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The project is financed by the Polish National Agency
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Philosophy of Law:

Hard Cases in the High Seas



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PHILOSOPHY OF LAW

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HARD CASES
IN THE HIGH
SEAS

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INTRODUCTION: WHY WOULD A LAWYER NEED PHILOSOPHY OF LAW?

When seeing the title of this course, many students will ask themselves the question: why would a lawyer need philosophy, and especially philosophy of law?

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If we assume that the work of most lawyers for the greater part of their professional career consists in taking part in applying law, the answers given to this question may at first sight be radically different. On one hand, the majority of lawyers will not see any practical importance in applying sophisticated philosophical arguments derived from the works of eminent thinkers to the everyday disputes between judges, prosecutors and counsels. At any rate, such work usually boils down to being able to evaluate evidence in a specific single case and determine its legal consequences in the light of previously known, general legal rule. In most instances, this task does not go beyond the scope of the intellectual toolset spawned by centuries of lawyering. Add to this a certain skill in swaying the minds of others, usually by using traditional legal arguments, and your professional success as a lawyer is assured. In contrast, however, each lawyer may occasionally encounter a particularly troublesome case which cannot be resolved using their standard legal skillset. This happens when the consequences of using applicable rules to answer a specific, although in some way special, instance have unexpected, unfair, irrational or otherwise unacceptable consequences. In other



words, our standard legal skillset fails because using it leads to an internal contradiction in the legal system or runs contrary to fundamental moral intuitions, sense of justice or the rational and purposeful nature of law. It is said that such situations may involve a so-called hard case that defies evaluation using the standard legal toolset.

During this course, we offer a position that the philosophy of law, understood broadly as reflection employing critical methods, ethical and axiological evaluations and deliberation over the purposes and functions of law, all of which are used in social and political philosophy, is a valuable addition to “regular” legal skills of law

interpretation and legal analysis. We will convince the audience that there is a link between general philosophical issues and practical problems of law related to its development and application. The philosophy of law allows to show how the letter of law, the so-called law in books, may when faced with unexpected circumstances undergo a transformation into law in action without prejudice to rule of law and other important values. To illustrate this premise and review legal thinking methods in philosophy of law, we are going to use a couple of hard cases, particularly those related to maritime law.



THE PLANK OF CARNEADES: THE CASE OF THE SHIP *WILLIAM BROWN*

On 13 March 1841, an American vessel called *William Brown* set out on a cruise from Liverpool to Philadelphia. In addition to sizable cargo, the ship carried 17 crew members and 65 passengers, mostly Irish and Scottish immigrants hoping to make a way in the New World.

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Seventy-one years later, almost the same course along Newfoundland shores would be attempted by the more renowned *Titanic* liner. Both cruises are similar in more ways than one – the vessels, captained by experienced seamen, traversed dangerous waters filled with icebergs drifting at fast speeds, were overloaded, and did not have enough lifeboats. Tragedy was therefore just waiting to happen.

William Brown's fatal collision with an iceberg happened on the night of 19 April 1841. The ship sank almost immediately together with 31 people who did not manage to get into either of two available lifeboats. Most of the crew found themselves in a smaller, more secure jolly boat, while those passengers who managed to escape the sinking ship crowded in another, slightly larger longboat. Before the boats drifted in different directions in search of help, captain George Harris had entrusted the command of the larger craft to first mate Francis Rhodes.

The castaways soon found themselves in dire straits. The next day, 20 April, the weather broke down and the overloaded boat was lashed by rough Atlantic waves. With no help in sight, the passengers (and crew) succumbed to hysteria. Crew members then took a dramatic decision – some passengers



had to leave the boat, although of course for the most part they would not do so willingly or heroically. No choice was offered to 14 of them who were single men, as well as two women, sisters of Frank Askin who requested to share the fate of their jettisoned brother. Soon after the last of the unfortunates sank beneath the waves, Alexander Holmes descried a ship, the *Crescent*, on the horizon, managed to alert it and thereby saved the remaining occupants of the boat. A few days later, the jolly boat was also found.

Despite considerable controversy related to actions of crew members, shortly after the tragedy American and British authorities initially decided that it was not necessary to bring criminal proceedings and elucidate the circumstances of death of those thrown overboard. Due to complaints of the survivors, proceedings commenced only one year after the cruise, and the sole crew member brought before the court was Alexander Holmes. The reason for this was quite mundane – he was the only one who stayed in Philadelphia and was found prior to the trial.

During the proceedings, which lasted from 13 to 22 April 1842, Holmes was charged with murdering Frank Askin. The grand jury however mitigated the legal classification of his act as they did not think he acted “maliciously”. Ultimately, the seaman was considered guilty of manslaughter of Askin and sentenced to six months in prison and a fine of \$20. At that time, American law punished this act with up to 3 years in prison and a fine of up to \$1000. The sentence passed on Holmes was therefore quite lenient, all the more so because he was relieved of the fine by an act of clemency of president John Tyler.

In proceedings before the District Court of Pennsylvania, Holmes primarily raised the self-defence and necessity defence. Although it ap-

pears that he was not the one whose voice mattered the most in decisions made during the tragedy (according to testimonies of some passengers, Holmes supposedly opposed throwing passengers overboard and also gave all his clothes to saved women and children to protect them against cold), one can hardly restrain the question advanced by judge Baldwin – why was not the life of crew members, seamen whose profession was connected with certain risks, sacrificed first? The answer to this question is, however, neither easy nor obvious. Justice in extremis can never be reduced to a few simple questions and answers.

It is enough to mention that the same dilemma was already pondered by ancient philosophers. In the second half of the second century B.C., Carneades of Cyrene formulated an almost identical thought experiment involving two castaways on high seas who spotted a drifting plank able to support the weight of only one of them. By asking the question about the ability of saving one’s life at the cost of another’s, Carneades argues that a just and good man can also be unreasonable, while a prudent man can also be wicked. Using violence against another, especially depriving someone of life, is undoubtedly an unlawful act contrary to the virtue of justice. If, however, the stronger of the two castaways decided not to use force against the other, he undoubtedly would be reckoned a just but also a foolish man not respecting his own life.

The above serves as a starting point for asking questions about the possible justification of the castaways’ actions, laying down the boundary between necessity and murder in extreme circumstances, or the formulation of perfectionist duties, which would require acts of heroism from those required to fulfil them, by the lawmaker. These and other issues will be analysed during the course.



CANNIBALISM IN THE HIGH SEAS: THE HORRORS OF THE YACHT *MIGNONETTE*

In 1884, the *Mignonette*, a 20-ton used yacht, was purchased in England by an Australian lawyer. Sailing this relatively minor vessel from Southampton to Sydney was undertaken by captain Tom Dudley along with his crew of three: boatswain Edwin Stephens, seaman Edmund Brooks and 17-year old cabin boy Richard Parker.

AUTHOR
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The yacht eventually left the home port on 19 May 1884, and the first weeks of the voyage to the antipodes were uneventful. However, once it entered the Southern Atlantic on 5 July 1884, the crew met with a strong gale that wrecked the craft beyond any hopes of saving. Because the captain decided to run along a route distant from the most crowded shipping lanes, when the crew left the deck in a small lifeboat they found themselves about 1,600 miles northwest of Cape Good Hope. All that could be saved from the *Mignonette* were a few provisions, but without any drinking water.

After one week, the exhausted crew first started considering the eventual necessity of sacrificing one of them to increase the chances of others – cannibalism, while an extreme proposition, was known and practiced among seamen in similar circumstances. Some two weeks after the yacht sank, Parker became ill, probably due to consuming seawater. His condition worsened quickly, and he lapsed into and out of a coma. In these conditions, captain Dudley proposed to select a crew member to sacrifice. Stephens was willing to go along with the plan, while Brooks disagreed. Because Parker was no more able to articulate his position, on the 19th day following the sinking Dudley stated that, unless help



should come, they would kill the boy on the next day to drink his blood and eat his flesh, saving their lives. He was convinced that this would merely shorten the agony and hasten the teenager's inevitable death. Stephens consented to this, while the silent Brooks did not take sides. With no prospect of rescue looming, Dudley killed Parker by slitting his throat with a penknife. Tormented by acute thirst, the three castaways immediately began to drink the blood of their companion. For the next three days, they sustained themselves by eating his flesh. Unexpectedly, on 29 July the lifeboat was spotted by the German sailing barque *Montezuma* and all three castaways were rescued and returned to England. On 6 September 1884, they arrived at Falmouth.

The crew of the *Mignonette* candidly related everything they did in the lifeboat in July. They even brought with them Parker's remains to be buried in England. In accordance with law, they gave detailed accounts to local authorities, convinced they had done nothing wrong, resorting to an old custom of the sea in the face of hopeless circumstances. However, Home Secretary William Harcourt recognized the *Mignonette* affair as an excellent opportunity to ultimately settle growing doubts in cases of this kind which occasionally cropped

up in various parts of the British Empire. Determined to follow the letter of the law, he did not sway by public sentiment which was unanimously in favour of the "heroic" seamen, and directed that an indictment be made. However, only Dudley and Stephens were indicted, Brooks appearing instead as a witness for the prosecution.

At that time, voluntary homicide carried a death penalty in British law. Despite a masterful defence, Dudley and Stephens were twice declared guilty of murdering Parker and sentenced to death by hanging. A few days after the sentence was passed, the two were however pardoned by Queen Victoria, their convictions replaced by six months' imprisonment. Having served their terms, they were released from prison on 20 May 1885, a year and a day after setting out on the fated voyage.

The landmark, philosophical and legal importance of *R v. Dudley and Stephens* and the controversies its moral and legal evaluation still engenders today cannot be overstated. Can necessity justify murder? Can an act of cannibalism be resorted to in extreme circumstances? What decides the value of human life and can one life be sacrificed to save others? The arguments put forward in this discussion will be analysed during the course.



WHOSE PROPERTY IS IT ANYWAY? WRECK OF THE RMS *TITANIC* AND ITS TREASURES

On 10 April 1912, the British passenger liner RMS *Titanic* put out to sea, leaving Southampton on her maiden voyage to New York. The proud operator was the British shipping company White Star Line.

AUTHOR
Kamil Zeidler

In the night of 14/15 April, *Titanic* collided with an iceberg and sank. Her disaster is perhaps not only the largest, but also the most famous shipwreck. It left a legacy not merely in changing the rules of maritime safety. The changes rippled to numerous areas, and the shipwreck itself was an event with far-reaching legal consequences, in particular concerning the ownership of the wreck itself, but also all things found on it, mostly owned by private individuals. This affair remains pertinent, at least potentially, even today.

In addition to its tragic human dimension, the incident had specific legal consequences, including those related to ownership. This begs for a question who is now the owner of *Titanic's* wreck and – allegedly quite valuable – objects which sank with it.

The problem of ownership of property located today on the bottom of seas and oceans is not merely a civil law issue. Nor is the objective to extend these speculations to maritime law or the international law of the sea. In the territorial aspect, one should also add the question of governing law, and therefore private international law issues. But what makes many matters concerning underwater property so complex is their value – and not merely



the material value, which is an empirical and civil law question. Our focus is on other values, those that bring these objects into the sphere of cultural heritage protection law. We are dealing here with sunken human artefacts that are today referred to as underwater cultural heritage.

The RMS *Titanic* case is peculiar for many reasons. It is highly spectacular as the largest shipwreck in history. However, reflections on it are of a universal nature, because they apply by way of analogy to the dozens, hundreds or even thousands of wrecks, known and unknown, scattered

all over the world. Under the sea surface there lies a host of sunken medieval cogs, early modern caravels, Spanish galleons carrying gold plundered in the Americas, sea-crossing frigates, clippers and schooners, 19th and 20th century merchant vessels, as well as warships destroyed in many sea skirmishes and battles. Thus, after we have settled *Titanic's* case, we can resolutely attempt to examine other similar occurrences, but achieving success is far from certain. Our objective is therefore to develop a scheme to handle these matters based on the RMS *Titanic* case.

GLOBAL
OCEAN
GOVERNANCE
AND
THE RIGHT OF OCEAN TO HEALTH
FOR HUMAN RESILIENCE

Dorota Pyć

- I Global ocean governance axiology
- II Global ocean governance and legal compliance
- III Ocean space culture for human resilience



GLOBAL OCEAN GOVERNANCE AXIOLOGY

The United Nations Convention on the Law of the Sea (UNCLOS) establishes the fundamental legal principles for the governance of the marine environment and its resources.

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Furthermore, in the context of the Global Ocean Governance (GOG), the international community is conscious that improving global and regional cooperation should be in the mainstream of socio-economic and political discourse. At present, UNCLOS is not able to provide a response to all the new questions arising in the law of the sea. Therefore, it would seem that there is a great need to provide more pragmatic approaches to global ocean governance by the international community as well as national governments, using the holistic paradigm of sustainable development.

The fundamental value of ocean governance is the maintenance of the long-term sustainability of marine natural resources. In setting out a comprehensive range of rules governing ocean activities, UNCLOS divides marine space into a number of zones horizontally as well as vertically.

Our oceans and seas are threatened by climate change, natural disasters, environmental degradation, depletion of fisheries, loss of biodiversity and ineffective flag state. The process of ocean acidification, which has a wide-ranging negative impact on the World Ocean health and marine living resources, is a global problem. UNCLOS is one of the most important sources



of global ocean governance. The Convention on the Law of the Sea establishes a legal regime of rules and recommended practices which can be used as a structure of government.

These and many other threats, as observed from many years growth on greenhouse gas emissions, are reasons for taking proper action, internationally and regionally. The International Maritime Organization, as well as the European Union and national governments recognise this problem and understand that cooperation is a must for today.

Ocean governance means the coordination of various uses of the ocean and protection of the marine environment. Ocean governance is also defined as the process necessary to sustain ecosystem structures and functions. Effective ocean governance requires globally-agreed international rules and procedures, regional action based on common principles, and national legal frameworks and integrated policies.

Global ocean governance, as well as management of the marine environment is essential for achieving the objectives of sustainable development. Common and rational use of the World Ocean should be based on integrated mari-

time governance, understood as the processes of planning, decision-making and management at the global level. It also includes maritime areas beyond national jurisdiction, and integrates activities substantively and institutionally. The protection and preservation of the environment as a unity and its natural resources should be considered as superior to irrational use of the marine environment. It is assumed that this would be possible with the creation of a global maritime administration having clear objectives and scope of activities.

Therefore, it would also need to have appropriate available financial resources and adequately-trained human resources, as well as a constantly-updated database. The creation of integrated management of the marine environment in maritime areas within the boundaries of coastal States and territories, where coastal States exercise sovereign rights associated with efficient and flexible instruments, allows for a reasonable balance between the protection and preservation of the environment and the freedom to use the seas and oceans. The sectoral approach to the marine environment, developed and persisted through the years, should be balanced by an integrated approach.



GLOBAL OCEAN GOVERNANCE AND LEGAL COMPLIANCE

The United Nations Convention on the Law of the Sea, very often called “the constitution of the oceans and seas”, pointed out that the main value for maritime law is unity of the Global Ocean: “the problems of ocean space are closely interrelated and need to be considered as a whole” (preamble).

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UNCLOS establishes the legal framework for all activities in the oceans. According to its preamble, UNCLOS sets out a legal order for the seas and oceans to facilitate international communication and promote peaceful uses of the seas and oceans, equitable and efficient utilization of their resources, conservation of their living resources and study, protection and preservation of the marine environment.

UNCLOS establishes a holistic and ecosystem approach. One of the objectives of UNCLOS is to develop the rational use of maritime resources and the conservation of marine living resources. The Convention on the Law of the Sea introduced the obligation to protect and preserve the marine environment to international law (Article 192) as *ius cogens* - an imperative for international community.

The institutional framework is composed by the administrative mechanisms that are required for established system of coordination and co-operation between all the stakeholders that have a role in the management of the ocean. In order to avoid the fragmentation of decision-making and the exclusion of stakeholders as well as in implementing an ocean governance framework, the international and regional regulations and procedures of coordination and co-operation



should be taken into consideration. In this context the holistic, ecosystem and precautionary approaches are very important as a direction or even driving force for the system.

Holistic, ecosystem and precautionary approaches are recognized as rules of marine resources management, but the idea of global ocean governance and regional maritime management is deeply fragmented and insufficiently developed. Numerous sectors are regulated and managed independently of others, by diverse agencies and under different rules and procedures.

The ecosystem approach has its roots in international environmental law. This approach is defined as the integrated management of human activities based on the knowledge of ecosystem

dynamics to achieve the sustainable use of ecosystem goods and services and the maintenance of ecosystem integrity. This kind of approach has many implications for GOG including the need to establish no-take reserves, effective marine monitoring and protection of threatened and endangered marine living resources.

The precautionary approach is necessary in the effective prevention against the degradation of the marine environment. According to the precautionary approach, where there are threats of serious or irreversible damage, the lack of full of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.



OCEAN SPACE CULTURE FOR HUMAN RESILIENCE

The problems of a functional nature are related with the process of planning (e.g. marine spatial planning - MSP) and the implementation of many of elements which are included in maritime policies.

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The integrated maritime policy of the European Union arises either through legislative actions as well as executive initiatives of its Member States. It is desirable for the development of the management system to base it on the integration of instruments and institutional capacity for cooperation and coordination, the creation of a knowledge base and cross-cutting tools necessary to enable the introduction of an integrated policy, the improvement of the quality of sector policies through the active search for synergies and increased coherence between sectors. The concept of the EU integrated maritime policy permits a clear vision of the direction the Member States should take to achieve an integrated and sustainable management in marine affairs. European regional maritime management is based on marine spatial planning, decision making and integrated management understood as the implementation of decisions and continuous improvement planning procedures and decision-making.

Maritime spatial planning involves identifying possible uses of marine resources and their rational distribution, as well as providing sustainable activity in terms of the ecosystem, all of which is performed in the marine environment



in order to achieve economic, social and environmental objectives arising from regional and national policies in accordance with international rules and standards, recommended practices and procedures for the protection and preservation of the marine environment.

In Europe, according to the policy of the European Union, maritime spatial planning involves the process of planning and regulating all human activities in marine areas, including maintaining the good condition of marine ecosystems, as well as marine biodiversity. The process of decision-making is closely interrelated to international global and regional cooperation. This approach is the essence of the maritime policy for both the European Union and the Member States in their national and regional maritime relations. This is also a framework for developing actions for better ocean governance.

The integrated management of the marine environment includes comprehensive, integrated management of human activities based on the available scientific knowledge on ecosystems and their dynamics, origin and impact of the activities, which are essential for the health of the marine ecosystem, as well as achieving the sustainable use of marine ecosystem assets and maintaining the integrity of the marine ecosystem.

It has been pointed out as a rather obvious fact that the future of the oceans depends on enhanced scientific research into ocean processes, the effective implementation of the international legal instruments that regulate various ocean activities and a comprehensive and integrated

approach to ocean management. Consequently, the concept of global ocean governance and integrated maritime policy of the EU as well as national maritime policies have emerged. Furthermore, the relation between the concepts of global ocean governance and maritime policy that every national maritime policy is an element of the governance of the ocean should be emphasised.

Promoting the principles of sustainable development in the maritime domain including shipping safety and security, the protection of the marine environment, maritime spatial planning, integrated coastal zone management and marine education and knowledge, an Integrated Maritime policy for the EU is handling a lot with the issues related to ocean governance. All these activities should take the specificity of each of the EU regional seas, as well as all the ocean space into account, through solutions tailored to the needs and pragmatic enforcement of the global ocean governance rules, instruments and recommended practices.

The most important step is to determine how an integrated national maritime policy should be developed. It is rather obvious that the mission of the maritime policy should maximise benefits for the people and the economy from the sustainable use of coastal locations and marine resources. There is no doubt that cooperation of the States for effective ocean governance, as the result of providing the countries maritime policies and strategies, is essentially important and may provide fruits for present and future generations.

Ma RI TiM e LAW

Justyna Nawrot

- I Tradition, universalism and practicality
- II What is maritime law?
- III Contemporary important challenges
- IV Specificity of Gdańsk's school of law



TRADITION, UNIVERSALISM AND PRACTICALITY

Maritime law is considered to be the oldest branch of law. Its origins date back to the 3rd century BC.

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The then-created *Lex Rhodia de iactu* was a kind of a catalogue of customs commonly shared in the Mediterranean, which during the heyday of the island of Rhodes in the years between 304 and 168 BC, began to be called Rhodian law. In the Middle Ages, maritime law collections were drawn up. The most important of them include: French Roles d’Oleron, The Black Book of Admiralty (English) and Il Consolate del Mare (Barcelona). During the era of great modern codification, public and private law issues were separated, and maritime law began to be associated with private law. As a result, for centuries it developed under private branches of commercial and civil law. Traditionally, the prevailing principle in maritime law was the principle of freedom of contract and the existing legal solutions were aimed at strengthening economic freedom and profit-making. From the 19th century onwards, the intensification of sea traffic and the change of technology in shipping triggered the need to regulate minimum standards of safety at sea. The issue was legally regulated at the international level only after the disaster of RMS *Titanic*, in the first International Convention for the Safety of Life at Sea (SOLAS) of 1929, which became legally binding. The adoption of SOLAS



1929 started an era of dynamic development of public maritime legislation. Currently public law regulations regarding maritime safety and protection of the marine environment are the most the most dynamically developing part of maritime

law. This is a result of subsequent technological changes in shipping and, accordingly, also new threats posed by shipping to people and the marine environment.



WHAT IS MARITIME LAW?

Modern maritime law consists both of shipping law, associated with private law, and of public law, created essentially under the auspices of the International Maritime Organization whose unification achievements aimed at increasing the level of shipping safety and protection of the marine environment have been reflected in numerous maritime conventions applied on a global scale.

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Legal academics and commentators divide maritime law into “wet shipping” and “dry shipping”. The first term refers to problem incidents or issues which come up during a sea voyage, and includes accidents, collisions, loss or destruction of freight at sea, piracy, explosions or capture by hostile groups, salvage operations. The second term refers to all other issues, such as contracts, charter agreements, construction and funding for ships, using port infrastructure, and to any disputes arising in this respect.

Issues related to shipping law focus on contracts concluded by private entities and relate to carriage of goods and passengers, ship chartering and ship construction contracts. An important issue in this area of maritime law is the specific concept of liability of entities responsible for ship operation. In maritime law a specific concept of liability for damage has been developed, including the possibility of limiting the shipowner’s liability for maritime claims. Currently, this concept is subject to wide criticism due to the privileged position of a very diverse category of entities that are responsible for ship operation. An important contemporary challenge for shipping regulations is also the issue of the most important



maritime contract, namely carriage of goods contract, in which the main debatable issue remains the carrier's liability for the goods accepted for carriage and proper performance of the carriage. The need to reform the regulations on these issues is widely recognized, in particular when taking into account modern maritime transport technology which leads to the blurring of differences between maritime transport and universal transport law.

Increased significance of maritime public law is linked to the growing significance of the protection of the common good, taking place in the 20th century, and the redefinition of the axiology of maritime law, from "commercial", i.e. profit-oriented, to one aimed at protecting universal values. This is demonstrated by great importance of public law conventions adopted under the auspices of the International Maritime Organization – aimed at protecting the marine environment and raising the level of maritime safety. The shift in focus is reflected not only in the creation of preventive standards – those regarding the safety of ships, people and the environment but also those regarding the change of liability systems aimed at full compensation of damage, especially damage to the environment. Huge disasters that

caused oil pollution, such as the *Torrey Canyon* disaster in 1967, *Exxon Valdez* in 1989, *Prestige* in 2002, and *Erica* in 1999, played a significant role in the redefinition of maritime law axiology. This resulted in key conventions being adopted with regard to liability for oil damage (the Civil Liability Convention and the Fund Convention). The axiological change is also manifested in the redefinition of the "no cure-no pay" principle in the relation to maritime salvage, which now also includes the salvage of the marine environment and not only property (the ship, its equipment or freight). This is also reflected in a relatively new trend aimed at supplementing the International Maritime Organization's convention with financial security instruments. In this respect, the decision-making process has clearly shifted from the level of individual states to the international level, at which it is easier to achieve a global compromise and to ensure the protection of universal rather than particular values and interests. This also caused a shift in the law of the sea, causing strengthening the role of the coastal and port state rather than flag state.



CONTEMPORARY IMPORTANT CHALLENGES

Today's maritime law deals also with numerous new threats, such as anti-fouling systems used on ships, environmentally sound ship recycling, ballast water management to prevent transfer of invasive species, or the issue of liability for removing wrecks that pose a navigational or environmental threat.

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The issue of preventing criminal offences at sea, which is also referred to by the legal academics and commentators as maritime security, presents yet another huge challenge. It is essentially linked to combating maritime piracy, terrorism and illegal migrants at sea.



SPECIFICITY OF GDAŃSK'S SCHOOL OF LAW

At the Faculty of Law and Administration in Gdańsk, special attention is given to the issues of broadly defined maritime safety and to challenges related to the operation of autonomous vessels.

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In particular, issues of regulatory approach and its changes in maritime safety standards and the transition from a policy that responds to gaps in the maritime safety system, exposed by maritime accidents, to ex ante, preventive policy and goal-based standards are addressed.

Similarly, the issue of the future regulatory approach to autonomous vessels is one of the leading research areas of the Gdańsk centre. Unmanned vessels, specifically their international navigation, present a particular challenge to maritime law. The existing legal framework, whether drafted at the beginning of the 20th century or recently, has always been developed for manned vessels with a shipmaster on board. Maritime law will face completely new challenges related to the particular nature of unmanned vessels. Challenges related to their operation are associated both with public law regulations (constructional safety, no involvement of the human factor, the need to ensure the participation of such vessels in providing assistance to other ships and people at sea), and with private law (inadequacy of applicable liability rules for damage, possible scenarios of liability for damage caused by decisions regarding ship



traffic and their operation taken not by humans – a shipmaster or crew – but by operating systems based on artificial intelligence). In this respect,

the staff of the Maritime Law Department participate in the work of the International Maritime Organization.

COⁿSTITUTIONAL StITU^tIONAL TIOⁿAL ReVIE^w

IN THE COUNTRIES
OF THE BALTIC
SEA REGION

Anna
Rytel-Warzocha

- I Diversity of the region in regard to constitutional review
- II The concept of diffuse constitutional review
- III The implementation of diffuse constitutional review in Nordic states
- IV The concept of centralized constitutional review
- V The implementation of centralised constitutional review in Germany, Baltic states, Russia and Poland
- VI Questions for debate



DIVERSITY OF THE REGION IN REGARD TO CONSTITUTIONAL REVIEW

As far as constitutional courts and constitutional review mechanisms are concerned, countries of the Baltic Sea region offer a wide range of various solutions.

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Some of them (Germany, Poland, Lithuania, Latvia, Estonia) adopted a centralized constitutional review system based on a model developed in the early 20th century by Austrian jurist Hans Kelsen. On the other hand, constitutional review in Nordic countries (Denmark, Sweden, Finland) has a diffuse character and its roots go back to the 19th century. It should be noted, however, that regardless of the chosen model of constitutional justice, detailed solutions adopted in each of these states show far-reaching differences that create the specificity of each system. Traditionally, there are two basic constitutional review models distinguished in legal doctrine.



THE CONCEPT OF DIFFUSE CONSTITUTIONAL REVIEW

Historically, the diffuse review of normative acts conducted by common courts, called the “American constitutional review model” after its place of origin, was the first one.

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This model is considered to derive from the *Marbury vs. Madison* case decided by the US Supreme Court (1803). A model in which constitutional review is undertaken by courts (judicial review) is characterized by a number of essential features. Such review is decentralized (powers to evaluate the conformity of law to the Constitution are vested in any court), universal (as the list of acts which can be reviewed by courts has not been defined by law, any act which needs to be applied in a case pending before a court may be subject to review), concrete (the review may be undertaken only when it appears necessary in a specific case pending before a court), a posteriori (since the review is strictly linked to the application of law, it can only extend to acts that have been enacted and entered into force) and *inter partes* (the consequence of a court finding an act to be unconstitutional does not apply to everyone (*erga omnes*), but only to the case heard by the court in which the unconstitutional act will not be applied).



THE IMPLEMENTATION OF DIFFUSE CONSTITUTIONAL REVIEW IN NORDIC STATES

The concept of diffuse constitutional review of parliamentary acts by common courts fell on fertile ground in Nordic states.

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Despite the lack of clear constitutional grounds, as early as in the 19th century Norwegian courts (in the judgement of 1866 in the *Wedel-Jarlsberg* case the President of the Supreme Court for the first time clearly stated that when statutory and constitutional norms collide and cannot be applied simultaneously, the judge is obliged to apply the constitution) and Danish and Swedish courts in the early 20th century started to develop their right to review the conformity of applied legal norms to the constitution. Even today, Nordic states clearly stand out as regards their constitutional review solutions not only among other Baltic Sea region states, but also Europe as a whole. Judicial review in these states has an exclusively concrete nature because it is inextricably linked to the process of law application, and by definition occurs a posteriori. However, courts' powers vary from one Nordic state to another: the Norwegian Supreme Court has a strong position and its ruling on the unconstitutionality of a statute de facto oblige the parliament (Storting) to make the required amendments, while Swedish courts very rarely exercise their powers even though they are explicitly set out in the constitution. The right



of courts to constitutional review is directly enshrined in the Swedish and Finnish constitutions, while in Denmark and Norway the principle of judicial review is based on customary law as a result of established constitutional practices. Chapter 11, Article 14 of the Swedish Instrument of Government of 1974 stipulates that courts should not apply provisions found to be in conflict with a rule of fundamental law. Section 106 of the Finnish Constitution, in turn, provides for primacy of the Constitution if the application of an act in a matter being tried by a court of law would be in evident conflict with the Constitution.

Providing common courts with the power to undertake constitutional review and to refuse to apply acts which in their opinion are in conflict with the constitution is combined with extended constitutional review at the stage of legislative work in the Parliament. In Sweden, for example, constitutionality review of bills is undertaken by a number of different bodies, including the competent parliamentary committees, the Riksdag Constitutional Commission, the talman (Speaker of the Riksdag) and the Council on Legislation which, despite the formally non-binding nature of its opinions, considerably influences the course of the legislative process in practice. In Finland, the burden of constitutional review is also imposed on the Parliament. Pursuant to section 2 of the 1999

Finnish Constitution, the powers of the State in Finland are vested in the people who are represented by the Parliament (Eduskunta). In relation to a priori constitutional review of statutes, a major role is played by the Constitutional Law Committee, whose competences in this respect are directly derived from section 74 of the Constitution, which reads: "The Constitutional Law Committee shall issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties." Opinions issued by the Constitutional Law Committee have two major functions. First, the interpretation of the Constitution by a respected body determines the further course of subsequent legislative proceedings. For example, it depends on the interpretation whether a government bill should be passed by a simple majority of votes suitable for enacting regular statutes, or by a qualified majority suitable for constitutional acts should its contents run contrary to the constitution, which would thus be amended if the bill were passed. Second, opinions of the Committee are intended to guarantee the proper protection of individual rights and therefore contain specific proposals of changes to the text of examined bills in order to harmonize them with the constitution and human right obligations that are binding on Finland.



THE CONCEPT OF CENTRALIZED CONSTITUTIONAL REVIEW

The remaining Baltic Sea region states (German, Poland, Lithuania, Latvia, Estonia, Russia) adopted the “European” model of centralized constitutional review.

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The concept of constitutional review by an independent and specialized body was developed in the early 20th century by an Austrian jurist and philosopher Hans Kelsen, who worked on the draft a new Austrian Constitution after the dissolution of the Austro-Hungarian Empire. Kelsen’s “European” model of constitutional review has the following features: the review is centralized (undertaken by a single specialized body), the list of legal acts that can be reviewed is limited, the review is as a rule abstract (it is carried out irrespective of the application of law), a posteriori (applicable only to already binding acts) and operates *erga omnes* (acts deemed unconstitutional are eliminated from the legal system). The Baltic Sea region countries that have incorporated this model into their constitutional systems supplemented it also with concrete review and a priori review which is carried out before the entry of the act into force.



THE IMPLEMENTATION OF CENTRALISED CONSTITUTIONAL REVIEW IN GERMANY

The German Federal Tribunal was established soon after the end of the Second World War, in 1949. Its creation was influenced by the experiences of national socialism and war.

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The need to enhance the protection of human rights and decentralize state power determined the search for new methods to protect the constitution. On the other hand, the emergence of constitutional courts in Poland and the three Baltic states was related to the downfall of communism and political transformation in Central and Eastern Europe which started in the 1980s. In 1982, the Constitutional Tribunal became a constitutional authority in Poland; a similar body was established in 1992 in Estonia, in 1993 in Lithuania and in 1996 in Latvia. Constitutional review by courts was perceived in these countries as an indispensable feature of a democratic state ruled by law. While Germany, Poland, Lithuania and Latvia established a separate constitutional court, in Estonia its functions were assigned to the Supreme Court that undertakes abstract review of legal acts.

The German Federal Constitutional Court is competent to conduct a material or formal review of the conformity of federal or state law to the Basic Law and of state law to federal law, examine constitutional complaints (which account for about 95% of all cases heard by the Constitutional Court), rule on constitutional liability of the federal president, conformity of the activities of political



party to the constitution, deprivation of fundamental rights, conformity of the federal parliament's decision on the validity of elections and the acquisition or loss of seats in the federal parliament, disputes concerning the scope of rights and duties of the highest federal authorities or other entities granted certain rights (competence disputes), disputes concerning the rights and duties of the fed-

eration and individual states, competence disputes from a particular state if state law made the Federal Constitutional Court competent to resolve them, dismissal, transfer or retirement of a federal or state judge in cases provided for in Article 98 (2) and (5) of the Basic Law, as well as the liability of Federal Constitutional Court judges.



THE IMPLEMENTATION OF CENTRALISED CONSTITUTIONAL REVIEW IN BALTIC STATES

The Estonian Supreme Court acting as a constitutional court has been vested with the power to rule on applications to declare whether generally applicable normative acts conform to the Constitution or to refuse to issue such acts, applications to examine the conformity of international agreements with the Constitution, applications to issue an opinion interpreting the Constitution in connection with European Union law.

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It also considers applications related to resolutions and complaints against resolutions of the Estonian parliament, parliament board and the President of the Republic, applications to declare a member of parliament, President of the Republic, Chancellor of Justice or Auditor

General unable to exercise their duties in the long term. Additionally, it hears applications to deprive a member of parliament of their seat, requests to express consent to the chairman of the parliament acting in the stead of the President of the Republic, to announce pre-term parliamentary elections or refuse such consent, applications to declare a political party illegal, and matters related to complaints and protests against the activities of electoral administrative bodies and the decisions and activities of electoral commissions.

The Lithuanian Constitutional Court reviews the conformity of statutes and other acts of parliament to the Constitution as well as the conformity of acts of the President of the Republic and government to the Constitution, provides opinions on potential violations of electoral statutes during presidential or parliamentary elections, and evaluates whether the President's health allows



him/her to fulfil his/her duties, whether international agreements conform to the Constitution, and whether the actions of the members of parliament and other public officials violate the Constitution.

In Latvia, the Constitutional Court examines matters related to the conformity of statutes to the Constitution and is empowered to declare statutes and other normative acts non-binding.



THE IMPLEMENTATION OF CENTRALISED CONSTITUTIONAL REVIEW IN RUSSIA

In contrast to the above states, the role of the Constitutional Court in Russia is limited to endorsing the acts of authorities.

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According to the Constitution, the President of Russia influences the personal composition of the court (the Constitutional Court consists of 19 judges appointed by the Federation Council on the motion of the President), which guarantees the head of state that judges demonstrate loyalty in their decisions. The Russian Constitutional Court has, among others, the following powers: on the request of an executive body, it can rule that a ECHR ruling does not conform to the Russian Constitution, which in practice prevents the effective enforcement of such rulings. This constitutes the violation of international treaties to which Russia is a party. As an example of the Constitutional Court's pro-presidential attitude can serve its judgement of 16 March 2020, when the Court decided that a constitutional amendment that allows the incumbent president to run for the next term of office conforms to the Constitution.



THE IMPLEMENTATION OF CENTRALISED CONSTITUTIONAL REVIEW IN POLAND

In Poland, the Constitutional Tribunal rules in matters of the conformity of statutes to the Constitution and ratified international agreements whose ratification required prior consent granted by a statute, the conformity of international agreements to the Constitution.

AUTHOR

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The conformity of legal provisions issued by central state authorities to the Constitution, ratified international agreements and statutes, examines constitutional complaints and legal questions, settles competence disputes between central constitutional state authorities, rules on the conformity of the purposes and activities of political parties to the Constitution, resolves on motion of the Marshal of the Sejm whether the President of the Republic of Poland is temporarily unable to fulfil his/her duties, and entrusts the temporary exercise of presidential duties to the Marshal of the Sejm. Since 2015, the Polish Constitutional Tribunal has been undergoing a crisis.

Questions for debate:

- 1.** Why haven't Nordic countries adopted the "European" model of centralized constitutional review and what were they inspired by?
- 2.** Why wasn't diffuse constitutional review adopted in Germany after the Second World War despite they had such experiences from the period of the Weimar Republic?



3. What role was assigned to centralized constitutional courts in systems based on the Kelsen's model – in Germany after the Second World War, in Poland and Baltic states during the transformation of the political system?
4. Can a review of the parliament's legislative activity by an outside authority such as a constitutional court be justified in the context of fundamental constitutional principles such as democratic rule of law, sovereignty of the people or division of powers?
5. Which constitutional review model do you think is better and why?
6. What are the current problems faced by constitutional courts in Poland and other Baltic Sea region countries?
7. What is the role of constitutional courts in liberal and illiberal constitutionalism?

DIRECTIONS TIONS OF CHANGES

Tomasz
Bojar-Fijałkowski

TAKING PLACE
IN EUROPEAN
PUBLIC
ADMINISTRATION

- I New theories of functioning of public administration
- II The withdrawal of the state from the public sector on the example of environmental protection
- III Private entities in the implementation of public services
- IV Computerisation of public administration and administrative proceedings



NEW THEORIES OF FUNCTIONING OF PUBLIC ADMINISTRATION

As a result of integration with the European Union, increased international cooperation and interest in the world, the expectations of people towards public administration are growing.

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More and more trends, ideas and philosophies, public administration models created in Western Europe, are beginning to reach into other doctrines and are starting to be implemented in home functional models.

One of them is public governance, the primary method of which is new public governance. It should be understood as the introduction of management ideas, shaped in the private sector, into the public sector. New public management involves the necessity of changes in the traditional model of public administration.

These changes include, firstly, market-oriented reforms that entail the introduction of competition. In the concept of public management the emphasis is on the citizen, as the consumer of public services, with all associated consumer rights. This concept strongly benefits from services outsourcing for the public administration, simply enabling replacing public administration with private sector services at the same time. Additionally comes efficiency and evaluation of the performance of the administration, i.e. new market elements in the public sphere.

Secondly, changes postulated by the new public management should place an emphasis



on participatory decision-making mechanisms. This is increasingly evident in both the formation of social communication as well as the formal procedures for the creation of substantive law and the functioning of procedural law. The broadly developed mechanism of the so-called “citizens’ budgets”, where the inhabitants of cities and towns decide, in the form of a plebiscite, on a part of the budget of the city earmarked for investments, meaning they choose the projects to be implemented in first order.

Finally, public management needs deregulation currently being discussed in the public space that limits the excessive and inadequate number of regulations, mainly in the area of substantive administrative law.

An extensive amount of literature on new public management indicates a catalogue of its characteristics. What differentiates public management from the ideal bureaucracy model are: the managerial style of management, flexible and diversified structures, oriented externally and for the needs of the audience, external control, long-term perspective of acting, interactive management, partnership and broad cooperation.

Among the other features, the following should be emphasised:

- handing control to professional managers who have clear goals and indicators, often in the form of audits;
- control of results rather than procedures that derive directly from quality management methods;

- taking the efficiency, meaning the correct proportion of inputs to effects into account, which is also related to materials’ consumption monitoring, the quality management systems, and also environmental management systems, in terms of ecological efficiency and thus economic gain.

The features of new public management also include:

- basing on economic theory, management theory and entrepreneurship theory, which emphasises the need for implementation in the public sector much more, management systems that come from private sector;
- public interest understood as the interest of members of society, which in the case of quality or environmental management requires cooperation with stake-holders;
- alternating the role of the state for ruling, meaning the use of management instruments and competitive market pressure to maximize the efficiency of the delivery of public service, for such a control quality and environmental management systems are used;
- delegation of decision-making power that serves to achieve a high degree of freedom of achievement for the purposes set out as a complementary method of quality management and environmental management systems that implementers may use voluntarily to achieve their goals and objectives more effectively;



- co-decision and delegation of responsibility, which is part of the active participation of the staff.

The process of redirecting public administration from the bureaucracy model to public management is neither easy nor short. This has been occurring for a long time and the results are, in first order, easier and faster seems for citizens to handle their official affairs. Tools to support new public management include, among others, quality management and environmental management systems.

Questions and problems for discussion:

1. What values are basic for the public sector and public administration that do not occur in the private sector?
2. Where is the border between the public and private administration?
3. Can private administration standards be fully implemented into public administration?
4. What aspects of public administration can be changed in order to improve its effectiveness?



THE WITHDRAWAL OF THE STATE FROM THE PUBLIC SECTOR

on the example of environmental protection

The tasks of the state, also in the sphere of environmental protection, are already mentioned in many European legal acts, also in the Polish Constitution, and they are further extended to several legislative acts. No matter what criterion of division of state tasks in the field of environmental protection we adopt, the role of the State in the issue of regulations is indisputable.

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These competences and tasks can, by no means, be passed on to the private sector subjects, as they are connected with the law-making function immanently assigned to the legislature. However, it is important to note the fact of globalisation and Europeanisation of the environmental law in force, which in some respects also results in the minor role of the state in establishing legal norms with a view of the protection of the environment.

The financing of environmental protection tasks largely originates from private sources, particularly those borne by entrepreneurs and other users of the environment in the form of fees, administrative penalties and concessions but also investments. In terms of environmental protection expenditure, funds originating from abroad, especially from European Union funds and non-EU countries, but participating in the European Economic Area, are undoubtedly significant public funds.

In order to present data on environmental protection financing in the case of Poland, it is worth using the publications of the Statistics Poland. While the most up-to-date data is available for 2015 and only covers fixed assets, thus excluding educational, promotional and other so called “soft activities”, they show some trends and tendencies. They point out



clearly that since 2002 investments in fixed assets for the protection of the environment, excluding water management, have systematically and significantly increased, with the exception of 2012 and 2013. While in 2015 as much as 41.6% of these expenditures came from private investors (individuals or entrepreneurs) own funds and 26.9% from abroad, 23.9% were ecological funds loans and credits and only 3.1% came from the state budget and local self-government units. However, over the past few years, there has been a tendency to decrease the share of all these sources, while at the same time increase foreign sources, mainly from the European Union. The decline in commitment to environmental protection relates first and foremost to the state budget, subsequently, budgets of local self-government units. For example, the commitment of these public budgets into outlays on fixed assets for environmental protection in 2011 amounted to 10.2% of all expenditures and in 2015 to only 3.9% of all spending. These data clearly show that financing environmental protection in Poland is outside the public sector and investors are usually entrepreneurs and individuals, not the state.

Monitoring the environment and its changes and controlling the users of the environment is an important environmental protection function. Tasks in this regard are assigned to environmental protection authorities. However, the number of implementing bodies, at various levels and to a varying extent, are much greater, including other central and territorial general administrations, maritime and river administrations and finally local self-government bodies. At the same time this structure is far from being transparent and efficient. Hence, non-governmental organisations, which the legislator has given specific powers to access and protect environmental

information, to participate in environmental protection, and to play an active role of official participant in the administrative procedures regarding the environment are active in environmental monitoring. Thus the state wants to systematically withdraw from environmental monitoring activities.

Another example of the withdrawal of the state from the active role in carrying out public tasks is the system of segregation and recycling of communal waste. The so-called “garbage revolution” of 2011 has transferred the uneasy task of organising a public system of the collection, transport and disposal of municipal waste to the communes. This system, which might be expected after its decentralisation and allowing for a complete individualisation in every commune, proved to be ineffective enough so it was necessary to amend it towards unification. It also illustrates how central agencies of governmental administration are trying to withdraw from their active role in the field of environmental protection by delegating the obligation of such actions to local self-government units.

Questions and problems for discussion:

1. Liberal state or welfare state?
2. Which services shall be delivered publicly by the state?
3. What are advantages and disadvantages of privatisation?
4. Will the state be an active business player owning companies on competitive markets?



PRIVATE ENTITIES IN THE IMPLEMENTATION OF PUBLIC SERVICES

The existence of private entities in the public sphere in the largest number, the communal economy. The communal economy consists in the execution by local self-government units of their own tasks, in order to meet the collective needs of the local community.

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It is important to note here that the communal economy consists in performing public service tasks aimed at the ongoing and continuous fulfilment of the collective needs of the population through the provision of publicly available services.

A sample catalogue of own local self-government units, in the area of which they run the communal economy, is contained in the acts on municipal self-government, the district self-government and regional self-government. At all levels of local self-government, with particular saturation in the case of the communal self-government, they fall into several areas of tasks: administrative-order, educational-cultural-social, infrastructural-technical. The last catalogue related to the construction and maintenance of road infrastructure; streets and bridges; water supply and sewage collection; maintenance of greenery; collection, transport and disposal of municipal waste; housing is particularly extensive. The infrastructural-technical services are involved the most, apart from education, expenditures of local self-government units.

The current law indicates several ways of implementing its economy. In practice, most often, this is done by means of commercial law company belonging to a self-government unit, much less



often a budgetary agency, which in itself is already a method of transferring the implementation of state public tasks to private sector entities.

Running a communal economy with the help of a company is encumbered with a number of defects. The tendency of moving more and more public tasks to commercial law entities, which is specific commercialisation or privatisation of the public sector, should be considered unprofitable. This process can undermine citizens' confidence in the institution of the state, when public administration units, especially self-government units and even governmental administration, so often and willingly renounce the right to manage public affairs. The situations in which commercial law agencies are entrusted with not carrying out specific tasks such as receiving, transporting and disposing of municipal waste, but managing e.g. city development, organising a communication system, or other conceptual and substantive work that should remain the domain of the body, and especially the officials, are particularly questionable.

Owing to its nature and ownership composition, a communal company may use "in-house" contracts provided without a tender, in the form of entrustment by the commune, district or regional owned by it. However, the amendment of the public procurement law introduced in this area, the conditions under which this is possible to apply this method, is advantageous from the point of view of the self-government unit and its company. In practice, municipal companies often do not meet current, inflated criteria. Thus, the tasks of self-government units are entrusted under the procurement law, where municipal companies are in competition with private entrepreneurs public tasks are often entrusted to private entrepreneurs. At the same time, the author's

own assessment does not allow him to agree with the view with reference to lowering the costs of implementing public tasks through the use of private entities for their realisation. It is important to particularly emphasise the risk of lowering the quality of such services, and sometimes even the problems of delivering them.

It should be added, only as an addendum, that the form of state withdrawal from the sphere of public tasks is generally every privatisation understood as the replacement of public entities by private ones in the process of carrying out public tasks. This process may have the effect of reducing the costs of implementing public tasks, but on the other hand, do not provide such a guarantee of reliability and quality as when implemented by public entities. An example of such privatisation is the realisation of public tasks, which can be any non-imperative and non-public forms of their implementation, including those on the basis of the Law on Public Benefit and Volunteering, Public-Private Partnership, Concessions for Construction Works or Services.

Questions and problems for discussion:

1. Should public services be offered by private entities?
2. Should public entities have monopoly on certain sectors, if yes which ones?
3. What risks occur when private entities are responsible for implementing public policies?
4. Computerisation of public administration and administrative proceedings.



Both citizens and entrepreneurs expect the public administration to provide them with services of a similar quality as the private sector currently provides. The digitisation of public administration is currently one of the top priorities of the state. Poland, realising the goals of the European Digital Agenda and the Integrated State IT Program, is creating new methods of communication between citizens and the public administration, fulfilling the requirements of the European Union.

The basic instrument used for this purpose is the 2005 Act. Since 2014, amendments have been made providing for a number of solutions aimed at increasing the accessibility and attractiveness of the electronic customer cooperation system with public administration bodies, and the universality of the electronic form of communication with the public administration.

The public administration services platform ePUAP is the result of the tasks taken up. Through it you can: settle many matters online in various offices, check online the status of cases and requests online, receive and send official correspondence in electronic form. The establishment of a "Trusted Profile", which allows for electronic filing with legal effect without the need for a traditional signature, is among the services offered by ePUAP.

However, only 32% of citizens use Internet in their contacts with public administration and 1.5% have a "Trusted Profile". Hence efforts are still being taken to standardize the practice of public administration. The legislator imposed the obligation on the public administration to use uniform delivery boxes. The authorities are obliged to submit their electronic formulas to the central

repository where they will be audited. Forms that do not meet the standards will be authoritatively removed from the ePUAP not to mislead the public. The equalisation of the electronic form with paper form is particularly worth mentioning. Offices are also obliged to correspond with the interested party electronically when they expresses their consent, or they themselves initiates it.

Digitalisation also goes deeper into the structure of administrative proceedings by allowing the electronic form to be used in the granting of a power of attorney, in testimonies or in explanations, in the formulation of a reference by an official, and in the summons. In addition, it is possible to use electronic copies of documents in their administrative proceedings after their authentication with a qualified certificate or trusted profile. This deserves a notice to make possible for the parties to view the file via electronic channels in both administrative and judicial administrative proceedings.

The success of computerisation is clearly visible on the grounds of tax proceedings. For the fiscal year 2015, the annual electronic settlement of personal income tax was filed by 8 million 400 thousand taxpayers. For the fiscal year 2016 there were already 9 million 670 thousand thus 50% of all settlements.

In addition, the digital content of the 2014–2020 program is also the development of broadband Internet. Alongside shaping the digital competence of the society and the e-administration projects described above the Part of Digital Poland 2014–2020 program, with a budget of EUR 2.2 billion, also includes the development of broadband Internet.



Questions and problems for discussion:

1. What public services should be delivered online in first order?
2. What are the risks related to computerisation of public administration?
3. Can elections be held online safely?
4. How can equal access to public services be secured if they are only provided in digital format?

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MENTAL ELEMENT IN CRIME - WHAT
DOES IT MEAN TO BE RECKLESS?

- I Recklessness in life and recklessness in law: how do we define it?
- II *Cunningham* Recklessness: do not mess with your mother-in-law
- III *Caldwell* Recklessness: a tale about holding grudges



RECKLESSNESS IN LIFE AND RECKLESSNESS IN LAW: HOW DO WE DEFINE IT?

“When you’re young, you’re very reckless. Then you get conservative. Then you get reckless again,” as Clint Eastwood would once have said. But what does “recklessness” actually mean to us?

AUTHOR

Andrzej Lewna

Most students, when faced with the lecture topic above, may wonder about the sense of such question. After all, each of us understands the term intuitively, we are usually also able to give examples of conduct in specific life situations which, in the face of a particular type of potential risk, would be considered reckless by ordinary prudent individuals. However, in criminal law, this issue is more complex. Modern criminal law, in the vast majority of cases, is essentially based on the principle of guilt, according to which a sentence imposed can only be considered fair if it has been established not only that a person charged with an offence has, through his or her act or omission, met the elements of conduct defined as prohibited, but also that such conduct was accompanied by a specific mental attitude: intentionally, i.e. with the intention of committing an act, or unintentionally, by recklessly or negligently putting the interests of others at risk. Proper legal treatment of recklessness as one of the so-called “forms of guilt” of the offender is of pivotal importance for criminal liability. During our classes we will try to look at the legal concept of recklessness from a comparative perspective by analysing several, funda-



mentally different jurisdictions and legal traditions: that of continental Europe and the Anglo-Saxon one. By presenting the development of a chosen legal concept in one legal system on the examples of specific, landmark decisions of English courts,

we will try to show the audience that the experience of jurisprudence and practice from one country can be used to reflect on the proper understanding of legal concepts in another one.



CUNNINGHAM RECKLESSNESS: DO NOT MESS WITH YOUR MOTHER-IN-LAW

The facts of this 1957 English case were that the injured person, an old woman named Mrs. Sarah Wade, was a tenant of a house at No. 7A Bakes Street, Bradford.

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The defendant Cunningham was engaged to be married to Mrs. Wade's daughter. After the wedding the young couple were to live at this address. Mrs. Wade and her husband, an elderly couple, lived in the house next door. At one time the two houses had been one, but when the building was converted into two houses a wall had been erected to divide the cellars of the two houses, and that wall was composed of loosely cemented rubble. One day the defendant went to cellar of No. 7A Bakes Street, wrenched the gas meter from the gas pipes and stole it together with its contents. As he later stated to the police officer in charge of the case: "All right, I will tell you. I was short of money, I had been off work for three days, I got eight shillings from the gas meter. I tore it off the wall and threw it away." Although there was a stop tap within two feet of the meter the appellant did not turn off the gas, with the result that a very considerable volume of gas escaped, some of which seeped through the wall of the cellar and partially asphyxiated Mrs. Wade, who was asleep in her bedroom next door, with the result that her life was endangered. At that time the law of England recognised a specific crime of maliciously endangering human life by exposing a person to a poisonous substance. However, the trial court had to decide



what “malice” basically meant in this context, since it was undisputed in the case that the defendant had no intention of poisoning his future mother-in-law, but he did so completely unintentionally, unaware of the danger. The trial judge directed the jury that “malicious” in this context means: “wicked – something which he has no business to do and perfectly well knows it. ‘Wicked’ is as good a definition as any other which you would get.” However, the defendant, convicted by the jury so directed, appealed to a higher court, indicating that such an understanding of this element of the offence is incorrect. The Court of Appeal endorsed the appellant’s view, finding that the “malice” of the conduct in question in relation to this offence must mean either an intent or recklessness, i.e. the situation where the accused

has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it. Since, in the specific situation, the jury did not decide whether the defendant had been aware of the risk of poisoning his mother-in-law and, accordingly, whether the elements of the offence had been met, the conviction had to be quashed.

Presented in class, this landmark case becomes the starting point for a debate on the relevance of the offender’s awareness for their criminal liability. What is the relevance of the defendant’s observations, mental condition and ability to recognize the risk? How to establish them? Is such subjectivity fair in all circumstances? These are some of the questions we will try to answer during the course, based on this and subsequent landmark decisions.



CALDWELL RECKLESSNESS: A TALE ABOUT HOLDING GRUDGES

In this case, which was decided in 1981 in England, the defendant Caldwell worked in a small hotel in London and held a grudge against his employer.

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One night he got very drunk and in the early hours of the morning he decided to revenge himself on the proprietor by setting fire to the hotel in which some ten guests were staying at the time. He broke a window and succeeded in starting a fire in the ground floor room; but fortunately this was discovered and the flames were extinguished before any serious damage was caused. At the arson trial, he said he was so drunk at the time that he thought that there might be people in the hotel whose lives might be endangered if the fire spread had never crossed his mind. The trial court sentenced him for recklessly endangering someone else's life. The defendant appealed, arguing that since he was unaware of the possible risk of endangering someone else's life owing to his intoxication, he could not be considered reckless and consequently convicted of the offence so defined – since recklessness, as we have seen from the Cunningham case, requires conscious risk-taking. However, the British House of Lords, which heard the case as a senior court, did not accept the defendant's arguments. This judgment established a new precedent according to which even in a situation where the defendant is unaware of the risk associated with his conduct, which



would be obvious to an ordinary prudent individual, he or she may be found guilty of recklessness. The case had a major impact on the subsequent development of English criminal law and caused a lot of controversy, in particular with regard to how the limits of reasonable conduct required of a “prudent individual” should be interpreted.

How far-reaching the consequences of such an interpretation can be, became clear in the 1983 *Elliot v C* ruling. The facts of the case were that a fourteen-year-old girl with learning difficulties caused a fire inside a wooden garden shed by lighting white spirit. The Magistrates Court, sitting as the trial court, found it necessary to take into account the girl’s age and awareness when assessing her being reckless. Finding that, in the circumstances of the particular case, she did not consider the consequences of starting the fire and could not be expected to be able to realise the danger brought about, the court relieved her of criminal liability. However, the High Court, hear-

ing the case on the prosecution’s appeal, rejected such reasoning considering that, since the legally accepted standard requires that the objective assessment should use the “average prudent individual” as a benchmark, there’s no place to take circumstances such as the offender’s age and mental condition into account, even if this seems unfair.

The example of these cases, along with others, will be used in our class to address wider criminal law issues. What standards should be set by criminal law – subjective or objective ones? What is the difference between the two ways of understanding the mental element of an offence? What are the consequences of taking one approach or the other? Next, the selected, controversial English cases will provide the starting point for a debate on the problems of guilt, understanding of intentionality and unintentionality in other legal systems, including Poland and other European countries.

FOR CLINGING to COOL DOWN

THE LIABILITY
OF INDIVIDUALS
AND STATES FOR
CLIMATE CHANGE

Maciej Nyka

- I Introduction
- II The evolving role of public involvement in environmental protection
- III Public law litigation on climate change
- IV Private law litigation on climate change
- V Conclusions



INTRODUCTION

Anthropogenic climate changes are one of the most serious challenges of modern times. Studies on this phenomenon, the ways to limit it, and means to adapt to climate change are of interest to science, politics, as well as national and international legislation.

AUTHOR

Maciej Nyka

Although knowledge on the causes of global warming is increasing and new norms to mitigate the process are introduced on national and international level, the threat does not subside. The issue at hand is the insufficient commitment of states to actions aimed at reducing greenhouse gas emissions as well as shortcomings in supervising and implementing legal norms.

In this lecture, I would like to tackle the problem potentially resorting to a newly emerging class of civil actions, namely climate change litigation. Identifying the conditions for effectively pursuing claims of this kind allows citizens to take over some competences related to supervising proper and effective implementation of national and international climate protection norms. The practical importance of these cases cannot be overestimated. On the one hand, they compel states and private entities responsible for greenhouse gas emissions to take specific actions, and on the other, thanks to considerable publicity generated by such cases, they increase social awareness of climate change issues.



THE EVOLVING ROLE OF PUBLIC INVOLVEMENT IN ENVIRONMENTAL PROTECTION

Environmental law has for many years recognized the role and importance of social involvement in protecting the environment.

AUTHOR
Maciej Nyka

Already during the first United Nations Conference on Human Environment which took place in Stockholm in 1972, direct relationships between the quality of the environment and the ability to enjoy human rights were noticed. This viewpoint has since been frequently upheld by legal academics and commentators as well as the instruments of international law, and provided legal theorists with a basis for attempting to identify groups of human rights related to climate protection issues.

Moreover, a whole range of environmental protection norms rightly assume that it is the members of society who are most directly concerned and threatened by the consequences of poor environmental conditions and the resulting climate changes. As noted in Principle 10 of the Rio de Janeiro Declaration, “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level”. In the context of preventing climate change, this problem has been addressed, among others, in the preamble to the 2015 Paris Agreement. The emergence of the new class of action – climate change litigation – is a manifestation of this trend which means people taking matters in their own hands losing their trust to political instruments such as elections which ap-



parently prove ineffective, but through legal recourse.

Under national law norms, climate change litigation can be subdivided into claims advanced by individuals against the state and claims advanced against economic entities. In the first category, the claims are usually based on the state's failure to fulfil certain duties to ensure environmen-

tal safety and its insufficient supervision over and limitation of the use of natural resources. Claims advanced against private entities are in turn based on attempts to prove a causal connection between their activities and damage or threats resulting from climate change.



PUBLIC LAW LITIGATION ON CLIMATE CHANGE

In 2015, a Dutch environmental organization Urgenda Foundation and 900 Dutch citizens sued the government of the Netherlands.

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Maciej Nyka

Their action related to the government's failure to take suitable measures preventing global climate change. The claim was based on the fact that the target emission reduction level of 17% by 2020, set in the Netherlands' climate policy – while international obligations entailed reducing emissions by 25–40% – was insufficient to meet the state's fair contribution toward the UN goal of keeping global temperature increases within two degrees Celsius of pre-industrial conditions. The court concluded that the state was obliged to undertake measures to mitigate climate change due to "the seriousness of climate change consequences and the considerable risk of their manifestation".

Article 21 of the Dutch Constitution imposes on the State a duty of care to keep the country habitable and to protect and improve the environment. Book 6, Article 162 of the Dutch Civil Code addresses the violation of a personal right and a breach of statutory duty or of an unwritten standard of care, which can be established by court. In the view of Urgenda, the standard of care is the result of an entire range of international obligations imposed on the Netherlands, including Articles 2 and 8 of the European Convention on Human Rights, or international climate protection law.



In a judgment of 25 June 2015, a court in The Hague obliged the state of the Netherlands to curtail GHG emissions by 25% below the 1990 level until 2020. While stating that the current undertaking of the government to limit emissions by 17% is insufficient, the court did not define

how the reduction is to be effected, but offered a number of suggestions such as emission trading or taxation measures. Despite subsequent appeals, on 20 December 2019 the Dutch Supreme Court ultimately upheld the ruling of the first instance court in favour of Urgenda.



PRIVATE LAW LITIGATION ON CLIMATE CHANGE

Another interesting case which should be discussed in the context of climate change claims advanced by individuals is the rather unusual case of *Saúl Ananías Luciano Lliuya v. RWE AG*, i.e. a suit brought by a Peruvian national Saúl Ananías Luciano Lliuya before a court in Essen, Germany.

AUTHOR
Maciej Nyka

The plaintiff lives in Huaraz, a town located over 4,000 meters above sea level near Lake Palcacocha in the Andes. Due to Andean glaciers melting as a result of climate change, the volume of water in Palcacocha is rapidly increasing, posing a real risk of catastrophic floods for Huaraz inhabitants. The suit followed Lliuya's calculations that RWE, a huge German mining and manufacturing works and electric utility company, is responsible for 0.47% of worldwide CO² emissions.

Lliuya has, firstly, motioned that it be determined that the defendant be to proportionally bear the costs for adequate preventative measures to protect the property of the claimant against a glacial flood from Lake Palcacocha. Hence, the claimant motioned that it be determined that the defendant be obligated to bear the costs for adequate preventative measures to protect the property of the claimant against a glacial flood from Lake Palcacocha, proportionally to its contribution to the damage (share in global greenhouse gas emissions), which is to be determined by the court pursuant to § 287 of the Code of Civil Procedure. Alternatively, the claimant motioned that the defendant be ordered to take adequate measures to ensure that the water volume of Lake



Palcacocha is reduced to an extent proportional to the defendant's contribution to the damage, which is to be determined by the court pursuant to § 287 of the Code of Civil Procedure, and further alternatively that the defendant be ordered to pay 17,000 euros to the association of local authorities, Waraq, as its contribution toward preventative measures adequate for the protection of the claimant's property, and finally alternatively that the defendant be ordered to pay 6,384 euros to the claimant. Lliuya's claims were not admitted by the court in Essen (Germany). The first claim was dismissed because the plaintiff did not give an exact value of the claim related to carrying out investments to protect against the flood, wrongly assuming that this would be done by the court. The second claim was dismissed based on very similar grounds. Here, likewise, the plaintiff failed to produce an accurate figure for his claim. Finally, the third claim was dismissed because of the absence of adequate and equivalent causation of the impairment. The court stated that the claimant's assertions, according to which the defendant's contribution to climate change through its greenhouse gas emissions is sufficient to affirm causation, are in fact not sufficient to establish a legal causality.

Undoubtedly, the claims submitted by a foreign national to a German court, concerning facts occurring thousands of kilometres away, in another country with entirely different legal, geographical

and social conditions, were filled with errors in law and inaccuracies. On the other hand, however, it must be noted that the court's approach was extremely formalistic, especially considering its lack of deeper interest in the substance of these claims. Yet the claims concern issues of a global nature that affect people worldwide in a similar way. In this view, the claims may be considered more as an attempt to bring the principle of justice to bear within and between generations that as the claims of a specific inhabitant of a floodthreatened small Peruvian town. A similar view seems to have been taken by the second instance court. On 30 November 2017, the appeals court recognized the complaint as well-pled and admissible. The case will move forward into the evidentiary phase to determine whether Lliuya's home is (a) threatened by flooding or mudslide as a result of the recent increase in the volume of the glacial lake located nearby, and (b) how RWE's greenhouse gas emissions contribute to that risk. The court will review the expert opinion on RWE's CO² emissions, the contribution of those emissions to climate change, the resulting impact on the Palcaraju Glacier, and RWE's contributory share of responsibility for causing the preceding effects. While the facts of this case must still be adjudicated, the court's recognition that a private company could potentially be held liable for the climate change related damages of its greenhouse gas emissions marks a significant development in law.



CONCLUSIONS

The brief discussion of two evidently interesting cases, presented above, seems to indicate the growing role of individuals in ensuring compliance with national and international environmental law.

AUTHOR
Maciej Nyka

The examples reviewed above evidence that a twofold choice exists: either to protect human rights threatened by climate changes, or to approach the issue using civil law principles, demonstrating all their attendant limitations. Equally important is that both cases show that claims can be advanced either against states due to their acts or omissions violating protection standards, or against private entities in relation to their tortious activities.

IN SUR ANCE LAW

Dorota Maśniak

RISK MANAGEMENT
TO SOLVE GLOBAL
PROBLEMS LIKE
ENVIRONMENTAL DISASTERS

I Insurance: origin and purpose

II Dam disasters in Brazil: Mariana 2010, Brumadinho 2019

III Environmental disasters in Mexico: Deepwater Horizon Disaster 2010, Mining Disaster 2014



INSURANCE: ORIGIN AND PURPOSE

Can insurance be used to solve global problems caused by man's operations? Climatic change, environmental pollution and global crises are the issues faced by humankind today. Looking for various methods to solve these problems, it is worth to consider the age-old concept of insurance.

AUTHOR

Dorota Maśniak

Centuries ago, men understood that one of the ways to obtain help in unexpected hardships is incurring risk jointly, distributing the losses suffered among members of the widest possible, specifically organized group of persons exposed to the same risk (for example theft of household items or damage to a goods-carrying ship). Thus understood, the idea of insurance is among one of the earliest manifestations of human culture, resulting from the same self-preservation instinct that prompts threatened individuals to band together to protect against danger and help one another to mitigate the consequences should it materialize. This idea arose spontaneously already in primitive societies within family and clan communities. The appearance of money and the growth of money and goods economy fostered the idea of splitting risk among members of a particular community. This idea burgeoned especially where the risk was difficult to prevent and could lead to considerable losses if realized, for example among participants in sea expeditions or caravans exposed to attacks or natural disasters.

A maritime law institution known as *lex Rhodia de iactu* is considered the forerunner of mutual insurance schemes. Under this scheme, if goods



were thrown into sea to save a vessel from going down, the resulting losses were distributed jointly and severally. Today, it is known to Polish legislation under the name of “general average.”

Prototypical life insurance, on the other hand, can be found in ancient Rome in the form of insurance in case of death. Poorer members of public entered into associations (*collegia funeratica*, *collegia tenuiorum*) to ensure financing the burial costs.

As money-goods economy developed, monetary credit relationships evolved that carried the germs of gainful activity. Profit orientation underlies the second variety of risk distribution, originating from the maritime loan scheme. A lender financing a maritime expedition reserved high interest rates – much higher than other lenders – while simultaneously releasing the borrower (ship operator or merchant purchasing overseas goods) from the obligation to repay the loan and interest if the ship and/or goods were lost, for example due to a pirate attack or sinking during a storm. The lender incurred the risk of losing the ship and goods purchased for borrowed money, while accepting the risk for gain in the form of loan interest. This institution was the forerunner of commercial insurance, but with reversed payment terms. Now it is the risk-exposed entity (ship operator, owner of transported goods) that pays the premium in advance, not in arrears in the form of loan interest, and the insurer pays the benefit (insurance indemnity) only when a loss occurs. Despite differences in the method of settling mutual benefits, the effect – assuming risk against a suitable fee – remains the same.

As early as in the 14th century, maritime loans gave rise to transport insurance as separate legal institutions. The earliest insurance policies are considered to be documents confirming entering into a ship (casco) and goods (cargo) insurance contract, issued in Genoa, Italy on 23 October 1347 and 13 January 1348. Initially, the role of insurers was played by individuals or groups of individuals, later supplanted by specialized insurance companies. This type of insurance is today dominant on all insurance markets, except for the UK, where the leading insurer is Lloyd’s.

Insurance is an economic and legal category. The legal viewpoint led to distinguishing insurance law as a separate branch of law, manifested in the multiplicity of methods used to regulate insurance relationships using legal instruments. Establishing the Insurance Law Department at the Faculty of Law and Administration of the University of Gdańsk was intended to focus teaching and research processes on legal issues of insurance. Being aware of the importance of insurance that combines preventive thinking and compensation, the Insurance Law Department prefers to consider insurance law in wide functional terms. These terms include regulating various branches of law whose function is to govern insurance relationships entered into to protect individual interests, achieve profit, or solve social problems.

The times are changing and so are the risks encountered. The only thing that does not is the fear... and insurance with its supporting legal regulations.



DAM DISASTERS IN BRAZIL: MARIANA 2010, BRUMADINHO 2019

In November 2015, in the town of Mariana (Minas Gerais) the Fundão dam owned by the Sanmarco Company, a joint venture between Brazil's Vale SA and BHP Billiton, collapsed.

AUTHOR

Dorota Maśniak

As a result, 50 million cubic meters of iron ore sludge leaked downstream to the Doce river. The toxic mud flooded an area equal to 25,000 Olympic swimming pools, inundating entire towns, killing 19 and causing enormous damage to the environment, such as the death of thousands of birds. Polluting the river cut off water supplies to about 200 localities with 28,000 people. The toxic fluid travelled through waterways to eventually reach the Atlantic coast. Restoring the affected areas to a suitable state is expected to take decades.

The company responsible for the disaster was covered by property insurance and business interruption insurance. In risky investments like these, the insurance risk needs to be diversified among several insurers. Here, the Swiss Zurich-based ACE insurance company was liable to pay 80% of the amount covered, while Spain's MAPFRE SA and Canada's Fairfax Financial Holdings Inc. also formed part of the team of underwriters. From the viewpoint of damage caused to other entities, third party liability insurance is of the highest importance. For the above loss, insurer Allianz SE paid out about 70 million reais in indemnity.

Unfortunately, before the ecosystem could really recover after the Mariana disaster, on



25 January 2019, in similar circumstances, Brazil's most tragic environmental disaster in history took place. Near Brumadinho (Minas Gerais), an 85 meters long dam, filled to the brim with 12 million cubic meters of tailings from iron ore mines, failed, causing the death of at least 250 people. The dam was owned by the Vale SA mining company. The calamity happened during lunchtime, when mud mixed with iron ore flooded the mine's administrative area where hundreds of employees were having lunch. As a result of inundation with toxic waste, 125 hectares of forest were lost, equivalent to over one million square meters or 125 football fields. Water life in the region was lost. In the most affected sec-

tions, the river was completely clogged with mud, making it impossible for water species to survive.

The sheer size and nature of losses caused by the disasters in Brazil spurred discussions on using insurance to compensate for environmental damage. Insurance is viewed as the most effective tool to manage risks. The risk of environmental pollution poses new challenges to insurance law and the insurance market, related among others to claims pursued by groups of entities and communities whose surroundings have been affected by the consequences of disasters. Another question is: how far can an insurer go to prevent the recurrence of similar disasters?



ENVIRONMENTAL DISASTERS IN MEXICO: Deepwater Horizon Disaster 2010, Mining Disaster 2014

A decade has passed since the famous Mexican Gulf oil leak. The leak, caused by an explosion at the Deepwater Horizon rig, became one of history's largest environmental disasters.

AUTHOR

Dorota Maśniak

On 20 April 2010 an offshore rig owned by BP exploded, killing 11 workers and causing the biggest oil leak in history. Over four months, the damaged well released almost 5 million oil barrels (as much as 82,000 barrels per day) to the Gulf of Mexico waters. This was history's second largest oil leak – only when the Iraqis deliberately set fire to Kuwaiti oil fields in 1991 were the statistics worse at about 8 million barrels.

Most likely, it was probably this event that led to Mexico introducing legal regulations on environmental insurance as the first country in the world to address this issue. The Mexican environmental protection statute requires each entity engaging in activities that might cause losses to the environment, including high-risk activities involving the generation of hazardous waste, to take out an environmental insurance policy. Detailed environmental insurance regulations were introduced, defining environmental risks, the scope of protection and sums insured, and establishing the National System of Environmental Risk Insurance.

Unfortunately, these measures failed to prevent further environmental disasters in Mexico. In 2014, about 40,000 cubic meters of acidified copper sulfate were released from the Buenavista



del Cobre mine in Cananea to the Bacanuchi and Sonora rivers, leaving 22,000 inhabitants of seven communes without potable water and means of survival. Even though five years have passed from the disaster, the waters of these rivers are still strongly contaminated.

Mexican experiences beg for the question regarding the role of legislation in development

of environmental insurance. The world is facing questions on how to use the financial potential demonstrated by the insurance market to preserve life on Earth. Should compulsory environmental insurance be introduced as a prerequisite of launching economic activities by the potentially polluting entity? Or perhaps insurance cover should be taken out by the potential victims, namely all of us?

WEL COmE TO THE TITAnIC

Anna Jurkowska-Zeidler
Damian Cyman
Edward Juchniewicz

THE GLOBAL
FINANCIAL
MARKET!

- I The history of the free market is strewn with increasingly larger speculative bubbles and increasingly painful crashes...
- II The 2008 global financial crisis
- III Post-crisis financial architecture: a journey through federalization of EU financial market law
- IV New consumer protection paradigm on the financial market
- V Money: evolution of money



THE HISTORY OF THE FREE MARKET

is strewn with increasingly larger
speculative bubbles and increasingly
painful crashes...

**If global economy were a ship,
it could be called the *Titanic*.
It is fated to run into a crisis.
An experienced seaman at the
helm knows that the longer
a streak of economic growth
lasts, the more likely it is that
a crash will occur.**

AUTHOR

Anna Jurkowska-Zeidler

The question is only whether it will be just a shoal, or an iceberg. In other words, is the crisis just a “market disturbance,” or heralding something larger? “Something larger” most commonly takes the form of a speculative bubble, a state of market agitation during which investors overestimate the value of particular goods or financial instruments. History shows that these can be tulips, stock of inland canal building firms, railways or real estate. Global capitalism is entering a new era. World trade is no longer regulated by the logic of supply and demand, but enormous waves of capital that follow alternating states of panic and frenzy. The story of the free market is a tale of increasing larger speculative bubbles and increasingly more painful crashes, usually preceded by some turning point.

What exactly is a speculative bubble?

A speculative bubble is formed when the market price of a particular asset, for example stock or real estate, exceeds its fundamental value. Speculation with goods causes prices to rise, which in turn leads to even more speculation. At some point, this spiral breaks down and a crash occurs – the bubble bursts,



prices plummet and the assets of many investors become worthless. Because finding the cause of this development is not easy, bubbles are often discovered at various stages. Generally speaking, a speculative bubble forms when the following conditions are met: the market price is higher than the real fundamental price, innovative features are present, the investment is expected to bring

returns at a later date, the bubble must eventually burst. The most spectacular bubbles include: the Tulip Mania (1636-1637), the South Seas Company (1711-1720), the Mississippi Company (1716-1720), the Railway Mania (1840-1846), the Japanese asset price bubble (1986-1991), the dot-com bubble (1995-2001), subprime credits (2007-2008).



THE 2008 GLOBAL FINANCIAL CRISIS

Once the dot-com speculative bubble burst, Wall Street capital moved to the real estate market, causing home prices to rise.

AUTHOR

Anna Jurkowska-Zeidler

The largest construction boom in US history was driven by the chair of the Federal Reserve, Alan Greenspan. Fearing the recession following the WTC attacks of 11 September 2001, the Fed started to lower interest rates, in other words the cost of loans. Once this process was completed, loans started to be readily available and US citizens, encouraged by the government's vision of achieving the "American Dream" and "ownership society" with "everyone having the right to own a home," triggered a wave of mortgage loans. The loan boom woke up the stock market as well and intensified consumption – Americans fancied their homes would gain in value indefinitely and secured even more loans with mortgages. The bubble should have burst when the US ran out of credible borrowers. But the banks wanted to prolong the good streak and started to offer loans to people with weak credit histories, so-called NINJAs (no income, no job, no assets). In 2006, loans with high risk of default, called *subprimes*, already made up 20% of new mortgages. The question of why the American speculative bubble problem spilled all over the world can be summed up in one word: securitization. To hedge against the risk of default, banks



resorted to financial engineering, “repacking” risky loans in so-called collateralized debt obligations (CDO). Their inner workings were understood by few, but Wall Street bankers and rating agencies swore that CDOs are not only profitable, but entirely safe. This new, profitable financial product saw investments by banks, investment funds and private investors wishing to turn a profit on the loan boom. Distributed risk turned into equally distributed and hard-to-estimate losses. The financial market was gripped by a herd effect – the tendency of market participants to align their behaviours with those of others. The disparities increased, but while “the music of low interest rates played on,” the wheels kept on turning. Yet once the Fed started to raise rates, an avalanche followed. At the turn of 2016, the surplus of empty homes was large enough to drive prices down, and because loan instalments simultaneously went up, the risk of insolvency began to materialize: NINJAs defaulted on loans, mortgage loan tranches with the lowest quality proved worthless and banks, fearing for their own solvency, ceased to lend to each other. The biggest market saving operation since the Great Depression was launched. The Fed lowered interest rates while offering huge financial injections to banks in an attempt to ensure

market liquidity, the grease needed by the global financial machine to run smoothly. Without this liquidity assistance, banks would fall like a domino chain, pulling with them the stock exchange, and then the rest of the economy. September 2008 saw the spectacular collapse of Lehman Brothers, one of America’s oldest investment banks, seen as the “true” start of the worst financial and economic crisis since the Great Depression of the 1930s. The biggest surprise is the extent of the contagion effect – speculations with US loans ruined the German IKB and British Northern Rock banks. It was not only banks that suffered – cities lost millions of dollars in municipal savings as well.

The crisis revealed the instability inherent in the banking system. Back then, the systemic risk in the banking sector was discounted as well. The problem was that banks were, as the common saying went, “too big to fail.” They could not be allowed to bankrupt, or the consequences for the entire finance system would be catastrophic. Countries had to save them – with taxpayer money. The crisis demonstrated that the banking sector may pose risks not only to the financial system, but also to the public sector and countries at a global scale. After the US sparked a financial crisis with worldwide repercussions, Europe plunged into a debt crisis.



POST-CRISIS FINANCIAL ARCHITECTURE:

a journey through federalization of EU financial market law

**In the European Union,
the financial crisis showed that
financial supervision varied from
one Member State to another.**

AUTHOR

Anna Jurkowska-Zeidler

It was too lax in some countries and stringent in others. These systems differed widely from one another. Europe was also in the grip of a peculiar banking nationalism. By changing prudence and institutional regulations, foundations were laid for a new financial safety net, defined as a set of regulatory and institutional solutions to prevent the financial system from becoming unstable.

The institutional components of the financial safety net include:

- the central bank as the lender of last resort,
- financial market supervision institution(s), and
- crisis management institutions (deposits guarantee system as well as systems for reorganization and managed liquidation of banks).

The safety net commonly includes the government (ministry of finance) which takes intervention measures (regulatory and financial) when a crisis looms and decides to use the budget's financial resources to restore financial stability (in particular by granting governmental guarantees



and recapitalising institutions threatened with bankruptcy). The financial safety net serves to limit the occurrences of financial crises and their scale (crisis prevention) and mitigating their consequences, should they occur (crisis resolution). The most important safety net objective is to protect all customers of financial institutions (in particular banks, insurers and investment firms) and maintain trust in the financial system as a whole. So far, this view of the financial safety net has not been rendered uniform across the European Union. Likewise, the obligation to ensure financial stability is limited to the national level and remains within the competences of individual member states. For this reason, the primary challenge for the UE following the experiences of the recent global crisis is the question of joint liability for financial market safety.

The global financial crisis forced institutional changes in the area of regulation and supervision of the EU common financial market to better prevent and more effectively manage crisis situations. The new bodies and safety institutions of the common financial market are undoubtedly strategic components of the European financial safety net. A fundamental change in the financial supervision architecture was the 2011 establishment of the new EU-wide European System of Financial Supervision. The system consists of three new European Supervisory Authorities, the European Systemic Board Risk, the Joint Committee of European Supervisory Authorities (competent in matters of supervising financial conglomerates) and national supervisors. This resulted in a division of competences in the area of macro- and microprudential supervision.

The new regulatory and supervisory changes transfer more powers to the EU and enhance the process towards the federalization of financial market law.

The new model of EU financial market law is based on four components:

- the introduction of supervisory bodies at EU level;
- a higher degree of harmonization through the introduction of a pan-European rule-book;
- greater consistency in the application of EU regulations;
- the transfer of direct supervisory powers over market actors to EU regulatory agencies.

Financial market regulation and supervision dilemmas:

- Should financial supervision be integrated across the EU?
- Should depositors be protected on a national basis?
- Does the federalization of financial market law ensure the market's safety?
- What should be the role of the European Central Bank when a crisis strikes?



NEW CONSUMER PROTECTION PARADIGM ON THE FINANCIAL MARKET

Services offered on the financial market are characterized by a considerable degree of complexity.

AUTHOR
Damian Cyman

The consumer is exposed not only to the risk resulting from the impact of external factors on the performance of the agreement, but also the failure to understand the very legal and economic nature of the contract. The manner in which the contract is worded may also cause consumers to involuntarily enter into additional contracts or consent to onerous sanctions of which they are not aware because of the intricacies and wording of the contract. For the financial market to operate properly, it is necessary to guarantee suitable protection of its participants, with special emphasis on consumers. This is designed to prevent multiple entities from using complex legal relationships to water down liability for improper performance of services or even shifting this liability onto the end user. Consumer protection on the common financial market is aligned with a wider EU policy of protecting consumers as the economically weaker party. It is based on the principle of transparency of information, which is of particular importance in contracts entered into on the financial market, which are often complex and obscure. Hence, the actual purpose of the legal regulation is not to favour consumers but restore the balance in information available to all financial market participants, or even compensate for lack of knowledge and information on the part of the consumer.



MONEY: EVOLUTION OF MONEY

Money is a commonly adopted means of exchange and legal tender, its concept going back thousands of years.

AUTHOR

Edward Juchniewicz

Money is nobody's "idea". Rather, it evolved along with society. It was widely proved that the concept of money was closely related to the increase of production capacities, growing exchange of goods and introducing the division of work in primitive societies.

This development of exchange was the consequence of changing forms of goods value. The original form was the simple and accidental value of goods which prevailed when exchange still occurred infrequently. The next stage in exchange growth was related to dividing labour in society and the emergence of surplus goods. In consequence, a large number of goods was available for exchange. Each good which could be exchanged had multiple other equivalent goods. An essential downside of this form of value was that due to the large amount of exchangeable goods the value of each good could not be expressed in final terms.

Further stages of development in production and exchange of goods resulted in the appearance of specific goods (such as salt, sugar or cattle) which served as objects exchanged on local markets.

The monetary form of goods value appeared when the need to exchange goods reached a large



scale. Subsequent stages of goods production growth required goods to be exchanged at wholesale quantities, leading to the need for using money.

To recapitulate, it should be added that money is a particular kind of good that evolved through the exchange of goods. The money base included various materials, but precious metals (especially gold and silver) proved the most suitable.

In legal categories, money can be considered as the main feature of the national monetary system, or the state medium of exchange. The scope of money analysis is considered to be restricted to public law provisions. Money also features in civil law relationships and serves as the universal (common) exchange instrument.

In a general legal view, money can be considered as an object which the lawmaker invested with the attributes of legal tender. Money is characterized by the following three features: monetary unit, monetary amount and medium of exchange. Monetary unit is the name for money used in a particular country. The amount

of money is the amount of monetary units stated on the medium(s) of exchange. Finally, the medium of exchange is a token, issued by the state (or other entities), to prove that the bearer owns a certain amount of money. Mediums of exchange are issued as coins or notes.

World (global) money

Considering various factors, certain mediums of exchange have enjoyed much more trust than others among their possessors. This special trust is expressed both in the scope of payment and the scope of savings. In the historical context, an example of particularly trusted world money were precious metals and gold coins. Today, only a few currencies – the US dollar, euro, pound sterling and yen – can aspire to the title of world money. The first two of these are the most widely applied. With some caution, one might also include the bitcoin virtual (electronic) currency in this category.

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COVER AND TITLE PAGES DESIGN

Studio Spectro

TYPESETTING AND PAGE LAYOUT

Studio Spectro

SEA-SEE PERSPECTIVE ON LAW

**“The project is financed by the Polish National Agency
for Academic Exchange”**



POLISH NATIONAL AGENCY
FOR ACADEMIC EXCHANGE



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50th Anniversary



Faculty of Law
and Administration
University of Gdańsk

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ISBN 978-83-8206-117-8

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