczne w państwach Europy Środkowej i Wschodniej w latach 1989-2009*, red. J. Jaskiernia, Toruń 2010, s. 150.

<sup>3</sup> *Parliamentary Assembly, 1999 Ordinary Session (Fourth part), Twenty – seven sitting, Tuesday, 21 September 1999 at 3 p.m., Minutes of Proceedings*, s. 8.

elected during the meeting of the Council of Europe Parliamentary Assembly on 5 October 2005 in accordance with Article. Resolution 9 (99) 50. He took up office on April 1, 2006<sup>1</sup>.

The ability to successfully accomplish the tasks contained in resolutions depends in particular on the international authority that the commissioner has<sup>2</sup>. Since the creation of the Office of the Commissioner the number of states visited increased by the commissioner and his activity covers a wide range of issues related to human rights in member states.

The commissioner takes the view that the credibility of international human rights standards will ultimately depend on whether they are actually implemented or not. More energy must be focused on their implementation. Governments should develop a more systematic and comprehensive strategy for the full implementation of treaties, in particular the European Convention on Human Rights and the revised Social Charter<sup>3</sup>. From the very beginning of the commissioner expresses his view that each country should be monitored and the human rights situation in each country must be reviewed for compliance with standards of the Council of Europe and the fulfillment of their obligations regarding human rights<sup>4</sup>.

The main and essential task of the commissioner is to spread knowledge about human rights in countries which are obliged to respect them, and therefore the commissioner is of the view that education on human rights is essential for the effective implementation of agreed standards because the only human rights that will be implemented are those that the people are informed about<sup>5</sup>.

The legal instrument by which the commissioner may impact member states is resolution 1999 (1950) of the Parliamentary Assembly passed on the III Summit of Heads of State of the Council of Europe in Warsaw in 2005. The resolution committed the Council of Europe to

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<sup>1</sup> Parliamentary Assembly, *Fourth part of the 2005 Ordinary Session*, Strasbourg, 03-07 October 2005, Doc.10661.

<sup>2</sup> J. Jaskiernia, *Komisarz...*, s. 13

<sup>3</sup> T. Hammarberg, *It is high time to make human rights a reality*, The Commissioner Viewpoints, 03 October 2006.

<sup>4</sup> T. Hammarberg, *Every country should be monitored – and should welcome that*, The Commissioner Viewpoints, 12 June 2006.

<sup>5</sup> T. Hammarberg, *Human Rights education is a priority – more concrete action is needed*, The Commissioner Viewpoints, 06 October 2008.

strengthen the institution of the Commissioner for Human Rights providing him the necessary tools for the implementation of his functions, mainly through Protocol 14 to the European Convention on Human Rights which went into effect<sup>1</sup>.

In accordance with the proposals to extend the mandate of the Commissioner for Human Rights contained in Protocol No. 14, the Juncker report and the report by the Group of Wise Men on the performance of the Tribunal for Human Rights allowed the possibility for the commissioner to come out before a court, when he seemed necessary, before it as a "third party". Before the protocol was to come into force, the commissioner must have informed the public what criteria would apply to take the intervention. The assembly expressed the view that the commissioner should intervene before a court only if there are systemic problems in the field of human rights abuses, where some general solution must be taken by the member state<sup>2</sup>. Implementing powers conferred to the commissioner by Protocol No. 14, the commissioner will be able to participate in all matters pending before the Board or the Grand Chamber by submitting his remarks and comments in writing and by participating in judicial hearings<sup>3</sup>.

Of key importance to the mission of the commissioner is his presence in member states and his independence. It is known that on such a wide range of issues that are now handled by commissioner, the budget is still too small. The commissioner must maintain his impartiality, so it is impossible for member states to finance him through grants, etc. Rules should be developed so that the commissioner may carry out all his tasks with a budget awarded to him without the risk of funding sources that could in any way undermine his independence.

The presence of the commissioner in the member states is required both for the spreading of knowledge about human rights, analyzing the situation of human rights in member states, but primarily is there to eliminate all activities and situations incompatible with the accepted

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<sup>1</sup> Action Plan, [w:] Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005 ), Strasburg 2005.

<sup>2</sup> J. Jaskiernia, *Komisarz Praw Człowieka Rady Europy – dorobek i perspektywy*, „Humanistyczne Zeszyty Naukowe- Prawa Człowieka” 2008, Nr. 11, s. 9.

<sup>3</sup> F. Benoit-Rohmer, H. Klebes, *Prawo Rady Europy. W stronę ogólnoeuropejskiej przestrzeni prawnej*, Wydawnictwo Scholar, Warszawa 2005, s. 86.

standards by the Council of Europe. The commissioner, by visiting countries and through close cooperation with national human rights institutions, is able to assess the condition of human in each country. Respectively, the commissioner directs and instructs the state in case of any incompatibilities with the standards of the Council of Europe. At a later stage, those same national institutions assist him in his study and implementations of his recommendations. The commissioner, after each visit in a member state, draws up a report on his visit to the member state in the form of proposals to assessments of the overall situation and the changes that are implemented from previous recommendations by the commissioner, mainly paying attention to all the legal acts have been adopted as the result his recommendations<sup>1</sup>. After each report, the commissioner writes a memorandum evaluating the implementation of his recommendations as well as listing all the troubling aspects and further instructions and recommendations for their implementation<sup>2</sup>.

In terms of his effectiveness, there is an essential link between the efforts of the commissioner and that of the Council of Europe's monitoring procedure. The commissioner's findings may have significant value in terms of information on whether states are complying with their commitments or not. This affects the closure of the monitoring process for a state or its continuation. The commissioner's work may have relevance for states for which the monitoring process has ended since the reports of the Council of Europe are directed to different international institutions and are also relevant for their chance of membership of the European Union for states which are applying for membership<sup>3</sup>. When it comes to the monitoring procedures and the effectiveness of the commissioner's work, they should be compared to the Council of Europe axiological system. Winston Churchill said in his speech on September 19, 1946: *Our constant aim must be to build and strengthen the United Nations. As part of this*

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<sup>1</sup>Follow up report on Romania (2002-2005): Assessment of the Progress made In implementing the recommendations of the Council of Europe Commissioner for Human Rights – CommDH(2006)7, 29 March 2006

<sup>2</sup>Memorandum to the Latvian Government : Assessment of the progress made In implementing the 2003 recommendations of the Council of Europe Commissioner for Human Rights – CommDH(2007)9, 16 May 2007.

<sup>3</sup> J. Jaskiernia, *Komisarz Praw Człowieka Rady Europy – nowa instytucja...*, s. 15.

*global structure, and under its aegis, we need to recreate the European family - this may be the United States of Europe - and the first practical step will be the Council of Europe*<sup>1</sup>.

The legal basis for the functioning of the Council of Europe was created by the statute of the Council of Europe signed on May 5, 1949 in London<sup>2</sup>. The Council of Europe is the first organization that has established membership values and serves not only countries that have established it, but clearly and directly its citizens. The Council of Europe has expanded, requiring a comprehensive and unprecedented system of norms and standards protecting human rights, numbering about two hundred conventions and other instruments of international law, which are the cornerstone of the European Convention on Human Rights, and is complemented by the European Court of Human Rights and the recommendations of the Committee of Ministers<sup>3</sup>.

The axiological system of the Council of Europe consists of the European Convention on Human Rights and Fundamental Freedoms (09-09-1953), together with 14 additional protocols, the European Social Charter (1965), the New European Social Charter (1996) - (new rights: the right to dignity in the workplace, protection against poverty and exclusion, the right to housing), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment (1987)<sup>4</sup>.

The legally binding standards contained in these conventions are subject to enforcement on par with other international agreements signed and ratified by the state parties. A feature of the Council of Europe is that it plays an important role also including the so called instruments of soft law. Mainly it comes in the form of recommendations by the Committee of Ministers to member states, although formally, these recommendations are not binding, the Committee of

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<sup>1</sup>A. H. Robertson, *The Council of Europe*, London 1961, s.1

<sup>2</sup>Statut Rady Europy, Londyn 1949.Dz.U. z 1994 r., nr 118, poz. 565.

<sup>3</sup>P.A. Świtalski, *Rola Rady Europy w systemie organizacji międzynarodowych*, [w:] *Rada Europy a przemiany...*, s. 24-25.

<sup>4</sup>J.Galster, Z. Witkowski., *Kompendium wiedzy o Unii Europejskiej*, Dom Organizatora, Toruń 2002, s. 127.

Ministers has the right to request information from member states about the progress in implementing its recommendations<sup>1</sup>.

The functions, related to the observance of human rights in the Council of Europe (on the principles of the Convention for the Protection of Human Rights and Fundamental Freedoms), have been attributed to the three bodies: the Human Rights Commission, the Court of Human Rights and the Committee of Ministers. In the course of improving the work of the Court, Protocol No. 2 of the convention gave the right to issue advisory opinions. Protocol No. 9 enabled individuals, NGOs or groups of individuals to lodge complaints to the Court if the subject of the complaint was listed in the protocol. The entire control mechanism for human rights reform was noted in Protocol No. 11. The primary objective of this Protocol was to simplify the structures created by the convention, strengthening the judicial character of the court, the liquidation of the European Commission on Human Rights and the abolition of the judicial functions of the Committee of Ministers. The Protocol entered into force on November 1, 1998<sup>2</sup>.

More attention should be noted to the issue of monitoring of the member states by the Committee of Ministers. The statute of the Council of Europe does not contain provisions empowering the committee to this type of action - a mechanism for judicial review can be found in the European Convention on Human Rights and Fundamental Freedoms, while each country must respect the commitments it has adopted in accordance with the Statute of the Council of Europe. Since the Parliamentary Assembly also has procedures for monitoring, the Monitoring Committee of Ministers must co-exist with them, and because it is impossible to duplicate these procedures, each of these bodies has different approaches to the instrument of control. The work of the Parliamentary Assembly is eventually made public, and the procedure of the Committee of

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<sup>1</sup> J. Jaskiernia, *Rada Europy jako organizacja międzynarodowa kreująca i oddziałująca na implementację standardów demokratycznych*, [w:] *Rada Europy a przemiany...*, s. 34-35.

<sup>2</sup> G. Michałowska, *Ochrona Praw Człowieka w Radzie Europy i w Unii Europejskiej*, Wydawnictwa Akademickie i Profesjonalne Sp. z o.o., Warszawa 2007, s. 165-167.

Ministers is kept confidential and relies mainly on persuasion, negotiation and diplomatic pressure.

The declaration on the compliance with commitments undertaken by member states of the Council of Europe was signed on 10 November, 1994 and it decided that matters concerning the respecting of obligations relating to the conditions of democracy, human rights and the rule of law in the member states may be submitted to the Committee of Ministers by one or more member states or the Secretary-General on the recommendation of the Parliamentary Assembly. It is interesting that until the year 2000, this procedure was not used - no country had used it, while the first and only case of its application was on 26 June, 2000 when the Secretary-General W. Schwimmer had formally informed to the Committee of Ministers on the situation in Chechnya. In 2001, was the first time this procedure was used under the 1994 Declaration. This was the case in the Ukraine and in Georgia, to which the assembly expressed disappointment at the lack of implementation of commitment<sup>1</sup>. The mission of the secretariat was to gather information about the political situation in these countries and report to the Parliamentary Assembly about its findings.

The committee in accordance with the Article 4 declaration also has the right in cases requiring specific action to request from the Secretary-General to establish contacts, gather information and formulate advice, give an opinion or recommendation or to take a different decision within the statutory powers. The Committee of Ministers sends missions and information to assist states in fulfilling their obligations. The latter solution is very beneficial because it expresses system of monitoring procedures and allows the committee to examine the situation in the country on the spot. A member state may take corrective measures based on current information available from the support, which may be the presence of the Council of

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<sup>1</sup> J. Jaskiernia, *Wpływ procedury monitoringowej na implementację standardów Rady Europy przez państwa członkowskie*, [w:] *60 lat Rady Europy. Tworzenie i stosowanie standardów prawnych*, red. H. Machińska, Warszawa 2009, s. 127.



Europe in the country<sup>1</sup>. The overall assessment of the Council of Europe regarding the protection of human rights regardless of the weakness of this mechanism shows that it is efficiently operating in the regional system, providing the most effective protection of human rights under existing international law<sup>2</sup>.

The ratification of the convention and the entrance to the Strasbourg system was important primarily for the internal evolution of the new democracies, which showed a deficit of democracy and human rights. The Strasbourg standards are suitable for application by national courts and have a binding character, so they were attractive mainly for the countries of Central and Eastern Europe because it showed them the way of transformation and opportunity how to make this transformation as compatible with the situation in the democratic countries of the old Europe<sup>3</sup>. One of the effects of these institutional changes associated with the process of systemic transformation in the countries of Central and Eastern Europe was the introduction of the *ombudsman* institution. For these countries, the establishment of this institution can be read as a reaction to previous experiences with an authoritarian system, and especially with the introduction of substantive guarantee of liberty and human rights while marginalising procedural safeguards. As a result, this type of solution to virtually deprive the citizen to pursue his rights, and authorities facilitated the infringement of such rights<sup>4</sup>.

Thomas Hammerberg, during his visit to Ukraine, pointed out that the existence of an independent and impartial judiciary (properly organized and effectively run) is a prerequisite for effective protection and enjoyment of human rights. Much remains to be done on this issue particularly in countries where there has been a lot of Soviet heritage. The right of access to

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<sup>1</sup> A. Drzemczewski, *Procedura monitoringowa Komitetu Ministrów Rady Europy. Użyteczny mechanizm „praw człowieka”?*, [w:] H. Machińska, *Polska w Radzie Europy 10 lat członkostwa*, Ośrodek Informacji Rady Europy Centrum Europejskiego Uniwersytetu Warszawskiego, Warszawa 2002, s. 57-66

<sup>2</sup> R. Kuźniar, *Prawa człowieka. Prawo, instytucje, stosunki międzynarodowe*. Wydawnictwo Naukowe Scholar, Warszawa 2008, s. 194.

<sup>3</sup> L. Garlicki, *Nowe demokracje przed Europejskim Trybunałem Praw Człowieka*, [w:] *Rada Europy a przemiany...*, s. 166.

<sup>4</sup> M. Cichosz, *Instytucja Rzecznika Praw Obywatelskich w wybranych krajach postkomunistycznych*, [w:] *Prawa Człowieka w systemie prawa krajowego*, red. A. Florczak, B. Bolechow, Toruń 2006, s. 93.

justice is one of the rights enshrined in the European Convention on Human Rights and it is increasingly important in countries where conflict resolution took place not in the courtrooms. There citizens have very little confidence in the justice system as it is precisely in the Ukraine<sup>1</sup>. It is difficult to disagree with the opinion of the commissioner. To testify to the importance of the commissioner's work are the acts adopted as a consequence of his recommendations. His visit and the suggestions do not remain without response, and even if the response to the recommendation does not end with the adoption of a particular law, the country pursuing a number of other activities, like membership in the EU, supports the effectiveness of the commissioner. Of course, it appears that the number of legal acts adopted in comparison to the number of reported problems in a country is very small. But, you can not refuse countries of good will and the commissioner's impact to shape the justice system in the domain of human rights.

One of the main items of interest for the commissioner is undoubtedly conflict situations since they always show many violations of basic human rights. This mainly concerns areas such as South Ossetia and Abkhazia in Georgia, Chechnya in Russia, Kosovo, the Nagorno-Karabakh issue between Armenia and Azerbaijan, Northern Cyprus occupied since 1974 by Turkey, Ukraine in the eastern Dniestr region. In the case of Armenia, a very important and noteworthy is the fact that after the fraudulent elections in March 2008 the Council of Europe Parliamentary Assembly adopted Resolution 1620 (2008), which allowed the commissioner to intervene and observe the conduct of reported cases on the spot. Based on the discussions held during the mission, he prepared a memorandum identifying the key problems with an expert group that investigated each case so that it was in accordance with the resolution and recommendations of the commissioner<sup>2</sup>. The biggest problem in this country, for which the commissioner draws particular attention to violations of freedoms and liberties and especially freedom of assembly,

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<sup>1</sup> Report by the Commissioner for Human Rights Mr Thomas Hammarberg on his visit to Ukraine 10-17 December 2006 - CommDH(2007)15, Strasbourg 26 September 2007, s. 2.

<sup>2</sup> T. Hammarberg, *Special Mission to Armenia. Summary of Findings*, Yerevan, 13-15 July 2008- CommDH(2008)28, Strasbourg 29 September 2008.

freedom of expression and opinion and access to information as well as violence and police brutality. Its impact on the situation in the country visited, let him work primarily at the invitation of the host country<sup>1</sup>.

It was very important for the commissioner to visit Chechnya since this part of the North Caucasus remain extremely difficult challenge. The commissioner concerned about stability and security of the work of NGOs dealing with human rights especially after the murder of Natalia Estemirova from the *Memorial* organization. Many of the recommendations of the commissioner failed to realize until now. A lot remains to be done and yet the intervention of the commissioner and his activity in this area has resulted in a much smaller number of disappearances and allegations of torture since 2008. On April 16, 2009 counter-terrorism operations (CTO ) were abolished after a decade in Chechnya. In 2009, due to increase in the number of terrorist attacks, kidnappings and killings, a special working group was established on civil society and human rights. In 2009, the amended law on the non-profit organizations and its review is ongoing<sup>2</sup>. All steps taken to improve the situation must be noticed because, even if only incidentally, they certainly contribute to the development of a new justice and judiciary system compliant with human rights.

An important area of interest commissioner is a matter linked to anti-discrimination and equal rights protection. The commissioner's recommendations on these issues resulted in ratification by Bosnia and Herzegovina in a number of agreements containing articles on non-discrimination and Protocol No. 12 to the European Convention on Human Rights. Bosnia and Herzegovina is a party to the UN Convention on the Elimination of All Forms of Discrimination against Women and in 2002 ratified the Optional Protocol. In 2003, the Act was adopted on gender equality. In 2004 the organization was officially registered undertaking measures to

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<sup>1</sup> Report by the Commissioner for Human Rights, Mr Thomas Hammarberg, on his special mission to Armenia- [CommDH\(2008\)11, Strasbourg 20 March 2008](#).

<sup>2</sup> Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe following his visit to the Russian Federation , (Chechen Republic and the Republic of Ingushetia) on 2-11 September 2009- [CommDH\(2009\)36, Strasbourg 24 November 2009](#).

combat homofonii and discrimination<sup>1</sup>. In 2004 the Equality Act came into force in Estonia. The purpose of the Act is to ensure equal treatment for men and women and promote gender equality in all spheres of social life<sup>2</sup>. In Poland, in January 2004, came into force, any amendment of the Labour Code, which identified direct and indirect discrimination in all its forms and urged her, as well as the commitment of employers to combat discrimination in employment<sup>3</sup>. In May 2004, Slovakia adopted a law 4 forbidding discrimination<sup>4</sup>.

An important aspect of the commissioner's work is the domain of the judicial system, police and criminal law. In this context, the commissioner in 2002, including recommendations listed for Poland the length of judicial proceedings, the intensification of efforts to eradicate violence by police, prison overcrowding and access to legal aid in custody. In this area, implementation of the recommendations of the commissioner's final report was done by introducing the 2003 amendments to the Polish Penal Code, which imposed procedural mechanisms designed to accelerate the proceedings. Between 2003-2006, a gradual increase in the budgets of the courts was observed every year. In 2006, Poland adopted regulations introducing the so-called 24-hour courts. On June 17, 2004, Poland introduced the law on the complaint of infringement of the right hand to hear the case in court proceedings without undue delay. A new institution, the National Training Centre for the Common Courts and Prosecutor's Office, was instituted for the continuous education of judges from around the country. Information on the European Court of Human Rights was presented in an Information Bulletin of European Law, which was published by the Ministry of Justice and sent to all courts and

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<sup>1</sup> Report by the Commissioner for Human Rights Mr Thomas Hammarberg on visit to Bosnia and Herzegovina 4-11 June 2007 – CommDH(2008)1, Strasbourg, 20 February 2008.

<sup>2</sup>Memorandum to the Estonia Government: Assessment of the Progress made implementing the 2004 recommendations of the Commissioner for Human Rights of the Council of Europe – CommDH(2007)12, Strasbourg 11 July 2007.

<sup>3</sup> Memorandum do Polskiego Rządu: Ocena postępu implementacji zaleceń Komisarza Praw Człowieka Rady Europy z 2002 roku – CommDH(2007)13, Strasbourg 20 June 2007.

<sup>4</sup>Follow up report on the Slovak Republic (2001-2005): Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights – CommDH(2006)5, Strasbourg 29 March 2006.

prosecutor's offices. In 2004, the Headquarters of the Police, the Provincial Commands, the Metropolitan Police Headquarters in Warsaw and all the police academies set up Plenipotentiaries on the Protection of Human Rights, whose task is to monitor the compliance by the police recommendations of organizations dealing with human rights. They collect information on good practices in the field of human rights and protection of victims, disseminate such information among the police, monitor racial discrimination, xenophobia and antisemitism, as well as cooperation between the police and ethnic minorities<sup>1</sup>.

In 2003, the commissioner in his recommendations to Latvia showed the problem of police violence, the long procedures for investigative detention, the lack of access to legal aid and the bad conditions of detention. On October 1, 2005 in Latvia came into force the new Code of Criminal Procedure, which radically reformed the procedures for such investigative detention and shortened pre-trial detention. All police arrests must submit a list of lawyers and associations providing legal advice support to the detained<sup>2</sup>. Of course, this was a small number of steps taken by Latvia in comparison to the commissioner's recommendations. The reason was lack of adequate financing, lawyers, judges and detention conditions or health care in prisons. Much remains to be done, but it is undeniable that the commissioner's recommendations result in concrete legislative action, even if they are small in number or do not cover all the issues. It is, however, the basis for further development.

In 2005, the Council of Europe Committee of Ministers adopted an action plan for cooperation between the Council of Europe and the Ukraine. During his visit to Ukraine in 2006, the commissioner had the opportunity to look at how the implementation of the plan was being done and how standards of the Council of Europe on human rights were put into life in the Ukraine. The most important was the reform of the judiciary. In May 2005 the President of Ukraine had appointed a National Commission for the strengthening of democracy, which

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<sup>1</sup>Memorandum do Polskiego Rządu: *Ocena postępu...*

<sup>2</sup>Memorandum to the Latvian Government: Assessment of the Progress made In implementing the 2003 recommendations of the Council of Europe Commissioner for Human Rights- CommDH(2007)9, Strasbourg 16 May 2007.

developed the concept of improving the justice system in order to bring it in line with European standards. In 2005, the Ukraine established a higher Administrative Court and adopted the Code for the Administrative Courts. In March 2006, the Law on the Enforcement of Judgments entered into force.

A very important issue for the Ukraine was undoubtedly accusations of torture and ill treatment of prisoners. Thus in 2006, the Ukrainian Parliament adopted the Act, which strengthened the prosecution of perpetrators for torture, mandated the respect for the rights of detainees and arrested, and gave right to the correspondence to the detained with the European Court of Human Rights<sup>1</sup>. The Ukraine is a very young democracy. A democracy in which the Soviet legacy is evident in every aspect of the justice system. The commissioner is keenly interested in political changes in Ukraine and monitors the implementation of his recommendations particularly in areas such as the independent judiciary and calls for the adoption of measures likely to make trials more transparent and equitable. The commissioner regrets the huge under-financing of the judiciary, the lack of access to justice for all citizens on equal footing since the main barrier is the cost of proceedings to the public who sometimes live at the edge of poverty.

The Ukrainian justice system is severely criticized by the rulings of the European Court of Human Rights. It is considered untimely and improperly functioning. It is required for the system to reform the institutions of law enforcement, prosecution, and the structures of the Ministry of Home Affairs. These are enormous challenges facing the Ukraine, but thanks to the presence and support of the commissioner, the Ukraine is not alone in their efforts and working towards the proper standards.

The developments in the field of human rights since the commissioner's visit to Romania in 2002 indicates that Romania has made considerable efforts to implement judicial reform. In its new constitution, the provisions concerning the status of judges were primarily aimed at modernizing the justice administration and the mechanisms needed to ensure effectiveness and

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<sup>1</sup>Report by the Commissioner for Human Rights Mr Thomas Hammarberg on his visit to Ukraine...

independence of judges and law officers. The Independence and Autonomy of the Judiciary Act was introduced in 2005. It repealed extraordinary powers of the attorney general like the issuing of warrants of arrest or preventive detention. The new Penal Code adopted in 2004 addresses a small part of the recommendations on prison overcrowding namely to provide a system of open or semi-open prisons for petty offenses. The commissioner recommended that Romanian officials stand against the perpetrators of abuses that were initiated the investigation and prosecution by the authorities. Therefore, the focus was placed on police training in human rights and the Human Rights Committee in the Ministry of Interior organized conferences on matters related to the protection of human rights and police operations<sup>1</sup>.

In the Czech Republic one of the main problems in the area comes up, which were addressed by the commissioner was the problem of access to the Constitutional Court. In his report of 2003, the commissioner noted that the Czech Republic had serious problems with procedural delays. During the inspection visit, most of the 346 complaints to the European Court of Human Rights against the Czech Republic concerned the excessive length of judicial proceedings. Czech Republic introduced an amendment to the Law 83/2003 on the Constitutional Tribunal in accordance with which the 60 day deadline constitutional appeal would run from the date of decision by the Supreme Court on appeal on legal matters and not how it was to date from the date of the appeal, which effectively impeded access to this Court. To the Penal Code of 2004 had been included in the definition of substantially extending the concept of human trafficking under the UN Convention and it is the most significant change at the national level in this domain<sup>2</sup>. In May 2003, the Commissioner recommended that Slovenia, change the composition of the office responsible for investigating of cases of alleged misconduct by police officers. In 2004, it was amended by article 28 of the Police Act, which changed the

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<sup>1</sup> Follow up Report on Romania (2002-2005): Assessment of the Progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights – CommDH(2006)7, Strasbourg 29 March 2006.

<sup>2</sup> Follow up Report on the Czech Republic (2003-2005): Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights – CommDH(2006)15, Strasbourg 29 March 2006.

way to investigate complaints concerning violations by police and the composition of the commission to investigate case offenses are no longer representatives of the police force following the recommendation of the commissioner in this regard. Its members include civilians and thus provided greater impartiality for the commission.<sup>1</sup>

However, an important and very important from the point of view of protection of human rights is a problem of national minorities. Their situation in Eastern and Central Europe includes the problem of the Roma community, which according to most of the recommendations of the commissioner to suffer from exclusion, poverty, difficulties in entering the job market and the proper living conditions.

In Bosnia and Herzegovina in 2003 was adopted the Law on National Minorities, "The Act covers some very important areas of life such as education, culture, media and a good starting point by establishing the general rules of law in this area. The law was very important for the protection of minorities, to define the notion of minorities and to raise awareness about the rights of minorities. In 2006 a decision on establishing the Council of Ethnic Minorities was set up. In Bosnia and Herzegovina, the Roma are the largest minority group. So far there is no legislation dealing directly to this minority to take action, in which the Roma also have their rights, but for now all preparations are in progress as the law on compulsory education providing preschool education for all children, including Roma. In 2002 the government of Bosnia Herzegovina created the Committee for the Roma, which still needs to strengthen and increase the resources for effective functioning<sup>2</sup>.

In the Czech Republic on June 16, 2004 the government approved an updated version of the "Concept of Roma integration policy" aimed at helping them integrate into society. Since January 2003 the Ministry of Internal Affairs coordinates the implementation of National Employment Strategy in relation to national and ethnic minorities. With regard to detention of

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<sup>1</sup>Follow up Report on Slovenia (2003 – 2005): Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights – Comm(2006)8, Strasbourg 29 March 2006.

<sup>2</sup>Report by the Commissioner for Human Rights Mr Thomas Hammarberg on visit to Bosnia and Herzegovina...



illegal immigrants and asylum seekers in 2005 adopted an amendment to Law No. 326/1999 on Residence of Aliens in the Czech Republic, which states that minors from 15 to 18 years remaining unattended may be detained in custody up to 90 days and adults up to 180 days. In 2004 a special government program was expanded giving access to housing for people applying for asylum<sup>1</sup>. In the Ukraine, the protection of minorities is largely written in the constitution and other acts of domestic law such as the Law on National Minorities, Article 161 of the Criminal Code prevents incitement to racism, ethnic and religious hostility. In 2001, the revised Law on Refugees and the amendment to provide the same social and economic rights for refugees and the citizens of the Ukraine. The project "Protection of Roma in the Ukraine and ensuring access to justice" is functioning in the Ukraine since 2004. In 2005, the Ukraine ratified the European Charter for Regional or Ethnic Minorities<sup>2</sup>. In Poland, as reported in the 2002, the commissioner stated that xenophobia, anti-Semitism and negative stereotyping of minorities were common and Poland and that the Polish government should promote tolerance, ranging from school programs. The consequence of this recommendation was the signing in 2005 of the Law on National and Ethnic Minorities and Regional Languages, which prohibits discrimination on grounds of national and ethnic minorities. The Act requires public authorities to take appropriate measures to promote full and effective equality in economic, social, political, cultural and protect those individuals who are subjected to discrimination, hostility or violence. In 2004, Polish authorities started implementing a long-term (2004-2013) National Programme for the Roma community in Poland<sup>3</sup>. In 2003, the result of recommendations of the commissioner, Croatia adopted a new law on asylum seekers that modified its procedures in which the minister of interior had exclusive competence to deal with applications and appeals. Thus a government commission for asylum seekers and refugees in the Ministry of Labour and Social Affairs will not have to give out opinions on asylum seekers and influence decisions on asylum. In addition, the Act refers to the person that asylum seekers will be able to be present during the procedure in special centers for

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<sup>1</sup>Follow up Report on the Czech Republic...

<sup>2</sup>Report by the Commissioner for Human Rights Mr Thomas Hammarberg on his visit to Ukraine...

<sup>3</sup>Memorandum do Polskiego Rządu: *Ocena postępu...*

asylum seekers. The Croatian authorities have themselves acknowledged that the conditions of admission of asylum seekers until recently, were incompatible with international standards and their actions in the form of legislation intended to eliminate inconsistencies in the area<sup>1</sup>. In 2004, Lithuania adopted a new Law on the Legal Status of Aliens by which applicants for asylum are obliged to stay in the center for asylum seekers during the procedure. As the commissioner expressed his regret that the new law is very restrictive and should be further amended. In 2006, many of the provisions on the legal status of foreigners have changed. Persons living illegally in the territory of Lithuania and the asylum seekers are no longer arrested and detained in prisons and the commissioner has adopted these changes with great enthusiasm<sup>2</sup>.

As can be seen in most countries, they do not remain indifferent to the commissioner's recommendations and work with him more or less on the problematic issues. The only exception appears to be Russia. Russia was admitted to the Council of Europe on the basis of political criteria and did not meet the general criteria of legal and especially in the field of human rights because of leading the war in Chechnya. However, Yeltsin's Russia was heading toward the Western model of democracy and the Council of Europe thanks to his support and monitoring apparatus could facilitate the path to European standards. When Russia entered the path of concentration of power and destruction of democratic structures, it became clear that it will undoubtedly be the biggest challenge for the Council of Europe.

Given the existing evidence that Russia violates human rights and does not legally apply to any recommendations it would seem that its membership of the Council of Europe misses any purpose. Russia, however, is a country in which the Council of Europe may in the long term check the efficiency of its procedures. At the moment, it sounds quite irrational but Russia will be happy to conduct a dialogue with the Council of Europe. Its participation in this dialogue will be a matter of prestige and membership fees from Russia represent 12% of the budget of the

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<sup>1</sup> Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the Republic of Croatia 14-16 June 2004 - CommDH(2005)3, Strasbourg 4 May 2005.

<sup>2</sup> Memorandum to the Lithuanian Government: Assessment of the progress made in implementing the 2004 recommendations of the Council of Europe Commissioner for Human Rights - CommDH(2007)8, Strasbourg 16 May 2007.

Council of Europe. Today it is hard to see that it is focused on the state, restricting fundamental human rights, a hybrid political system, not subject to any democratic standards. Russia does not bow to the pressures and standards of the Council of Europe, but there is much more benefit in the dialogue with Russia, to monitor the situation in this country, to appeal for change, cooperate with institutions and officials than the turning away from her. The effects of the work of the commissioner in the member states provide evidence that dialogue and cooperation is producing tangible results, if not through specific acts in specific activities aimed at eliminating abuse of human rights violations.

## **Summary**

The institution of the Commissioner for Human Rights of the Council of Europe was established primarily to promote the awareness and the respecting of human rights by member states. Since its creation more than a decade ago, the Commissioner for Human Rights has developed a wider presence on the international scene. The commissioner follows the situation of human rights in all member states as well as being personally present in these countries.

The legal areas of activity that the commissioner is present in is only a part of the extensive problems concerning the protection of human rights.

The examples of legal acts adopted as a result of the commissioner's visits and the implementation of his recommendations show the important role that the commissioner is creating in the new democracies of Central and Eastern Europe.

The full implementation of the powers of the Commissioner on Human Rights requires and will require adequate funding. The current financial resources of this institution are inadequate.

This is one of the main problems of the institution. Grants should be increased. However, this should not undermine the independence of the commissioner. The largest strength of this institution is its impartiality.

The commissioner quickly and flexibly responds to the problems of human rights violations, prepares annual reports on his activities and reports on visits to member states. He

also evaluates the implementation of European standards and also to signals the domains that require the most work and are suffering from major problems. The commissioner cooperates with many international institutions and states in order to protect human rights. He does so by encouraging the participation in his visits where he reviews the level of human rights in the member states. He adds his say to the resolutions of the Parliamentary Assembly of the Council of Europe. The commissioner upholds the enforcement of judgments of the European Court of Human Rights because they are the evidence of violations of human rights. New powers give him the power of the role of "third party" before the Court and thus its activity may enter into new domains.

The role of the commissioner is very important in identifying and eliminating causes of lawsuits before the European Court of Human Rights. This will grow in importance and its support for the creation of independent mediation systems in the member states will find its expression in a number of cases brought before the European Court of Human Rights in the future. The activity of the commissioner on implementing the recommendations and standards of the Council of Europe has and will be of great importance in forming the legal basis for the protecting of human rights particularly in the young democracies.

Countries such as Russia will be the new challenge for the Council of Europe and the Commissioner for Human Rights. They will further need the support, monitoring and implementation recommendations.

## Tomasz Gulla

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## **"Promotion of terrorism in a scope of the Council of Europe Convention on the Prevention of Terrorism 2006"**

The Internet is a global and widely accessible computer network whose participants are users and resources<sup>1</sup>. Lillian Edwards stated that *"the Internet is like a great and untamed river which flows through the territories of many countries but none of them can stop the river within their political and jurisdictional boundaries ..."*<sup>2</sup>. It gives almost unlimited freedom of communication, which promotes the formation of on-line communities. In addition, the Internet helps to send and receive both text and visual messages. However, the Internet has also many disadvantages. Due to great anonymity it has become a great tool for offenders. The Internet as a source of information is becoming a medium for promoting political, religious and ideological objectives of many terrorist and anarchist groups. The medium also helps to provide information in a different kind of manuals, including instructions on how to construct homemade bombs and intelligence and propaganda techniques aiming at the intimidation of civilians. What is more the latest leak of secret documents containing the details of certain military operations in Afghanistan to the website Wikileaks.org<sup>3</sup>, is significant information for different groups, not only the terrorist ones.

The information entails many other risks which may not necessarily be related to terrorist activities but also can be used by mentally unbalanced people to commit criminal offences. Websites, chat rooms, forums give the possibility of direct conversation and help to convince others to different views, objectives, ideas. The shared information for the purpose of recruitment or instruction has a great influence on people.

According to the European Commission, in 2007 every other European was a regular Internet user<sup>4</sup>.

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<sup>1</sup> S. Juszczak, *Człowiek w świecie elektronicznych mediów – szanse i zagrożenia*, Katowice 2000.

<sup>2</sup> L. Edwards, *Regulating Cyberspace is there a role for law?* Computer and Law, 1998.

<sup>3</sup> See: <http://www.guardian.co.uk/world/2010/jul/25/wikileaks-war-logs-back-story>

<sup>4</sup> *Cyfrowa przyszłość dla Europy. Śródkresowy przegląd i-2010*, Komisja Wspólnot Europejskich, Bruksela, 17 April 2008., COM (2008) 199 final version.

In 2008, the 304 Intelligence Battalion warned in its report that the popular website - Twitter – can be used by terrorists as a real-time communication tool to send short messages. It was shown that the site had been used before to coordinate the actions of socialists, hacktivists and communists. Thus, the authors of the report claim that terrorists can become another group that will take advantage of this mini-blog website.

However, one can expect that the data will be blocked, not only by the agencies that fight with terrorism, but by the companies themselves. On 24 February 2010, Google and Microsoft - two giants of IT branch - announced that they will fight together with terrorism - propagation and recruitment<sup>1</sup>.

On Jihad's websites one can find both typical propaganda slogans that exhort to join the organization and claims that encourage to find the new ways of fighting which are not related to religious dogmas<sup>2</sup>.

The agencies fighting with terrorism are aware of the fact that their enemy is still developing his methods of operation. That is why it is not surprising to find the materials describing the techniques of conspiracy and spying on the Internet<sup>3</sup>. In those materials it is recommended to keep them in secret and take appropriate measures to hide your opinions, as well as eliminate the signs of interest in Muslim religion. Those materials describe also how to use mobile phones and the Internet in a safe way and how to avoid having one's line tapped, etc.

Moreover, the websites propagating religious – mainly Islamic – terrorism are no longer in the Arabic language. They are more often created in European languages. The aim of this is, beyond doubt, to recruit new members within the borders of particular European countries, and not only in the Muslim countries. Such activities are particularly common in Germany, where a lot of such websites have already been launched. They not only incite people to terrorist acts, but they also give instructions on how to make a bomb – both in German and in Arabic. The Internet

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<sup>1</sup> M. Chmielewski, *Microsoft i Google wspólnie zajmą się zwalczaniem terroryzmu*, *Gazeta.pl* 24.02.2010.

<sup>2</sup> See: K. Surdyk, *Jihad 2.0 – Zmiana oblicza światowego terroryzmu*, *Stosunki Międzynarodowe – Miesięcznik ogólnopolski* 2009.

<sup>3</sup> Abu Anas z Khachoroy, *Porady z dziedziny bezpieczeństwa na podstawie inguskiego jihuadu*.

has thus become a means for the propagators of terrorism to move from public places, such as mosques, to the private space, namely the Internet.

The precursor of the electronic war on the Internet is Younis Tsouli, a 22-year old man of Moroccan origin, living in London. His Internet nickname is “Irhabi 007”. A specialist on cyber-terrorism – Evan Kohlmann – has named Irhabi “the Al-Qaida’s telecommunication company”<sup>1</sup>. Irhabi’s activity started in the year 2003 on Internet forums for the Jihad supporters<sup>2</sup>. At first, he mainly commented the current events connected with the war against terrorism - he, for instance, praised the acts of terror. Then he moved on to distributing a software which masked the computer’s IP, and instructions on how to use the proxy servers. He also included certain information on the Al-Ansar website, e.g. the topographic map of Israel, CIA instructions on how to make explosives and vests for suicide bombers, intelligence-related materials as well as manuals for snipers. Moreover, he made an analysis of information he found on the Internet blogs of soldiers who served in Iraque – this allowed him to create and public plans with the locations of military posts as well as some information concerning the American tactics and military activity. Irhabi was finally noticed by the Abu Musab al-Zarqawi’s terrorist group and thus started his co-operation with Al-Qaida. However, on the 21st October 2005 he was arrested by Scotland Yard. During the trial he confessed that he “*inticed another person to commit an act of terror, in whole or in part outside the territory of Great Britain, which, if committed in England or Wales would be considered homicide*”<sup>3</sup> and to have committed fraud to the detriment of banks and companies servicing credit card payments. Irhabi was finally sentenced to 16 years of imprisonment. Unfortunately, his activity is still followed by many extremists.

It should be taken into consideration that due to a global nature of the Internet, the fight against cyber-terrorism will not be effective if it is only within a single EU Member State. The

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<sup>1</sup> N. Labi, *Dżihad w sieci*, Rzeczpospolita 22.07.06 No. 170 -

[http://www.rzeczpospolita.pl/dodatki/plus\\_minus\\_060722/plus\\_minus\\_a\\_4.html](http://www.rzeczpospolita.pl/dodatki/plus_minus_060722/plus_minus_a_4.html)

<sup>2</sup> The websites included information about, inter alia, the methods of using chemical substances in agriculture as a weapon of mass destruction.

<sup>3</sup> An offence act penalized by Terrorism Act 2006 of 30 March 2006r

(<http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=2321013>)



obstacle in the fight against terrorism is, among others, the difficulty in identifying the phenomena associated with the organizational structure. After the memorable events of 11 September 2001 the problem of checking has returned - what can be done and how can it be achieved and this concerns particularly private correspondence. The view that correspondence security is the supreme value and that authorities should not breach it, is a predominant view. On December 14, 2005 the European Parliament accepted the report on recording and use of the data from the telephone being bugged, the Internet and sms control and the data may be archived for a period of 6 months to 2 years.

In the case of the so-called terrorism education, it is not only concentrated on military training, but it also concerns the creation of personality in a spirit of intolerance and hatred against the enemy. We can talk here about using universal psychological processes that lie on the basis of the acquisition of pro-social attitudes, which are to shape the attitude of hostility.

The use of new technologies by offenders on a global scale has undoubtedly had an influence to take legal actions by the international community to criminalize such behavior which can be regarded as incitement and public incitement to commit a terrorist act or training for the need of terrorism.

After the attacks of 11 September 2001 the European Union further intensified the fight against terrorism in accordance with its fundamental principles, the regulations of the Charter of the United Nations and the obligations determined in the Security Council Resolution of the United Nations no. 1373 of 28 September 2001 on actions aimed at combating international terrorism. In December 2003, the Council of Europe adopted the European Security Strategy, which identified terrorism as one of fundamental threats for the interests of the European Union.

One of the objectives of the European Union, in accordance with the Article. 29 and 30 of the Treaty on European Union, is to ensure the security for citizens by preventing and combating organized crime and any other act of violence, particularly terrorism.

In the European Council Declaration on Combating Terrorism of 25 March 2004, the Member States have obliged to strengthen judicial cooperation and provide comprehensive cooperation in the event of terrorist acts.

What became so indispensable is the introduction of a new category of offences, this is, public incitement to commit a terrorist act and terrorist recruitment and training – it was a kind of novelty.

In the period from July 2004 to February 2005 the project of Convention on the prevention against terrorism was under construction and Poland took an active part in it. The Convention (also known as Warsaw Convention) on the prevention of terrorism is, in fact, the first international law act whose aim is to penalize the activities preceding and preparing the act of terrorism – prevention against terrorism.

This Convention is based on the latest trends, including the protocol amending the European Convention for the Suppression of Terrorism (ETS No. 190), the Second additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182) and the United Nations Convention against Transnational Organized Crime.

This Convention should be regarded as the first international agreement aimed at preventing the existing forms of terrorism and not only fighting it. The aim of this Convention is to *"strengthen the efforts of the Parties in terrorism prevention and negative effects that terrorism has on the full use of human rights, especially the right to life both through measures taken at the national and international level, taking into account existing relevant multilateral or bilateral treaties or agreements between the parties"*<sup>1</sup>. Here, in fact, we are talking about developing cooperation between states-parties by taking appropriate measures to prevent public incitement to commit terrorist offenses, as well as recruitment and training for terrorism. It is a kind of a novelty in treaty relations<sup>2</sup>.

In the absence of a uniform definition of terrorism, in this Convention in the Article 1 paragraph 1 *"an offence of a terrorist nature"* means any offense specified and defined in international agreements. This directory is open because each party or the Committee of

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<sup>1</sup> Art. 2 of the Council of Europe Convention on the Prevention of Terrorism prepared in Warsaw on 16 May 2005r.

<sup>2</sup> J. Wójcik, *Przeciwdziałanie finansowaniu terroryzmu*, Warsaw 2007, p. 160-161.

Ministers may suggest updating the list of treaties listed in the Annex (article 28 paragraph 1). However, such update may only concern treaties concluded within the system of United Nations.

It should be noted that offences of terrorist nature, in accordance with the Convention, have subjective scope determined separately, this is, they include "*offences remaining in the scope and defined in one of the treaties listed in the Annex*" (Article 1 paragraph 1). However, their scope corresponds with the definition of an terrorist offense referred to in the Article 115 § 20 of the Polish Criminal Code. However, in accordance with the Article 115 § 20 of the Polish Penal Code, *an offense of a terrorist nature is a forbidden act subject to imprisonment of a maximum duration which amounts to at least 5 years and is committed to:*

- 1) seriously intimidate a lot of people,*
- 2) force public authority of the Republic of Poland or another international organization or authority to take or refrain from certain acts,*
- 3) cause serious disturbances in the body of the economy of the Republic of Poland, another state or international organization.*

The objects of this Convention are the acts which previously were not recognized as separate offences by the international law. It was defined as follows:

- article 5 as a "*public incitement to a terrorist offense*",
- article 6 - "*recruitment in aid of terrorism*",
- article 7 - "*training in aid of terrorism*".

Article 5 of the Convention, the act of "*public incitement to commit a terrorist offense*" is considered as distribution or any other kind of sharing messages to public media to incite people to commit a terrorist offense as far as such behavior in a direct or indirect way creates danger to commit such an offense.

The offense would concern a wide range of methods of distribution of a publication. The publication would be "*a publication of a terrorist nature*" within the meaning of the offence if the content it contains, directly or indirectly incited or encouraged in other way to commit and

prepare the act of terrorism (only if such a publication would be perceived in this way by some people or all of them), or if it contained information about committing or preparation of such acts of terrorism.

In the defense of a particular person it can be proven that he did not get familiar with the publication and therefore he had not grounds to suspect that this was a terrorist publication.

The offense, considered together with the distribution, is associated with a particular respect for the freedom of media in a democratic society, included in the article 10 of this Convention on the Protection of Human Rights and Fundamental Freedoms. For example, in the case of *Erdogdu v. Turkey*, the Court stated that "*there where a publication can not be classified as the one which incites to violence, the Contracting States may not limit the right of general opinion to information by transferring the burden of responsibility for offences to the media in order to prevent riots or offences*".

The recipients of the terrorist propaganda are primarily potential supporters, candidates for bombers, as well as sponsors and supporters, for example, those providing confidential information<sup>1</sup>.

Article 6 of this Convention as a "*recruitment in aid of terrorism*" means incitement of other person to commit or participate in committing of an offense of a terrorist nature, or to join an association or group in order to contribute to such offense.

The last case concerning the recruitment of militants by an American citizen - Coleen Larose, using the nickname "Jihad Jane" clearly shows how many possibilities terrorists have on the Internet. This woman submitted in 2008 on YouTube a comment that "she is desperate to do anything to help Muslims." In the period from December 2008 to October 2009, which is the time of detention "Jihad Jane" established cooperation with five people who wanted to be martyrs like she. The aim of the actions was to recruit, find funds for terrorist activities and killing the Swedish cartoonist Lars Vilks, who in 2007 introduced the Prophet Mohammed as a dog<sup>2</sup>, and Al-Qaeda offered a reward in the amount of \$ 100,000 for his killing. Coleen Larose,

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<sup>1</sup> In 2003 one of the soldiers of the US Army was passing on information on his military unit using chat room.

<sup>2</sup> See: <http://www.euroislam.pl/index.php/2010/03/mam-siekiere-do-obrony/>

an American jurisdiction accused him of "*a conspiracy to provide material support for terrorists, a conspiracy to murder in a foreign country, making false statements to government officials and attempting identity theft*"<sup>1</sup>.

Incitement of a person to terrorist activity and then recruiting him depends on personality traits of the person who incite and the person who is incited. Bruno Holyst shows that those who incite should be characterized by charisma, leader-type personality and the person who is incited is usually a person susceptible to persuasion<sup>2</sup>.

In light of the Polish criminal law, the behaviors described in the Article 6 Paragraph 1 of the Convention should be considered as incitement, this is from the Article 18 § 2 of the Penal Code to the forbidden act of the characteristics listed in the Article 115 § 20 of the Penal Code or to participate in an organized group or criminal bond - Article 258 § 2 of the Penal Code.

Article 7 of the Convention "*training in aid of terrorism*" is considered as the acts of offense. This include providing guidance for the use of explosives, firearms or other weapon or noxious or hazardous substances, as well as other specific methods or techniques to commit or contribute to terrorist offense, knowing that the obtained skills are to be used for such a purpose.

Incitement can take place in various ways, for example, on the Internet or directly by directing a person.

Article 7 paragraph 1 of this Convention is in fact an accessory (Art. 18 § 3 of the Penal Code), mostly mental one. As I already mentioned, Articles 5 and 6 of the Convention have a reference to the Polish Penal Code, this is Article 18 which governs the form of committing criminal offences in the way of perpetration, as well as inciting and accessory actions. As a result of it, this institution uses up signs of the offenses defined by the Convention, this is terrorist offences.

Currently, on the Internet you can find a variety of publications on training for terrorists, which fill the scope of the Article 7 of the Convention. In my opinion, at this point we should

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<sup>1</sup> <http://news.bbc.co.uk/2/hi/americas/8561888.stm>

<sup>2</sup> B. Holyst, *Terroryzm*, t. 1, Warsaw 2009, p. 144.

divide the source of publication of these materials one the ones coming from official bodies and the ones coming from other, unofficial sources.

On the official website of the United States Department of Justice there is a great number of excerpts from the training manual for terrorists entitled "Encyclopedia of Afghan Jihad."<sup>1</sup> The published articles are in my opinion quite controversial, despite the legal notice which states that "The Department is only providing the following selected text from the manual because it does not want to aid in educating terrorists or encourage further acts of terrorism." They include, inter alia, information where explosives should be placed to obtain an effective field of destruction, what living targets and public facilities destroy and information about a psychological war. Furthermore, this publication includes information on how to falsify test results of polygraph. In connection to the above, it is hard to understand the intentions of the U.S. government when making this publication available. In spite of the fact that these materials are abridged, they still include quite substantial instructions and recommendations for future terrorists.

The next training manual for future terrorists not only from the sign "Jihad" is an officially available book by William Powell, entitled "*Anarchist Cookbook*" It was published in 1970 as opposition to the war in Vietnam and the U.S. government policy<sup>2</sup>. It includes - as majority of this kind of publications - diagrams and instructions of the construction of homemade bombs, sabotage techniques, as well as manuals for using a weapon.

In addition, the publication of Ernesto Che Guevary entitled "*Guerrilla Warfare*"<sup>3</sup> and similar ones, where you can see certain signs of instruction, for example, in carrying coup d'état. However, in my opinion we cannot treat them as training publication to commit a terrorist offense. Article 7 of this Conventions includes information that terrorist training is providing

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<sup>1</sup> The manual was made available by the British services after the liquidation of the Al-Qaeda unit in Manchester – parts of it available at [http://www.au.af.mil/au/awc/awcgate/terrorism/alqaida\\_manual/](http://www.au.af.mil/au/awc/awcgate/terrorism/alqaida_manual/)

<sup>2</sup> At [http://www.amazon.com/Anarchist-Cookbook-William-Powell/dp/0974458902/ref=sr\\_1\\_1?ie=UTF8&s=books&qid=1261666866&sr=1-1](http://www.amazon.com/Anarchist-Cookbook-William-Powell/dp/0974458902/ref=sr_1_1?ie=UTF8&s=books&qid=1261666866&sr=1-1) there is a statement of the author of the book about the reasons of writing the book. Moreover, Powell indicates that he wants to Widaw the book from sale but he is no longer the owner of the copyrights.

<sup>3</sup> Published in 1961 became a guidebook for thousands of partisans in different countries all over the world.

other specific methods or techniques to commit or contribute to commit a terrorist offense, knowing that the gained skills are to be used for such purposes.

In order to penalize the actions determined in Article 5-7 and 9 of the Convention, it is not required to actually commit a terrorist offense (Article 18 of the Convention). The offences mentioned in articles 5 to 7 have several common elements, this is, they must be committed unlawfully and intentionally. The authors of the Convention agreed that the precise meaning of '*intentionality*' should be left to the interpretation of national law.

In addition, Art. 9 introduces the category of auxiliary offences. The acts which relate to the offences referred to in Article 5-7 of the Convention should be punished. They include: accomplice, organization of committing and contribution to commit one of the above mentioned offences which are committed in order to support criminal activity of groups or are committed intentionally.

However, this Convention seems to create a problem related to basic human rights and freedom so that, in practice, too much interference in those rights are not made. The preamble to the Warsaw Convention states that regulations cannot be interpreted as aiming at limiting the rights such as freedom of speech, freedom of assembly or association, right to respect private and family life, including right to respect secrecy of correspondence. They also cannot be interpreted as aiming at limiting opportunities to spread information for scientific, academic or reporting purposes.<sup>1</sup> The freedom of expression is one of the most fundamental rights to a democratic society and, according to the European Court of Human Rights judicature (see *Lingens v Austria*, judgment of 8 July 1986, HUDOC Ref. 000000108), it is applicable not only to ideas and information that are favorably received or regarded as offensive, but also to those that "offend, shock or disturb."

Article 10 paragraph 2 of the European Convention on Human Rights determines the conditions which allow restrictions of freedom of expression in accordance with the European

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<sup>1</sup> point 13-15 of Warsaw Convention.

Convention on Human Rights. The article 15 of the European Convention on Human Rights allows derogation from certain rights in case of emergency.

It should be noted that criminalisation of the acts specified in articles 5-7 and 9 of the Convention, may lead in certain situations to limitation of human rights, and in particular the right to freedom of expression, freedom of association and freedom of religion. Pursuant to article 10 item 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms everyone has the right to freedom of expression and this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

However, item 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms stipulates that the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Human rights and counter-terrorism should not exclude, but rather complement one another. These rights can not be abused or used as a protection for promoting terrorism or other activities of a criminal nature. Counter terrorism can not be identified as limitation of civil liberties, including the limitation of freedom to expression, because these measures are taken to protect democracy, and therefore to protect these rights. That is why the Convention does not limit human rights , but aims at reinforcing them.

In a democratic society the protection of political speech as well as the provision of freedom to participate in public debate is of particular importance. Exercising of this freedom is, however, complicated and sensitive.

In the decision of *Müslüm Gunduz v. Turkey*, the court held that statements arousing hatred, which may offend individuals or groups, do not enjoy the protection of Article 10 of the



Convention<sup>1</sup>. Moreover, respect for the dignity of human beings is the foundation of a democratic and pluralistic society. However, action taken which should prevent inciting statements or promoting hatred based on intolerance must be proportionate to that situation.

However, in the case of *Norwood v. United Kingdom*, the court emphasized that a general and violent sudden attack on a religious group, (in this case Muslims), and linking it as a whole with terrorism is wholly inconsistent with the values proclaimed and guaranteed by the Convention<sup>2</sup>. Those punished who would rely on the protection of freedom of speech should remember the prohibition of abuse of rights resulting from Article 17 of the Convention. The court is clearly of the position that "hate speech" will not be protected.

In situations where the state is at war or other public danger threatens the existence of the nation, the state may in accordance with Article 15 of the Convention take precautions derogating the use of obligations under the present Convention (for example: freedom of speech - Article 10) within a range strictly responding to requirements of the situation, on the condition that these precautions are not inconsistent with other obligations under international law.

An example of a state rightly limiting the right for freedom of speech and expressing opinions was the case of Gerard Adams – the leader of Sinn Fein party recognized as bound with the IRA organization. The Commission has rejected Adam's complaint claiming that Great Britain's Secretary of State could think that Adams, who was to deliver a speech in the House of Commons, could allow for public presentation of ideas and opinions praising political violence<sup>3</sup>.

The authorities must very carefully study published opinions for promotion of using force against the state. Lack of such supervision can result in media becoming a tool of propaganda of hate and inciting violence.

In cases against Turkey the European Court of Human Rights has often underlined that when assessing law for the freedom of speech – where there is inducement for violence, states are allowed to use wider than usual margin of freedom when introducing limitations.

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<sup>1</sup> Decision of 04.12.2003, Chamber (Section I), claim no. 35071/97, §40-41.

<sup>2</sup> Decision of 16.11.2004, Chamber (Section), claim no. 23131/03.

<sup>3</sup> Decision of 13.01.1997, claim no. 28979/95, 30343/96, DR 88-A/137.

In the case of *Zan v. Turkey* the Court has claimed that basic rules, which concern using article 10 of the Convention, can also be used for measures taken by the state for keeping its safety and public safety as a form of the struggle against terrorism<sup>1</sup>. That should form the basis of assessment if the balance between fundamental right of an individual for the freedom of speech and justified entitlement of democratic society for protection against activity of terrorist organizations has been kept.

The other issue worth mentioning in this article is *Leroy v. France*.<sup>2</sup> *"The applicant filed on 11 September 2001 in the editorial office of the Basque weekly newspaper a drawing showing an attack on World Trade Centre with an inscription which parodied a well-known advertising slogan: 'We have all dreamt of it ... Hamas did it.' The drawing had been printed two days later. The applicant was convicted of complicity in promoting terrorism and sentenced by the French court to a fine of EUR 1,500"*<sup>3</sup>. The Court held that in this case there is no criticism of American imperialism but promotion and glorification of its destruction by violence. When it comes to the slogan, the Court held that the applicant expressed his moral solidarity with the alleged perpetrators of the attack on 11.09.200 and positively evaluated the violence against civilians by attacking the dignity of the victims.

Furthermore, the incitement to racial hatred can not be considered acceptable because of the right to freedom of expression (Article 9. 2 of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965). This also applies to incitement to terrorism and the Court has already held that certain restrictions on the information which may constitute indirect incitement to terrorism offence is in accordance with the Convention on Human Rights (see *Hogefeldv. Germany*. January 20, 2000, HUDOC REF 00005340).

Parties to the Convention, in order to prevent offences of terrorist nature, undertake to – pursuant to Article 12 of the Convention, to penalise in the national law such acts as:

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<sup>1</sup> Decision of 25.11.1997, claim no. 18954/91.

<sup>2</sup> Decision of 02.11.2008, Chamber (Section V) claim no. 36109/03.

<sup>3</sup> M. Nowicki, *Europejski Trybunał Praw Człowieka. Wybór Orzeczeń 2008*, Warsaw 2009, ps. 228.

- public calling for offences of terrorist nature,
- recruitment in aid of terrorism,
- training in aid of terrorism.

Considering legal impacts of the ratified Convention onto the Polish law, it ought to be noted that the scope of the Convention actually applies to matters provided for in the Act dated 6 June 1997 – the Penal Code, the Act dated 6 June 1997 – the Code of Criminal Procedure, and the Act dated 28 October 2002 on the liability of collective entities for acts prohibited under pain of penalty.

In the event of political offences, it has been decided (Article 20) that for the purpose of extradition or mutual legal assistance the offences provided for in the Convention (i.e. in Articles 5 - 7 and 9) shall be treated as political offences or offences inspired by political motifs. Nevertheless, it has been allowed to submit reservations permitting evasion of this obligation in individual cases. However, each of the Parties to the Convention may refuse to enforce application for extradition or deny legal assistance if they have justified grounds to believe that the application is aimed at prosecuting or penalising a specific person due to their race, religion, nationality, ethnic origin or political views (Article 21 paragraph 1).

Furthermore, the convention also foresees the responsibility of legal persons for participation in offences of a terrorist nature – independently from the responsibility of natural persons who committed the given offence. The responsibility of legal persons may be criminal, civil or administrative (Article 10 item 2).

This convention raises itself the aim to develop cooperation between countries through taking effective measures in order to limit and prevent public incitement to offences of a terrorist nature and also through recruitment and training to fight terrorism.

Moreover, it is necessary to consider the support of tolerance through dialogues between particular religions and cultures in order to prevent tensions which could lead to commitment of offences of a terrorist nature.

Terrorists consciously exploit loophole which is given to them by democratic country. They take advantage of the freedom of speech. We have to understand that the next problem

connected with the fight with terrorism is the everlasting dilemma of a country which has to keep the balance between providing safety for the citizens and giving freedom to the citizens to exercise their constitutional rights and liberties<sup>1</sup>.

The Internet as the medium of inciting people as well as adopting aggressive behaviour and as a device of terrorists recruitment may and indeed offers great effectiveness. It needs to be remembered that actions that select entities who are responsible for propagating terrorism are singled out by a tapping system ECHELON<sup>2</sup>.

Acts of terrorism are expected to be spectacular and media in order to draw attention. An exaggerated interest of media in a particular act of terrorism may restrict the effectiveness of government service in detecting offenders and preventing subsequent attacks. Walter Laquer claimed, "*media are the terrorists' best friend (. . .), act of terrorism itself does not mean anything, publicity is everything*"<sup>3</sup>. The relation between publicity and acts of terrorism happens to be paradoxical and complex since publicity appeals to sympathizers, new recruits. However, publicity may paradoxically bring a reverse effect, namely an indignant public opinion.

Report of a working group on Internet Governance of June 2005, warns that measures which aim to secure or prevent crime may result in infringement of the right to freedom of speech, included in the Universal Declaration of Human Rights and the Declaration of Principles issued during the first phase of World Summit on the Information Society<sup>4</sup>. However, as regards terrorism prevention, the European Union does not intend to guarantee an unlimited right to freedom of speech<sup>5</sup>.

To sum up, the right to the freedom of expression and information can be limited in order to sustain the safety of country. A conflict between two basic values such as right to

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<sup>1</sup> See: C. Warbrick, *The European Response to Terrorism in an Age of Human Rights*, The European Journal of International Law 2004, Vol. 15, no. 5, p. 1016-1017.

<sup>27</sup> See: M. Yew Meng Hor, *Global anti-terrorism law and policy*, Cambridge 2005, p. 221-222.

<sup>3</sup> W. Laquer, *The futility of terrorism*, Harper's Magazine, March 1976, p. 99-105.

<sup>4</sup> Point 24, *Report of the Working Group on Internet Governance*, Château de Bossey, June 2005.

<sup>5</sup> K. Kowalik – Bańczyk, *Sposoby regulacji handlu elektronicznego w prawie wspólnotowym i międzynarodowym*, Kraków 2006, p. 281.

freedom and right to safety it is not easy to solve. In my opinion the problem should be considered in a way in which we use the standard of rightness via appealing to the sense of responsibility of citizen who has this kind of problem. If we put the safety of country and its democratic basic in danger as a result we can cause the danger of freedom. To protect freedom and safety of the whole country we have to sometimes sacrifice the rights of individuals. However, this relation can not lead to lawlessness, can not be a continuous practice because it can cause a disorder of the bases of democratic country. Nevertheless, in situation such as terrorism people are prone to accept the constraint of their rights<sup>1</sup>.

The European Convention on Human Rights indicates that it is vitally important to balance right and freedom of individual to keep the country in a save way<sup>2</sup>.

The Internet gives terrorists a lot of freedom to popularize their views, acts of aggression and they are anonymous in this global village. This instrument is used to widen hate, lead psychological war but a full control of the Internet it is not possible to realization.

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<sup>1</sup> A. Mednis, *Prawo do prywatności a interes publiczny*, Kraków 2006, p. 36.

<sup>2</sup> J. Kochanowski, *Symbioza mediów z terroryzmem, Media a terroryzm*  
([www.bbn.gov.pl/download.php?s=1&id=1970](http://www.bbn.gov.pl/download.php?s=1&id=1970))

**AUTHOR: dr Waldemar Bednaruk**

## **“Views of the Nobility from the Lubelskie Province on the functioning of the Permanent Council”**

The system of central offices established already in the Middle Ages survived in an unchanged form practically until the reign of Stanisław August. Earlier attempts to reform this obsolete structure failed mainly because of fear of the excessive strengthening of the King's power, which in consequence could lead to the limiting of the privileges of the nobility. Therefore, despite the awareness that not all bodies were functioning properly the whole of the knighthood attributed all those problems to the weakness of human nature – it was the people in the office positions that did not fulfil their obligations, but the system itself was good. So instead of making thorough changes they called for the selection of adequate employees, believing that the political system of the Commonwealth established by their ancestors was perfect.<sup>1</sup>

Meanwhile, the offices established ages before ceased to perform their role. A thorough reform of the whole state administration was necessary. It was understood better and better by the representatives of intellectual elites already in the Saxon period, who popularized among the nobility the idea of the establishment of modern executive authority body in order to gain its support for the changes planned. The most known columnists of this period include Stanisław Dunin-Karwicki, who, like Stanisław Leszczyński later on, called for a political system reform, suggesting the establishment, inter alia, of a strong executive authority body, which would be a manifestation of the legislative authority.<sup>2</sup> Stanisław Konarski, during the last period of the reign of Augustus III, wrote a monumental work entitled "O skutecznym rad sposobie" ["On effective line of advice"], in which he called for rejection of prejudices against solutions used in other

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<sup>1</sup> A. Czaja, "Między tronem, buławą a dworem petersburskim. Z dziejów Rady Nieustającej 1786 – 1789," Warsaw 1988, p. 34 and following.

<sup>2</sup> A. Czaja, "Między tronem ...," p. 38.

countries. He wanted the citizens considering a new form of a political system not to disregard foreign experiences but take whatever they would find useful.<sup>1</sup> It was him who in his work used a term “permanent council,”<sup>2</sup> which later on inspired the founding fathers of the project from 1775. Also the Czartoryski Family prepared their own political programme, presenting a vision of joint executive power with member elected by the Sejm.<sup>3</sup>

A long-awaited moment of implementation of the changes planned occurred after death of Augustus III. At least so the supporters of the reforms thought. In practice, despite the advantage of the Czartoryski Family at the Convocational Sejm, only some plans were fulfilled. New joint central administration bodies, which limited the power and influences of current dignitaries, originating mainly from magnates, were established at the time. The Crown and Lithuanian tax commission headed by subtreasurers was established. They were responsible for economic and financial matters, and their current power was limited. A similar effect was brought by the establishment of a Crown military commission headed by hetmans. During the Coronation Sejm a Lithuanian military commission and a Mint Commission, which dealt with monetary matters of the country, were established. Unfortunately, further reforms were hindered by the activities of more and more determined conservatives, who gained support of the Petersburg court worried by the process of healing of the state structures.<sup>4</sup>

Established by the Partition Sejm (sitting with intervals in the years 1773 - 1775), the Permanent Council in its initial form limited some prerogatives of the king,<sup>5</sup> at the same time weakening the power of current uncontrolled ministers. The changes implemented a year later extended its competences, strengthening at the same time the king's power at the expense of the ministers. Divided into five departments, the Permanent Council, due to skilful politics of the

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<sup>1</sup> S. Konarski, “O skutecznym rad sposobie, i inne pisma polityczne,” Wrocław 2005, p. 251.

<sup>2</sup> Ibid., p. 253, “§ 11. Przemowa do następującej rad nacjonalnych planty i pierwszy punkt planty o nieustającej radzie.”

<sup>3</sup> J. Michalski, “Plan Czartoryskich naprawy Rzeczypospolitej,” *Kwartalnik Historyczny* 4 – 5/1956, p. 36.

<sup>4</sup> More in A. Czaja, “Między tronem ...,” p. 45.

<sup>5</sup> The establishment of the Council contributed to the establishment of partial supervision of the current, quite independent and deprived of effective control politics, inter alia, in the field of foreign contacts of the king, implemented through the king's Office, by the Foreign Matters Department. Although it should be said that skilful politics of the king in this regard enabled him to maintain considerable independence in this field. See M. Rymaszyna, “Gabinet Stanisława Augusta,” Warsaw 1962, p. 101 and following.

king and efforts of its own members, became in time an efficient executive authority body developing politics beneficial for the country. Nevertheless, despite numerous undoubted successful reforms of the country the Council remained a symbol of Russian enslavement of the nation and as such was not popular with the nobility.<sup>1</sup>

Similar attitude towards the Council from the beginning of its existence was expressed by the citizens of the Lubelskie Province. For the whole period of the Council's functioning the Lublin regional sejm not even once expressed an acceptance of any act passed by this body. All resolutions and instructions of the regional sejm, mentioning the Permanent Council, criticized its activities or demanded undertaking of specific activities, and most often required limiting of interference in the state matters.

Already in the instruction from 1776 the nobility of the Lubelskie Province expressed fear that the new magistracy may appropriate too much power in the state and demanded that its deputies undertake efforts to precisely determine and hedge with law its powers and competences. At the time they feared the influence of the executive authority on the judiciary of the nobility. Therefore, the attention of the province representatives was drawn particularly to tribunals, rural and borough courts, which should always be free from the authority and control of the Council, retaining competences of the above-mentioned bodies which they had had for ages.<sup>2</sup>

The Permanent Council was accused of interfering in the judiciary of the nobility by the nobility of the Lublin Province in its instruction from 1780, claiming that the Military Department illegally appropriated court powers. Such illegal activities were to consist in the Department's examination, by way of extensive legal proceedings, of legitimacy of requests for military aid in the execution of sentences. The citizens of the Lubelskie Province also demanded

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<sup>1</sup> More about the Permanent Council itself and its operations in W. Konopczyński, "Geneza i ustanowienie Rady Nieustającej," Kraków 1917 and A. Czaja, "Między tronem ...," p. 49 and following.

<sup>2</sup> See "Instrukcja poselska z 15 lipca 1776 roku" [in:] "Dokumenty z lat 1649 – 1798 dotyczące miasta Lublina i województwa lubelskiego," a manuscript of the PAN Library in Kraków, No. 3278, sheet 39.



that the military aid once granted not be recalled later by contradictory orders.<sup>1</sup> Nearly identical accusations appeared in the instruction of the regional sejm from 1784, and the impatient nobility demanded that the persons responsible for such abuse be called before the Sejm court following any report.<sup>2</sup>

The second accusation frequently put forward by the nobility of the Lubelskie Province against the Council concerned the Council's going beyond the legal framework in the area of legislation. For the first time the demand in this regard was presented by citizens of the Lubelskie Province in 1780, who demanded that the Council, pursuant to law, remained within the limits determined by its resolutions and did not aspire to any legislative powers. In the following years the nobility of the Lubelskie Province demanded revocation of all Permanent Council's resolutions containing legislative elements.<sup>3</sup>

Apart from the most sensitive matters in the instructions of the regional sejms there are critical remarks regarding the Council's resolutions on particular matters, often accompanied by a demand for revocation of such acts. The citizens of the Lubelskie Province did not like the regular increase of the number of clerks employed in this magistracy, as their salaries constituted significant and unnecessary burden for the treasury of the Commonwealth. They demanded that some officials be dismissed and that the rule that the people employed there are not foreigners but native noblemen be observed in the future.<sup>4</sup>

Fulfilling the electors' recommendations included in the instructions the deputies from the Lubelskie Province many times acted against the activities of the Permanent Council. And reports of the deputation controlling its activities were an opportunity for such offensive actions

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<sup>1</sup> "Teki Pawińskiego. Akta sejmikowe województwa lubelskiego" (hereinafter TP), a manuscript of PAN the Library in Kraków, No. 8326, book 9, sheet 411.

<sup>2</sup> Cf. TP., book 9, sheet 434, where a more firm, as compared to the one from before four years, demand of the following wording is included: "The deputies demand that the Military Department not participate in the cognizance of the proceedings executed by the Starost or his Office, but that aid be granted immediately, and that contrary orders regarding such executions be banned, should the Department in this or another circumstance compliant with the Law object, so that it could respond in the Sejm courts *ad Cujusvis Instantiam*."

<sup>3</sup> "Księgi Grodzkie Lubelskie. Relacje, Manifesty, Oblaty" (hereinafter KGL), a manuscript of the State Archives in Lublin, No. 476, sheet 329 and TP., book 9, sheets 411 and 434.

<sup>4</sup> TP., book 9, sheet 434.

aimed at this hated symbol of Russian enslavement. At the beginning of each new term of the Sejm the commissions to “examine” central bodies, including the Council, were elected. The main task of the deputation members included an analysis of the documents of a given institution, on the basis of which a post-control protocol, presented together with a report on the activities of the commission at the Sejm session, was prepared. If it was found that everything was in accordance with the law, then the parliament granted a vote of approval for the politics of a given body and passed a so-called statement, in which gratitude for the efforts undertaken for the sake of the country was shortly expressed. At the same time maintaining the possibility to change such Council’s achievements and resolutions, which would be regarded as contrary to the law.<sup>1</sup>

Presentation of a report on the activities of the commission “examining” the Permanent Council of the former term was a perfect opportunity to express disapproval of this institution. The deputies from the Lubelskie Province used then that moment to critically summarize its activities. A particularly harsh dispute regarding the politics of this body was led by two representatives of the Lubelskie Province: Stanisław Kostka Potocki, a crown steward, and Wojciech Suchodolski, a royal chamberlain, at the Sejm session in 1782. Initially nothing indicated the later incident. At the Sejm session on 21 October, after the work of the deputation, appointed to control the Council’s activities at the end of its term, finished, a report on the activities performed was presented by the Smoleńsk Bishop Gabriel Wodziński, as the first in rank from the commission members. He spoke highly of the efforts of the body “examined.” All departments were functioning perfectly well, no neglect was observed, and the documents were found to be in perfect order.<sup>2</sup>

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<sup>1</sup> See “Volumina Legum. Przedruk zbioru praw staraniem XX. Pijarów w Warszawie od 1732 do 1782 roku, Petersburg – Kraków – Poznań 1859 – 1952” (hereinafter VL), Vol. VIII, p. 576, “Zaświadczenie czynności Rady przy boku naszym Nieustającej” from 1778 and of similar content from subsequent Sejms, Ibid., Vol. VIII, p. 584, Vol. IX, pp. 10 and 33.

<sup>2</sup> “Dyaryusz Seymu Walnego Ordynaryinego Warszawskiego Sześćcio – Niedzielnego Roku Pańskiego MDCCXXXII” (hereinafter Dyaryusz Seymu 1782 roku), Warsaw 1782, sheet 121 and following.

The remaining members of the commission spoke one after another in the same spirit and the protocol on the activities of the deputation with a statement draft was about to be read, when a deputy from the Podole Region, Pius Borejko, also a commission member, asked for permission to take the floor. Expecting critical remarks, which could shatter an ideal image of the Council presented, there were attempts not to allow him to present his remarks. During a violent argument, when the Speaker of the Chamber of Deputies refused to give deputy Borejko the floor at that moment, striving to have all the documents prepared by the deputation read, deputy Borejko received a strong support from the deputy from the Lubelskie Province, Wojciech Suchodolski. After a long argument, with active involvement of deputy Suchodolski, deputy Borejko could at last present his point of view as regards the activities of the body controlled. It was entirely different from the point of view presented earlier. Deputy Borejko noticed in the conduct of the Council a number of irregularities, such as appropriation of legislative power, interfering with court decisions and thoughtless squandering of public money. The heaviest accusation against the magistracy regarded its inactivity and consent to violation of fundamental rights of the nobility. He referred to the stance of the Council on imprisonment of bishop Kajetan Sołtyk by the Chapter of Kraków. Borejko condemned the Council for that, because, despite numerous complaints filed at the time, it refused to intervene in this matter.<sup>1</sup>

The speech delivered by the deputy from the Podole Region constituted a pretext for the deputies from the Lubelskie Province to start an argument lasting for a number of days (from 21 October to 2 November) regarding the revocation of the Council's resolution concerning the case of bishop Sołtyk and punishment of the Chapter of Kraków. Stanisław Potocki, at the following Sejm sessions, presented a number of fiery speeches in defence of the bishop, accusing the Chapter of Kraków of violation and infringement, and the Council of inactivity in the face of flagrant violation of fundamental rights of the nobility. He demanded that the bishop be set free,

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<sup>1</sup> Ibid., sheet 147 and following, for the details of the imprisonment of the Kraków bishop declared as insane by a part of the Chapter of Kraków see "Mowa Xcia Stanisława Lubomirskiego Marszałka Wielkiego Koronnego na Sessyi Rady Nieustającej Dnia 1 Marca 1782 miana" [in:] "Papiery z archiwum zamku Suskiego," a manuscript of the PAN Library in Kraków, No. 941, sheet 635 and correspondence of various people in this matter, Ibid., sheets 638 – 646.

the Chapter of Kraków punished and the activities of the Council in this matter condemned, as in his opinion it sinned by violating the law or by not insisting eagerly enough on its observance – which, as he hoped, would have been explained during the examination of all circumstances. Potocki did not limit himself to the criticism alone, presenting a resolution draft prepared by him called “On the Council’s Resolutions” for the Sejm debate, and demanding immediate voting on this matter. The draft submitted included a decision on the revocation of the Council’s resolution in the Kraków case as unlawful and for the same reason the revocation of another resolution, concerning a reply to a crown field hetman’s letter (as for this resolution no need to reply to Rzewuski’s letter was recognized, as it was insulting for the body members, who it was addressed to).<sup>1</sup>

In the condemnation of the Permanent Council he was supported by another deputy from the Lubelskie Province, Wojciech Suchodolski, who demanded simply punishment of the Military Department for secret cooperation with a part of the Chapter of Kraków, which deprived the bishop of his freedom. As regards the acceptance of the activities of the Kraków priests, expressed by the Military Department of the Council, and then its justification of the conduct of the Military Department in this regard, he claimed that it was a flagrant abuse of power. “By what right,” Suchodolski asked, “one magistracy, by appropriating the power of the Commonwealth, confirms the legality of the activities of another?” He also said that the Council could not be stronger than the law itself, which it should be subject to and which it should protect. “If the Sejm does not undertake effective activities,” he concluded, “it will mean that the magistracy may violate the law with impunity and will get away with it, since such serious accusations are not supported by the estates gathered at the Sejm session.”<sup>2</sup>

Finally, despite such intensive attempts the draft prepared by Potocki was voted against, both by the Chamber of Deputies and the Senate. The majority of the parliamentarians decided that the activities of the Council in those particular matters did not violate the law. Those

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<sup>1</sup> See “Dyaryusz Seymu 1782 roku ...,” sheets 156 – 344, Ibid. Hetman Rzewuski’s letter to the Council, sheets 344 – 347.

<sup>2</sup> Ibid., sheets 177, 282 and 320.

criticising the Council, who at the same time defended freedom of Kajetan Sołtyk, could not convince the majority of the debating, and even the remaining deputies from the Lubelskie Province, from among which three deputies did not vote, and one voted differently than his fellow deputies.<sup>1</sup> It was due to several reasons: firstly, a great information and propaganda campaign before the Sejm led by the court fraction<sup>2</sup> convinced a part of the society (possibly even the majority) that the Kraków bishop had gone mad; secondly, everybody knew that the Potocki Family and Sołtyk were related, so the fight of the deputies from the Lubelskie Province was perceived as self-serving one; thirdly, by attacking the Council the King himself, cooperating with the Council on the Kraków matter, was indirectly attacked, so his supporters voted against the draft of the deputy from the Lubelskie Province.

Defeat of the two above-mentioned deputies from the Lubelskie Province, which they suffered in a squabble with the Permanent Council in 1782, does not prove in any way that the attitude of the nobility towards this body changed or that it was all powerful. On the contrary, great influence on the course of the state matters made the body being carefully watched by the Sejm, which sometimes combined efforts to revoke its more troublesome acts.<sup>3</sup> A certain

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<sup>1</sup> It was Romuald Walewski participating in the works of the delegation “examining” the activities of the Military Department. Knowing the subject matter of the dispute he firmly stated that the accusation of violation of the law was in that case wrong, as the rule of *neminem captivabimus* may be applied only to sane beings and the Kraków bishop as a person indisputably insane was not subject to it. Therefore, he supported the activities of the Council in this matter, expressed his gratitude and in the voting on Potocki’s draft he voted for its rejection, cf. “Dyaryusz Seymu 1782 roku ...,” sheet 210.

<sup>2</sup> See Copy of “List Koniuszego Koronnego Imieniem Króla pisanego z Warszawy do Ziemstwa Lubelskiego 5 Marca 1782 Roku,” [in:] “Papiery z archiwum zamku ...,” sheet 636, in which the author, taking advantage of the fact that the nobility gathered in Lublin during a rural court term, writes to it on behalf of the king explaining the events that took place in Kraków. The letter presents an image of the bishop, who had gone mad as a result of long-lasting Russian enslavement; according to this account he allegedly celebrated Holy Mass at strange hours, ordained the same priests twice, chased after people with a stick, threw money out of the window and publicly insulted his prelates and canons. When they tried to oppose him, he wrote terrible lampoons on his subordinates, which he then printed out and distributed; he threatened people with anathemas and did such inappropriate things that he had to be locked up for his own sake so as not to get into bigger trouble. People did not know all about that, so they held demonstrations in his defence and already some provinces stood up for him, and he strangled people sleeping with him for his safety and service and nearly deprived them of their lives. Therefore, writing on behalf of the King, Józef Kicki, appealed for peace and asked the nobility of the Lubelskie Province not to pay any attention to the declarations and appeals circulated throughout the country, to remain calm and make others act moderately. The case was going to be dealt with by two independent commissions: one appointed by the primate, and the other one by the king, and here he provides the last names of the people making them up and calls for peace and patience.

<sup>3</sup> Cf. VL., Vol. VIII, p. 576, which contains three resolutions of the Sejm from 1778 revoking Permanent Council’s resolutions and doing the same in the following years, in which, apart from the Sejms in 1780 and 1782 the number of revoked acts is growing, See *ibid.*, Vol. IX, pp. 10 and 33.

hindrance as regards the effectiveness of such control activities of the Sejm was that it was summoned every two years for several weeks, and the Council appointed for a two-year term had a lot of freedom between the Sejm sessions. The control of the acts of the Permanent Council was possible only as regards the ones which came into force and were passed by the body ending its term. It was a serious deficiency, as, despite criticism and revocation of unlawful or unpopular resolutions, nothing could be done. In theory, it was possible to prosecute individual members of this body for violation of the law, but in practice there were obstacles of the procedural nature, greatly hindering the possibility to bring a counsellor of the Council to the Sejm court. It was due to the fact that decisions could be taken by secret ballot, which many times made it impossible to determine an individual responsibility of a particular person.<sup>1</sup>

Despite the passage of time aversion to the Permanent Council among the nobility was no weaker.<sup>2</sup> Each next Sejm lost more and more time on disputes regarding sustenance or revocation of Council's resolutions. It was the subject of complaint of the nobility of the Lubelskie Province in their instructions.<sup>3</sup> The Council was also one of the symbols of enslavement of the nation by foreign powers and when, in relation to an advantageous international situation there appeared a chance to gain full independence the regional sejms demanded such reforms, which, while strengthening the country, would at the same time remove the traces of former dependence.<sup>4</sup>

The Lubelskie Province Regional Sejm, sitting on 18 August 1788, included, among other postulates, a categorical demand for the liquidation of the Permanent Council, giving the reasons for such a firm motion. Firstly, by that time the Commonwealth did not need such an institution, due to the presence of senators at the king's side for ages, supporting him in the rule of the country and it all was functioning very well, so the country could do without the Council.

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<sup>1</sup> Also the defenders of the Council paid attention to that during the argument with Potocki and Suchodolski during the Sejm session in 1782, See "Dyaryusz Seymu 1782 roku ...," sheet 282 and A. Czaja, "Między tronem ...," p. 75.

<sup>2</sup> The analysis of the cause of aversion of the knights to the Council was conducted by Aleksander Czaja, See his "Między tronem ...," p. 313.

<sup>3</sup> Cf. TP., book 9, sheet 463.

<sup>4</sup> A. Czaja, "Między tronem ...," p. 313.

Secondly, the liquidation of this body was required by the honour of the nation, security of all citizens and peace at the Sejm sessions. Honour, as the Council, explaining the regulations in force to the citizens, made an impression that the nation itself, which established standards, did not understand what it established and it was necessary for it to wait for the Council to explain them to it. Security of each citizen, as in the republican political system nothing but the law provides security and protection to the citizens, but how could the law provide security to an individual if it did not have it itself, being subject to the arbitrary interpretation of the Council. Peace at the Sejm sessions, as by that date the greatest intrigues in the Senate were related to the election of counsellors and in the Chamber of Deputies the fiercest arguments regarded the sustenance of the acts passed by the Permanent Council, which contributed to the loss of time by both chambers.<sup>1</sup>

This exhaustive and quite complicated justification for the liquidation of the organ unpopular with the nobility was to be implemented by the deputies from the Lubelskie Province, who, finding numerous supporters among the representatives of other Provinces, made the liquidation of the Council one of the priorities of their mission. Among all parliamentarians the deputies from the Lubelskie Province were in the process of the liquidation of the Permanent Council the most active and among them there was Stanisław Kostka Potocki, who distinguished himself by greatest commitment, and who, like at the Sejm session in 1782, was supported by Wojciech Suchodolski, this time representing the Chełmskie Province.

Before the joining of the gathered parliamentarians to form a confederation the parliamentarians from the Małopolskie Province gathered at the regional sessions agreed on a certain procedure, according to which they intended to implement the plan of action, largely based on complex program of changes, prepared at the Lubelskie Province Regional Sejm, and among the key postulates it included the demand for the liquidation of the Council.<sup>2</sup> The first

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<sup>1</sup> TP., book 9, sheets 462 – 463.

<sup>2</sup> The clear relation between the programme of the nobility of the Lubelskie Province drawn up in the form of a regional sejm instruction and the activities of the opposition at the first stage of the Sejm session was indicated by A. Czaja, See his “Między tronem ...,” p. 314.

moves, aiming at the achieving of this goal were made already a few days before the commencement of the Sejm session, during a meeting organized by the King, attended by the representatives of the opposition and Stackelberg. King Stanisław August, who desired the Sejm session to be successful, preferred to discuss all disputable issues before the opening of the first Parliament session. At the meeting the King presented his assumptions as regards the matters, which, according to the King's will, should be discussed at the session and confederation act draft, which was to be established at the beginning of the Sejm session and it was this act that triggered objection of Prince Adam Czartoryski, a deputy from the Lubelskie Province, participating in the meeting. According to the King's will, the confederation was to be established with consideration of the "Catholic faith, entirety of the country, republican government, King's prerogatives and existing magistracies and dicasteries".<sup>1</sup> Prince Czartoryski demanded that the term dicastery be removed from the text, arguing that to the nobility this term would suggest the Military Department, the activities of which it criticised.<sup>2</sup>

Subsequent efforts preparing the ground for the liquidation of the Council were undertaken at the first Sejm session. At the time the deputation of deputies from the Małopolskie Province delegated to see the King, appeared before the King demanding, on behalf of their Province, that the confederation be established only at such magistracies, which existed before 1773 and demanding voting by secret ballot at the Sejm session. It would have been a large step on the road to the implementation of at least those items of the reform programme that could be supported by the majority of the nobility. Establishment of the confederation at the institutions existing before the Partition Sejm excluded from this circle those which were established after 1773, so it touched directly the hated Council. Forcing through of voting by secret ballot deprived the King of the possibility to control his supporters, who in crucial matters could support the postulates of the opponents. King Stanisław August knew the plans of the opposition as regards the Permanent Council and knew that the consent to their demands would facilitate their implementation. He also knew the consequences of too radical activities, which inevitably

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<sup>1</sup> W. Kalinka, "Sejm Czteroletni," Kraków 1895, Vol. I, book II, p. 169.

<sup>2</sup> Ibid., p. 170.



had to alienate Russia as regards its attitude towards Commonwealth, and he still counted on Catherine the Great's acceptance of necessary reforms and maintaining friendly relations with her – therefore he firmly refused.<sup>1</sup>

At the second Sejm session the deputies from the Małopolskie Province were supported in their demands by the representatives of the Wielkopolskie Province. The King was being convinced that open voting may pose a threat to the representatives of the annexed territories, who could not vote according to the dictates of their conscience. The resisting King was induced to compromise by the unrest inspired by the opposition, which was started in the chamber by a group of deputies shouting that, if the King did not consent to voting by secret ballot, they would form a confederation without him. Finally, a compromise was reached: the term *dicastery* was removed from the text of the confederation act, but no one talked about forming of the confederation at the institutions existing before the Partition Sejm; it was also agreed that after each open voting, at a request of even one of deputies voting by secret ballot would take place, with the exception of tax issues, which could be decided on only in an open voting.<sup>2</sup>

The subsequent sessions were devoted to determinations regarding the military, but already on 16 October 1788 a deputy from the Lubelskie Province, Stanisław Potocki, in his speech, referring mainly to the military issues, attacked the Council, claiming that mere determination of a number of military units would not solve the problem of the country's security if the Sejm did not deal with the issue of efficient control of the military.<sup>3</sup> Criticising the current situation<sup>4</sup> he called on the King to support his efforts to restore military and fiscal

<sup>1</sup> A. Czaja, "Między tronem ...," p. 315 and W. Kalinka, "Sejm Czteroletni ...," p. 171.

<sup>2</sup> VL., Vol. IX, pp. 46 – 47 and W. Kalinka, "Sejm Czteroletni ...," Vol. I, book II, pp. 171 – 173.

<sup>3</sup> The speech delivered by Stanisław Potocki, a deputy from the Lubelskie Province, at session 5 taking place on 16 October 1788 [in:] "Dyaryusz Seymu ordynaryinego pod związkiem Konfederacyi Generalney Oboyga Narodów w Warszawie rozpoczętego roku 1788" (hereinafter Dyaryusz Seymu Wielkiego), Warsaw 1790, Vol. I, part I, p. 45 "Lecz nie dość mieć Woysko, nie dość go opatrzyć, trzeba go ieszcze urządzić, iżby Nas od obcey broniąc przemocy, nie stało się wewnętrzney narzędziem, iżby cały Oyczyźnie, nie komuś w Oyczyźnie służyło. Wszak tu Publiczności tylko iestem odgłosem, y iey mówię imieniem. Jeżeli trwożliwą dla Niey iest postać bezbronna Polski, równie trwożliwą zbroyna, lecz nie urządzona."

<sup>4</sup> Ibid., p. 45 "Widzi z obawianiem się Naród w iedney Magistraturze wszystkie prawie Rzepltey połączone władze. Widzi iak szybkim mocy swoiey postępem, Rada podług ustanowienia swego zwierzchni tylko dozór Rządu między Seymem a Seymem maiąca, w krotkim czasu przeciągu Praw tłumaczeniem Prawodawczą pod siebie podciągnęła władzę, Panem się zupełnym Woyska stała, y Skarbu, kiedy chce, Panią być umie. Już się tu moc Cywilna z mocą Woyskową w iednym ręku spiknęła przeciw własnemu Rady ustanowieniu. Bo na dozór

commissions functioning at the beginning of the reign of Stanisław August, which better served the country than the current Departments of the Permanent Council. At the same time Potocki submitted to the Speaker of the Sejm an act draft called “Restoration of the Military Commission of the Polish-Lithuanian Commonwealth.”<sup>1</sup>

Referring to the fears expressed in Potocki’s speech that the military should serve the country, and not interests of particular persons in the country, Wojciech Suchodolski took the floor, demanding that the present military take an oath before the Sejm, before the passing of a resolution of its enlargement.<sup>2</sup> In this way they tried to bring the military under the Sejm control, disregarding the Council and King. Suchodolski submitted a relevant act draft, demanding that the deputation, which would witness the military take an oath, be appointed. The King’s supporters suggested a counter proposal that not the whole military but only the Military Department take an oath before the Sejm, which on the one hand was to squash the idea of depriving the Council and King influence on the military, and on the other it legitimized the activities of the whole central executive authority body, whose further functioning the opposition was against. The voting which took place on 17 October brought victory to the King’s draft and three days later the Military Department took an oath before the King in the presence of all the estates.<sup>3</sup>

Success of the court fraction did not discourage the opposition, which for the following days did not miss an opportunity to criticize the Council, and in particular its Military Department, because, as a result of the works on the reform of the military, it was easy to find a pretext for attacks. Additional arguments against it were provided by the excesses of the Russian military on the Polish Eastern Borderlands, of which the estates gathered were informed, condemning inactivity of the Military Department.<sup>4</sup> When the attacks of the opposition

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wszystkich Magistratur ustanowiona Rada, iakżeż ma dozierać, gdy ogarnieniem mocy Woyskowej sama iak naypilnieyszego dozierania wymagającym stała się urzędem.”

<sup>1</sup> “Dyaryusz Seymu Wielkiego ...,” pp. 45 and 89.

<sup>2</sup> The speech delivered by Wojciech Suchodolski, a deputy from the Chełmskie Province, at session 5 on 16 October 1788, *Ibid.*, p. 52.

<sup>3</sup> Cf. “Dyaryusz Seymu Wielkiego ...,” session 7 of 20 October 1788, p. 83.

<sup>4</sup> “Dyaryusz Seymu Wielkiego ...,” p. 193.

intensified, in which the deputies from the Lubelskie Province had a significant share, and the possibility of forcing through of the draft submitted by one of them as regards the military commission, which could bring about a major change in the scope of control of the military, became real, the King decided to try once more to save the Council, and in particular a more and more threatened Military Department. A day before the session decisive for the future of the Military Department, King Stanisław August called a meeting, invited the leaders of the opposition and tried to convince them of disastrous effects of the overthrow of the Military Department for the Polish-Russian relations. The meeting was attended by three deputies from the Lubelskie Province: Prince Adam Czartoryski, Stanisław Potocki and Eustachy Sanguszko. The King asked the participants to support the draft submitted earlier by Szczęśny Potocki, who suggested that the Council be maintained in an unchanged form, but with more precisely defined competences by a statute and establishment of the “ready Sejm,” which could constantly control it. The political party leaders present at the meeting, convinced by the King’s arguments, promised to support Szczęśny Potocki’s draft and save the Council.<sup>1</sup>

However, after the opening of the session on 3 November 1788 from the beginning not everything was going on according to the King’s will. The session opened was very violent and the long battle (the session lasted 15 hours from 1 p.m. to 4 a.m.)<sup>2</sup> was full of dramatic moments. During one sitting 79 speeches were delivered, with total 65 parliamentarians speaking, who for the major part were against further maintenance of the Military Department. The representatives of the Lubelskie Province proved to be very active in this debate, with 4 deputies speaking: Potocki, Wybranowski, Rościszewski and Sanguszko, and one senator – a Łuków castellan, Jacek Jezierski. All of them spoke definitely for the appointment of a military commission, the draft of which was already submitted at the fifth session by one of the deputies, Stanisław Potocki, and against the Military Department. In his speech, one of the deputies from the

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<sup>1</sup> W. Kalinka, “Sejm Czteroletni ...,” p. 243 and following.

<sup>2</sup> “Dyaryusz Seymu Wielkiego ...,” p. 323, presented in a different way by A. Czaja, “Między tronem ...,” p. 319, who writes that the session lasted 16 hours from 12 p.m. to 4 a.m.

Lubelskie Province, Ignacy Wybranowski, clearly indicated that the regional sejm gave him no choice in this matter, so there was no doubt as to how he should vote.<sup>1</sup>

After long-lasting arguments the voting on the proposal, which was worded as follows: “Are you for the Military Department with description of its powers? Affirmative. Are you for the Military Commission with description of its powers? Negative.”<sup>2</sup> took place. The open voting proceeded according to the King’s will: for the Military Department voted 70 senators and 79 deputies, against: 19 senators and 95 deputies. Thus, the result was satisfactory for the court fraction: 149 votes were cast for the maintenance of *status quo*, and 114 votes were against. However, the voting by secret ballot held at the request of the deputies demonstrated a totally different distribution of the votes: out of 262 total votes 122 were for the Department, and 140 were against.<sup>3</sup>

How significant it was for the nobility to deprive the Council of its control over the military can be seen in great activation of the deputies, as out of 177 total deputies elected by the regional sejm 174 participated in an open voting, only one was absent and two abstained from voting. It also turned out that the political party leaders did not have such power over their deputies as during the previous Sejm sessions. The opposition, contrary to assurances of its leaders, voted against the Military Department, but the question is whether it was a conscious break of a promise made to the King or not.<sup>4</sup> Or maybe it was a result of grass-roots pressure of the deputies intending to vote on this matter according to the dictates of their conscience and the will of electors expressed in the instructions. This is not known for sure. The court could not rely completely on its supporters as well, because in an open voting they voted according to the King’s will,<sup>5</sup> but in a voting by secret ballot they voted against the King’s plans and contributed

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<sup>1</sup> “Dyaryusz Seymu Wielkiego ...,” p. 291.

<sup>2</sup> “Dyaryusz Seymu Wielkiego ...,” p. 215 and the same questions but with a slightly different spelling VL., Vol. IX, p. 52.

<sup>3</sup> VL., Vol. IX, p. 52, See also “Dyaryusz Seymu Wielkiego ...,” where wrong numbers are provided: for the Department: 129 votes, against: 140 votes.

<sup>4</sup> Inter alia, Walerian Kalinka, Bronisław Dembiński and Aleksander Czaja, See W. Kalinka, “Sejm Czteroletni ...,” p. 246, B. Dembiński, “Polska na przełomie, Lwów 1913,” p. 154 and A. Czaja, “Między tronem ...,” p. 319.

<sup>5</sup> But not all, since the King himself, not knowing the names of 16 deputies, estimated on 30 August 1788 that at the regional sejms 93 of his supporters and 68 opponents or persons of political preferences unknown to him were elected, then the open voting on 3 November, in which only 79 deputies supported the solution forced through by

to the success of the opposition. Comparing the results of the first and second voting it can be seen that a number of them, taking advantage of the freedom given by the voting by secret ballot, voted against the Military Department.

The liquidation of the Military Department and appointment of the Polish-Lithuanian Military Commission was only the first step to the overthrow of the whole Council. The second one was prepared also early enough. Already at the fifth Sejm session on 16 October Wojciech Suchodolski attacked the Foreign Matters Department, accusing it of activities contrary to the Polish reason of state and demanded its liquidation. He claimed that it should be replaced by a special deputation made of deputies and appointed by the Sejm. The pretext for Suchodolski's speech was a declaration of the King of Prussia read out at the previous session, which informed, inter alia, that the Prussian diplomacy knew about the new Polish-Russian alliance draft prepared by Russia and already presented to appropriate Commonwealth bodies and considered by it for some time. Prussia declared that it was against such an alliance, as it would not bring anything positive but could expose the Commonwealth to the conflict with Turkey. Suchodolski was indignant at such secret talks, of which even the Sejm was not informed, and concluded that the Department acted to the detriment of the country and its citizens.<sup>1</sup>

His speech did not evoke a response at that time, as the majority of the deputies acknowledged the need for the liquidation of the Military Department in the first place. Only after the removal of the first obstacle another one could be removed. Subsequent arguments regarding legitimacy of further maintenance of the Council were presented at the session on 22 November 1788 and like before the representatives of the Lubelskie Province demonstrated great activity, but, despite numerous votes in support of the idea of the liquidation of the whole Council, the final dispute did not start as the deputies came to a conclusion that it was still too early.<sup>2</sup> On 9 December the King, after long insistence of the estate members gathered, decided to

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him, had to be an unpleasant surprise for him, cf. J. Michalski, "Sejmiki poselskie 1788 roku," *Przegląd Historyczny* 51/1960, Vol. 3, p. 465.

<sup>1</sup> See "Dyaryusz Seymu Wielkiego ...," p. 38.

<sup>2</sup> *Ibid.*, session 22, pp. 190 and 191.

send deputies to foreign courts. In agreement with the parliament the King appointed adequate persons<sup>1</sup> and granted his consent for the special instruction, which they should follow in the fulfilment of their mission, to be prepared for them by a deputation appointed by the Sejm. Initially, it was planned that it would be only a body appointed for a certain time and that it would be dissolved when the task designated was completed. The draft of its implementation was read out at the session on 10 December, and afterwards the works on particular solutions were going on for several days and on 16 December a resolution appointing a deputation was adopted unanimously.<sup>2</sup>

A few days later the members of the deputation were selected, and the deputation at the beginning of its functioning demanded that the whole management of foreign matters be entrusted to it, which so far one of the Departments of the Permanent Council was responsible for. The King's fraction was dismayed, not knowing what stand to take. On the one hand further weakening of the Council was not in the King's interest, and negative reaction of Russia, which every activity directed against this institution regarded as an insult, should also be taken into consideration, and on the other the pressure of the opposition on the King, demanding that the King meet the demand of the Sejm deputation, was high. Finally, the King, with his back to the wall, yielded, depriving the Council of further important prerogatives.<sup>3</sup>

The final battle with the considerably weakened Permanent Council occurred on 19 January 1789. The opposition began its massive attack again, and on that day, during a sitting lasting for hours, its parliamentarians delivered 52 speeches, accusing the Council of evil that touched the country in the past years, demanding its complete liquidation. Like in the case of a similarly dramatic sitting on 3 November of the previous year, the representatives of the Lubelskie Province considerably contributed to the forcing through of a draft providing for the overthrow of the Council. Numerous speeches were delivered, referring to the will of the nobility

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<sup>1</sup> The deputy delegated to France was Stanisław Potocki, one of the representatives of the Lubelskie Province, appointed at that time during the Sejm session, cf. "Dyaryusz Seymu Wielkiego ...," session 32, p. 366.

<sup>2</sup> VL., Vol. IX, p. 60 and "Dyaryusz Seymu Wielkiego ...," session 33, pp. 381 and 38, p. 499.

<sup>3</sup> VL., Vol. IX, p. 61 and W. Kalinka, "Sejm Czteroletni ...," p. 335.

included in the regional sejm instruction and accusing it of acting to the detriment of the country.<sup>1</sup> Despite desperate defence undertaken by the King himself and fewer of his supporters the opposition won the voting, in the vote ratio of 120 to 11, with as many as 62 abstaining votes.<sup>2</sup>

The liquidation of the Permanent Council, which was a symbol of Russian enslavement, was received with great enthusiasm. This day was regarded as the day of final liberation of foreign influence, when the time of complete independence of the Commonwealth began. Gratitude to the estates gathered was expressed by regional sejms in special resolutions; it was also expressed by the nobility of the Lubelskie Province already on 15 July 1789, after receipt of a report on the achievements of the Sejm from its deputy, Stanisław Potocki.<sup>3</sup> The joy at the liquidation of the Council was expressed for the second time by the citizens of the Lubelskie Province in the regional sejm resolution of 8 February 1790, in which they noted that they already felt salutary effects of the liquidation of the hated magistracy, and the expected benefits of such an achievement would be visible in every sphere of the country's and nation's existence for many future generations.<sup>4</sup> At the pre-regional-sejm sessions, held on 16 November the same year, the nobility of the Lubelskie Province recommended its deputies to use all possible efforts to develop such a political system of the country that in the future would best ensure the freedom of the citizens and happiness of the whole nation.<sup>5</sup>

The joy at the overthrow of the Permanent Council turned out to be premature. Admittedly, the Great Sejm in the Constitution passed on 3 May 1791 established a new central

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<sup>1</sup> "Dyaryusz Seymu Wielkiego ...," session 52, pp. 209, 215, 222, 249 and 251.

<sup>2</sup> VL., Vol. IX, p. 64 and "Dyaryusz Seymu Wielkiego ...," session 52, p. 266.

<sup>3</sup> See TP., book 9, sheet 471, where the citizens debating in Lublin assured of "...wdzięczności od całego Narodu i wiekopomney pamięci ..." to their magnificent parliamentarians.

<sup>4</sup> "A że z Narodem całym czuie Woiewodztwo Nasze przemiane na dobre nieszczęśliwych Oyczyzny losów y uznaje że przez zniszczenie Rady Nieustaiącey zabezpieczona wolność narodowa. Że przywrócenie samowładności Rzplitej - wzmocnienie sił kraiowych - Powiększenie dochodów skarbowych - Wybór Posłów do postronnych godność Narodową okazujących - Staranie o nayużyteczniejsze z Potencyami Traktaty y o ustawę naylepszego rządu iako o duszę do ożywienia Cywilnego Ciała istotnie potrzebną a słowem mówiąc wszystkie dążące do uszczęśliwienia Rzplitey kroki po Bogu winniśmy y terazniejszemu Seymowi którego uwielbienie y sławę naypóźniejsza potomność z uczuciem wdzięczności powtarzać będzie, ..." TP., book 9, sheet 475 and the same text in KGL., No. 510, sheet 248.

<sup>5</sup> TP., book 9, p. 486.

executive authority body called Guardians of the Laws, which as an institution established without foreign inspiration and pressure was approved by the society, like the fundamental act, but its existence was quite short. Already a year after passing the Constitution its opponents formed a confederation in Targowica, the purpose of which was to fight revolutionary solutions adopted by the deputies and called Russian troops for help. After losing of a war with Russia and second partition of Poland, the Sejm sitting in Grodno from 17 June 1793, following the demand of Catherine the Great, restored the Permanent Council.<sup>1</sup> It was a symbolic event indicating the end of liberation aspirations of the Polish state.

### **Streszczenie:**

Państwo polskie aż do czasów panowania Stanisława Augusta nie dokonało gruntownej reformy aparatu administracyjnego. Funkcjonujące urzędy i instytucje w znakomitej większości swój rodowód wywodziły jeszcze z okresu późnego średniowiecza. Dopiero po śmierci króla Augusta III podjęto pierwsze próby zmian w przestarzałej strukturze organów władzy. Jeszcze przed elekcją Stanisława Poniatowskiego pojawiły się projekty utworzenia rządu centralnego zdolnego do przejęcia kontroli nad całością zarządu państwem. Jednak pierwsze lata panowania tego władcy upłynęły na sporach z niechętnymi zmianom konserwatystami oraz próbach przełamania nieufności państw sąsiednich blokujących reformy mogące uzdrowić i wzmocnić Polskę. Utworzona w 1775 roku przez sejm, pod naciskiem Rosji, Rada Nieustająca była instytucją, jak na tamte czasy, nowoczesną a jej powołanie uznać należy za duży krok w kierunku modernizacji struktur państwowych. Jednak od początku swojego istnienia borykała się Rada z niechęcią i nieufnością szlachty ( również lubelskiej), pozostając symbolem rosyjskiego zniewolenia. Dlatego kiedy pod koniec lat 80-tych XVIII wieku pojawiła się możliwość zrzucenia obcej kurateli pierwszym postulatem obywateli województwa lubelskiego była likwidacja Rady Nieustającej. Dokonał tego Sejm Wielki w pierwszych miesiącach swojej działalności.

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<sup>1</sup> VL., Vol. X, p. 152 and following, See also D. Rolnik, "Szlachta koronna wobec konfederacji targowickiej (maj 1792 – styczeń 1793)," Katowice 2000, p. 62 and following.



Słowa kluczowe: szlachta, Rada Nieustająca, Sejm Wielki, Lublin, Stanisław August Poniatowski, demokracja szlachecka, historia Polski, XVIII wiek.



# Emerging Markets:

A Review of Business and Legal Issues

