Russian Journal of Legal Studies

Has been issued since 2014.
E-ISSN 2413-7448
2021. 8(1). Issued 2 times a year

Journal is indexed by: **CrossRef, OAJI, MIAR, ERIH PLUS**

All manuscripts are peer reviewed by experts in the respective field. Authors of the manuscripts bear responsibility for their content, credibility and reliability.
Editorial board doesn't expect the manuscripts' authors to always agree with its opinion.

Postal Address: 1367/4, Stara Vajnorska str., Bratislava – Nove Mesto, Slovak Republic, 831 04

Website: http://ejournal25.com/
E-mail: birukovpn@yandex.ru

Founder and Editor: Academic Publishing House Researcher s.r.o.

Release date 05.09.21
Format 21 × 29,7/4.

Headset Georgia.

Order № 12.

Russian Journal of Legal Studies

2021

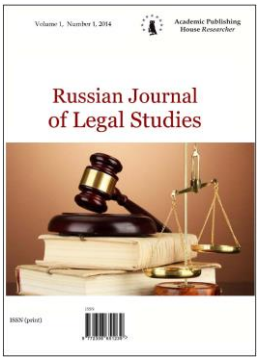
Is. 1

C O N T E N T S

Articles

Published in the Slovak Republic
Russian Journal of Legal Studies
Has been issued since 2014.
E-ISSN: 2413-7448
2021. 8(1): 3-8

DOI: 10.13187/rjls.2021.1.3
www.ejournal25.com



Articles

Regulation of Extradition and Its History – an Austrian Example

Krzysztof Bokwa [a, *]

[a] Jagiellonian University in Kraków, Poland

Abstract

The institution of extradition has existed in international law since the earliest times. Moreover, it is becoming increasingly important in a globalizing world. This article aims to present it in a legal, historical and comparative context, through the analysis of a specific example – the Austrian regulation. Starting with a historical outline and a comparison with the asylum institution, the author goes on to discuss contemporary Austrian legislation (esp. Extradition and Mutual Assistance Law of 1979, ARHG), showing its origins and historical roots, dating back to the 19th century. The key role that the EU law plays for contemporary Austrian law especially in the matters of penal law (incl. the instruments given by European arrest warrant) is emphasized. Also the international aspect immanent to the regulation of extradition (international conventions and treaties) is shown. The discussion of the construction of ARHG and its norms allows both to show the dilemmas that every contemporary legislator must resolve and the success of the Austrian regulation, which can inspire lawmakers in other countries.

The application of legal sciences research methods in the article will include multiple instruments, among them the historical method (also in its systematic version), comparative legal research, critical and systematic analysis, critical-legal dogmatics.

Keywords: Austria, Austrian law, extradition, penal law, legal history.

1. Introduction

The institution of extradition occupies a special place among the issues of international law and the criminal process. This is not surprising, since the specificity of criminal liability is, on the one hand, its territorial limitation to the area where a given legal system is in force, and on the other hand – the pursuit of a public prosecution of actions considered reprehensible and unacceptable universally, not only in a certain country.

From the earliest times, the above contradiction encourages people to avoid criminal liability in a relatively simple and very effective way – by moving to another jurisdiction. I use the term "jurisdiction" on purpose, and not "state" – it is worth remembering that until recently in the European legal area, these were not synonymous due to numerous legal particularisms. This enabled e.g. the creation of the right of asylum in sacred areas, common in medieval Europe (Cisoń, 2003). So far, its remnants are the possibility of obtaining asylum in diplomatic posts (diplomatic asylum) or on the territory of other countries (territorial asylum) (Wierzbicki, 1976: 91-95).

* Corresponding author
E-mail address: krzysztof.bokwa@student.uj.edu.pl (K. Bokwa)

However, the right of asylum has always been an exception, intended to protect the weak or persecuted – this is also how it is understood in contemporary legislation. Apart from it, there is no doubt that the phenomenon of avoiding criminal responsibility by fleeing or hiding in other jurisdictions is mutually unfavourable – both for the state where the crime was committed and for the state that involuntarily becomes the "promised land" for the criminals from a neighbouring country.

Thus, extradition can be defined as a way to overcome the above-mentioned problem, having both a purely pragmatic dimension (fighting crime *en général*) and ethical (combating impunity of criminals). Mutual extradition was already provided for in the Treaty of Kadesh – the oldest surviving peace treaty, concluded between pharaoh Ramesses II and Hittite king Hattusilis III in the thirteenth century B.C. This undoubtedly proves the timelessness and importance of the problem of (to employ modern language) the international prosecution of perpetrators of crimes.

As can be seen from the above, the regulation of extradition remains primarily the domain of public international law – namely international treaties. At the same time, however, it is inevitable to regulate extradition at the level of national law. In this context, Austria is a particularly good example to be analyzed – as a country belonging to the European Union, but at the same time having an uninterrupted legal continuity since the 19th century and, what is also not common, having a separate law regulating extradition matters.

2. Materials and methods

This article is based on the analysis of various sources – primarily contemporary and historical legal acts (including international agreements and conventions). In order to deepen the theoretical basis of the article and to describe the essence and purpose of extradition, the author refers to diverse legal literature. In order to illustrate the public perception of the extradition issue, press releases were also analysed.

The application of legal sciences research methods will include: the historical method (also in its systematic version), comparative legal research, critical and systematic analysis, formal-legal dogmatics. Historical analysis will be utilised to depict a broader historical course of processes that led to the developments researched in the text. Critical legal analysis serves as an instrument aiding the authors in presenting and commenting on the results of their research. Formal dogmatic method will be employed to analyse the relevant law – statutory material and treaties.

3. Discussion

3.1 The genesis and sources of extradition regulation in Austria

Gradually, along with the "shrinking world" of the nineteenth century, the necessity of extradition (and, at the same time, for the practical possibility of its execution) became more and more frequent, giving an impulse to conclude multiple extradition international treaties. For example, the first extradition clause to which the United States was a party was included already in their treaty with Great Britain of 1794, regulating the relations of both countries after the end of the American Revolution (the so-called Jay's Treaty), and concerned the extradition of murderers and counterfeiters (Jay's Treaty).

From the mid-nineteenth century, the Austrian Empire (then transformed into Austria-Hungary), still a significant European power at that time, concluded numerous extradition agreements. In 1852, an agreement was ratified with the Netherlands, and in subsequent years – successively with Belgium, France, the Duchy of Modena, the United States, the Papal States and Spain. At the turn of the 20th century, Austria-Hungary was a party to extradition treaties with almost all European countries, and even with states as exotic as Uruguay (Staatsvertrag, 1896) or Brazil (Staatsvertrag, 1884).

Some of these agreements were long-lived and also tied the legal successors of the dualist Habsburg state that failed in 1918, namely the Republic of Austria and the Kingdom of Hungary (later the Hungarian People's Republic). For example, the agreement of the Austro-Hungarian Empire with Switzerland of 1896 (Staatsvertrag, 1897) remained in force (with regard to Austria) until the ratification of the European Convention on Extradition in 1957, and to this day partially remains in force with regard to relations between Switzerland and Hungary (Fedlex, 1896).

The subject of the analysis in this paper, however, will primarily be the current regulation of the institution of extradition in Austrian state law. As it was already mentioned, the Republic of Austria is a

member of the European Union and has also ratified the European Convention on Extradition of 1957. Already in the 1990s, however, it was assessed as "inefficient" and "inadequate to reality" (Płachta, 1999: 77-94). In connection with the above, a new convention on extradition between EU member states was adopted in 1996, which, however, did not finally enter into force due to its non-ratification by some EU countries (*Convention Relating to Extradition between the Member States of the European Union* [Dublin, 27 September 1996]; Austria has ratified the convention).

In Austria the possibility of extradition was finally replaced – In relations with other EU countries – by the new institution of the European Arrest Warrant (EAW), established by the *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*; its Art. 31 ordered to replace the national provisions on extradition in relations between the Member States with the provisions of this decision from 01/01/2004 on. Its regulation is well-described and well known in the literature and doctrine (e.g. Malinowska-Krutul, 2007; Starzyk-Sulejewska, 2007). Therefore, the subject of further analysis will be the regulation of extradition in Austrian state law.

The legal act regulating extradition in Austrian law today is the Federal Law of December 4, 1979 on extradition and mutual assistance in criminal matters, abbreviated as "Extradition and Mutual Assistance Law" (hereinafter – ARHG). When it entered into force on 1 July 1980, it repealed several articles of the Austrian Code of Criminal Procedure *(*hereinafter – StPO), which so far (albeit in a rudimentary way) regulated the way and conditions of extradition. The enactment of the ARHG was part of a broader legislative action carried out in Austria in the 1970s and aimed at a thorough reform and modernization of criminal law regulations. The ARHG also repealed a much earlier act regulating this issue, which was the ordinance of the Ministry of Justice of September 2, 1891, concerning the transit of criminals through Austria (Verordnung, 1891).

The ARHG consists of 78 paragraphs, divided into 8 chapters, titled consecutively (all):

1. "General provisions" (§ 1-9);
2. "Extradition from Austria" (§ 10 et seq.);
3. "Transit Deportation" (§ 42 et seq.) – previously governed by the Ordinance of 1891; in principle, the provisions on extradition apply accordingly to transit;
4. " Mutual assistance for Foreign Countries " (§ 50 et seq.);
5. " Assumption of criminal prosecution and observation; Enforcement of foreign criminal convictions"(§ 60 et seq.);
6. "Obtainment of extradition, transit, transfer, law enforcement assistance, as well as the assumption of criminal prosecution, custody and execution of sentence" (§ 68 et seq.) – thus regulating the situation in which the Austrian authorities request the actions referred to in chapters 2-6 to be performed abroad;
7. "Joint Investigative Groups" (§ 76a-76b) – a chapter added at a later stage related to European cooperation in criminal matters;
8. "Final Provisions" (§ 77-78).

As can be seen from the above, the provisions on extradition from Austrian territory account for nearly half of the ARHG, and further analysis will focus on these too; hence in the remaining chapters, the legislator makes extensive use of the technique of referring to the regulation of chapter 2.

As it is stated in § 1 of the ARHG, the act applies only if not provided otherwise in international agreements. This regulation, opening the law since its creation, is an expression of the inseparability of the extradition from international law; the existence of international or transnational agreements is a *sine qua non* for the feasibility of its implementation. Hence, this kind of, undoubtedly, rare clause, determining at the outset the subsidiarity of the entire act. In this context, first taken into account should be the aforementioned actual replacement of extradition, within the territories of the European Union, by the institution of the European arrest warrant. In Austria it is regulated by a separate, comprehensive law (Bundesgesetz, 2004). It should therefore be remembered that the ARHG regulation currently applies to extradition requests from countries outside the European Union, and only from those with which Austria has concluded an extradition agreement.

An important general clause was included in § 2 of the ARHG by the Austrian legislator, stating that the application of a foreign party may be granted only if it does not violate public order or other essential interests of the Republic of Austria. Such a standard is a "safety valve" for

emergency situations, should all other (numerous and described below) restrictions on extradition and other requests prove to be insufficient. § 3 establishes the general principle of reciprocity, undoubtedly crucial for the entire regulation. According to it, a foreign request for the extraditon may be complied only if it is guaranteed that the requesting state would treat the application of the Austrian party analogously. In case of doubt on this point, the Austrian court must consult the Minister of Justice.

3.2 Extradition in Austria under the ARHG

The first provision of the ARHG directly relating to extradition is § 10, which provides a general definition of it; hence extradition is recognized as a surrender of a person to the authorities of another state "for the purpose of prosecution for offences punishable by court penalty or for enforcement of imprisonment or a preventive measure imposed for such an offense". A characteristic feature of the Austrian regulation is the prohibition of the extradition of own citizens, resulting directly from § 12 of the ARHG; it should be emphasized, however, that – obviously – It does not apply to situations in which an EAW is applicable (Oberösterreichische Nachrichten, 2008).

Section 12 of the ARHG is supplemented by § 44, according to which the transit of an Austrian national through the territory of the Republic is also unacceptable. Both these provisions have a constitutional rank *(Verfassungsbestimmung)*. It should be mentioned that in Austria there is an original system of dispersed sources of constitutional law – the land's constitution consists of numerous laws of constitutional rank *(Verfassungsgesetze)*, as well as individual provisions of other laws – an example of the latter are the above-mentioned provisions of the ARHG (Allgemeines Glossar).

In principle, it is also impossible to extradite perpetrators remaining under Austrian jurisdiction, irrespective of their nationality (§ 16). Section 15 also introduces the principle according to which it is not permitted to extradite persons who have committed prohibited acts, considered under Austrian law only as military or fiscal crimes. It seems that such a limitation results from the close connection of these types of crime with the legal systems of various states and with significant differences that may arise in this context. Moreover, these types of crimes are harmful only to the interests of a given state, and not to generally protected goods.

Further restrictions are contained in § 14, stipulating that extradition of persons prosecuted for political offences may not occur either. This clause reflects well the complementary nature of the institutions of extradition and asylum – while the former is aimed at general, international protection of the legal order, the latter may be regarded as an exception aimed at the protection of fundamental rights. This exception is protected by the § 14 of the ARHG. Such a reservation is a standard feature of extradition legislation and a long-standing tradition. A famous example of asylum due to the political grounds of prosecution was the refusal of the Italian court to hand over the assasins of the Yugoslav king Alexander I and the French prime minister Barthou in the attack in Marseilles in 1934. This event, widely recognized as an abuse, gave the League of Nations an impulse to create a draft international convention on combating terrorism (Prakash Sinha, 1971: 186).

The regulation of § 14 of the ARHG is extended in § 19, which prohibits extradition to states where criminal proceedings or impending penalties may be contrary to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR, of 4 November 1950; Austria ratified it in 1958 – BGBl. No. 210/1958), as well as if the reason for the prosecution is the origin, race, religion, nationality, ethnicity or political views of the accused. An elaboration of the above regulation is § 20, which absolutely prohibits extradition for the purpose of enforcement of the death penalty; and if the person surrendered could, under the law of the state requesting extradition, face the death penalty, surrender shall be possible only under the guarantee that it will not be carried out. The same applies to other penalties, the imposition of which would be contrary to Art. 3 of the ECHR (cf. Art. 604 § 1 section 1 of the CCP). Further prerequisites, meeting the need to provide the accused with basic procedural guarantees, are contained in § 19a, imposing additional requirements in the event of extradition for the execution of freedom sentences imposed *in absentia*.

Noteworthy is § 17 of the ARHG, pursuant to which extradition of a person who is subject to the jurisdiction of a third state but has already been validly sentenced or served a sentence is unacceptable – the legislator is undoubtedly aiming at global protection of the fundamental procedural principle *ne bis in idem*. Section 18, on the other hand, absolutely prohibits extradition

also if the offense to be prosecuted has been statute-barred either under the law of the requesting state or under Austrian law (!). Similarly, extradition of minors at the time of the alleged act is also prohibited (§ 21).

Finally, § 26 et seq. contain procedural and technical provisions relevant already at the stage of implementation of extradition; their analysis is beyond the scope of this work. However, it is worth noting the content of § 29, which regulates the possibility of pre-trial detention of a person subject to an extradition request. A special provision is also § 32, which provides for a simplified extradition procedure in the event of consent of the wanted person; the legislator rightly assumes that in such a case the risk of violating the rights of the perpetrator is significantly reduced.

4. Results

As can be seen from the above considerations, the Austrian legislator has effectively regulated the issue of extradition and its related institutions in one act. From the point of view of legislative technology, this law can be considered a successful work, as evidenced by nearly 40 years of its existence and a relatively small number of amendments (eleven in total, almost all already in the 21st century). There is no doubt that legal stability and certainty is particularly important in matters of international law – the Austrian regulation meets these conditions.

However, as it was already pointed out, it is clear that the ARHG is currently only the backbone of the legal system governing extradition in Austria; at the same time, its importance is severely limited by the existence of the institution of the European arrest warrant. However, this regulatory duality does not seem to be a systemic problem in Austria. The problem of conflict with the EU law – common in this type of situations in European jurisdictions – has been solved by a clear separation of the scopes of regulation. This is undoubtedly due to the inclusion of extradition and related issues in a single law.

5. Conclusion

Analysis of ARHG can be useful for European lawyers and legislators - high quality of the Austrian act shows a possibility of creating a long-living and coherent regulation. In spite of strong bounds to the international law, the Austrian example proves that it is possible for such a regulation to exist also in the age of European integration and ongoing unification of law.

References

ARHG – Bundesgesetz vom 4. Dezember 1979 über die Auslieferung und die Rechtshilfe in Strafsachen (ARHG), BGBl. No. 529/1979. ARHG quotations after the English translation. [Electronic resource]. URL: https://www.imolin.org/doc/amlid/Australia/Austria_Federal_Law_on_Extradition_and_Mutual_Assistance_in_Criminal_Matters_1979_As_Amended_2003.pdf

Bundesgesetz, 2004 – Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union (EU-JZG). BGBl. I № 36/2004. [in German]

Staatsvertrag, 1894 – Staatsvertrag zwischen der österreichisch-ungarischen Monarchie und dem Kaiserthume Brasilien wegen gegenseitiger Auslieferung von Verbrechern. RGBl. 142/1884. [in German]

Staatsvertrag, 1896 – Staatsvertrag zwischen der österreichisch-ungarischen Monarchie und der Republik Oriental von Uruguay wegen gegenseitiger Auslieferung von Verbrechern. RGBl. 221/1896. [in German]

Staatsvertrag, 1897 – Staatsvertrag zwischen der österreichisch-ungarischen Monarchie und der Schweiz wegen gegenseitiger Auslieferung von Verbrechern. RGBl. 1/1897 [in German]

StPO – Strafprozeßordnung, 1975. [Electronic resource]. URL: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002326 [in German]

Verordnung, 1891 – Verordnung des Justizministeriums vom 2. September 1891 betreffend die Durchlieferung von Verbrechern durch Österreich, JMVBl. Nr. 34/1891. [in German]

Allgemeines Glossar – Parlament erklärt – Allgemeines Glossar – V. [Electronic resource]. URL: https://www.parlament.gv.at/PERK/GL/ALLG/V.shtml [in German]

Cisoń, 2003 – *Cisoń, B.* (2003). Prawo „do azyli" czy prawo „o azyl"? [The right of "asylum" or the right of "asylum"?]. Instytucja azylu w zarysie. *Studia Redemptorystowskie*. 1: 215-260. [in Polish]

Fedlex, 2003 – Fedlex – Die Publikationsplattform des Bundesrechts – Auslieferungsvertrag zwischen der Schweiz und Österreich-Ungarn [Electronic resource]. URL: https://www.admin.ch/opc/de/classified-compilation/18960002/index.html

Jay's Treaty – Jay's Treaty: Primary Documents in American History. [Electronic resource]. URL: https://guides.loc.gov/jays-treaty

Malinowska-Krutul, 2007 – *Malinowska-Krutul, K.* (2007). Ekstradycja a przekazanie w ramach europejskiego nakazu aresztowania [Extradition and surrender under the European arrest warrant. Prosecutor's Office and Law]. *Prokuratura i Prawo*. 6: 100-114. [in Polish]

Oberösterreichische Nachrichten, 2008 – Im neuen Jahr wird auch Österreich eigene Staatsbürger ausliefern. Oberösterreichische Nachrichten, 3.09.2008. [Electronic resource]. URL: http://www.nachrichten.at/oberoesterreich/Im-neuen-Jahr-wird-auch-OEsterreich-eigene-Staatsbuerger-ausliefern-br;art4,14046. [in German]

Płachta, 1999 – *Płachta, M.* (1999). Konwencja Unii Europejskiej z 1996 r. o ekstradycji [European Union Convention on Extradition 1996]. *Studia Europejskie*. Pp. 77-94.

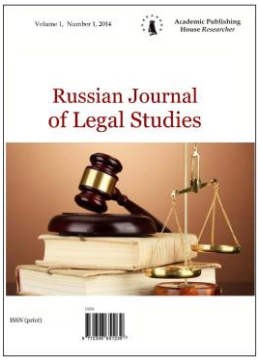
Prakash Sinha, 1971 – *Prakash Sinha, S.* (1971). Asylum and International Law, The Hague.

Starzyk-Sulejewska, 2007 – *Starzyk-Sulejewska, J.* (2007). Implementacja współpracy sądowej w sprawach karnych [in:] W. M. Góralski (ed.) [Implementation of judicial cooperation in criminal matters [in:] W. M. Góralski (ed.)]. *Unia Europejska. Tom II. Gospodarka – Polityka – Współpraca*. Kraków, pp. 220-234. [in Polish]

Wierzbicki, 1976 – *Wierzbicki, B.* (1976). Ekstradycja, azyl, wydalenie [Extradition, asylum, expulsion]. *Państwo i Prawo*. 31: 4. [in Polish]

Published in the Slovak Republic
Russian Journal of Legal Studies
Has been issued since 2014.
E-ISSN: 2413-7448
2021. 8(1): 9-15

DOI: 10.13187/rjls.2021.1.9
www.ejournal25.com



State, Corporation, Corporatocracy – the Relevance of the Congo Free State And Its Roots

Krzysztof Bokwa [a, *], Iwo Jarosz [a]

[a] Jagiellonian University in Kraków, Poland

Abstract

The constant development of public international law witnesses a steadily growing tendency of various non-state entities performing increasingly important roles in global relations and governance. Majority of these entities are what private law labels as corporations. This phenomenon is assessed in various ways on the basis of social sciences. Oftentimes commentators and scholars alike indicate grave risks related to the processes of corporatization of power and the privatisation of channels of governance and public services alike. Frequently there subsists a belief that these tendencies are novel. The science of the history of law, however, provides numerous evidence of previous occurrences of such phenomena. Deep analysis of past experiences, coupled with a careful comparison of differences and similarities between modern and bygone corporatization processes, will prove to be a fruitful venture helping lawyers and other social sciences' scholars to hone their expectations and construct better. An interesting example regarding the modern era of international law's maturity is the history of the creation of the Congo Free State as a political entity organized and maintained by a private-law body corporate, and its subsequent recognition by what undoubtedly had been and would still be recognized by international law as traditional states. The article presents its history, also showing the historical context of corporate persons' participation in social and economic history as well as in international relations. The application of legal sciences research methods will include: the historical method (also in its systematic version), comparative legal research, critical and systematic analysis, critical-legal dogmatics.

Keywords: Congo, corporations, colonization, public law, international law, legal history.

1. Introduction

The status of corporate bodies of private-law in international relations in light of the public international law is dynamically evolving (Wouters, Chagne, 2015: 225-251). Private entities have, in the last decades, risen to the rank of serious players in international trade and politics (Bianchi, 2009: 4). History, especially the historical development of law and economy, has taught us that such processes had happened before. The existence of corporations has often resulted in the emergence of *corporatocracy*, understood as the exercise of power by private entities, reaching as far as establishment of quasi-state organisms by them.

Contemporary states, in particular Western ones, are subjected to serious criticism in the context of the excessively high degree to which the power-yielding processes and political activities are influenced by international corporations. Much attention is paid to how the functions traditionally ascribed to the state are assigned to private law entities, whether by virtue of

* Corresponding author
E-mail address: krzysztof.bokwa@student.uj.edu.pl (K. Bokwa), iwojarosz@gmail.com (I. Jarosz)

conscious policies (one can easily point to such evidence as public-private partnership or the approach to public services dubbed the New Public Management) or as a result of a practical retreat of political bodies from certain areas traditionally reserved for the state (understood in the context of its political and administrative capacity).

Given how deeply connected to the issues of today and tomorrow the problem of corporate sovereignty or corporatocracy may seem, it may be surprising to realize how far its historical roots reached. Of the plethora of sovereign or quasi-sovereign corporate entities, the Congo Free State is undoubtedly a special case.

2. Materials and methods

The application of legal sciences research methods will include: the historical method (also in its systematic version), comparative legal research, critical and systematic analysis, critical-legal dogmatics.

Among the sources examined by the authors a seminal positions is occupied by the relevant legal text – Conventions and general acts (quasi-convention instruments) summarizing the relative conferences. The authors also analyzed the broad body of scholarship work – legal literature both modern and contemporary.

Formal dogmatic method will be employed to analyze the relevant law – statutory material and treaties. Fruitful to that extent will be the use of the comparative legal analysis, with its potential to seek and find the peculiarities of a decisive magnitude, defining specifically the researched processes. Historical analysis will be utilized analyze the relevant historical legal sources against the historical context and contemporary academic and practical legal responses thereto, as well as to depict a broader historical course of processes that led to the developments researched in the text. Critical legal analysis shall then serve as an instrument aiding the authors in presenting and commenting on the results of their research.

3. Discussion

3.1. Military orders and trade companies - corporations until the 19th century

The competition between the public and the private is as old as the existence of private corporations – thus it dates back at least to the medieval period. The mature Middle Ages was an era of blooming social and economic growth, as a result – also of substantial development in the field of law; the latter was greatly catalysed by the rediscovery of Roman law's heritage (Dziadzio, 2008: 112-120). Along with flourishing secular corporations (guilds, early banks), this period witnessed also the rise of military orders (Potkowski, 2004: 167 et seq.). Some of them achieved crucial political and economic power, enabling them not only to achieve actual independence from the authorities both episcopal (especially the Papacy) and secular, but also to gain their own territory.

A model example, commonly known from the history and culture of Eastern Europe, is obviously the Teutonic Order. Like its twin Livonian Brothers of the Sword, the Teutonic Knights managed to establish their own state. Characteristically, however, the Order (as a corporation) retained its separateness from the state it ran (being, legally and practically, a corporation of ecclesiastical and private law managing a state known as Deutschordensstaat (France, 2005: 380). This allowed it to survive the secularization and loss of territory in the 16th Century and to exist till the times modern.

A particularly interesting example of a monastic corporation, which not only for centuries has operated on the very limits of the state, ecclesiastical and private spheres, and also exists nowadays, is the Sovereign Order of Malta (*SMOM, Knights Hospitaller*) (Bokwa, 2016: 17). Having been established in the 12th century in the Holy Land, the Order, from the 1400s for over four centuries, had maintained what in fact had been an independent state – first in Rhodes, then in Malta. Particularly interesting is that, much like in the case of the Teutonic Order, that Knights Hospitaller ultimately lost the territories it had controlled did not lead to the Knights Hospitaller losing their international subjectivity; nowadays, the Order of Malta is recognized as a subject of international law (Cox, 2006: 9), with its foreign policy and diplomatic missions (embassies in multiple countries, a special envoy in Russia, a non-state observer status to the United Nations). It has extraterritorial exclaves, a judiciary and a legal system; in the modern world it is therefore an unprecedented example of a corporation recognized, despite the lack of territory, as a sovereign entity of international relations, with its rank equal to that of a state.

The era of geographic discoveries and colonization opened new perspectives not only for European powers crafting their colonial empires, but also brought about a completely new scale of trade. The possibility to launch overseas expeditions was connected, on the one hand, with the possibility of tremendous profits, and on the other hand, with a high risk and the necessity of very significant investments (to set about and equip a far-reaching expedition). This gave an impulse to the establishment of the first stock exchanges and joint stock companies – the trading companies (Bratkowski, 2010: 145).

The first and the most spectacular example of this type of institution is the Dutch East India Company (under the acronym VOC – *Vereenigde Oostindische Compagnie,* i.e. the "United East India Company"), recognized as the world's first corporation . Established in 1602, the VOC obtained a monopoly on Dutch trade with the Far East (Niestrasz, 2015: 4 et seq.). Existing for nearly two centuries, VOC quickly became a political power with its own territorial base, including a large part of what is now Indonesia, minted a coin, maintained naval and land forces, pursued its own foreign policy (Weststeijn, 2014: 13-34). At the same time, it had always maintained the status of a joint-stock company, regularly paying dividends and independent of the state authority. Its existence was brought to an end by the occupation of the Netherlands by the French in 1799.

The so-called *Company Raj* in India - a hundred-year period of effective wield of power over a large part of the Indian subcontinent by the *British East India Company (*EIC), ended only with the Sepoy Mutiny in 1858. It was established in 1600 under the Royal charter of Elisabeth I, the Company was initially primarily a trading venture. Its victorious wars in the middle of the 18th century, however, led to the Company arriving at the position of *de facto* sovereignty over large stretches of Indian territories, which were then divided into three presidencies – each with its own army, administration and judiciary.

Although the Company was formally rooted in the sovereignty of the English state, which was emphasized even by its motto: *Auspicio Regis et Senatus Angliae*, in fact it maintained statehood (Stern, 2011: 142). At the height of its power, the EIC controlled standing armies of a manpower of over a quarter of a million – twice as many as the armed forces of the British Crown. *Company Raj* was replaced by *British Raj* as a result of the *Government of India Act 1858*. By this statute, the Crown took over the territory, property, armed forces and the administration over EIC. EIC, thus in fact nationalized, having paid its ultimate dividends, ceased to exist in 1873 (as per the East India Stock Dividend Redemption Act 1873).

Until the 19th century, European colonization in Africa was mainly limited to maintaining coastal trading posts (with the exception of South Africa). With time, however, it was the African interior that became the last "no man's land", the exploration and exploitation of which appeared to be more and more attractive to Europeans of the *Belle Époque* – both for state authorities and private individuals. The Congo Free State was to be born on the wave of such tendencies.

3.2. The birth of the Congo Free State

In the 1870s, the scramble for colonial land was entering its last phase. King of the Belgians, Leopold II, employed the growing interest in African territories for his own benefit by convening the Brussels Geographic Conference in 1876. Scientists and philanthropists gathered under the conference's auspices established the International Society for the Study and Civilization of Africa (French: *Association Internationale pour l'exploration et la civilization de l'Afrique*), better known under the shorter name of the International African Association (French *Association internationale africaine*, AIA) (Reeves, 1909: 103). It had initially maintained to have assumed humanitarian, research and philanthropic goals; king Leopold was elected its chairman. National committees were established as part of the Association, of which the Belgian committee was particularly active. On its commission, the famous researcher Henry Morton Stanley travelled to Congo in the following years, with an unofficial mission to organize the colonization of the Congo basin (Hochshild, 1998: 81).

Independently of the AIA, king Leopold II chartered the Committee for Research of Upper Congo (French *Comité d'Études du Haut-Congo*) equipped with purely mercantile goals; British and Dutch entrepreneurs were financially involved together with a Belgian banker, who in fact represented Leopold himself. However, as early as 17 November 1879, the Committee was replaced by the International Society of the Congo (French: *Association internationale du Congo,* AIC), in which the King Leopold II held, through colonel M. Strauch, a controlling interest; AIA was merged with AIC in 1882 (Cornet, 1944: 73-80).

King Leopold contributed to the AIC not only financial support, but also seemingly lend to it his agility and business prowess. AIC's representatives were far from idle, from the very moment of the Society's establishment they explored the *terrae nullae* of the Congolese interior, striving to conclude agreements with representatives of indigenous peoples. Under agreements with these indigenous *quasi*-political entities, AIC acquired vast tracts of land. The above-mentioned HM Stanley played a leading role in this activity (Gondola, 2002: 51). The legal implications of these agreements were unclear, as described below. The fact is, however, that they resulted in AIC taking actual control over the areas on which a new entity – the Congo Free State – was soon to be established.

The intense diplomatic efforts of Leopold and his henchmen, aimed at international recognition of the AIC's sovereignty over the acquired areas, have brought satisfying results. International conditions were not without significance, characterized by increased efforts of the great powers (to which Belgium did not belong) to check and balance each other, in order to facilitate a situation of equilibrium. The logic of the international relation led each of the powers preferring the instead of one of its other rivals colonising Congo themselves, a politically neutral state emerge, stemming from another neutral organism – Belgium.

First to recognize the statehood – of what still had been AIC – were the United States, doing so on 22 April, 1884. The next power that recognized the existence of the Congo Free State was, on 8 November, 1884, Germany, to conclude the preparations for the upcoming Berlin Conference. Ultimately, this process was crowned with the General Act of the Berlin Conference, whose signatories were, inter alia, the Kingdom of Belgium and the Congo Free State itself. The key provisions of the General Act include, in addition to *de jure* acceptance of the existence of the Congo Free State – a peculiar entity that was, systemically, a legal amalgam of Leopold's private property under his absolute power, military and political neutrality – the formulation of the principle of effective occupation (Article 35 of the General Act). According to this principle (yielded with a prospective nature), the occupation of African territories could be considered effective (only then would it bear legal consequences) as long as the occupied territories were to be seized by a power capable of protecting acquired rights and the freedom of trade and transit.

The circumstances outlined above show the unusual nature of the colonization of this vast stretch of Central Africa, which was to become the Belgian Congo. Contrary to the aforementioned trade companies, the Congo Free State not only did not arise from the colonization action organized by the state; on the contrary, in this case the private (at least in theory) colonial activities resulted in the creation and recognition of a new, peculiar statehood. As it was aptly pointed out, "Leopold II, skilfully exploiting the disputes between the leading imperialist states, led to the recognition of the International Congo Society as a state organization having the right to manage the seized territories" (Jaremczuk, 2006: 46).

Indeed, the Congo soon became a site of successful colonization; "there was functioning postal system, highways and railroads were built, communication between the cities was provided (connection between Leopoldville and Matadi). The exploitation of the abundant riches of these lands – rubber, ivory, gold, tin, diamonds, uranium – commenced, which awarded huge profits to those daring to invest, which, in turn, attracted the attention of the Belgian industrial circles" (Lechwar-Wierzbicka, 2011: 189). The Free State also had an armed force – the *Force Publique*, composed of local soldiers and European officers. In the 1890s, they even fought a victorious guerrilla war with Arab slave traders (Nzongola-Ntalaja, 2002: 21) – notwithstanding the fact that slavery flourished in the Free State itself.

The ruthlessness and brutality of the new "corporate" powers that held the Congo basin was so unprecedented that it was met with an increasing indignation from what can be considered a germinating "international community". The abuses and atrocities in the Congo area found a wide resonance even in the literary world – Arthur Conan Doyle and Mark Twain wrote about the situation in the Congo (Lechwar-Wierzbicka, 2011: 193), and above all – Joseph Conrad, immortalizing the conditions he witnessed in the "Heart of Darkness".

In 1904, Leopold II allowed an international commission to conduct an investigation, and in 1908, under international pressure, consented to the annexation of the Free State by the Kingdom of Belgium, previously unsuccessfully having attempted to keep a strip of the Free State's land in his hands as private property of the monarch (Senelle, Clement, 2009: 153).

After stormy disputes, seven years after the creation of its first project, on October 18, 1908, the Belgian Parliament adopted the Colonial Charter (*La Charte Coloniale*). Under it, on November

15, 1908, the Congo Free State ceased to exist, replaced by the Belgian Congo – a colony in the classic sense of the word, which was to exist for more than half a century.

3.3. The Congo Free State – what was it?

The issues of the existence of a state and, in particular, its recognition, are of a great importance for the Congo Free State history. This issue vital in Belgian politics in the context of the pressures to abolish the independent statehood (separate from Belgium) of the Congo Free State. If the statehood of this entity was established by the decision and will of the powers assembled at the Berlin Conference, then these powers, it was argued, could enforce other decisions in relation to the Free State (Reeves, 1909: 101). In turn, the Belgian scholarship emphasized the status of the Free State as a *de facto* state existing in fact prior to its, in this view: purely declaratory, recognition. However, compelling arguments exist that in the territory of the Congo prior to the Berlin Conference, there existed nothing amounting to statehood as it was then understood: not owing to non-recognition, but due to their lacking any political entity capable of exercising power in respect of the area of the Congo basin (Reeves, 1909: 100). Such an entity was created only by the Final Act of the Berlin Conference.

The participation of non-state entities (separate from the country of incorporation, at least: partially private) in the factual process of establishing the Congo Free State should be considered a typical phenomenon and perceived as unremarkable in the context of the era. However, what was peculiar about the activities carried out under the auspices of king Leopold was the status of the entities that carried them out. With the exception of the Upper Congo Research Committee, they were devoid of any legal personhood – they were not legal persons neither under Belgian nor any other jurisdiction, nor internationally (Reeves 1909:105). They were not incorporated in any state and therefore did not have their national statute within the meaning of the conflict of laws.

Also, the International African Association established in the course of the Brussels Geographical Conference in 1876 has not been formally incorporated. In the legal sense, it was merely an informal grouping. The subsequently created International Committee for the Study of Upper Congo was the only body established during the period of colonization of the Congo that had been organized as a legal entity known to its contemporary Belgian law. Namely, it had been a Belgian silent partnership (*Société en participation*) (Reeves, 1909: 104). This entity, however, proved to not play a greater role, at least *in nomine suo*, in the history of the formation of the Congo Free State, as it was quickly replaced by the then established International Society of the Congo (AIC). AIT, in turn, did not have any national legal form, though it had a formalized – and respected – internal structure. Only *ex post* was it awarded what amounted to international recognition of its subjectivity, as the territorial acquisitions and other agreements concluded by AIC were recognized as valid and binding during the Berlin Conference. Until then, however, the Association itself undoubtedly had no form known to any national law, including the laws of Belgium. As one author described it: "The International Society of the Congo is a purely fictional entity: nothing more than a name for which only Leopold II is hidden" (Stengers, 1985: 3).

The fact that the political power of the Congo Free State extended to the territories it seized or acquired is not in doubt, just as the extension of such power over local indigenous peoples. One criterion of statehood known to international law then: effective power (self-control) (Ehrlich, 1947: 104; Phillimore, 1879: 81) can be attributed to the Free State indisputably. Its international recognition in the context of the decisions of the Berlin Conference is also not a subject of controversy. However, the international legal status of the AIC is not clear. First of all, it should be noted that the borders of the Congo Free State were only finally defined at the Berlin Conference. It is also doubtful, due to the low level of influence of the colonizers on the indigenous population, that AIC, during its rule, could be declared to exercise political power over the local peoples. However, above all, the most serious doubts concern the sovereignty of the AIC in the pre-Berlin period. This entity did not have the features of Belgian statehood.

4. Results

Three theories existed that could explain the AIC's acquisition of *sui iuris* statehood traits. First, the theory of the assignment of sovereignty made by the representatives of the indigenous African tribes, secondly: the appropriation of no-man's territory, and thirdly: the long-term occupation. As indicated above, AIC did not have legal personality under Belgian (or any other) law. However, its legal nature is much closer to a private law corporate person than to a public entity. This feature disallows assumption that the land acquired by the representatives of King Leopold was acquired for

AIC as a sovereign, but for a private law actor. Then-binding international law barred the acquisition of political powers belonging to a state by private persons (Reeves, 1909: 106). On the other hand, the representatives of AIC lacked *animus rem alieni acquirendi*, the necessary intent to acquire in the name of a third person, which precludes the conclusion that the territories in question were in fact acquired by Belgium. Nb. the constitution of the Kingdom of Belgium (article 64), moreover, precluded the acquisition of territory by means other than statutory. Therefore, it should be recognized that the effects of the agreements in question extended only in the private-law sphere.

It is also interesting to note how the status of the political entities formed by the indigenous peoples under international law of the era prevented AIC from gaining *de facto* statehood in two of the above-mentioned ways. Referring to these indigenous entities, weakly organized as they were, lacking a satisfying level of social development from a Western perspective, but undoubtedly political, the public international law in the second half of the 19th Century refused to recognize their status as states and to ascribe them political rights (Reeves, 1909: 102, 106). They were not considered members of the international community. At the same time, however, it granted the members of indigenous peoples themselves certain "moral rights" and granted them a *sui generis* title to the territory they occupied. However, it was not an international law title, it was closer to a private law title. An effective – under international law – cession of such territory as made between two sovereign entities was inconceivable. On the other hand, it did not preclude the acquisition of land ownership in the private-legal aspect.

This was insignificant in the case of Congo and Belgium, as Belgian law ascribed no further consequences to the acquisition of land by Belgian nationals, but in the case of the United Kingdom would prove vital: the law of the UK stated that the acquisition of land from indigenous persons by British nationals resulted in (i) them receiving interests in land, and, simultaneously, (ii) the United Kingdom acquiring sovereignty over the land in question. At the same time, due to aboriginal moral rights and, as a result, the at least *quasi-private* legal title to the land of the indigenous peoples being accepted, the theory of original acquisition of statehood by appropriation, as well as prescriptive acquisition stemming from of long-term occupation, was ruled out in the case of the Congo Free State.

Complementing the considerations on the international recognition of the Congo Free State and treating it as a sovereign entity, it is worth mentioning that for almost a quarter of a century of its separate history, this state concluded unquestionable and implemented international agreements, which were later taken over by Belgium by succession. In addition to multilateral treaties, such as the General Act of the Brussels Conference of July 2, 1890 or the Brussels Convention of June 8, 1899, there were also bilateral agreements (among others: a friendship, trade and navigation treaty concluded with the United States on 24 January, 1891, an agreement on preferential treatment of French nationals concluded with France on 5 February 1895 or a convention made with the Kingdom of Belgium (sic!) on 3 July, 1890.

5. Conclusion

As indicated in the introduction – and hopefully shown in the article – private-law entities (corporations) entering major political arenas is hardly a novelty. Such evolution of global governance sparks criticism, referring in particular to the USA, highlight the soon-to-happen change of political and commercial control, some elements thereof at least, by corporations. Would an establishment of a sovereign state effected by a corporation be possible? The example of Congo Free State and, in particular, the private-law entities preceding it seem to prove that such possibility may not be excluded. If we may say that the conceptual framework and the landscape of legal forms and their relations has changed in the public international law since the 19th century, it is a change directed at the liberalization, the emergence and prevalence of soft law and non-state actors in ius gentium. Also gaining substantial traction is the notion of separation of statehood from national issues (let it be said that it is disputable here whether such tendency is more of a novelty or actually a return to normalcy preceding the emergence of nationalisms and mass politics). Abstaining from resolving these non-legal issues, it is worth noting that in the fascinating story of the colonization of Congo Basin, private entities played a prominent role in an executive aspect, where political elements played were a propelling factor. Also the ultimate granting of sovereign status to the Congo Free State was but a result of a favorable political situation.

The history of the West seems persistently to indicate that the political prevails over the private. The history of Congo Free State is no exception. Open remains the question whether,

should the phenomenon of old statehoods giving up sovereignty to corporations really happen, we will recognize the paradigm shift in the substitution of political organism by non-political entities, or rather identify a transfer of political importance to other subjects? It seems that, all in all, politics may change but never yield.

References

Bianchi, 2009 – *Bianchi, A.* (2009). Non-State Actors and International Law, London: Routledge.

Bokwa, 2016 – *Bokwa, K.* (2016). Suwerenność bez terytorium i ludności? Casus Suwerennego Zakonu Maltańskiego [Sovereignty without territory and population? The case of the Sovereign Order of Malta]. In Eckhardt P., Guzy M., Kaliński M., Malczewski J., *Kto tu rządzi? Suwerenność w filozofii polityki i prawa*. Kraków: Koło Naukowe Historii Doktryn WPiA UJ.; pp. 165-178. [in Polish]

Bratkowski, 2010 – *Bratkowski, S.* (2010). Nieco inna historia cywilizacji. Dzieje banków, bankierów i obrotu pieniężnego [A slightly different story of civilization. The history of banks, bankers and money trading]. Warszawa. 490 p. [in Polish]

Cornet, 1944 – *Cornet, R.* (1944). Catanga, Bruxelles: Editions L. Cuypers.

Cox, 2006 – *Cox, N.* (2006). The Continuing Question of Sovereignty and the Sovereign Military Order of Jerusalem, of Rhodes and of Malta. *Australian International Law Journal*. 13.

Dziadzio 2008 – *Dziadzio, A.* (2008). Powszechna historia prawa [The Universal History of Law]. Warszawa: Wydawnictwo Naukowe PWN. [in Polish]

Ehrlich, 1947 – *Ehrlich, L.* (1947). Prawo narodów [Law of nations]. Kraków: nakł. Księgarni Stefana Kamińskiego. [in Polish]

France, 2005 – *France, J.* (2005). The Crusades and the Expansion of Catholic Christendom, 1000–1714. New York: Routledge.

Gondola, 2002 – *Gondola, Ch.* (2002). The History of Congo, London: Greenwood.

Hochschild, 1998 – *Hochschild, A.* (1998). King Leopold's Ghost. A Story of Greed, Terror and Heroism in Colonial Africa, London: Houghton Mifflin.

Jaremczuk, 2006 – *Jaremczuk, E.J.* (2006). Konflikt kongijski [Congo conflict]. Toruń: Wydawnictwo Adam Marszałek.

Lechwar-Wierzbicka, 2011 – *Lechwar-Wierzbicka, E.* (2011). „Misja cywilizacyjna" Belgów w Kongu [The "civilization mission" of the Belgians in the Congo]. *Historia i Polityka*. 6(13): 187-202. [in Polish]

Niestrasz, 2015 – *Niestrasz, Ch.* (2015). Rivalry for Trade in Tea and Textiles: The English and Dutch East India companies (1700–1800), Houndmills/New York: Palgrave Macmillan.

Nzongola-Ntalaja, 2002 – *Nzongola-Ntalaja, G.* (2002). The Congo. From Leopold to Kabila. A People's History, London/New York: Zed Books.

Phillimore, 1879 – *Phillimore, R.* (1879). Commentaries upon international law, Vol. I, London: Butterworths.

Potkowski, 2004 – *Potkowski, E.* (2004). Rycerze w habitach [Knights in habits]. Warszawa: Bellona. [in Polish]

Reeves, 1909 – *Reeves, J.S.* (1909). The Origin of the Congo Free State. *The American Journal of International Law*. 3(1): 99-118.

Senelle, Clement, 2009 – *Senelle, R., Clément, E.* (2009). Léopold II et la Charte Coloniale, Brussels: Mols. 207 p.

Stengers, 1985 – *Stengers, J.* (1985). La Fondation de l'État indépendant du Congo, Liège: section d histoire [The Foundation of the Independent State of Congo, Liège: history section]. [in French]

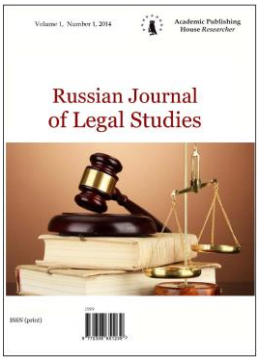
Stern, 2011 – *Stern, P.J.* (2011). The Company-State. Corporate Sovereignty and the Early Modern Foundations of the British Empire in India, Oxford: Oxford University Press.

Weststeijn, 2014 – *Weststeijn, A.* (2014). The VOC as Company-State: Debating Seventeenth Century Dutch Colonial Expansion. *Itinerario. International Journal on the History of European Expansion and Global Interaction*. 38: 13-34.

Wouters, Chagne 2015 – *Wouters, J., Chagne, A.-L.* (2015). Multinational Corporations in International Law. *M. Noortmann, A. Reinisch, C. Ryngaer*, Non-State Actors in International Law, Oxford: Oxford University Press.

Published in the Slovak Republic
Russian Journal of Legal Studies
Has been issued since 2014.
E-ISSN: 2413-7448
2021. 8(1): 16-27

DOI: 10.13187/rjls.2021.1.16
www.ejournal25.com



The Nature of the Firm Revisited

Łukasz Chyla [a, *]

[a] Jagiellonian University in Kraków, Poland

Abstract

Ronald Coase, who lived from 1910 to 2013, was an outstanding British economist and writer, professor at excellent American universities and a longtime editor of the Journal of Law and Economics in its heyday. To this day, Ronald Coase remains one of the most cited economists in history. Ronald Coase's observations about the nature of firms as economic entities should be treated with due admiration – especially considering that his reasoning was based on an economy known at the beginning of the 20th century. Due to his groundbreaking insights into the dynamics of business formation and the role of transaction costs in microeconomics, he received the 1991 Nobel Prize in Economics. Ronald Coase is considered the father of law and economics, the most famous economist among lawyers and the most famous lawyer among economists. The aim of the article is to present Ronald Coas' thoughts contained in his first famous work titled The Nature of The Firm in the contemporary economical context. The author presents Coase's profile and subjects his work to a critical analysis. Moreover, the aim of the article is to look at the theses contained in the Coase's work from the point of view of the 21st century modern economy. The article is based mostly on academic literature.

Keywords: Ronald Coase, transaction costs, the firm.

1. Introduction

Ronald Coase, who lived from 1910 to 2013, was an outstanding British economist and writer, professor at excellent American universities (University at Buffalo, University of Virginia, University of Chicago) and a longtime editor of the *Journal of Law and Economics* in its heyday (Formaini, Siems, 2003: 1; Cheung, 1987). To this day, Ronald Coase remains one of the most cited economists in history (Schwab, 1993: 359). Due to his groundbreaking insights into the dynamics of business formation and the role of transaction costs in microeconomics, he received the 1991 Nobel Prize in Economics. It is worth noting that Ronald Coase is considered to be one of the fathers of law and economics (Henderson, 2013), as well as the doyen of the New Institutional Economics and Modern Organizational Theory (Downes, 2013). Many outstanding scientists, including Nobel Prize winners, were associated with the resulting Society for Institutional and Organizational Economics. Among them were Douglass North, Elinor Ostrom and Oliver Williamson (Williamson, 1991), considered the most important heir to Coase's thought. Coase's most important publications include: *The Nature of the Firm* (Coase, 1937), *The Federal Communications Commission* (Coase, 1959), *The Problem of Social Cost* (Coase, 1960) as well as *The Lighthouse in Economics* (Coase, 1974). Especially *The Nature of the Firm* and *The Problem of Social Cost* brought him fame and recognition from the world of science. Those two most cited

* Corresponding author
E-mail address: lukasz.chyla@doctoral.uj.edu.pl (Ł. Chyla)

(and often criticized) economic works of the 20th century are considered to be the two pillars on which virtually all of Coase's thought rests. The most important achievements of Coase, making a huge contribution to the development of economic thought of the 20th century, are the research on the phenomenon of transaction costs, the famous *Coase theorem* (Allen, 2015: 379-390), and the so-called *Coase conjecture*.

It is worth noting that there are some interesting features that distinguish Coase from the whole pantheon of 20th-century economists. First of all, Coase postulated the study of real market phenomena, unlike most economists, whom he accused of dealing only with the so-called "blackboard economics", i.e. a theoretical economy completely detached and disconnected from economic reality (Henderson, 2013). Second, Coase produced only a dozen works, and most of them did not use mathematics or used it to a very limited extent. In his works, he has employed simple, concise language, and he was awarded the Nobel Prize practically because of just two relatively short publications (*The Nature of The Firm*, *The Problem of Social Cost*), the first of which was written shortly after his graduation from University. Third, Coase was a kind of outsider because he was not an economist by training, but merely a lawyer. Fourth, Coase, despite the overwhelming influence of various political and economic doctrines, created his own original current, followed by many to this day (Cassidy, 2014). Initially, he considered himself a socialist, and with time he discovered the soul of a free marketer, and even became (not fully rightly) a patron of economical *laissez-faire* thought (Bylund, 2014: 30). Finally, Coase is an author so interesting and ambiguous that his views have sometimes been distorted and misinterpreted for particular interests or the political and economic agenda on both sides of the scientific and political spectrum (Schwab, 1993: 360). An excellent example of this phenomenon can be found in *The Problem of Social Cost*, which is considered by the left to be a pro-interventionist argument, and at the same time anti-interventionist by the right. Despite his precise and matter-of-fact arguments, as well as a concise style, Coase is by no means an easy-to-read author. Rather, on the contrary, there is a depth of reasoning behind seemingly short texts, which has led many – usually contradictory interpretations to arise around them (Cassidy, 2014). This is largely due to the different ways in which his works were perceived by numerous commentators, as well as his general lack of inclination to make strong economic judgments.

In addition to *The Nature of the Firm*, which is the subject of this analysis, the turning point in Coase's career was the publication of the *The Federal Communications Commission*, in which he presented the essence of institutional property rights and their impact on effective capital allocation. This was the basis of the so-called Coase Theorem – the idea according to which, in the absence of transaction costs, clearly defined and enforceable laws (mainly property rights) allow to achieve the most economically effective result, without the need for major subsidiary state intervention. The result of these considerations was the famous meeting Coase had with a dozen of the most influential economists by the time, convened to refute his claims (such as: Rueben Kessel, Milton Friedman, Martin Bailey, Arnold Harberger, Gregg Lewis, John McGee, Lloyd Mints and George Stigler) (Formaini, Siens, 2003: 3). Interestingly, all of Coas's adversaries were convinced during the hours of discussion, which brought him great publicity and secured a job in 1964 at the University of Chicago, whose school of law and economics was the most influential current by the next several dozen years. The immediate consequence of this discussion was the publication by Coas of his most famous article, *The Problem of Social Cost*, in which he accurately presented the more precise meanders of his reasoning. Using examples from the English common law system, Coase explained why regulatory interventions (top down approaches) most often led to less effective results than if the problem was left to be solved by the parties, i.e. the free market (bottom up approach) (Formaini, Siens, 2003: 3). This approach was in opposition to the then dominant concept of Arthur Pigou, who in his publication *The Economics of Welfare* (1920) advocated that government regulations lead to the most effective solutions by improving numerous market shortcomings (Formaini, Siens, 2003: 3). These considerations were of particular importance in the context of disputes involving more than one actor – the so-called externalities, such as damage caused by animals, immissions (sound, noise, smell, harmful substances), mining damage, environmental damage, etc (McChesney, 2004). According to Pigou, in these cases the state should restrain, punish or tax the source of the problem. However, according to Coase, with low transaction costs, a more effective solution would be to leave the dispute to stakeholders who, under voluntary contracts, would be able to solve the problem among themselves (the so-called

hands off approach). As Coase himself said during the Nobel Prize lecture in 1991, *what are traded on the market are not, as is often supposed by economists, physical entities but the rights to perform certain actions and the rights which individuals possess are established by the legal system* (Coase, 1991).

Coase's approach was so groundbreaking and convincing that it practically gave rise to a new field (law and economics) and gave Coase enormous popularity among the Chicago school of thought, neoclassical economists and economic libertarians. At the same time, it was used to promote a political agenda limiting the role of the state and interventionism, which met with an exceptional wave of criticism from the socialists and the broadly understood "economic left". To this day, Coase's work evokes great emotions due to the alleged contradictions of his theses. Prima facie, *The Nature of the Firm* appears to be an economically left-wing position that takes into account the positive aspects of central planning. On the other hand, the *Problem of Social Cost* is a free market position that undermines the concept of state intervention. Despite their apparent differences, both works have a lot in common – their central element is the concept of transaction costs and their importance for the effective allocation of goods in the economy. When analyzing Coase's works, it is worth remembering that his caution in formulating his judgments turned against him, prompting the political and economic forces on both sides of the ideological spectrum to understand his works abnormally (Schwab, 1993: 369). Indeed, Coase' s careful observation of the activities of state bodies allowed him to conclude that almost never a solution imposed by public authorities would be effective in practice (Henderson, 2013). At the same time, however, it did not rule out that in certain situations it would be possible or even advisable (Bylund, 2014: 30). Coase argued that each individual case should be analyzed separately and with appropriate caution. Moreover, it should be noted that the famous *Coase Theorem* is more of a logical concept and refers to an abstract situation in which transaction costs are zero or negligible – a situation that almost never occurs in practice (Henderson, 2013).

2. Materials and methods

Despite his simple language, Ronald Coase is considered one of the most interesting and sophisticated authors of law and economics. To date, two of his works: *The Nature of the Firm* and *The Problem of Social Cost* are considered the most cited legal works in history.

At the same Coase is an author so interesting and ambiguous that his views have sometimes been distorted and misinterpreted for particular interests or the political and economic agenda on both sides of the scientific and political spectrum. This is despite the fact that numerous materials and data on this subject are readily available on the Internet, the vast majority of them in English. As a result, many secondary publications do not fully reflect his views and are subject to authors' own prejudices.

This article is based mostly on scrutinizing the original works of Ronald Coase, academic literature, reports and data published by competent market actors. Legal scientific research methods applied by the author include: the historical method, comparative research, critical analysis, and to some extent – law and economics.

3. Discussion

At the time of writing of *The Nature of the Firm,* Coase was just under 25 years old. This article was written during the *Great Depression* (1921–1933), which saw one of the greatest economic debates of all time regarding the effectiveness of the concept of central planning, known primarily as the *Socialist Calculation Debate (*Schwab, 1993: 362; Bylund, 2014: 2*)*. The fruits of this discussion significantly influenced the scientific development and reasoning of young Ronald Coase. The crucial element of the Debate were the publications of Ludwig von Mises ("*Die Wirtschaftsrechnung im sozialistischen Gemeinwesen*" (1920) and *Die Gemeinwirtschaft* (1922)), in which he argued that without private means of production there is no competition, and consequently – the ability to determine the price and value of individual goods (Bylund, 2014: 2). As a result, socialism excludes the calculation of gains and losses from the economy, leading to its profound ineffectiveness. Contrary to the above, authors with socialist inclinations (including Fred Taylor, Enrico Barone, and Oskar Lange) argued that the state, like a central counterparty, using accounting-like methods, can still regulate prices on the basis of over-demand or oversupply.

Coase faced those controversies while studying at the London School of Economics (hereinafter – LSE). LSE, founded in 1895 by socialist thinkers (Sidney Webb, Beatrice Webb, George Bernard Shaw), was aimed at creating an intellectual cadre in the field of socialist economics, although it was characterized by considerable freedom of academic discussion and looking at the problems of modern economics from many different perspectives (Bylund, 2014: 4). Interestingly, in the 1930s, the LSE paradoxically became one of the most important centers of modern classical economics, which happened under the influence of thinkers such as Lionel Robbins (a socialist converted under the influence of Mises) (Bylund, 2014: 7), Fridrich von Hayek, John Hicks, Nicholas Kaldor, and Coase's personal mentor, Arnold Plant (also a socialist convert). It was during this period, as a student at the LSE, that Coase had the opportunity to learn about the theories of the Austrian School, the theory of capital, and Mises's arguments against socialism, which then counterbalanced the increasingly popular interventionist policies advocated by John Maynard Keynes.

Ronald Coase himself was only a law student at the time, and it was not until the series of lectures and discussions at the LSE that prompted him to become interested in economics (Bylund, 2014: 10). Initially, despite the great influence of Arnold Plant (in the field of business organization and the invisible hand of the market) and Hayek (in the field of the Austrian capital theory), young Coase saw himself as a socialist who changed his mind only later in life.

It is believed that the direct reason for writing *The Nature of the Firm* were Coase's reflections on the imperfection of the market (and classical economics) as a result of the emergence of high transaction costs. During his stay on a scholarship in the USA (1931–1932) he worked at the University of Chicago with outstanding scientists such as Frank Knight and Jacob Viner. During his stay in the United States, Coase was mainly engaged in researching the vertical and horizontal integration and organization of American super-enterprises (including General Motors). The meeting with the candidate of the socialist party, Thomas Norman for the US president, must also have had a huge impact on the thoughts of young Coase (Bylund, 2014: 11). Throughout his research stay, Coase has been wondering, why the price mechanism in the market ignored the issue of the organization of enterprises and the central relationship between the employer and employee in this respect, which Coase compared to the relationship between master and servant.

Coase was looking for the source of the impossibility (according to the Austrian economy) of organizing Leninist Russia in a similar way to a centrally planned factory, since factories and economic entities of enormous size were emerging on the free market by themselves (Henderson, 2013). If the free market mechanism operated in accordance with the classical theory, there would be no need to create firms and produce goods, according to Coase, because all these goods (or their substitutes) would be readily available on the market at a price regulated by the law of supply and demand. Since they did in fact arise, it seemed the usual market exchange combined with the invisible hand of the free market in the form of a price mechanism could not have been functioning properly for some reason (Bylund, 2014: 26). Ronald Coase identified the high transaction costs of market operations as the major cause of these imperfections.

Interestingly Coase did not problematize the assumption of the bottom-up price mechanism and the top-down planning entrepreneur. By doing so Coase did not consider specialization or the division of labor as a sufficient explanation of integration in firms. *He viewed firms as hierarchical, planned structures akin to socialist economic planning – essentially a "mirror image" of the market's efficient allocation of resources* (Bylund, 2014: 22).

In the essay the *Nature of the Firm*, Ronald Coase identifies the following issues related to the formation, existence and further expansion of companies.

1. First, Ronald Coase points out that since, according to the traditional theory of economics of Adam Smith, the free market is efficient (it provides the best goods and services at the lowest price), it should always be cheaper to buy a given product or service on an exchange market (outsource outside) than to hire workers to create the good. Following this line of reasoning, "*outside the firm, price movements direct production, which is coordinated by a series of exchange transactions in the marketplace. Within a firm, these market transactions are eliminated, and in place of the complicated market structure with exchange transactions is substituted the entrepreneur–co-ordinator, who directs production. It is clear that these are alternative methods of co-ordinating production. Yet, having regard to the fact that if production is regulated by price movements, production could be carried on without any organization at all,*

well might we ask, Why is there any organization?" (Formaini, Siems, 2003: 2). Since production is regulated by prices, Coase asks the question of the meaning and reasons for the existence (and moreover, the emergence of new and more) organizations (companies), instead of basing everything on a system of independent, self-employed people who would contract with each other on the free market.

2. Then Coase wonders why the coordination is the work of the pricing mechanism in one case and the enterprise in another. According to the author, *the purpose of these considerations is to bridge the gap between the assumption (made for some purposes) that resources are allocated by means of the price mechanism and the assumption (made for other purposes) that this allocation is dependent on the entrepreneur–co-ordinator* (Coase, 1937: 33). Therefore, Coase explores the practical determinants of choosing one of these paths for capital allocation.

3. Coase then concludes that there must be a significant cost of using the price mechanism in the free market (and therefore organizing production in such way) (Coase, 1937: 35). The author distinguishes here primarily the cost of finding out what prices are appropriate, as well as the costs of negotiating and concluding a contract each time on the exchange market. While agreeing that these costs cannot be completely eliminated also in the case of organizing production under the aegis of an enterprise (company), he is of the opinion that these costs are significantly lower (one employment contract, one negotiation of a labor contract, etcetera). Coase points out that the employment contract does not contain all the obligations of the employee and the entrepreneur's prerogatives, but it establishes a general relationship of subordination and control, i.e. the performance of official orders by the employee on the basis of the boss's coordination decisions. In other words, the contract only generally defines the framework of the employer's authority in return for the employee's remuneration.

4. Coase also notes that there are other downsides to using the pricing mechanism (Coase, 1937: 36). Especially in the case of longer-term contracts, dealing more with services than goods, it may turn out that concluding one long-term contract is more convenient and less economically risky. At the same time, specifying the detailed provisions of the contract may be impossible or significantly difficult – as a result, it may be more effective to replace the contract of equal parties with an employment contract within the company.

5. Coase summarizes the above arguments by stating that depending solely on the market costs money, and by establishing an organization or firm and entrusting the entrepreneur's managerial power over the means of production, certain costs are saved (Coase, 1937: 37). The entrepreneur needs to try to perform his managerial duties at a lower cost than on the free market, or alternatively, return to it.

6. By the way, Coase wonders if there are other factors that may be influencing the phenomenon of business start-up, such as market uncertainty, or the legal system (for example, tax-favoring intra-company trading vis-à-vis trade between different entities). Coming to the conclusion that these factors may affect the size or number of companies, however, they are not considered the main determinants of the phenomenon of their formation (Coase, 1937: 38).

7. Then Coase goes on to the following problem – is it possible to examine the factors and forces that determine the size of companies? (Coase, 1937: 38) He indicates, inter alia, the Knight's reflection on the subject, arguing that the incentive for a company to become a monopoly must be counterbalanced by a powerful force that degrades productivity as the company grows. Coase poses a tough question: why do market transactions take place at all, if everything could just function within one company, resembling the mythological Leviathan? The author indicates the probable causes, i.e. decreasing management revenues or the increasing price of the supply of production factors, deriving 3 basic factors on which the companies' growth tendency depends (Coase, 1937: 39):

a) the lower the organizational costs and the slower they grow with the increase in the conducted transactions

b) the lower the chance of the entrepreneur's mistakes and the slower the chance will grow with the company's growth

c) the more the price of supply of factors of production decreases (or grows less) with the growth of the firm.

8. Accordingly, Coase notes that the organizational costs and losses due to occurring errors increase with the spatial growth of the company, the variety of transactions, and the likelihood of price movements. As a result, at some point, efficiency will decline as your business grows. Coase

also noticed that various inventions (e.g. communication) reduce spatial dispersion and organizational costs, which leads to the expansion of companies.

9. Further on, Coase deals with alternative approaches to the problem at hand (Coase, 1937: 39). He unequivocally rejects the view that the company was the result of the growing complexity of the division of labor, recognizing that this complexity is already reflected in the market mechanism. In addition, Coase also analyzes Frank Knight's reflections on the role of uncertainty in the market (Knight, 1921).

According to Knight, it is the uncertainty that causes the production of goods to be made on the basis of predictions by the entrepreneur, and also requires supervision, technical management and specialization in decision-making (understood most clearly as a function and responsibility). The result is, according to Knight, a class that focuses on predicting needs based on its expertise, while guaranteeing wages for employees. Coase rejects this theory, arguing that the price mechanism may well be about knowledge and specialization in terms of production needs and does not require these people to actively participate in the production process. It is also worth noting that in the realities of today's economy, outsourcing this type of service is not unusual. The market has even developed a number of entities offering specialized services in the field of market research and its needs in relation to a given segment of goods or services. Moreover, the integrity of such an analysis will usually be more cross-sectional and precise, and at the same time free from prejudices that might be guided by corporate insiders.

4. Results

Coase himself lamented that *The Firm* was often cited and little used in practice (Coase, 1972). Nevertheless, many commentators (e.g. Benjamin Klein) recognized that the subsequent publication of *The Problem of Social Cost* is in fact merely a repetition of the most important thoughts from *The Firm*, and the common denominator of both publications lies precisely in the fact that they place particular emphasis on transaction costs, which was the missing link in the economic models of that time.

The above considerations made by Coase significantly influenced the contemporary perception of the company and work organization, as well as the essence of transaction costs in the price market. As Coase thinks, transaction costs are at the heart of choosing between a pricing mechanism and the centrally managed alternative. Many consider Coase's arguments to this day as a socialist argument for the rationality of central planning – at least in some justified cases. However, it is worthwhile to further analyze this one of the most famous ideas in the history of economics.

Coase, wondering why firms are islands of conscious power in a seas of free market and the pricing mechanism, concluded that the main reason were transaction costs. This is why the pricing mechanism is replaced by an imperative relationship within a company that also carries a certain cost. The size of the company will therefore be determined by the ratio of the cost of using the pricing mechanism and the marginal cost of maintaining this employer-employee relationship. Following this lead, Coase made two main conclusions. First, the company is characterized by hierarchical, not contractual relations. Secondly, decisions in the company are made on the basis of the entrepreneur's power, and not on the basis of the price mechanism.

By embedding Coas's deliberations in his contemporary discourse and historical events (the Great Depression), one can get the impression that *The Firm* fits in with the socialist idea that it is possible to achieve an effective market with the help of central planning, which at the same time would allow for greater social justice. Coase thus rejects Hayek's criticism that central planning is incapable of reproducing market efficiency – on the contrary, even under strictly capitalist conditions, there are planned transactions that, in his opinion, are completely outside the sphere of the price mechanism and the free market.

The argument that the company was characterized by sovereignty detached from the pricing mechanism and consensual contracts was also taken up by the followers of Coase-nobel laureates: Herbert Simon (Simon, 1951: 293-305) and Oliver Williamson (Williamson, Sidney, 1991). Both emphasized the special difference between the free market and the decision-making process in a company characterized by sovereignty, a hierarchical, and even authoritarian relationship. It is this issue that has received considerable criticism.

First, there was criticism of Coase's from relational contract theorists (Schwab, 1993: 364). Criticized was his statement that long-term contracts should ultimately turn into employment in the company. It was pointed out that more and more often there are multi-year agreements between separate entities (letters of agreements, cooperation agreements, investment agreements, consortium agreements), which are based on the principles of good faith or contain adaptation clauses that allow to avoid disputes in the event of major changes in market conditions or structure (especially in the case of supply contracts). As a result, cooperation agreements, consortium agreements, groups of capital companies, or long-term supply agreements between independent companies often replace the concept of vertical integration, so vividly promoted by Coase. It is worth remembering, however, that the significant development of the international contracts law (including adaptation clauses, the concept of hardship, *force mejeure* and *rebus sic stantibus*) took place not until after the war, i.e. long after Coase wrote his article.

Second, Coase has been criticized by corporate theorists (Schwab, 1993: 365) – inter alia: Michael Jensen (Jensen, Meckling, 1976), William Mechling, Armen Alchian, Harold Demsetz (Alchian, Demsetz, 1972), Oliver Hart (Hart, 2009), Ben Klein (Klein, 2006) who see the company as a nexus of contracts (Jensen, Meckling, 1976). They believe that the difference between inside and outside transactions is illusive, and that the company is nothing more than a set of voluntary contracts between independent entities exchanging their work, expertise and services at market exchange prices, and thus driven by means of a price mechanism and free market forces.

According to them, each employee may at any time leave the company or offer their services to another entity on a purely market basis, i.e. consistent with the principles of the pricing mechanism. Corporate theorists criticize a peculiar personification of the company, considering the company to be a purely market concept, devoid of hierarchical power in the sense of Coase. They also point out that all corporate decisions regarding the allocation of means of production, etc., are only a derivative of the price mechanism taking place on the free market, so it is the free market that determines these decisions, and making decisions contrary to market incentives will lead company's collapse.

Again, it is worth noting that the times *The Firm* was written coincide with the greatest crisis in human history, and it was preceded by the days of classic capitalism, where workers' rights were only *in statu nascendi*. All real privileges such as paid leaves, employment tribunals, notice periods, non-discriminatory practices, etc. began to seriously develop only after the war. In Coase's time, the company was not yet like a corporation today, severe disciplinary punishment was applied in some industries, minors were exploited, the workday lasted 14 hours, and the dismissal of any worker was a matter of the employer's discretion alone. The concept of the unemployment benefit was also unknown, or it was not popular at that time. As a result, the vast majority of workers worked under a peculiar imperative, having as an alternative starvation or extreme poverty. Looking at the contemporary Coase company, it is understandable that the then employer-employee relations were much more hierarchical than they are today. As a result, despite the fact that the grounds of Coase's arguments have lost their validity, his criticism in this respect is, in my opinion, unjustified.

Going further, it is also worth considering Coase's text from the point of view of employment in the company in the form of an employment contract. It is undoubtedly a great accomplishment of *The Firm* that it prompted further research on this subject. Particular attention should be paid to the works of Bengt Holmstrom (Holmstrom, 1989), Paul Milgrom (Milgrom, 1991), John Moore (Moore, Hart, 2009) and Oliver Hart (Hart, Grossman, 1986) who stated that a contract within the company works especially where a balance of many undefined tasks is needed. In such case, the best solution seems to be to pay a predetermined salary, and then leave the discretionary decision in the hands of the employee or manager. Alternatively, too rigid and literal definition of tasks, or linking salary with financial results may lead to short-sightedness or lack of due diligence (e.g. linking remuneration with quarterly results, share price, dividend may result in employees making systemic errors, the consequences of which might be felt by the company only after many years.). In addition, the employment contract will be particularly important whenever the employee gradually acquires experience, knowledge and the so-called soft skills, and its real value will result from his long-term presence in the company and certain relationships with contractors or clients. This will be of particular importance for industries characterized by white-collar work. It is worth giving here the example of a law firm or consulting company – the very creation of a

company is not driven by wish to cut transaction costs, but the need to operate under a common name, use of mutual experience and recommendations, as well as use a scattered reputation. Affiliation in a law firm is often an added value, and the work with the same clients alone makes it possible to establish a valuable relationship for the entire cooperative.

Moreover, it is worth considering whether the main determinant for establishing a company are transaction costs. It seems that, especially nowadays, such a statement will be wrong. The production of many complex goods, such as airplanes, smartphones, machines, computers, computer games, requires specialized, disciplined and coordinated work of numerous people, which would not be merely replaced by the price exchange mechanism – primarily because the final result is not only the arithmetic sum of their work, but primarily results from teamwork, which is an added value. For example, when building another iPhone, individual employees do not yet have a specific concept for its creation, but as a result of team work of various departments and brainstorming, the final model is finally reached. This is of particular importance at a time when each subsequent product must be technologically better than its predecessor (e.g. in the case of electronics, smartphones, etc.). In addition, the required time that a well-coordinated and experienced team must spend on trial and error, perfecting the final product should be taken into account. To quote famous US investor Warren Buffett, "*No matter how great the talent or efforts, some things just take time. You can't produce a baby in one month by getting nine women pregnant.*" In my opinion, this argument would also be applied at the beginning of the 20th century, for example in the armaments industry, or in the car industry, so well-known to Coase himself.

By the way, it should be noted that Coase's strict distinction between hierarchical, vertically integrated companies and an exchange market composed of independent entities cannot be defended at present (Economist). In the modern so-called "Gig economy", outsourcing of simple tasks or components / elements plays a key role in production, and the sales model depends on numerous complex sub-dependencies (e.g. company A produces cotton, company B designs a t-shirt, company C sews, company D makes imprint, and company E sells the goods). Moreover, many large companies are de facto complex and interconnected micro-entities (franchises: MCDonalds, KFC) or are based on the web of self-employed workers (UBER, AIRBNB), displaying some sort of collective intelligence (exchange of experiences, work and service algorithms, etc.)

What's more, it is worth remembering in the times when *The Firm* was written, the economy was more dependent on supply than demand as scarce resources were stretched relatively thin on the market. To the much bigger extent than today the prices were determined by a limited supply of raw materials and labor. Predicting the size of production in a situation where the vast majority of produced goods will ultimately find its buyers does not resemble the model of the modern demand economy, in which the main problem is the lack of special interest in the goods produced, and consequently overproduction. The economy of the twenty-first century is based on careful predictions as to the size and types of production, and often production with the intention of only secondary creation of demand. As a result, only big companies are able to invest serious capital and time in potentially risky economic ventures, which individual self-employed workers would not be able to do. The role of the modern company is therefore not only to reduce transaction costs, but above all to anticipate market needs and actively create them, which would not be possible for individuals due to the lack of sufficient influence.

Bearing in mind the above, it should be argued that companies are also created in response to uncertainty and the need to mitigate the market risk, which is closer to Knight's concept than to the Coase's (Knight, 1921). Moreover, it is worth paying attention to the quasi-economic aspects, such as the legal system, which Coase apparently downplayed. Due to the correct recognition of the role played by companies in the modern economy, they can enjoy various tax breaks, grants, subsidies, etc. Moreover, these facilitations function not only on the public law level, but also on the private law level. The concept of the lack of personal responsibility of an entrepreneur in the case of legal persons (e.g. capital companies) is a huge incentive to actively reinvest funds and create jobs. In the hypothetical absence of liability limitation, wealthy people would be afraid to invest funds by setting up firms and companies, because in the event of a failure, any losses would be covered from their personal property. As a result, these funds – instead of circulating through the arteries of economy – would be accumulated and would not stimulate economic growth, innovation, employment, etc. As a result, it may be tempted to say that companies are also created in response to the favorable policy of legal system.

Companies that have been operating for many years also ensure the trust of both consumers and contractors. On the other hand, the legal regime regulating the functioning of corporations is more demanding than in the case of natural persons. Companies are subject to capital requirements, their statutes must meet the requirements set out in laws, and their activities are subject to the supervision and control of various bodies. Such factors greatly contribute to an increase of transactional costs.

Moreover, with regard to the growing number of consumer products, the key success factor is not only functionality or quality, but rather the reputation of a given brand or trademark. In the era of globalization, even one marketing event or a successful advertising campaign can immediately affect the structure of demand for a given product or service. Product campaigns are often attended by well-paid stars of mass culture, athletes, influencers, and the barrier to entry into this "market" is so significant that only large companies can afford it. Taking into account that in the times of social media, fashion becomes global, the possibility of creating consumer behavior by individuals or smaller entities is becoming more and more limited.

It is also worth looking at Coase's reflections on the formation and further expansion of companies and firms from the perspective of time. In the first half of 20th century, production efficiency and reduction of transaction costs were key to market success, and larger entities gained an advantage over smaller ones due to stable long-term business models. The economy of the 21st century looks quite different (Denning, 2013). First of all, market power has been diverted from the producer to the consumer. In addition, goods and products have become more personalized, and their main advantage is a certain added value that distinguishes a given product from many similar products. Internal efficiency has been relegated to the background, and the market is conquered by products not only with the best prices for value, but also those characterized by non-objective criteria such as prestige, inaccessibility, personal bond created by the brand with the consumer, expansive marketing, pro-ecological operation, diversity, egalitarian message , identification with the client, etc.

Moreover, in an increasingly digitized world, thanks to a widespread, highly advanced technology, the size of the company does not necessarily work in its favor. Large enterprises are associated rather with colossi with feet of clay, which, due to their internal inertia (thousands of employees, rented office and utility space, software, rigid business models), more and more often generate relatively modest profits, giving way to a small, resilient and innovative start-ups or flexible companies from the SME sector.

It is worth mentioning here the phenomenon of the so-called unicorns, i.e. private companies worth over a billion dollars, which have never decided to conduct an initial public offering (IPO). In the book *The Elastic Enterprise* (2012) (Shaughnessy, 2012), Nicholas Vitalari and Haydn Shaughnessy described how the traditional management model works to the disadvantage of large economic entities in relation to small resilient firms, especially those managed in a decentralized manner. A good example is also the more and more frequent use of artificial intelligence as part of customer service or distributed ledger technology in management. It is worth paying attention to the prophecy of John Hagel, who believes that the future of the firm belongs to small and organizationally agile companies that, instead of building the scale effect, will focus on distributed, decentralized and dynamic "science" in order to better and faster capture market needs and trends, and also respond to them in a quick manner (Hagel, 2013).

On the other hand, the opposite phenomenon is also noticeable (Hill). Large economic entities continue to grow, and some concerns are turning into monopolistic Behemoths with a market capitalization of hundreds of billions of dollars. Definitely, one of the reasons is that these companies have more and more modern remote management methods and strict employee control, which have allowed them to eliminate numerous intermediate managers and to replace them with more direct control. Thus, by reducing management costs, these companies are able to continue to benefit from scaling and growing. However, it seems controversial whether the further expansion of these companies is definitely associated with lower transaction costs in relation to the market exchange mechanism. It is worth noting that the average return rates of large enterprises have been systematically decreasing. Therefore, it may be tempted to say that in the modern, dynamic and unpredictable economy, large economic entities are not able to actually use the advantage in the form of transaction costs, and the determinants of such a state of affairs are of a more complex nature. So why is this happening?

It looks like the rich get richer (Denning, 2013). Increasingly frequent mergers and acquisitions, as well as public offerings on capital markets, do not always lead to a "real" increase in the value of companies, and their market cap is often not reflected in periodic financial results. Nevertheless, the size of the company in the long run allows it to gain a privileged position in the market, or even a monopoly, and thus effortlessly eliminate smaller rivals from the market. It does not seem like antitrust laws are particularly efficient around the world as they seem to mitigate only tiny fraction of actual problem. In addition, large companies are able to gain access to many sales markets simultaneously, as well as effectively avoid taxation by locating their subsidiaries in tax havens or implementing various international tax schemes. What's more, multinational companies are able to negotiate tax breaks or interest-free loans with governments of individual countries and make further investments dependent on governmental willingness to cooperate in this regard. Sometimes they can also make use of special economic zones, government subsidies or other types of public-law grants. It is also worth remembering that larger entities are able to obtain diplomatic assistance from their home state, and they can also afford crowds of lobbyists in order to obtain favorable legislation, fiscal policy or to push through their own political and economic agenda. Even in the absence of a real driving force, they are often the first to know the directions of new regulations, which allows them to adapt faster than the competition, which learns about new requirements and regulations only from the official legal journals.

With an appropriate market share, these companies can also participate in price fixing or informal oligopolies or cartels, in order to set the prices of a given product at a fixed level. It is much easier for such entities to enter into corruption or quasi-corruption schemes with the administrative bodies, especially since such relationships are often difficult to prove. Moreover, big companies eliminate competition by buying it up at early stage of its development. Finally, some large companies employing tens of thousands of employees or having a significant share in the financial market constitute such an important element of the national or even global economy that even in times of financial struggles they can count on government aid (*too big to fail*). In fact, this means minimizing the market risk. Paradoxically, in extreme cases, these entities, despite their ineffective business model, are even able to grow (carry out new public offers, look for new PE investors) in order to effectively counteract or delay their own failure. They often record long-term losses (Uber, Netflix, Tesla) by investing putting more efforts into eradicating competition and gaining a monopoly – like status. As a result, international concerns have a significant advantage over smaller entities, even if it was not necessarily the effect of using the scaling advantage as a result of reducing transaction costs.

Large entities also grow because they are able to effectively sell a narrative beneficial for them, e.g. impose trends in new technologies, legal requirements, certification or green financing standards. Thus, they can impose criteria which only they are able to meet at this stage of development. Their CEOs are contemporary celebrities whose media presence instantly reaches viewers and future consumers. Growing and scaling also allows them to better understand the market and users' needs, and thus help them make use of artificial intelligence algorithms (e.g. machine learning or deep learning). Moreover, they have the tools to enter new market segments, conduct subsequent rounds of financing on the private market or public offerings on the public market, and as a result effectively attract capital from the competition. Due to their size, they need not to worry about entry barriers (including the costs of disclosure obligations) known to start-ups and companies from the SME sector.

5. Conclusion

The above reservations do not change the fact that Coase's observations about the nature of firms as economic entities should be treated with due admiration – especially considering that his reasoning was based on an economy known at the beginning of the 20th century. A detailed analysis of Coase's works shows, first of all, that he was careful about his opinions and realized that there was a lot of liquidity between the two alternative ways of organizing work: the firms and the market exchange mechanism (Schwab, 1993: 362). Despite the criticism of *The Firm* from some free marketers, as well as the considerable approval from the socialists (quite contrary to *The Problem of Social Cost*), it is worth remembering that Coase's publications are kind of logical games (Cassidy, 2014) aimed at stimulating the reader's imagination (Schwab, 1993: 369). Thus,

it is only an introduction to further research on companies and the interdependence of transaction costs – as indicated by the author himself.

In fact, similar to other Coase's works, *The Firm* can be compared to a metaphorical water surface. You can look at it to see only a reflection of your own views. You can also immerse yourself in it, only to discover the infinite depth of problems that it opens up. Perhaps it is the inability to find the right answer to the questions posed by Coase that causes so many commentators to stick to the former, using Coase's work mainly to affirm their very own views.

References

Alchian, Demsetz, 1972 – *Alchian, A.A., Demsetz H.,* (1972). Production, Information Costs and Economic Organisation, *American Economic Review*.

Allen, 2015 – *Allen, D.W.* (2015). The Coase theorem: coherent, logical, and not disproved. *Journal of Institutional Economics*. 11(2): 379-390.

Bylund, 2014 – *Bylund, L.* (2014). Ronald Coase's 'Nature of the Firm' and the Argument for Economic Planning. *Journal of the History of Economic Thought*.

Cassidy, 2014 – *Cassidy, J.* (2013). Ronald Coase and the Misuse of Economics. *The New Yorker*. 03.09.

Cheung, 1987 – *Cheung, S.N.S.* (1987). Ronald Harry Coase. *The New Palgrave: A Dictionary of Economics*, vol. 1, ed. John Eatwell, Murray Milgate and Peter Newman (New York: Stockton Press), pp. 455-57.

Coase, 1937 – *Coase, R.H.* (1937). The Nature of the Firm, *Economica*.

Coase, 1974 – *Coase, R.H.* (1974). The Economics of the First Amendment: The Market for Goods and the Market for Ideas. *American Economic Review*.

Coase, 1959 – *Coase, R.H.* (1959). The Federal Communications Commission. *Journal of Law and Economics*. 2.

Coase, 1960 – *Coase, R.H.* (1960). The Problem of Social Cost. *Journal of Law and Economics*.

Coase, 1972 – *Coase, R.H.* (1972). Industrial Organization: A proposal for research in policy issues and research opportunities in industrial organization. Victor R. Fuchs ed.

Coase, 1991 – *Coase, R.H.* (1991). The Institutional Structure of Production. Nobel Prize Lecture to the Memory of Alfred Nobel, December 9. [Electronic resource]. URL: www.nobel.se/economics/laureates/1991/coase-lecture.html

Denning, 2013 – *Denning, S.* (2013). Did Ronald Coase Get Economics Wrong? *Forbes*, 25.09.

Downes, 2013 – *Downes, L.* (2013). Remembering Ronald Coase. *Harvard Business Review*.

Economist – Economist. [Electronic resource]. URL: https://www.economist.com/schools-brief/2017/07/29/coases-theory-of-the-firm

Formaini, Siems, 2003 – *Formaini, R.L.; Siems, T.F.* (2003). Ronald Coase: The Nature of Firms and Their Costs. *Federal Reserve Bank of Dallas*. 8(3).

Hagel, 2013 – *Hagel III, J.* (2013). How Drucker Thought About Complexity. *Harvard Business Review*. [Electronic resource]. URL: https://hbr.org/2013/06/how-drucker-thought-about-comp

Hart, 1989 – *Hart, O.* (1989). An Economist's Perspective on the Theory of the Firm. *Columbia Law Review*.

Henderson, 2013 – *Henderson, D.R.* (2013). The Man Who Resisted 'Blackboard Economics'. *The Wall Street Journal*, 09.03.

Hart, Grossman, 1986 – *Hart O., Grossman S.* (1986). The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration. *Journal of Political Economy*.

Hill, 2013 – *Hill, A.* (2013). New life in the idea of the big company. *Financial Times*: [Electronic resource]. URL: https://www.ft.com/content/bca97630-1634-11e3-856f-00144feabdc0.

Holmstrom, 1989 – *Holmstrom B.* (1999). The Firm as Sub-economy. Journal of Law Economics & Organisation.

Jensen, Meckling, 1976 – *Jensen, M.C., Meckling, W.H.* (1976). Theory of the firm: Managerial behavior, agency costs and ownership structure. *Journal of Financial Economics*. 3(4).

Knight, 1921 – *Knight, F.H.* (1921). Risk, Uncertainty and Profit. Chicago: University of Chicago Press.

Klein, 2006 – *Klein, B.* (2006). The Economic Lessons of Fisher Body – General Motors.

McChesney, 2004 – *McChesney, F.S.* (2004). What'd I Say? *Coase, Demsetz and the Unending Externality Debate.*

Milgrom, 1991 – *Milgrom, P., Holmstrom, B.* (1991). Multitask Principal-Agent Analysis: Incentive Contracts, Asset Ownership and Job Design. *Journal of Law, Economics and Organisation*.

Moore, Hart, 2008 – *Hart, O., Moore, J.* (2008). Contracts as Reference Points. *Quarterly Journal of Economics*.

Shaughnessy, 2012 – *Shaughnessy, H., Vitalari, N.* (2012). The Elastic Enterprise.

Simon, 1951 – *Simon, H.A.* (1951). A Formal Theory of the Employment Relationship. *Econometrica*. 19(3): 293-305.

Schwab, 1993 – *Schwab, S.J.* (1993). Coase's Twin Towers: The Relation between the Nature of the Firm and the Problem of Social Cost. *Journal of Corporation Law*. 18.2.

Williamson, Sidney, 1991 – *Williamson, O.E., Sidney G.W.* (1991). The Nature of the Firm: Origins, Evolution, and Development. Oxford: Oxford University Press.

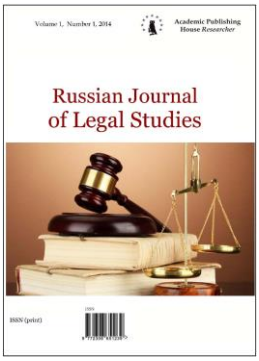
Williamson, 1979 – *Williamson, O.E.* (1979). Transaction-Cost Economics: The Governance of Contractural Relations. *Journal of Law and Economics*.

Williamson, 2002 – *Williamson, O.E.* (2002). The Theory of the the Firm as Governance Structure: From Choice to Contract.

Williamson, 1975 – *Williamson, O.E.* (1975). Markets and Hierarchies, Analysis and Antitrust Implications: A Study in the Economics of Internal Organization. New York: Free Press.

Published in the Slovak Republic
Russian Journal of Legal Studies
Has been issued since 2014.
E-ISSN: 2413-7448
2021. 8(1): 28-40

DOI: 10.13187/rjls.2021.1.28
www.ejournal25.com



Free Legal Aid System and Its Changes *vis a vis* Law School Legal Clinics – A Missed Opportunity for Much Needed Synergy?

Iwo Jarosz [a, *]

[a] Jagiellonian University in Kraków, Poland

Abstract

The steady growth of the body of legal provisions and law's significance in our modern, highly juridified and often over-regulated societies, renders the issues of free legal aid and legal awareness vital and always up-to-date. These issues then capture the attention of political factors and result in legislative action. An example of a regulation of free legal aid is the polish act on free legal aid, free civic counselling and legal education. The system of free legal aid created by this act is currently in its sixth year of operation, this itself a success worthy of appraisal. However, the system is burdened with certain flaws as to its operation and the status of persons active within it. The gravest inadequacy of the system, however, is that it failed to, even partly, include within it the pre-existing system of existing law school clinics in Poland, which have for years succeeded in coupling legal education (both of the participating students as well as of the public) with free legal aid offered to those who cannot bear the costs of professional legal services. This missed opportunity for synergistic operation of both systems has no good justification. The text employs the following legal research methods to critically analyse the shape of the free legal aid regulation currently in force in Poland, as well as how the regulation completely omitted the existing system of clinical legal education programs at Polish law schools: formal-dogmatic method, comparative method, historical method, sociological methods.

Keywords: legal aid, clinical legal education, lawyers, legal profession, law reform.

1. Introduction

The issue of access to legal services has for many years occupied a prominent place in legal and political discourse. It is raised both by reformers interested in improving the access to legal services and already existing institutions, and populists desiring to score easy popularity gains alike.

The costs of professional legal services are an ever-present barrier, difficult to overcome for a significant part of the society. At the same time, it is increasingly hard to navigate ones legal affairs without a lawyer's (or even lawyers') assistance. The reasons for this state of affairs are multifold: the dense network of regulations, the power of regulations covering more and more areas of life, the decodification of law and the sectoral nature of detailed, excessively detailed regulations with the decreasing quality of legislation make it extremely difficult for a layman to operate in this system independently. The growing number of lawyers only partially mitigates this effect, although it should, as a supply factor, increase access to professional legal advice.

* Corresponding author
E-mail address: iwojarosz@gmail.com (I. Jarosz)

The social, and therefore political, consequences of excluding entire groups from access to professional legal assistance are negative. Political authorities and the legal community, acting either synergistically or independently of each other, are making efforts to facilitate access to professional legal assistance. The aim here is in particular to overcome the financial barrier.

Indirect impact of legal and civic counselling is also not to be underestimated. Legal awareness (public legal education) can be considered a very peculiar activity that benefits not only its main intended beneficiaries, but also those that provide such education (in that they may better study and better understand the issues they are to explain). Another indirect impact of legal and civic counselling is to sensitize the practitioners to human rights violations (Chavkin, 2002: 2). It should be noted that within the dynamic, modern interpretation of the concept of "social security" free legal advice is sometimes understood as its element, a fragment of state social policy (Lach, 2016: 32).

2. Material and methods

The body of European literature concerning legal aid is growing, yet not vast – most of it, in Poland's case, concerns legal clinics ran by law schools. The notion free legal aid is often analyzed in the context of European law and civil rights' guarantees proffered by it (both EU law and international European law i.e. the ECHR). American scholars often analyze the very minutiae of legal clinics' work and practice. The Polish legislation on free legal aid financed by the state, though it is in force since 2016, has not yet been broadly analyzed by academics and practitioners of law alike.

Among the sources examined by the author, the chief role is played by the relevant provisions of the law – European conventions and treaties, Polish statutes regulating the free legal aid, Polish procedural acts and regulations concerning the position of attorneys in Polish court practice. Also analyzed is the body of scholarship work – modern legal literature concerning free legal aid. Research conducted has also touched upon statistical data concerning the

Formal dogmatic method will be employed to analyze the relevant law – statutory material and treaties. Fruitful to that extent will be the use of the comparative legal analysis, with its potential to seek and find the peculiarities of a decisive magnitude, defining specifically the researched processes. Historical analysis will be utilized analyze the relevant historical legal sources against the historical context and contemporary academic and practical legal responses thereto, as well as to depict a broader historical course of processes that led to the developments researched in the text.

3. Discussion

3.1. Free legal aid. University clinics

Legal aid as a notion, broadly speaking, encompasses all forms of assistance to certain categories of persons in the form of State funded legal advice and/or representation (CEPEJ, 2020: 34). The CJEU has remarked that the notion of "legal aid" encompasses both the assistance by a lawyer and dispensation from advance payment of the costs of proceedings (Case C-279/09).

In Poland it is assumed that legal aid in general terms (not limited to its university face i.e. legal clinics) is a form of social activity, most often remaining within the institutional framework characteristic of the third sector – non-governmental organizations (NGOs) (Dudkiewicz, Schimanek, 2013: 25). In practice, it is the provision of free information and legal advice aimed at solving a specific problem (a specific case), for the benefit of an individual (or, more rarely, for the benefit of NGOs, especially non-profit organizations) and is provided by lawyers or persons without formal education, but equipped with relevant competences. In the case of law school clinics these are university students of law, working under the supervision of experienced lawyer-academics. Civic advisors (introduced by the amendment to the FLAA) are an important addition to this sentence in the current Polish legal order.

Article 47(3) of the Charter of Fundamental Rights of the European Union states that Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. It is worth noting that this provision repeats the wording of the 1973 *Airey* judgment of the European Court of Human Rights (Airey v. Ireland). However, Member States may place conditions on the granting of legal aid, provided they are compliant with Article 52(1) of the Charter of Fundamental Rights (Kellerbauer et al., 2019: 2226).

And the several Member States, just as other countries all over the globe, do just so. Just as is the case with numerous – arguably all – forms of welfare, serious challenges for legal aid efforts result from the very phenomenon of scarcity (. Ever-insufficient resources demand that hard choices be made as to how to help and whom to help; this, coupled with cuts to funding, requires an approach both flexible and goal-oriented: it usually demands that clear priorities are set, more and more often just to address the most urgent issues.

For many years, an important element of the free legal aid system in Poland were students' legal clinics, affiliated with law faculties of various Polish universities. Certainly, such legal clinics were not – nor is it the ambition of this text to prove the contrary – a way to provide legal services to the poorest on a mass scale. However, law school clinics were present in the system, they served numerous clients, they were effective, and some of their specific features, such as: independence from the pressures of operational economic calculation, detachment from political factors (both local and central), reliance on the university apparatus, i.e. both the work of student volunteers and tutors-academic lawyers, ensuring a high level of substantive and ethical operation of the clinics, can be considered large and difficult to replace advantages.

However, these clinics, along with other elements of the scattered, grassroots legal advice system, were not effective or efficient enough to be deserving of political factors' satisfaction. Therefore, the Journal of Laws of the Republic of Poland of 2016, item as amended, hereinafter referred to as: FLAA – the Free Legal Aid Act. This law was subsequently substantially amended in 2019. It introduced several new institutions and developed some solutions. Several new institutions were introduced, some solutions were developed. However, no reference was made to a certain omission (intentional or not), which undoubtedly constitutes a defect of the Act in its original wording. It concerns the lack of inclusion of law school clinics in the system created by the Act. This is particularly so in the context of the fact that the dispensaries could have been used.

The remainder of the text will discuss the 2015 FLAA and its amendments. Before that, the text will briefly recapitulate the nature of law school clinics and a certain barrier to their development. Against this backdrop, the shortcomings of the FLAA will be pointed out, especially what could have been done to make more effective use of the existing infrastructure and human resources – both in law school clinics' disposition – and harness it to work towards a guidance system that would better facilitate the common good.

3.2. University legal clinics in Poland

In Poland, legal education has a traditionally academic character. While it is obvious that the role of the university is not to provide exclusively professional education in a strict, sense, i.e. purely practical, vocative-like legal education, but to confer a body theoretical knowledge, the idea that certain elements of practical professional education should be reflected in the law schools' curricula is uncontroversial. Such a claim has been increasingly reflected in syllabi in recent years: in particular, it is strongly visible in the context of an increasing number of workshop classes.

It seems that the emergence and spread of student (university) legal clinics is a manifestation of efforts to achieve such a compromise. The so-called clinical program, carried out within the framework of student legal clinics, is usually an optional subject in the course of study. It supplements the model of education with highly practical classes. Their practicality is practically complete. The model of operation of student legal clinics does not differ much from the work of a lawyer on the market of services provided by attorneys. The biggest difference is the nature of operation not determined by economic realities. What can be emphasized here is the lack of payment as a scheme of relations with the client and the lack of necessity for the lawyer to cover the costs of operation and his own existence – this as a specific scheme of relations with oneself (no pressure, no economic background for the selection of cases and setting priorities). The only apparent difference is the fact of working under the supervision of another, more experienced lawyer – such a fate is, also outside the clinics, very often shared by young and middle-aged lawyers, and certainly during the apprenticeship period.

The parallel existence of two goals of clinical law teaching is emphasized – the first one includes providing students with practical knowledge (Klauze, 2014: 100), showing the realities of practicing legal professions, and finally: enabling these young people, most often at the beginning of their life path, to verify whether the practice of law, in its broad sense, is their life calling.

The second purpose, which is probably more important from the social point of view (although it is impossible to deny the social importance of the first purpose), is providing pro bono legal aid to persons who are not able to bear the costs of a professional lawyer (Szewczyk, 1999: 15).

In the Polish system, all students working in the clinics provide legal advice to the poor (those who cannot afford a professional lawyer). The assistance is provided in accordance with the rules set forth by the foundation that oversees all the clinics, which has drawn up a document of standards binding for the clinics. According to these standards, law clinics should strive to provide the highest quality assistance and be supervised by qualified lawyers. The assistance provided by the clinics is free of charge. One of the main values in the work of law clinics should be far-reaching confidentiality. The client of the clinic and the student dealing with his/her case should be connected by a deep relationship of trust (FUPP, 2014).

The clinics received their highest ever number of cases in the 2011/12 academic year, when the clinics accepted a record 13,379 cases. Since then they have recorded a noticeable decline in those interested. In 2014/15, the figure was 10,693 cases, giving an average per student of around 5 clients accepted. In the 2019/2020 academic year, the university-ran legal clinics handled 2,547 cases. There were 1,219 students and 318 teaching staff active in the clinics. This is tantamount to two cases per student and eight cases per academic supervisor. The number of cases in the academic year in which the FLAA came into effect was 8424. This represents a decrease of almost 70 %.

Between 2003 and 2020, the number of university clinics increased from 17 clinics in 14 cities to 27 clinics in 17 cities. It is noticeable that the growth rate has slowed down since the FLAA came into force. Indeed, from 2016 to date, only one new dispensary has emerged (which corresponds to the emergence of one new dispensary in a 5-year period, with the previous dynamic of 9 new dispensaries in 13 years). It is not possible to clearly link this issue with the omission of legal aid offices in the FLAA or, what seems most logical, with the emergence of a broad system of state legal aid competing with student legal aid offices. The correlation is interesting, however.

All the above is happening while the number of court cases, especially the rate of civil litigation, has been rising – steadily. In Poland only, during the period from 2010 to 2016, the so-called *disposition time index* had increased by a little over 62 % (Klimczak, 2020: 7-9). In the period between ending in 2020 and starting in 2015, the average time of court proceedings increased from 4.2 to 7 months (the increase of 2.8 months is tantamount to a 67 % increase rate). Polish courts are overburdened, even though the number of judges in relation to the population is relatively high (Siemaszko, 2016: 14, Kociołowicz-Wiśniewska, Pilitowski, 2017: 23). This data indicates that the rate of Poles' activity in legal and court matters is quite high and rising.

3.3. Audition rights as a barrier for law school clinics

Legal barriers facing university clinics can be divided into procedural and institutional (Hadel, Jarosz, 2017: 82). The former are related to the way court proceedings are structured. The latter: with the functioning of the entire system of free legal advice on the one hand, and the system of student legal clinics on the other, with the way the position of university clinics is shaped in the system of law and law protection bodies, as well as, in a broader sense, with the regulations governing the undertaking and conduct of activities consisting in the provision of legal assistance (Pisulinski, 2005: 38). Issues of substantive law (other than those regulating the existence and life of law school clinics themselves, that is, broadly speaking, issues of civil or criminal law) can be treated here as existing and, as being the core subject of the activity of legal advice, not directly affecting the way such clinics operate. They affect the whole society in the same way, its defects are not defects specifically affecting clinics.

Unfortunately, none of these barriers were addressed in the FLAA. Some even believe that the Act has worsened the position of university clinics.

The first and most serious and procedural barrier unaddressed thus far is the inability of a student participating in a law school clinical program to appear in court proceedings, either as an attorney *ad* litem or as a representative for certain actions (especially to act, argue and represent the client in a hearing).

The possibility to act as a defense attorney in criminal proceedings is limited to advocates and, starting from 1 July, 2015, also to legal advisers i.e. the other profession grouping attorneys in Poland (see: Article 82 of the Polish Code of Criminal Procedure, Articles 65-69 of the Polish Advocates' Profession Act and Article 24 of the Legal Advisers' Profession Act). The rule applies also to attorneys representing other parties in criminal procedure (e.g. acting as the so-called

auxiliary prosecutor for the harmed person) (see: Article 87 of the Polish Code of Criminal Procedure). The regulation is analogous in misdemeanor proceedings (see: Article 24 of the Polish Code of Procedure in Misdemeanor Cases). However, it must be underlined here that the previous Code of Procedure in Misdemeanor Cases provided, in its Article 30, that a defense representative, apart from a person entitled to act as such pursuant to the provisions of the then-biding act regulating the legal profession, could also be any other trustworthy person admitted by the chairperson of the adjudicating council or the chairperson of the panel of judges – seemingly, therefore, this provision could have been interpreted as to encompass a possibility for a law student to be admitted to defense *ad litem*, notwithstanding the fact that no legal clinics existed then.

In civil trials, the catalogue of persons entitled to act as parties' representatives is exhaustively regulated by Article 87 of the Polish Code of Civil Procedure. In principle, the position of an *ad litem* representative is restricted to the benefit advocates and legal advisers, with a few exceptions: a broader one for family members of a party (Article 87(1) of the Polish Code of Civil Procedure) and a narrower ones for 1) specialized legal professions (a patent attorneys or a restructuring adviser) in cases within the scope of their area of expertise, 2) persons managing a party's property or interests, 3) persons maintaining a permanent contract of mandate with a party, covering the subject matter of a given case, and 4) co-participants in the dispute.

A similarly narrow, as in civil proceedings, catalogue of possible legal representatives is provided for in the court-administrative procedure, in which a party's representative may be an advocate or a legal adviser, and also another plaintiff or a participant in the proceedings, as well as a spouse, siblings, ascendants or descendants of a party and persons in an adoption relationship with a party, and other persons, if specific provisions so provide.

An example of Polish regulation starting from a different premise is the administrative procedure. The Administrative Procedure Act allows for the appointment of a representative of any person having legal capacity (Article 33(1) of the Polish Code of Administrative Procedure). There is also an additional exception, rarely used in practice, existing within the framework of criminal executive procedure: this act creates the institution of a convicted person's representative (Article 42 of the Polish Code of Criminal Enforcement), who enjoys limited powers to submit, on behalf of and solely in the interest of the convicted person, motions, complaints or requests to the competent authorities and institutions, associations, foundations, organizations, churches and other religious associations, but otherwise may be allowed to participate in proceedings before the court – although, as explained in the case law, within a scope narrowed in principle to attendance at a session.

The inability to act for a party as his/her representative implies the impossibility of filing letters for him/her and of participating in procedural acts, in particular in hearings and meetings. It is also associated with minor impediments, such as lack of access to case files and access to information (by telephone or computer) about the status of the case. The lack of regulation of professional secrecy is also a significant issue.

The catalogue of entities entitled to access to the records of proceedings is specified in procedural laws. In civil proceedings, pursuant to Article 9 § 1 sentence 2 of the Code of Civil Procedure, only the parties and participants to the proceedings have the right to inspect the case file and obtain copies, copies or excerpts thereof. These issues are overlapped with the provisions of the Rules of Procedure of common courts of law, which provide that access to files and the documents contained therein for the purpose of inspection or independent recording of their image to a party or a participant in a non-trial proceeding may take place upon proof of their identity, and with respect to other persons – upon proof of the existence of a right arising from the provisions of law. It is clear from the wording of this standard that students of university clinics do not have such a right and – without the status of an attorney – cannot have it. The practice shows that court employees even exclude the possibility of a party reviewing files in person, albeit in the company of an assisting person. Such a solution results in significant logistical and practical difficulties for clinics.

Not only can the student not review the case file himself, but he cannot even view it with his client. On the part of the clients, this results in the necessity to incur unnecessary costs of making photocopies of the files and printing them out for the Clinic, or even ordering photocopies from the court, as due to age or resourcefulness of persons assisted by the Clinic, it is often impossible to make photographs of the files on their own). It is also a hindrance from the point of view of the clinic's obligation to verify the client's statements and limited trust in him – the ethical rules obliging the participant's in university-ran legal clinics, modelled strongly on the lawyer's ethics,

requires such an approach. Meanwhile, because of restrictions on access to the case file, the student conducting the case must rely only on material received from the client, about which there is a risk of (not necessarily deliberate) selection.

The same applies to obtaining information about the status of a case by phone or e-mail. It should be added here that the Rules of the Common Courts of Justice in theory severely limit the catalogue of matters that can be determined over the phone (to information such as appearing on the agenda and information about the date and manner of resolving the case). In practice, however, telephone information provided to attorneys also includes information about service of documents and their dates. In the Polish system, such information is of key importance, as it determines whether a hearing will be held at all (e.g. the issue of failure to serve a summons on a witness).

An important unfortunate problem with the informal status of law school clinical program participants is the lack of regulation of professional secrecy (or similar). This exposes both students and the clients they serve to the risk of being required to testify about facts learned in connection with a case. Even a cursory recapitulation of the arguments in favor of professional secrecy of lawyers is beyond the scope of this text. Rooted in European legal culture and anchored in the conditions of international and European mechanisms for the protection of human rights, the Polish legal system protects advocacy secrecy on several levels, as expected. However, it has not been able to find a solution that would protect students taking part in clinical programs and the citizens they serve.

3.4. Proposals to regulate limited audition rights for students in clinical programs

A peculiarity of university clinics, especially in the context of other institutions operating in the system of legal aid and civic counseling (which often prefer not to venture beyond the public legal education), is that they rarely avoid accepting cases that need ultimately to go to a civil trial. As a result of this, and the limitations described above, students of university clinics assist clients in cases where their services are limited to drafting briefs (including appeals). As for other aspects and phases of a trial, the client is left to his or hers own devices; especially argue during hearings on his or her own. The student responsible for the case may only be present at the hearing – practically forced to stay in the seats reserved for the public. It should be emphasized that this issue is regulated in a similar way in the currently binding FLAA as regards the scope of free legal aid, with the difference that the activity of the advisors is limited to drafting a brief (possibly with an application for a public attorney). On the one hand, perhaps the legislator's intention was not to create room for market competition with advocates and legal advisers. On the other hand, there are, in the author's opinion, strong arguments for broadening the scope of activities that are permissible for students participating in law school clinical programs.

The possibility of at least a limited appearance alongside and on behalf of clients would seem to be of considerable importance for the practice of law clinics, expressed in at least two aspects. Firstly, it is necessary to point out the particular characteristics of the clientele of university clinics. For reasons that probably don't need explaining, they are mostly elderly, ill people, often inadequate in life, lacking court experience and familiarity with presenting their arguments. One should also take into account the factor of being under stress: clients are very often extremely nervous about the situation, intimidated by the seriousness of the court and worried about the consequences. Clients ask for help in often complicated cases, in which professional attorneys are not willing to provide legal assistance for economic or practical reasons.

It is common for clients of clinics, when brought to court alone and without assistance, to make statements and express positions that are not accurate or harmful to themselves. It is less of a problem if clients' statements are made off-topic, "beside" the point. It is more difficult when clients themselves contradict key elements of their own position, whether in terms of legal argument or those relating to the facts of the case. This strongly suggests that clinic clients would benefit from having students present their position and speak on their behalf in court – it would relieve them of a burden that they are often unable to carry. The psychological significance of the presence of a student, acting in a role similar to that of an advocate, as a support and assistance to the client cannot be overestimated either.

It should also be noted that the student legal clinics make intensive use of the procedural opportunities offered to them by the Code of Administrative Procedure and the Criminal Executive Code. In addition to acting as attorneys in administrative proceedings and as representatives of the convicted person in criminal executive proceedings, students of the student legal clinics actively

undertake activities in the role of guardians ad litem appointed by the courts in various types of proceedings. Student legal clinic volunteers often also take part in university disciplinary cases as defense counsel.

The functioning of the university legal clinics, including constant, regular and thorough monitoring of student activities by senior staff, allows for the maintenance of standards of maximum diligence expected of a professional lawyer acting in a trial on behalf of his or her client. A possible risk of making mistakes exists as always, however, the above-mentioned way of shaping the work of the clinic and, achieved thanks to the reliably conducted sifting of students during recruitment, the high substantive level of students donating their time to the clinic allows for a significant minimization of this risk – in principle, to the level uncontroversial in the Polish legal system in the case of trainees conducting various acts in litigation independently (though under supervision). In the event of erroneous practice, there also remains the issue of the university's liability insurance, certainly higher than that of law firms.

Interestingly, there exist in the broadly understood Western legal order certain states whose procedural laws provide for certain audition rights for students working in legal clinics there. This is the case within virtually every American state (Joy, 1999: 267; Chavkin, 1998: 1546-1554). In addition, the United States Judicial Conference adopted a model student practice rule and most federal courts permit student practitioners (Walker, 1980: 1101).

The flagship example of a state regulation granting students a limited capacity to act in court is the one from Louisiana. Rule XX of the Rules of the Supreme Court of Louisiana, enacted in 1999, provides for the possibility for students working in university-run legal clinics to appear before all courts and tribunals (the equivalent of specialized administrative courts, etc.), subject to several requirements. The case must be conducted within the framework of a clinical program that takes into account the supervision of its conduct by the university, it must be individually selected through a recruitment process controlled and conducted by the university's law faculty, and the student's appearance in a given case before a court must be supported by the prior written consent of the principal-client and the written consent of the person supervising the conduct of the case. The student must have completed at least four semesters of legal education (tantamount to two thirds of the education period in a three year American law school program), and a required law school coursework in legal ethics.

It bears underlining that American courts treat the requirements that are to be fulfilled by student-practitioners very seriously (especially on grounds of US Constitution's Sixth Amendment's right to the assistance of counsel, which is construed as to demand the assistance of a professional, as opposed to attorneys-in-fact or laypersons). For instance, the Supreme Court of Illinois held that a law school clinic's volunteer who had failed to comply with the requirements of the that court's "student practice" rule was not "counsel" for purposes of a defendant's constitutional right to counsel (Denzel, 2010: 710).

In light of the above, a proposal has been put forward (Hadel, Jarosz, 2017: 83) to grant university legal clinic students certain limited audition rights, allowing them to appear on behalf of and in the company of their clients at court hearings, to offer factual explanations and to make legal arguments on the clients' behalf. The power to perform dispositive procedural acts (would obviously have to be excluded from the scope of such authorization. The exclusion would also apply to the possibility of students, as sui generis legal representatives, to submit pleadings on behalf of the parties. To that extent, clients would retain exclusivity, maintaining in their hands control over the written positions presented at trial. The concept was that the ability of law clinic students to have audition rights in court procedures would have to be subject to requirements similar to those provided by the Louisiana state legislature.

The prerequisites that the relevant provision would thus have to provide for would be: supervision of the handling of the case by the university (student law clinic), an express written authorization from the client consenting to the student's representation in the scope of the court hearing, and the express written consent of the clinic coordinator, as the person with substantive supervision of the student's practice, to the appearance of that particular student as a litigation representative. It is worth noting that a specific consent to the provision of legal aid by a person of a particular, incomplete professional standing is also present under the FLAA – this Act deals with potential shortages of staff in legal aid facilities by allowing lawyers without professional qualifications to provide advice, provided, however, that the client gives a written consent to such

an arrangement. Even more so, there is currently no systemic reason to exclude the possibility of a client's informed consent to another form of legal risk, such as allowing a narrowly empowered student to act in a case.

3.5. The new Polish regulation on free legal aid and civic counselling.

Placed in Chapter I (General Provisions) – Article 1 FLAA states that: "The Act lays down rules for the provision of free legal aid, as well as rules for the operation of public administration bodies in the field of legal education". This provision should, however, be read in conjunction with Article 3 of the FLAA. From the juxtaposition of these provisions it clearly appears that free legal aid covers only legal services rendered in the the pre-court stage, and only to a limited extent.

According to further provisions of the Act (Article 3 FLAA), free legal aid includes:

1) informing an entitled person of the current legal status, of the rights to which they are entitled or of the obligations incumbent upon them; or

2) indicating to the entitled person the way of solving his/her legal problem or

3) providing assistance in drafting a letter in matters referred to in points 1 and 2, excluding pleadings in pending pre-trial or court proceedings and pleadings in pending court-administrative proceedings or

4) free mediation;

5) drafting an application for exemption from court fees or appointment of a public attorney in court proceedings or appointment of an attorney in administrative court proceedings.

Before amendments, Article 3 s. 2 FLAA in the original version of the Act excluded from the scope of free legal assistance matters: 1) tax matters related to the conduct of economic activity; 2) customs, foreign exchange and commercial law; 3) matters related to the conduct of economic activity, with the exception of preparation for the start of such activity.

However, this provision has been repealed together with a set of new SARS-CoV-2 pandemic and is intentional. This is because it has been combined with the expansion of the catalogue of persons entitled to assistance under the FLAA to include self-employed individuals – but only those who have not employed other persons during the past year.

Initially (the first version of the Act of 2015), the catalogue of persons entitled to receive assistance was casuistically narrowed (and included, for example: beneficiaries of social assistance, pregnant women, seniors, veterans, etc., etc.). Currently, free legal aid and free civic consultancy is available to entitled persons who are unable to bear the costs of paid legal aid. This is how it was regulated by the amendment that came into force in 2019. After the changes introduced during the pandemic: an individual who runs a sole proprietorship not employing other persons during the last year is also entitled to assistance. An important test determining access to forms of assistance is the submission of relevant declarations.

Free legal assistance is provided, in principle, by an advocate or a legal adviser, with the option to have trainees act as substitutes. An advocate or legal advisor provides free legal assistance on the basis of an agreement concluded with the county (*powiat*). This is how, *prima facie*, the Act stipulates. In practice, however, another provision of the FLAA contains a backdoor. Article 11 of the FLAA states that half of the facilities allocated within the county for the purposes of the Act shall be given to legal advisers and advocates for the purpose of providing free legal assistance, and the other half to non-governmental organizations for the purpose of providing free legal assistance or free civic consultancy. In these facilities – as explicitly stated in Article 11 s. 3(2) – free legal aid may also be provided by a person with no criminal record and without civil or public liability, who: a) holds a degree in law from a higher educational institution in Poland or a degree recognized abroad, b) has at least three years' experience in performing activities requiring legal knowledge and directly related to the provision of legal aid, c) enjoys full public rights and has a full capacity to perform legal acts. Such a solution constitutes a huge and important breach in the principle of free legal assistance provided by eligible lawyers, which is present in relation to half of the free legal assistance facilities in Poland. Interestingly, in the case referred to in the above mentioned provision, the client, before obtaining assistance, shall make a written statement that he/she is aware of the fact that he/she is getting legal assistance from a non-professional. An analogous solution has been applied by university law clinics (FUPP, 2014). Definitely important in practice, but also for theoretical considerations about the location in the system of non-professionals providing advice within NGOs, is the issue of silence by the law on the issues of their professional

secrecy (attorney-client privilege) and duties towards the client, including loyalty, avoidance of conflicts of interest and others, which are inherent in the relationship of lawyers with their clients.

The newly added Article 3a of the FLAA in turn defines unpaid citizen counselling. It covers activities tailored to the individual situation of the person entitled, intended to make that person aware of his or her rights or obligations and to help him or her resolve the problem independently, including, where necessary, drawing up an action plan together with the person entitled and assisting in its implementation. Free citizen counselling includes, in particular, advice for people in debt and advice on housing and social security matters. Sponsors of the bill explained it thus: "counseling in general, and civic counseling in particular, undoubtedly makes it easier to navigate the legal system, prevents social marginalization of those who receive counseling, helps solve the problems of those already excluded, and thus facilitates their return to society. It also provides a practical form of legal and civic education" (Reform Bill Explanatory Memorandum, 2018: 3).

Free civic counselling may also be provided by a civic advisor. According to Article 11 s. 3a of the FLAA, a civic advisor is a person who has been trained to provide civic counselling or who has at least three years' experience in providing specialist advice or in social work. The training consists of 70 hours of counselling, of which at least 15 hours are for counselling methodology and at least 20 hours for debt counselling - Article 11a s. 1 FLAA.

3.6. Critical remarks on FLAA and it omitting the law school clinics.

It is noteworthy, as already described above, that the FLAA – both in its original version (FLAA 2015) and in the substantially amended text adopted in 2018 (binding since 01.01.2019), and finally: after the changes introduced during the SARS-CoV-2 pandemic – entirely omits, as if completely disinterested, the already existing alternative system of legal aid that university legal clinics are. The law was constructed as if it was to be enacted in a state with no forms of free legal counsel, as if free legal aid was to be a completely new and previously inaccessible phenomenon.

Such a solution deserves multifold criticism. Firstly, such a decision resulted in the newly-built free legal aid system failing to utilize the existing apparatus of the legal clinics; though the number of students' legal clinics has been meek compared to the number of facilities now run under FLAA, it is hard to fathom why had the law chosen not to employ also those existing venues – from a purely logistics-oriented perspective. Similar remarks apply to the people active in the university legal aid system. Especially in the early months of FLAA's operation, it is puzzling why had the lawmaker not taken an "all-hands-on-deck" approach toward the issue of whom and to what extent is available to partake in the free legal aid system. It is an omission both reprehensible and unjustified, not to take advantage of available human resources that are highly qualified, motivated (as many volunteers are) yet at the same time: operate under professional academic supervisions in terms of both substantive quality of the advice proffered as well as the ethical aspects of activity. Another mistake was the failure to take advantage of the existing reputation of the university's clinics, coupled with the reputation of the university.

The above is incomprehensible, all the more so given that FLAA provides for a considerable place for third sector entities. Interestingly, it should be emphasized that the possibility of running free legal aid facilities by non-governmental organizations was not obvious from the very beginning. The first version of the bill did not provide for this at all. It was only the resistance and protests of many non-governmental entities providing free-of-charge civic counselling services that inspired the Ministry of Justice to amend the draft law. Similar pressure from university clinics, however, was not given consideration.

At the same time, it is impossible not to see that the entry into force of the FLAA, a law shaping a system in which the bulk of the work (at least half of it, given the inflexible division of facilities between NGOs and attorney's professional societies) is carried out by advocates and legal advisers, must have affected the popularity of law school legal clinics, whose public perception cannot by any means overcome the awareness that advice is nevertheless given by students (Lach, 2016: 21). Though a clear link between the emergence of FLAA and the continuously diminishing popularity of students' legal clinics is hard to prove in causal terms, it is, *ceteris paribus*, tough to establish any other reasons that could have led to such a downfall in terms of case and client number (over 70 % within 4 years). That FLAA would have such an effect had not maybe been directly intended, but must have been foreseeable. This must lead to an alternative: either the sponsors of the FLAA bill did not care at all about university legal clinics and their operation, or they decided to deliberately sacrifice the law school aid programs in the name of a greater good.

Whichever is the case, the bill and its explanatory memorandum does not offer a slightest rationale to this end.

Furthermore, FLAAs failure to employ law school clinics in the system and the resulting decline in client and case numbers on their part is a blow to the law school programs as a form of legal education. The less cases there are, the less students may partake in the program – and, to that extent, partake actively. That a student may deal with, on average, two cases a year, is not enough to make the clinical program intensive enough for educative purposes nor does it allow it to be a fair simulation of a professional lawyer's work. This is a significant weakening of the university clinics' attractiveness from the perspective of interested candidates. It has been argued that involvement in clinical programs is a net educative benefit especially for the students. That benefit has been visibly diminished. Moreover, FLAA offers nothing in return. It does not provide for any forms of students' commitment in the legal aid system (unless they choose to become civic advisors).

It also bears noting that the FLAA has been criticized because of the significant imbalance between the number of facilities allocated to professional attorneys and those allocated to non-governmental organizations. On the one hand, this was admonished by the professionals and their association. For one, the Polish Supreme Bar Council presented an opinion on the bill, deploring the solutions adopted therein, pointing to the discrimination of professional attorneys: advocates and legal advisers on grounds of costs (fees) and number limits (NRA, 2014: 11). On the other hand, this solution has been criticized on the grounds that it allocates facilities in equal parts between professional attorneys – of whom there are, together with trainees in pupillage, more than 80,000 persons – and non-governmental entities, which are not equipped with such numerous human resources. Commentators have pointed out that the legislators unreasonably placed such a large obligation on NGOs (Paxford et al., 2016: 264).

At the same time, the legislator encumbered NGOs with the obligation to present, to a competent supervising public body, agreements entered into with professional attorneys (apparently for the purpose of giving advice in the facilities ran by NGOs). It is not clear what the legislators' intention was here, especially given the prescriptive, not enabling wording of the provision at hand; whether the rule was to serve as a form of broadening the human resources pool available for non-governmental entities (in such case, however, it would be sufficient to simply allow them to conclude agreements with professional lawyers, clarifying any possible doubts in this regard – i.e. employ an enabling mood in the wording of the rule), or whether this provision is aimed at fulfilling a guarantee role (a minimum level of services provided). In the first case: why, then, were as many as half of the facilities given to non-governmental organizations?

Alternatively, if we accept the second option: why, then, were two further-reaching exceptions allowed, with: 1) lawyers without qualifications, and 2) civic advisors being admitted to offer legal and civic aid? Regardless of the above: in the context of the need to "save" the system with professional attorneys, it seems even more erroneous that the legislator gave up on the idea to utilize the pre-existing clinical system operating in connections with Poland's top law schools.

Another omission of the commented law, which is the result of it being constructed as if law school clinics had not existed, is the failure to not only make the university clinics a part of the free legal advice system but also to regulate the status of their volunteers or employees. In the context of the enactment of the Act and its shape at that time, this was probably a consequence of the overall omission of the phenomenon of clinics in the regulation.

A certain logical opportunity to partially regulate the status of students from university clinics was the amendment of 2018. At that time, it was possible, with the invention of citizen counsellors into the system, to give their status automatically, or to introduce a similar special status. Nor was the FLAA's systemic change to allow unqualified lawyers to provide legal advice – with the client's written consent – employed similarly in the case of law school. Such a breakthrough could have provided a primer on how, in similar conditions, clients are allowed to make dispositive choices as to whom they agree to offer them legal aid.

Finally, the FLAA omitted the issue of attorney-client privilege. A global overview of the regulation of attorney-client privilege reveals that the specific regulations vary considerably from one jurisdiction to another. Among the common features, however, it covers knowledge of facts obtained from the client in the course of providing legal assistance by an advocate. This broad definition includes, inter alia, giving oral advice, conducting all matters for a client, including the

so-called ongoing legal services, as well as representing the client in specific, individual proceedings, including in particular criminal defense proceedings.

However, it is important to note that the concept of attorney-client privilege has inherently two aspects: it encompasses both the obligation to maintain confidentiality with respect to information learned in the course of, or in connection with, the professional activity of an advocate (the internal aspect of attorney-client privilege – the legal, ethical and moral obligation incumbent on the advocate), but also the sets of specific legal instruments available for the attorney to protect the confidentiality of information covered by the privilege (the external aspect – the attorneys' rights utilized as to protect secrecy).

In particular, in the case of professional service of activities of such social importance as legal advice, the enactment of rules protecting professional confidentiality is a necessity. Each legal system constructs certain principles for maintaining and protecting attorney-client privilege. This makes it all the more surprising that in the case of the FLAA, it is really only a narrow regulation of the internal aspect of secrecy (in case of the NGOs; the law is tacit about professional attorneys active in the system, possibly due to them being already covered by their respective professions' rules on confidentiality), obliging the entities who provide advice to further oblige the persons active with them to maintain confidentiality. The question is whether it would not have been more appropriate to impose a statutory duty of confidentiality on those persons, while still respecting the internal aspect of confidentiality.

And above all, what was above called the external aspect of attorney-client privilege was not addressed at all in FLAA. The least the law could have done was to allow persons providing advice under the free legal aid system to benefit from the advantages accorded to advocates and legal advisers – such as the right to refuse to give testimony, the right to refuse to answer questions, the protection of documents made in the course of giving advice to clients, and other.

4. Results

Free legal assistance offered to persons who cannot otherwise afford to cover the costs of legal services themselves has been, since many decades, a vital and evergreen problem for modern states. Especially Western societies with the ever-increasing number of elderly citizens may find themselves in a condition where the shape of the free legal aid system will shape how the courts and the law as an entire apparatus of the social machinery operates. Unsurprisingly, the Polish legislators have at last turned their attention toward the problems of flee legal aid. However, the system of free legal aid they have thus created is not free from flaws. Clinical legal education programs at the best Polish laws schools have, since well over two decades, formed an important piece of the puzzle that Polish legal aid system was, prior to it being encompassed by one encroaching regulation. Obviously, how university clinics operated was stained with difficulties and barriers, some of them purely legal.

Having outlined such barriers, we have seen how FLAA has failed include the law school clinics in the system and, moreover, failed to address the barriers laid before such clinics in a systemic way. Both these failures show that the legislators responsible for certain solutions of FLAA have not had a proper chance to participate in the free legal aid system prior to choosing to regulate it. The new free legal aid system and law school clinics could have benefited from mutual interactions: the former could use the clinics' experience and standards of operation, as well as students' volunteer work, their vitality and free time, especially given certain manpower hardships in the case of free legal aid facilities run by NGOs; the latter, in turn, could use the infrastructural and financial support that the state-financed system may offer. Unfortunately, how FLAA was shaped, even after amendments, constitutes merely a missed opportunity for much needed synergy in the area of free legal aid.

5. Conclusion

The analysis conducted leads to a conclusion that the method of constructing the free legal aid system in Poland has certain shortcomings. While the fact alone that the lawmaker considered it reasonable to address the issue of free legal assistance, it is impossible not to notice the inadequacies of the adopted solutions. To begin with, the failure to engage with law school clinics and render them a part of the free legal aid system is a missed chance for synergistic operation and an improvident approach to existing human and infrastructural resources. Secondly, the publicly

backed free legal aid system failed to address certain procedural, systemic and ethical problems related to the activity of persons active in the system that had already been pointed out with respect to law school clinics.

References

Airey v. Ireland, 1979 – Case of Airey v. Ireland, Application № 6289/73, judgment of 9 October 1979.

Case C-279/09 – Case C-279/09, DEB, EU:C:2010:811

CEPEJ, 2020 – European Commission for the Efficiency of Justice (CEPEJ). (2020), CEPEJ 2020 Report: Efficiency and quality of justice in Europe (2018 data).

Chavkin, 1998 – *Chavkin, D.F.* (1998). Am I My Client's Lawyer? Role Definition and the Clinical Supervisor, 51 SMU L. Rev. 1507, p. 1507-1554.

Chavkin, 2002 – Chavkin, D.F. (2002). Clinical Legal Education. A Textbook for Law School Clinical Programs, Cincinnati, Ohio. 169 p.

Denzel, 2010 – Supreme Court of Illinois (2010). In re Denzel W., 237 Ill. 2d 285, 341 Ill. Dec. 460, 930 N.E.2d 974, 62 A.L.R.6th 705.

FLAA, 2021 – Polish Act of 5 August, 2015, on free legal aid, free civic counselling and legal education, amended version (consolidated text: Journal of Laws of the Republic of Poland of 2021 item 945) (wherever referred to as FLAA, the reference pertains to the amended, now-binding version).

FLAA, 2015 – Polish Act of 5 August, 2015, on free legal aid and legal education – as enacted (Journal of Laws of the Republic of Poland of 2015 item 1255).

FLAA Reform, 2018 – Polish Act of 15 June, 2018, amending the Act on free legal aid and legal education and certain other acts (Journal of Laws of the Republic of Poland of 2018 item 1467).

FUPP, 2014 – Fundacja Uniwersyteckich Poradni Prawnych (2014). 'Standardy działalności Uniwersyteckich Poradni Prawnych', Tekst jednolity przyjęty przez Radę Fundacji Uniwersyteckich Poradni Prawnych na mocy uchwały nr 9/2014 z dnia 08.03.2014 r. (in English: „Standards of University Legal Clinics", consolidated text approved by the Board of the University Legal Clinics' Foundation by resolution no. 9/2014 of 08.03.2014).

Hadel, Jarosz, 2017 – *Hadel, M., Jarosz, I.* (2017). Współczesne problemy poradnictwa prawnego na przykładzie działalności Studenckiej Poradni Prawnej UJ – kwestie de lege lata i de lege ferenda [Contemporary problems of legal counseling on the example of the activity of the Student Legal Clinic of the Jagiellonian University – issues de lege lata and de lege ferenda]. Internetowy Przegląd Prawniczy TBSP UJ. 8: 78-95.

Joy, 1999 – *Joy, P.A.* (1999). Political Interference With Clinical Legal Education: Denying Access To Justice, 74 Tul. L. Rev. 235: 220-284.

Kellerbauer et al., 2018 – *Kellerbauer, M., Klamert, M., Tomkin, J.* (2018). The EU Treaties and the Charter of Fundamental Rights. 2328 p.

Klauze, 2014 – *Klauze, M.* (2014). System poradnictwa prawnego i obywatelskiego w Polsce [System of legal and civic counseling in Poland. Implementation of model solutions]. Wdrażanie rozwiązań modelowych. Red. M.J. Skrodzka Warszawa. Pp. 87-118. [in Polish]

Klimczak, 2020 – *Klimczak, J.* (2020). Szybkość postępowań sądowych w Polsce i innych państwach Europy [Speed of court proceedings in Poland and other European countries]. Instytut Wymiaru Sprawiedliwości – Analizy Wymiaru Sprawiedliwości Warszawa. [in Polish]

Kociołowicz-Wiśniewska, Pilitowski, 2017 – *Kociołowicz-Wiśniewska, B., Pilitowski, B.* (2017). Ocena polskiego sądownictwa w świetle badań [Assessment of the Polish judiciary in the light of research]. [Electronic resource]. URL: https://courtwatch.pl/wp-content/uploads/2017/05/Raport-Fundacji-Court-Watch-Polska-Ocena-polskich-sądów-w-świetle-badań-maj-2017.pdf [in Polish]

Lach, 2016 – *Lach, D.* (2016). Nieodpłatna pomoc prawna jako instrument zabezpieczenia społecznego [Free legal aid as an instrument of social security]. *Ruch Prawniczy Ekonomiczny i Socjologiczny*. 3: 21-34. [in Polish]

NRA, 2016 – NRA (Naczelna Rada Adwokacka). Opinia NRA 145-U.15.2014 w przedmiocie projektu ustawy o nieodpłatnej pomocy prawnej oraz edukacji prawnej [Opinion of NRA 145-U.15.2014 on the draft law on free legal aid and legal education]. Warszawa, 2014. [Electronic resource]. URL: https://www.nra.pl [in Polish]

Paxford et al., 2016 – *Paxford, B., Rynkun-Werner, R., Wasylkowska-Michór, M.* (2016). Ustawa o nieodpłatnej pomocy prawnej oraz edukacji prawnej [Act on free legal aid and legal education]. Komentarz., Warszawa. [in Polish]

Pisuliński, Łomowski, 2005 – *Pisuliński, J., Łomowski, D.* (2005). Studencka Poradnia Prawna. Idea, organizacja, metodologia [Student Legal Clinic. Idea, organization, methodology]. Pp. 38-51. [in Polish]

Reform Bill Explanatory Memorandum, 2018 – Explanatory memorandum to the bill of the Act amending Act of 15 June, 2018, amending the Act on free legal aid and legal education and certain other acts, Polish Sejm Bill no. 1868. 143 p.

Siemaszko, 2016 – *Siemaszko, A. et al.* (2016). Sądownictwo. Polska na tle pozostałych krajów Unii Europejskiej [Judiciary. Poland compared to other European Union countries]. Warszawa. 83 p. [in Polish]

Skrodzka, 2014 – *Skrodzka, M.J.* (2014). System poradnictwa prawnego i obywatelskiego w Polsce [System of legal and civic counseling in Poland]. *Wdrażanie rozwiązań modelowych.* Warszawa. 203 p. [in Polish]

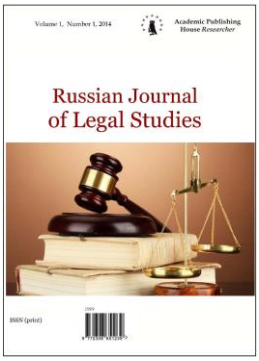
Sokal, 2017 – *Sokal, P.* (2017). Pozytywy oraz trudności nieodpłatnej pomocy prawnej – próba oceny. *Monitor Prawniczy* [The positives and the difficulties of free legal assistance - an evaluation attempt. Legal Monitor]. № 9, pp. 482-490. [in Polish]

Szewczyk, 1999 – *Szewczyk, M.* (1999). Idea uniwersyteckich poradni prawnych [The idea of university legal clinics]. *Klinika*. 1: 13-31. [in Polish]

Walker, 1980 – *Walker, G.K.* (1980). A Model Rule for Student Practice in the United States Courts, 37 *Wash. & Lee L. Rev*. 1101: 1101-1158.

Published in the Slovak Republic
Russian Journal of Legal Studies
Has been issued since 2014.
E-ISSN: 2413-7448
2021. 8(1): 41-46

DOI: 10.13187/rjls.2021.1.41
www.ejournal25.com



Some Issues Related to the Circulation of Weapons in the Russian Federation

Ilya Saprin [a], [*]

[a] Voronezh State University, Voronezh, Russian Federation

Abstract

The article analyzes the problems relating to the weapons turnover in the Russian Federation. The paper focuses on some imperfection of the legislation regulating the circulation of weapons in the Russian Federation. The consideration of the subject today is particularly timely because it concerns weapon community in Russian Federation, because gun culture in Russia and it promotion remains a popular trend. In the course of the research author focus on typical cases encountered in law enforcement practice and provides examples of contentious legal norms. In recent times in Russia, there has been a tendency for interpretation of the law, which prejudice rights of the gun owners. Particular attention is paid to improvement of legislation in this area, specifically in terms of regulating the possibility of transferring weapons to citizens of the Russian Federation and foreign citizens. The purpose of this research is the correct application or interpretation of the law for exclusion deficiency of law.

Keywords: administrative law, weapons, arms trafficking, regulatory legislation.

1. Введение

Оружие являлось одной из причин развития цивилизации. Можно сказать, что эволюция человечества в определенной степени отражена в истории развития оружия (Kolotushkin, Loseva, 2018).

В России вопросы, связанные с оружием, всегда стояли довольно остро. Можно выделить два подхода к регламентации статуса оружия:

1) либерализации законодательства, регулирующего оборот оружия, и

2) ужесточение законодательства.

Сторонниками либерализации чаще выступают лица, владеющие гражданским оружием на законных основаниях. Обычно они объединяются в сообщества или организации с целью развития оружейной культуры как в рамках региона, так и в рамках государства.

Как отмечал А.Н. Устинов, лица, принимающих сторону ужесточения законодательства, чаще всего являются либо действующими сотрудниками правоохранительных органов, либо вышедшими на пенсию. Разумеется, они имеют отпечаток профессиональной деформации вследствие службы в органах правопорядка (Ustinov, 2019).

2. Материалы и методы

В процессе исследования использовался комплексный подход к изучению законодательства в области регулирования оборота оружия на территории Российской

* Corresponding author
E-mail address: ilya.saprrin@gmail.com (I.G. Saprin)

Федерации. Автор руководствовался общими положениями административного законодательства и теории права. При подготовке статьи были использованы такие методы, как: анализ и синтез, системный, сравнительного правоведения, логический, аналогии и другие. Использование указанных методов обоснованно необходимостью полного и глубокого исследования обозначенного вопроса.

3. Обсуждение

Основными документами, регулирующими оборот оружия в Российской Федерации, являются Федеральный закон «Об оружии» от 13.12.1996 № 150-ФЗ, Постановление Правительства РФ от 21.07.1998 № 814 «О мерах по регулированию оборота гражданского и служебного оружия и патронов к нему на территории Российской Федерации». Можно также указать в этом списке внутриведомственные приказы МВД и Росгвардии. Жесткая регламентация поведения субъектов публичной администрации свидетельствует о недоверии к ним законодателя (Sherstoboev, 2018).

Разумеется, существуют и иные нормативные акты, имеющие отношение к оружию или в которых упоминается данный объект, например, Федеральный закон от 24.07.2009 N 209-ФЗ «Об охоте и о сохранении охотничьих ресурсов и о внесении изменений в отдельные законодательные акты Российской Федерации», Приказ Минприроды России от 24.07.2020 N 477 «Об утверждении Правил охоты».

Интересно, что в Республике Сербия МВД также выполняет функцию оказания услуг населению, в том числе в части регистрации оружия, но такая форма нормативных актов, как административные регламенты, там не используется (Matveev, 2020).

Под оборотом оружия и основных частей огнестрельного оружия (далее – оружие) понимается производство оружия, торговля оружием, продажа, передача, приобретение, коллекционирование, экспонирование, учет, хранение, ношение, перевозка, транспортирование, использование, изъятие, уничтожение, ввоз оружия в РФ и вывоз его из РФ.

В последнее время законодательство, регулирующее оборот оружия, претерпевает постоянные изменения. Расценивать внесенные и вносимые изменения можно по-разному.

Наше внимание будет сконцентрировано на таком виде оружия как гражданское. К нему относят такое оружие, которое предназначено для использования гражданами Российской Федерации в целях самообороны, для занятий спортом и охоты, а также в культурных и образовательных целях.

Отдельно можно выделять оружие самообороны, гладкоствольное длинноствольное спортивное оружие, все типы охотничьего оружия, поскольку именно они особо интересны.

Передача оружия в РФ строго регламентирована Постановлением Правительства РФ № 814. В ст. 15-18 постановления дан перечень лиц, которые могут передавать оружие, и указано, кому они могут его передавать. Обозначены также органы, принимающие их для ответственного хранения.

Согласно п. ж(4) ст. 15 постановления, оружие и патроны могут передаваться гражданам Российской Федерации, имеющим разрешения на хранение, хранение и ношение или хранение и использование оружия либо лицензии на приобретение оружия и патронов к нему, а также иной документ, подтверждающий право на хранение и ношение оружия, либо при отсутствии оснований для отказа в выдаче гражданину РФ лицензии на приобретение оружия, установленных пунктами 2-4 и 9 части ст. 20 ФЗ «Об оружии», – спортивными и образовательными организациями на стрелковых объектах для проведения учебных и тренировочных стрельб. Также и в пунктах «Ж(5)» и «Ж(6)» фигурирует возможность передачи оружия гражданам России и иностранцам.

В соответствии с постановление передать оружие гражданам может только юридическое лицо – образовательная или спортивная организация (как частная, так и государственная военизированная организация) для проведения учебных, тренировочных и спортивных мероприятий. Для учебных и тренировочных стрельб они могут передавать оружие только тем гражданам, которые имеют разрешение на хранение или хранение и ношение оружия, либо не имеют противопоказаний к владению оружием.

Гражданин обязан подтвердить данный факт для того, чтобы избежать наступления ответственности как для себя, так и для организации, предоставившей оружие, которое будет использовано для учебных и тренировочных стрельб.

Думается, однако, что пункт «Ж(4)» представляет собой мертвую правовую норму. Это правила, которые не претворяются в жизнь в большинстве случаев, в которых они должны применяться на практике (Orlova, 2019). Дело в том, что осуществить контроль за соблюдением данного положения практически невозможно, а доказать факт незаконной передачи очень сложно.

Практика показывает, что при посещении организаций, предоставляющие услуги в сфере учебных и тренировочных стрельб, с граждан не требуют предоставления каких-либо документов, подтверждающих отсутствие противопоказаний к владению оружием, либо специальных разрешений на хранение или хранение и ношение и др. Обосновывается это тем, что, предоставляя подобные услуги только лицам, имеющим все надлежащие документы, не окупались бы затраты на организацию и предоставление подобных услуг. Расходы превышали бы доходы, и организация бы не получала никакой прибыли.

С другой стороны, полное соблюдение подобного предписания может спровоцировать резкое повышение цен на предоставляемые услуги, потому как это повлечет за собой резкое сокращение числа потребителей.

Все это приведет к спаду качества и количества организаций и предоставляемых ими услуг, которые направлены на развитие оружейной культуры среди граждан, и, как следствие, снижению количества приобретаемых спортивными образовательными организациями, связанными со стрелковым спортом, боеприпасов. Это, в свою очередь, ударит по гражданской оружейной промышленности, повлечет снижение спроса и сокращение оборота огнестрельного оружия и боеприпасов. Именно по этой причине указанные требование законодательства не соблюдается подобными организациями, они умышленно совершают правонарушения.

Для того, чтобы пресекать подобные нарушения, необходимо проводить мероприятия по государственному контролю (надзору) в области оборота оружия, которые регламентированы Приказом Росгвардии от 14.01.2020 № 8 «Об утверждении Административного регламента Федеральной службы войск национальной гвардии Российской Федерации по осуществлению федерального государственного контроля (надзора) за соблюдением законодательства Российской Федерации в области оборота оружия». Статьи 8.6 – 8.7 данного акта предусматривают запрет препятствования руководителю, иному должностному лицу или уполномоченному представителю юридического лица присутствовать при проведении проверки лицензионных требований и давать разъяснения по вопросам, относящимся к предмету такой проверки. Исходя из этого руководитель, осведомленный и предупрежденный о проверке, в моменты проведения проверки с абсолютной легкостью способен организовать полное соблюдение законодательства на территории организации, стрелкового объекта.

Частой практикой является ведение базы данных или неформального журнала на подобных объектах и в организациях, предоставляющих услуги по организации учебных, тренировочных, развлекательных стрельб. Однако, даже проверка подобных журналов, в которых записаны персональные данные посетителей подобных организаций, которым были предоставлены услуги, не дадут стопроцентной возможности изобличить организацию в нарушении, поскольку гражданин предоставил справки по форме 002-ОУ и 003-ОУ. Данные справки свидетельствуют об отсутствии противопоказаний к владению оружием, а их изъятие не предусмотрено даже Регламентами надзорного органа.

Соответственно, единственным видимым способом обеспечения соблюдения рассматриваемой нормы является постоянное дежурство сотрудника органа, уполномоченного в сфере оборота оружия, на каждом стрелковом объекте, в каждой организации, предоставляющей услуги связанные с оружием, а также постоянный мониторинг ресурсов в сети «интернет», что является абсолютно неэффективным.

Альтернативой может быть обязывание организаций в сфере предоставления услуг, связанных с передачей оружия, снимать копии с документов, подтверждающих отсутствие преград для передачи оружия, однако, включение такого требования может повлечь иные проблемы.

Вопрос о том, целесообразно ли вносить изменения в п. Ж(4), ст. 15 Постановление Правительства РФ от 21.07.1998 № 814, в части необходимости предоставления лицами подтверждений отсутствия препятствий для передачи оружия, остается открытым, потому

как способов контроля соблюдения норм и требований, связанных с передачей оружия, за исключением выше перечисленных, автор не видит.

Помимо обоснованных и рассмотренных проблем присутствует еще одна, которая связана с наличием коррупционной составляющей пунктов Ж(4) и Ж(6) Постановления Правительства № 814. Это подтверждается тем, что обозначенные пункты фактически дублируют друг друга, за следующим исключением: положение пункта Ж(4) предписывает организациям проверять наличие разрешений и лицензий и медицинские справки, подтверждающие отсутствие противопоказаний к владению оружием для того, чтобы передать оружие для проведения учебных и тренировочных стрельб.

В то же время пункт Ж(6) позволяет передавать оружие гражданам РФ и иностранным гражданам без предоставления со стороны физического лица указанных выше документов для проведения учебных занятий по виду спорта, связанных с использованием оружия.

В нормативных актах отличий понятий «Учебные занятия по виду спорта, связанные с использованием оружия» и «Учебные и тренировочные стрельбы» не приведено, как и сами понятия остаются не раскрытыми. Это приводит к тому, что уполномоченные органы могут вольно трактовать понятия и выбирать в соответствии со своим пониманием норму, которая должна быть применима в том или ином случае, что может повлечь привлечение к ответственности за нарушение в сфере оборота оружия. Данное положение подтверждается судебной практикой. Так, в декабре 2019 года ЦССК ДОСААФ России было привлечено к ответственности по данным основаниям Решением Тушинского районного суда г. Москвы (Delo № 02a-0656/2019~ Ma-0956/2019).

В главе V Постановление Правительства РФ от 21.07.1998 № 814 отсутствует норма, регулирующая передачу оружия и патронов гражданином другому гражданину.

Сложившаяся практика показывает, что отсутствие подобного разрешения, а, соответственно, существование прямого запрета на передачу оружия одним физическим лицом другому физическому лицу полностью игнорируется значительным числом владельцев оружия вследствие большого неудобства.

Действительно, по мнению автора, подобный запрет является абсолютно нецелесообразным в определенной части. Оружие является объектом повышенной опасности и передача его иному лицу, которое не владеет им на законных основаниях, является нарушением законодательства в сфере оборота оружия. Это грозит для владельца оружия серьезными последствиями, которые предусмотрены ч. 6 ст. 20.8 КоАП РФ. Тем не менее, нарушение этой нормы сложно доказуемо.

Как уже указывалось ранее, нарушением является передача оружия одним физическим лицом другому физическому лицу, даже в том случае, если лицо, которому передается оружие, имеет разрешение на хранение или хранение и ношение оружия, то есть само владеет оружием на законных основаниях, либо имеет подтверждение отсутствия противопоказаний на владение оружием. Возникает вопрос, почему юридические лица имеют право передавать оружие лицам, имеющим разрешение на хранение или хранение и ношение оружия на законных основаниях, либо лицам, имеющим подтверждение отсутствия противопоказаний на владение оружием, а физическое лицо лишено этой возможности?

Особенно сильно такой запрет оказывает влияние в тех случаях, когда один владелец желает перерегистрировать на другое лицо оружие, подарить. Одариваемый не имеет какой-либо возможности даже подержать оружие в руках, чтобы понять, подходит оно ему или нет, нужно оно ему или нет, поскольку подобный акт передачи грозит для владельца передаваемого оружия серьезными последствиями.

Вопрос о том, а совершает ли правонарушение лицо, которое принимает передаваемое ему оружие, например, для учебной стрельбы, является дискуссионным. С одной стороны, в ст. 20.8 КоАП РФ не предусматривается ответственность за нарушение правил использования оружия, следовательно, принимающий оружие не будет привлечен к ответственности по данной статье. С другой стороны, ст. 20.8 КоАП РФ предусмотрено наказание за нарушение правил ношения оружия, которое в силу ст. 62 Постановления Правительства № 814 осуществляется на основании выданных Федеральной службой войск национальной гвардии Российской Федерации лицензий либо разрешений на хранение и ношение, хранение и использование конкретных видов, типов и моделей оружия.

По аналогии с нарушениями со стороны юридических лиц, подобные несоблюдения законодательства сложно доказуемы и на практике привлечение к ответственности за незаконную передачу оружия встречается довольно редко. Однако, те нарушения, которые все же выявляются оказывают влияние на статистику совершенных правонарушений в сфере оборота оружия, а, значит, провоцируют причины и условия незаконного оборота оружия в Российской Федерации (Radzevanovskaya, Kuznecov, 2018), даже будучи малозначительными.

Приведенные аргументы говорят о том, что существует необходимость введения изменений в Постановление Правительства РФ «О мерах по регулированию оборота гражданского и служебного оружия и патронов к нему на территории Российской Федерации», а именно закрепление на законодательном уровне разрешения на передачу оружия физическим лицом другому физическому лицу.

Для постепенного изменения, смягчения и совершенствования законодательства, предлагается внесение изменений путем добавления нового пункта в следующей формулировке:

Пункт Ж(4.1) ст. 15 Постановления Правительства РФ от 21.07.1998 № 814 (ред. от 31.12.2020) гласит: гражданам Российской Федерации, имеющим разрешения на хранение, хранение и ношение или хранение и использование оружия либо лицензии на приобретение оружия и патронов к нему, а также иной документ, подтверждающий право на хранение и ношение оружия, за исключением таких видов как служебное, боевое ручное стрелковое оружие и огнестрельного оружия с нарезным стволом, - гражданами, владеющими таким оружием и патронами на законных основаниях, имеющим разрешения на хранение, хранение и ношение или хранение и использование оружия на территории стрелковых объектов, а также на территориях организаций, специально подготовленных для мероприятий связанных с использованием оружия.

Внесение подобного изменения позволит частично устранить пробел в законодательстве, ликвидировать запрет, надзор за соблюдением которого практически невозможен, расширит возможности законных владельцев оружия в части развития оружейной культуры. Подобное изменение благоприятно скажется на силе регулирующего воздействия указанного предписания.

4. Результаты

По результатам исследования было выявлено несовершенство законодательства. В связи с этим необходимо провести углубленный анализ пунктов Ж(4) и Ж(6) Постановления Правительства № 814 с целью устранения пробелов в противодействия коррупции и внесения соответствующих изменений в нормативный акт, с использованием предложенной автором формулировки с необходимыми доработками. При рассмотрении проектов по изменению законодательства, регулирующего оборот оружия, положительную роль может сыграть привлечение представителей общественных объединений владельцев легального огнестрельного оружия с целью учета мнения таких лиц и анализа представляемых ими предложений на ряду с органами компетентными в сфере оборота оружия в Российской Федерации.

5. Заключение

В заключение хочется отметить, что предложенные пути решения по рассмотренному вопросу окажут положительное влияние в сфере контроля и надзора за оборотом оружия, избавит законных владельцев от ограничений, которые не являются целесообразными. Развитие оружейной культуры в Российской Федерации является важным направлением государственной политики. Необходимо способствовать развитию данного направления, при этом соблюдая баланс между либерализацией законодательства в сфере оборота оружия и его ужесточением, поскольку чем выше уровень оружейной культуры граждан, тем меньше ими совершается преступлений с легальным оружием по неосторожности и небрежности, а также правонарушений в сфере оборота оружия.

References

Delo № 02a-0656/2019~Ma-0956/2019. – Delo № 02a-0656/2019~Ma-0956/2019. Arkhiv Tushinskogo rayonnogo suda g. Moskvy [Archive of the Tushinsky District Court of Moscow]. [in Russian]

Kolotushkin, Loseva, 2018 – *Kolotushkin, S.M., Loseva, S.N.* (2018). K voprosu o koncepcii oborota grazhdanskogo oruzhiya [On the concept of civilian arms trafficking*]. Probely v rossijskom zakonodatel'stve*. 2. [Electronic resource] URL: https://cyberleninka.ru/article/n/k-voprosu-o-kontseptsii-oborota-grazhdanskogo-oruzhiya [in Russian]

Matveev, 2020 – *Matveev, S.P.* (2020) Administrativnye reglamenty v sfere okazaniya uslug Ministerstvom vnutrennih del: otechestvennaya i zarubezhnaya praktika [Administrative regulations in the sphere of rendering services by the Ministry of Internal Affairs: domestic and foreign practice]. *Zhurnal administrativnogo proizvodstva*. 1: 32-36. [in Russian]

Orlova, 2019 – *Orlova, S.V.* (2019). O roli konstitucionnogo pravosudiya v reshenii problemy «mertvyh» yuridicheskih norm [On the role of constitutional justice in solving the problem of «dead» Legal norms]. *Voprosy rossijskogo i mezhdunarodnogo prava*. T. 9. 8-1: 19-29. [in Russian]

Radzevanovskaya, Kuznecov, 2018 – *Radzevanovskaya, Yu.V., Kuznecov, A.V.* (2018). K voprosu o priznakah nezakonnogo oborota oruzhiya [To the isue of signs of illegal arms trafficking]. *Gumanitarnye, social'no-ekonomicheskie i obshchestvennye nauki*. 7. [Electronic resource] URL: https://cyberleninka.ru/article/n/k-voprosu-o-priznakah-nezakonnogo-oborota-oruzhiya [in Russian]

Sherstoboev, 2018 – *Sherstoboev, O.N.* (2018). Administrativnaya diskreciya i princip razumnosti (chast' 2: rossijskij opyt) [Administrative discretion and the Principle of reasonableness (Part 2: Russian experience)]. *Vestnik Voronezh. Gos. un-ta. Seriya: Pravo*. 1: 74-83. [in Russian]

Ustinov, Yakimova, 2019 – *Ustinov, A.N., Yakimova, E.M.* (2019). Gosudarstvennoe regulirovanie oborota oruzhiya v Rossijskoj imperii [State regulation of arms turnover in the Russian Empire]. *Administrativnoe pravo i process*. 4: 32-35. [in Russian]

О некоторых вопросах, связанных с оборотом оружия в Российской Федерации

Илья Геннадьевич Саприн [a] , [*]

[a] Воронежский государственный университет, Воронеж, Российская Федерация

Аннотация. В статье анализируются проблемы, связанные с оборотом оружия в Российской Федерации. Акцентируется внимание на некотором несовершенстве законодательства, регулирующего оборот оружия в Российской Федерации. Рассмотрение этой темы сегодня особенно актуально, поскольку она касается оружейного сообщества в Российской Федерации, а оружейная культура в России и ее пропаганда остаются популярным направлением. В ходе исследования автор акцентирует внимание на типичных случаях, встречающихся в правоприменительной практике, и приводит примеры спорных правовых норм. В последнее время в России наметилась тенденция к толкованию закона, ущемляющего права владельцев оружия. Особое внимание уделяется совершенствованию законодательства в этой сфере, в частности в части регулирования возможности передачи оружия гражданам Российской Федерации и иностранным гражданам. Целью данного исследования является правильное применение или толкование закона для исключения дефицита права.

Ключевые слова: административное право, оружие, оборот оружия, законодательство.

[*] Корреспондирующий автор
Адреса электронной почты: ilya.saprrin@gmail.com (И.Г. Саприн)