

**SECURITY DIMENSIONS
AND
SOCIO-LEGAL STUDIES**



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ANDRZEJ ZACHUTA

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Wyższa Szkoła Bezpieczeństwa Publicznego i Indywidualnego „Apeiron” w Krakowie
ul. Krupnicza 3, 31-123 Kraków
Tel. 12 422 30 68, Fax. 12 421 67 25
e-mail: science@apeiron.edu.pl
www.apeiron-wydawnictwo.pl

Table of contents:

Jerzy Ochmann Reservations towards Steering Europe	5
Wiesław Kozub-Ciembroniewicz Teaching Constitutional Law to Undergraduate Students of Administration and Security	16
Janusz Józef Węc The Reform of the Area of Freedom, Security and Justice of the European Union in the Treaty of Lisbon	25
Tadeusz Ambroży, Juliusz Piwowarski Modernity, Tradition and Security in Budo Karate	42
Bernard Wiśniewski Experiences in Defense Preparations of Selected Countries	61
Krzysztof Jankowiak Selected Cultural and Historical Aspects of Development of the Samurai Ethos with a Few Remarks about the Typology of Martial Arts	74
Paulina Ledwoń The Historical Background as Factor Favoring the Occurrence of Mercenaries and the Contemporary Role of Mercenarism in the Context of International Law	100
Kaja Kowalczevska Self-regulation of Private Military Corporations – the Optimal Solution?	112

Jerzy Ochmann

Reservations towards Steering Europe

Abstract:

The paper poses the question of possible consequences of steering Europe and altering its cultural identity. The author examines significant international documents and European institutions in view of the values they inherently entail. In his analysis of the possible course of events, on the one hand, he raises the issue of the emergence of new values and a new philosophy. On the other, he points out that the process of current cultural changes and the dominance of civilization over culture may lead to unpredictable and potentially dangerous results.

Key words: European Constitution, values, identity, philosophy, steering

Steering poses potential threats as well as creates opportunities for European identity and culture. In his work *Quale costituzione per quale Europa?*¹ [What constitution for what Europe?], Danilo Castellano focuses on this issue and begins by stating that the future Europe will be steered mainly by its constitution and institutions.

The European Constitution is a constant and well-defined element. Hence the question: “What will Europe be like?” depends in a great deal on the content of Europe’s constitution and its vision of the future. This in turn makes the question: “What constitution for what Europe?” extremely important. Castellano notes that the constitution only accentuates civilization; a vision of European identity rooted in civilization rather than culture; and that it disregards many values of the old European culture. If culture is discussed there at all, it is easy to see that the new vision omits many traditional European values. The French version of the constitution,

¹ *Quale costituzione per quale Europa?*, D. Castellano (ed.), Napoli 2004, p. 131.

where it mentions culture at all, only mentions material culture and civilization. The emphasis is put on money, banks, trade. The political integration, ranking almost as high as monetary issues, deals with the problems of citizenship, legislation, and social benefits. The social integration has been programmed according to pre-agreed upon instructions of the European Social Charter, the Charter of Fundamental Rights of the European Union, and the European Cultural Convention. The new European man and the new European identity, as programmed by the constitution, may turn out to be not only different, but also worse than the old ones that had grown in the member states. Will Europe be a continent of hope or one of devastation? Many pessimists state that this new “global constitution” may turn out to be worse than its precursors. Previous constitutions (in particular countries) presented their countries’ old identity in an idealized manner, but would like to see a part of their own heritage incorporated into the new identity currently being put forward. Will the future generations be pleased or disappointed, will they take note of the favorable difference between what was and what is to come, between aspiration and effect? In the Polish history we have an interesting example: there was a time when the whole nation was enthralled by the Prussian Homage, and only a dwarf wondered whether this great celebration was strategically advantageous for Poland. When reading the European constitution, it is plain to see that the new vision eliminates many traditional values. Many political scientist compare the preamble of the modern constitution with the preambles of the previous European constitutions, focusing on the categories in use there: *civitas*, *socialitas*, sovereignty, independence; they also compare the concepts of human rights, natural law, European conscience. Most are shocked to see that the new tree being planted has been deprived of roots. A question arises: who has drawn up such a constitution and whose position it takes?

European society will be steered. Sadly, the commanding center is placed in the core of the declining Western culture in the midst of a cultural crisis. It augurs a disarray in values and the transfer of evil from the center to the whole of Europe, even reaching places where Europe used to

be healthy. We are threatened by a flow of values of the declining Western civilization, and the anticipated progress may turn out to be a programmed mess.² The phrase “controversial novelties” often appears in the context of a critical approach towards European constitution. The new, half-baked vision of Europe may unfavorably program next generations.

Reservations towards steering are expressed in fundamentalist tendencies which attempt to defend cultural values and identity. At times, they also rebel against civilization shaped in this manner. Market fundamentalism is considered the biggest threat to open society. The return of revolution of liberation is feared. “Revolutions and rebellions broke out to counter the pathologies of the 19th and 20th centuries. Will a rebellion against post-humanism and post-naturalism begin? It is very hard to form a prognosis. The post-industrial era has its own logic and its own narrative, or rather a ‘multi-narrative.’ Probably for this reason there was no great rebellion against civilization after the counter-culture of the 1960s: the civilization is industrial no longer. The civilization emerging in its place requires new forms of creativity, innovation and adaptation. This situation activates the ‘challenge–response’ psychological syndrome, and the culture being born is a novelty, perhaps even opium of sorts – ‘digital opium’”.³

Hopes in programming Europe

Europe’s hope⁴ lies in its constitution, institutions, mentality and new philosophy.

The hope placed in the constitution is substantiated in many of the document’s points, mainly in its care towards identity, value system, political and social integration. The very fact of discussing them guarantees the creation and cultivation of shared values. The gradual emergence

² Ch. Jonscher, *op. cit.*, p. 305; J. Gwynn, *Europa przygotowuje się do ery informacyjnej*, [in:] „Dialog Europejski – magazyn na rzecz integracji europejskiej”, marzec/kwiecień 1997.

³ K. Krzysztofek, *op. cit.*, p. 65.

⁴ *Enjeux et rouages de l’Europe actuelle. Culture et citoyenneté européennes*, ed. 2, Bruxelles 2004, Foucher, p. 272.

of a European value system as well as its inherent place in the constitution promises a Europe of shared values and rekindles optimism. In the light of the constitution and its axiological decisions, the European value system comprises: civilizational values (economy, trade, agriculture, industry, banking, money, scientific research, energy, transport, fishery, regional policy, technological development); cultural values (the issues of youth, education, political stability, security); international values (peace, security, fighting terrorism, ecology, international cooperation); and social values (asylum, immigration, unemployment, demography, employment, social service, humanitarian aid, equality of men and women, discrimination, social stability).

The hope placed in European institutions is rooted in the reality that said institutions “live” and hire specialists who take care of the proper development of particular sectors. The institutions are also able not only to respond defensively, but also to initiate action. Another reason for optimism is the fact that these public organs are subject to strict directives (rules), regulatory and control systems. It gains particular importance when the Union itself, its laws and institutions are viewed and felt differently by Europeans and by non-Europeans.⁵ To guard the institution known as the Union of Europe several bodies have been appointed and steps taken: The Council of Europe (founded in Paris on December 10th, 1979), its secretariat, the Council of Ministers and advising committees, European Parliament (founded in London on May 5th, 1945), European Commissions that comprise the executive, legislative, legal, banking, advisory systems; and Treaties: Treaty of Rome (March 25th, 1957), Maastricht Treaty (February 7th, 1992), Treaty of Amsterdam (October 2nd, 1997), Treaty of Nice (Fe-

⁵ The author discussed this issue in papers presented at three conferences: *Il diritto europeo visto dagli non-europei (L'Europa e la codificazione. A 200 anni dal Codice di Napoleone*, Bolzano, October 8th–11th, 2004), *Persona, famiglia, nazione e umanità della Nuova Europa (Quale governo per l'Europa*, Bolzano, September 5th–7th, 2000) and *L'etica della globalizzazione (Europa e la globalizzazione*, Bolzano, October 10th–13th, 2002).

bruary 26th, 2001). The most esteemed sets of European values have been incorporated into Declarations: the Charter of Fundamental Rights of the European Union (passed in Cologne, June 3rd–4th, 1999) discusses dignity (chapter I), freedom (chapter II), equality (chapter III), solidarity (chapter IV), citizenship (chapter V) and justice (chapter VI); the European Convention on Human Rights (Rome, November 4th, 1950) ensures the right to life, to liberty and security, to a fair trial; it guarantees the respect of private and family life, freedom of thought, conscience and religion, freedom of speech, freedom of assembly and association, the right to marriage, and the right to an effective remedy. It prohibits discrimination, torture, slavery, forced labor, unlawful punishment.

Later additions concern the protection of property, the right to instruction, the right to free elections, freedom of movement, the right to compensation in cases of miscarriages of justice, and equality between spouses. It further prohibits imprisonment for debts, the expulsion of nationals, the collective expulsion of foreigners, death penalty, and retrial of anyone who has already been finally acquitted or convicted of a particular offence. The Citizen Rights Charter (February 7th, 1992, article 8 in the Maastricht Treaty) ensures the right to free movement, settlement and employment across the EU; a right to vote and stand in elections to the European Parliament or in local elections in any EU member state; the right to consular protection from other EU state's embassies; the right to petition the European Parliament and the right to apply to the European Ombudsman. The European Social Charter (Turin, 1961, extended in 1996) guarantees and defines social and economic rights, such as: housing, health, education, labor rights, employment, social service, free movement and non-discrimination. The Convention for Institutional Reform (December 14th–15th, 2001) supplements the axiological content of the Declarations that reaches far into European future. It heralds the integration as a continued and constant process. It presents the directives for cultivating the identity of individuals and nations and preserves political realism. As many as 70 areas in which accord has been reached are listed there. Also

instructions regarding auxiliaries, freedom, justice, cooperation, democracy, security, health, culture, education and ecology have been specified. In this way, a process of constant institutional reform that guarantees the cultivation of European values has been established.

The third source of optimism stems from those layers of European mentality that social psychologists cite when they want to prove that “Europe is a continent of hope,” or the positive tendencies towards building, repairing, creating, absorbing and synthesis. Among them are: the tendency to build perspectives; acknowledging and respecting the development processes of a person, family, nation and humanity; the tendency to include ethics in the course of globalization. Europe forms a society that is open toward people and their values, as well as new values; open to immigration and social integration. Krzysztofek states: “We are facing a brand new situation today: with the progress of genetics, natural science enters human spirituality and mystical areas: life, heredity, intellect; it is necessary to find a common language with traditional humanities and undertake a cooperation in order to ‘regenerate the Renaissance.’”⁶ The great art of compromise between technocracy and humanities plays an important part. Among the notable intellectuals of this century that is coming to an end, very few are brave enough to say that in order to saturate man with culture anew, refurbish him spiritually... we must break with illusions. It took significant intellectual courage to say it at a time when one-third of the globe was slowly liberating itself from authoritarianisms... From the intellectual circles most often comes a call for restoration of the standing of higher culture and for an active education and cultural policy which would counterbalance the excess and extravagance of science and technology, with their tendency toward economism, growth, etc. That is the message of manifestos, reports and programs drafted under the auspices of international organizations in recent years... For if we do not find a way out, we should look around for a ‘spare civilization’ in the form of some

⁶ K. Krzysztofek, *op. cit.*, p. 48.

uncontaminated tribe's culture... Well, but where to find such a tribe?"⁷ A compromise between the future and the past has always been the driving force for novelty as rebirth.⁸ The consent to the existence of opposition is yet another favorable quality emphasized by social psychology. European mentality sees numerous benefits in it. Internal opposition offers alternative suggestions, takes note of mistakes and shortcomings of the official proceedings.

The fourth favorable circumstance for hope is a new philosophy. We should consider the emergence of a new philosophy (one that would be able to address the intellectual issues of all times), new ethics (a call for ethics resounds) and a new religion. In his *Upadek człowieka* [The fall of man] K. Lorenz attempts to define a few postulates of technocratic religion. According to him, the notion that everything that is certain and realizable, must be realized,⁹ is the most important of them. Another postulate is to create a new knowledge (it seems gratifying to base human growth on knowledge rather than ignorance) and a new pedagogy in which everything is verifiable and subject to further improvement. Good pedagogy promises geniuses who are able to solve all problems.¹⁰ It is said that they are to spring up as mushrooms from the circles of computer-educated youths and that they will be a great hope for information society. They will become this great hope because we will find ourselves in brand new situations in which our existing experience will prove uninformative. All this promises a new society and a new sociology. The social metamorphosis is underway, and it is progressing faster than in other epochs of human growth because the flow of information is nearly unlimited and human

⁷ *Ibidem*, p. 66. Also: Z. Bauman, *Europa niedokończona*, transl. T. Kunz, Wydawnictwo Literackie, Kraków 2005, pp. 187–212.

⁸ N. Postman, *W stronę XVIII stulecia. Jak przeszłość może doskonalić naszą przyszłość*, Warszawa, 2001, p. 49 [original edition: *Building a Bridge to the 18th Century: How the Past Can Improve Our Future*, 1999]; L. W. Zacher (ed.), *Spoleczeństwo informacyjne w perspektywie człowieka, techniki, gospodarki*, Warszawa 1999, p. 265.

⁹ H. Jonas, *Zasada odpowiedzialności. Etyka dla cywilizacji technologicznej*, Kraków 1996, p. 409.

¹⁰ T. Serra, *L'uomo programmato*, *op. cit.*, p. 105, 106.

communication is taking place on an unprecedented scale. There are prognoses for a new civilization, a new society and possible ways of social development. Krzysztofek proposes a few scenarios: a society of weakening democracy; a disciplined society; a society of democratic continuity; and a transformative society. The latter would be a society of permanent changes in which people would be constantly being prepared to face them. Society will be un-massed, individualized, with a dominant role played by information and a basically unlimited access to technology. These prognoses include a situation in which the simultaneous increase of information and freedom will cause higher forms of humanity to emerge. There are a number of possible scenarios: they allow us to foresee the positive sides in order to develop them and the negative sides in order to prevent them. We should consider that leaders will hear the call of the new era.¹¹ There are several figures who have noticed and accepted those challenges, who have controlled their pace, corrected and planned them. This is not the first era in the history of mankind, but the fact that it is steered as no other allows for a lot of hope.

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¹¹ Z. Brzeziński, *Kłopoty dobrego hegemonu*, Gazeta Wyborcza, 4–5.VII.1998; K. Doktorowicz (ed.), *Spółczesność informacyjna. Wyzwania dla gospodarki, polityki i kultury*, Katowice 2002, p. 159 ; B. Chyrowicz (ed.), *Spółczesność informacyjna. Szansa czy zaproszenie*, Lublin 2003, p. 196.

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Wiesław Kozub-Ciembroniewicz

**Teaching Constitutional Law to Undergraduate Students of
Administration and Security**

Abstract

The author endeavors to display the didactic process in undergraduate studies in administration and security. He emphasizes the legitimacy and the understanding of trans-political functions of the law. The article also discusses the legal and constitutional notion of liberty and security, which students do not find obvious. Moreover, he puts forward some methods that make lectures in constitutional rules more accessible to students.

Key words: constitutional law, pedagogy, history of law, positive law, natural law

Introductory remarks

My didactic experience as a historian of legal and constitutional doctrines demands reflection and a synthetic approach. This article presents but a few thoughts. General deliberations are yet to come. Undoubtedly, modern students are much different from students from the previous century. Also the current structure of undergraduate studies has its own characteristics and requirements. Without a doubt, pedagogy in the course of undergraduate studies in security administration is an important link of shaping the profile of the studying youth. The level of said pedagogy has a both professional and intellectual dimension. Both dimensions are equally important for establishing the framework of safety culture.¹

¹ M. Cieślarczyk, *Kultura bezpieczeństwa i obronności*, Wyd. AP, Siedlce 2010, p. 210; M. Cieślarczyk, *Fenomen bezpieczeństwa i zjawisko kryzysów postrzegane w perspektywie kulturowej*, [in:] *Jedność i różnorodność*, E. Reklajtis, B. Wiśniewski, J. Zdanowski

Constitutionalism and the history of state, law and political and legal doctrines

Teaching constitutional law reaches the optimal level if it meets the criteria of a comparative and interdisciplinary synthesis.² Students may find the exposition inaccessible if teaching is limited to presenting and analyzing the text of the constitution itself. In particular, a linguistic and semantic analysis of the constitution, when it is considered separately from an analysis of its function, is of little use to students, as well as abstract and largely pointless. The role the constitutional rules play is easier to comprehend when the lecturer is able to explain their purpose. The history of state and law offers ample resources for exemplification.³ For instance, it is impossible to reasonably explain the core of liberal democracy to students without showing its origins. The lecturer should persuade the students that liberalism and democracy are not merely slogans but meaningful notions whose content and range is defined by the history of political and legal doctrines. Said political and legal doctrines also determine the meaning of a number of terms which seem homogeneous and obvious to students, whereas in reality they are diverse and controversial and require constitutional codification.

For instance, the legal and constitutional notion of liberty is neither obvious nor simply intuitive. It is not easy to persuade the students that not only despotism and tyranny, but also anarchy are the opposites of liberty. Such an endeavor requires displaying the crux of the matter in a synthetic

(ed.), ASPRA-JR, Warszawa 2010, p. 96.

² The writings of Konstanty Grzybowski are a role model for an intellectual, interdisciplinary synthesis. See: W. Kozub-Ciembroniewicz, *Konstanty Grzybowski - uczony, homo politicus, publicysta*, [in:] *Konstanty Grzybowski – myśliciel sceptyczny*, scientific committee: J. Bardach, J. Baszkiewicz, M. Jaskólski, W. Kozub-Ciembroniewicz (ed.), J. Majchrowski, H. Olszewski, M. Waldenberg, Kraków 2000, p. 19 ff.

³ Studying source materials significantly enriches the didactic process, as I have ascertained myself by presenting various declarations and constitutions to my students during lectures. I recommend, for instance: *Historia Państwa i prawa. Wybór tekstów źródłowych*, compiled by A. Gulczyński, B. Lesiński, J. Walachowicz, J. Wiewiórowski, Poznań 1995.

way, and hence – explaining the very essence of civilization, with its axiological aspect, the role of law, standards, and institutions. It is no easy task, albeit it is a necessary one if students are to understand and remember the knowledge relayed to them during the lecture.⁴ During seminars, one should not expect spontaneous questions from the students. Questions must be provoked by presenting the different ways in which such notions as liberty have been defined, depending on the time period and ideological inclinations.⁵

Positive and natural law

The issue of fundamental rights is relevant to the exposition of constitutional law, and the problem of overpositive laws plays a singular part within it. It is hard for the students to comprehend the complex matter of positive and natural laws, even if the lecture in constitutional law is preceded by an introduction to jurisprudence.

Hence it is necessary to use a well-chosen example. One such example that shows the complexity of this issue is the *Declaration of the Rights of Man and of the Citizen*: “declaring” rights, or reminding that there are overpositive laws already in existence, is different from creating laws, or constituting a normative order. The model of overpositive laws deriving from the Age of Enlightenment is rationalistic. This model should

⁴ I have noticed that referring students to compendia, essays or dissertations, no matter how good, (e.g. Z. Witkowski (ed.) J. Galster, B. Gronowska, W. Szyszkowski, A. Bień-Kacała, A. Cieszyński, K.M. Witkowska, *Prawo konstytucyjne*, Toruń 2006; M. Grzybowski, S. Bożyk, A. Jackiewicz, G. Kruszeń, J. Matwieju, A. Olechno, K. Prokop, *Prawo konstytucyjne*, wyd. 2, Białystok 2009;) is sadly not productive. As a rule, students have professional obligations and thus expect from their lecturer a concise, communicative information. On the other hand, rulings of the Constitutional Tribunal prove useful. Selected cases successfully help broaden the students’ theoretical knowledge.

⁵ See: M. Bankowicz, W. Kozub-Ciembroniewicz, *Dyktatury i tyranie. Szkice o niedemokratycznej władzy*, Kraków 2007, p. 38; W. Kozub-Ciembroniewicz, *Konrad Adenauer personalizm i tradycjonalizm*, Kraków 2000, p. 27.

be set off against the model of laws of nature of a religious origin.⁶A fine example of this overpositive reflection is offered by Konrad Adenauer's legal and political doctrine, which expresses the renaissance of law of nature in a particular situation of post-war Germany, following the collapse of the national socialist system.⁷

It was Konrad Adenauer who advocated legal and political personalism, based on the fundamental rule of the value of a person in building a new, democratic Germany. For him, totalitarian systems are most of all anti-personalist as they ignore inalienable rights of human person. The constitutional order cannot be arbitrary; it stems from a non-relativist order of things. Materialist worldview leads to relativism, whereas the constitutional order demands observing and cultivating suprahistorical values.

Presenting issues of such complexity requires not only a clear exposition, but also conversing with students. Only in this way it is possible to examine the material understanding of the lecture among students.

Rechtsstaat

Usually students find the concept of Rechtsstaat unclear as the word suggests an incorrect understanding of the issue, presupposing a distinction between "a state of law" and "a state without law." In other words, a state of law is a state in which law is in force. Nothing could be further from the truth. And convincing students of this requires some didactic effort.

The norms of Nazi law are one example. However, one should take care to explicate their content and the way they were legislated, which are fundamentally different from the liberal and democratic model. Students usually grasp and understand the discriminative content of a legal rule that

⁶ J. Piwowarski, B. Płonka, *Etyka w administracji i zarządzaniu publicznym. Motywacje, realizacja, bezpieczeństwo*, Kraków 2012, p. 23; 29; 54.

⁷ Ibidem.

deprives a certain group of people of their indelible rights. The Discrimination in the form of institutionalized racism is something that is conceivable. Students understand the iniquity of racist law and the absurdities it leads to (e.g., in marital law).

From a didactic point of view, it is convenient to show the issue of discrimination by means of a comparative example of Soviet Russia and the USSR. Discrimination of particular groups of population as class enemies is especially instructive. Given this context, and employing the “*a contrario*” method of thinking, students are able to correctly understand the model of state which adheres to essential and formal standards, or Rechtsstaat.

The essence of a totalitarian state, rooted in the cult of personality,⁸ extremely voluntaristic and absolutely arbitrary, lacking control from independent courts, clarifies the procedure of constituting law well for students. Introducing issues of natural law into the exposition of the institutions of Rechtsstaat not only enriches said exposition, but also allows students to grasp the trans-political function of the law and the fact that any form of political infiltration is the biggest threat to law.

Legal, political, social, and professional pluralism

To students, the constitutional model of a pluralistic state is usually obvious, whereas the mechanism of dictatorship seems more difficult to grasp as dictatorship itself is abstract, unimaginable. It is even harder to comprehend the sources of pathological threats to democracy. Students are more conscious of their symptoms, while the functioning of political parties in relation to the so-called “interest groups” is entirely abstract.

Modern Austria gives a great example of such correlations as its social partnership system, developed after 1957, is well-established.⁹ It turns

⁸ See: W. Kozub-Ciembroniewicz, *Doktryny włoskiego faszystwu i antyfaszystwu*, Kraków, 1992, p. 17 ff.

⁹ See: W. Kozub-Ciembroniewicz, *Socjaldemokracja w Austrii współczesnej 1945–1966*, Poznań 1982, p. 110 ff.

out that the model of constitutional system analysis, when it is reduced only to the role played by political parties, is simply incomplete and simplified. A democratic parliament and government are not the sole definers of the mechanisms of power. For in order to exercise power effectively, a mandate of a democratically legitimized power does not suffice. At the same time, there is a system safeguarding a permanent social dialogue, most of all with social and professional institutions. The Austrian example displays the intricacies of exercising power, where two threads entwine: democratic and egalitarian one, and a professional and social, non-elitist thread.

On the one hand, constant consultations and compromise stimulate progress, and on the other, they conserve the foundations of a constitutional state. Students find it easier to comprehend the democratic system when they view it as a result of a legal game between various subjects.

Centralism – federalism – autonomy

The exposition of constitutional law that analyzes the structure of the regime, utilizes the concepts of centralism, federation, and autonomy. Students are usually familiar with the federal structure of Germany and the United States of America, and consider it obvious.

On the other hand, the regime of the Habsburg Monarchy is completely foreign. This model is very instructive as it shows the evolution of the constitutional system, at the same time providing for its diverse, multinational essence. The Habsburg Monarchy long functioned as a centralistic structure of absolute monarchy. The changes that occurred during the Springtime of the Peoples turned out to be temporary. The October Diploma, on the other hand, proved to be a breakthrough and initiated the constitutional period¹⁰ of the Habsburg Monarchy. It lasted as long as the

¹⁰ W. Kozub-Ciembroniewicz, *Austria a Polska w konserwatyzmie Antoniego Z. Helcla 1846–1865*, Kraków 1980, p. 123.

monarchy did, albeit in a modified shape. The most significant change was the dualism of the state expressed in the Austro-Hungarian Empire and the autonomy of other crown lands of the monarchy.¹¹

Austro-Hungarian constitutional experiences may be useful in the further progress of European integration as it offers an efficient mode of rule that respects unity and national diversity and is not abstract, but rather historic. Students will understand modern times better when they are familiar with the premises and problems of European constitutionalism.

Conclusion

To conclude this article, we would like to offer some observations and didactic suggestions *pro futuro*. It is advisable to methodically attempt to equalize the students' educational level (as early as the first year of studies). Teaching logic will undoubtedly be conducive to that as logic facilitates the perception of theoretical subjects, which are relevant in displaying the trans-disciplinary character of administrative-defensive studies, particularly in the Rechtsstaat aspect. At the same time, it is expedient to suggest supplementary reading in order to broaden the students' knowledge, making it easier for them to learn. For one should remember that students begin their undergraduate studies having graduated from high schools of varied profiles and standards of education. Hence a compendium that will determine the optimal perception of theoretical and professional subjects taught at the college is necessary. Also in B.A. seminars material balance should be maintained, without favoring solely the professional approach. The Bachelor's exam should test not only professional skills, but also the graduate's intellectual capacity. A graduate should competently connect legal and administrative issues as well as elements of social sciences significant to security studies. This intellec-

¹¹ H. Wereszycki, *Historia Austrii*, Wrocław – Warszawa – Kraków – Gdańsk 1972, p. 253 ff.

tual capacity of a graduate is associated with “considerations and actions aimed towards eradicating ‘the feeling of threat from the unstable order that we live in.’”¹²

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¹² J. C. Garnett, *Introduction*, [in:] *Theories of Peace and Security*, London 1970, p. 31; [after:] J. Piwowarski, A. Zachuta, *Pojęcie bezpieczeństwa w naukach społeczno-prawnych*, Kraków 2013, p. 8.

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Janusz Józef Węc

The Reform of the Area of Freedom, Security and Justice of the European Union in the Treaty of Lisbon

Abstract:

In view of the recent reform of the area of freedom, security and justice in the European Union as it is codified in the Treaty of Lisbon, passed on 13 December 2007, this paper analyzes the changes put forward by the new legislation. Beginning with the system of the Treaty regulations, it goes on to provide a general outline of the changes in the six policies within this area: visas, asylum, immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation.

Key words: European Union; Treaty of Lisbon; area of freedom, security and justice; legislation

Introduction

This paper discusses the reform of the area of freedom, security and justice in the European Union as it is codified in the Treaty of Lisbon, passed on 13 December 2007. First, the paper will present the system of the Treaty regulations. Secondly, we shall proceed to outline changes in the six policies within this area: visas, asylum, immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation.

Systematics of the Treaty provisions relating to the area of freedom, security and justice

By making changes to the TEU and the TFEU, the Treaty of Lisbon significantly strengthens the legal basis for the future establishment of the area of freedom, security and justice in the European Union. The replacement of the pillar structure with a unified international organization seems to be the most significant change. This results, among other things, in placing cooperation regarding visas, asylums, immigration, judicial cooperation in civil (Title IV TFEU) and criminal matters as well as police cooperation (Title VI TEU), under a uniform legal regime of an international organization, which “is identical with the Community’s regime.”¹ All of these policies are included in Title V of the TFEU, which consists of the following chapters: “General provisions,” “Policies on border checks, asylum and immigration,” “Judicial cooperation in civil matters,” “Judicial cooperation in criminal matters” and “Police cooperation.” It should also be noted that under the Lisbon Treaty, establishing the area of freedom, security and justice moves in the UE’s hierarchy from the fourth to the second place and ranks immediately after the goal of promoting peace, the Union’s values and the well-being of its peoples (Article 3 sec. 2 TEU).²

¹ A. Grzelak, *Reforma przestrzeni wolności, bezpieczeństwa i sprawiedliwości*, [in:] *Traktat z Lizbony. Główne reformy ustrojowe Unii Europejskiej*, J. Barcz (ed.), Urząd Komitetu Integracji Europejskiej, Warszawa 2008, p. 264; idem, *Unia Europejska na drodze do przestrzeni wolności, bezpieczeństwa i sprawiedliwości*, Centrum Europejskie Natolin, 2009, z. 37, p. 70. More on the reform of the area of freedom, security and justice: J. Monar, *Die Vertragsreformen von Lissabon in den Bereichen Inneres und Justiz: verstärkte Handlungsfähigkeit, Kontrolle und Differenzierung*, „Integration”, 2008, H. 4, pp. 379–398; A. Grzelak, T. Ostropolski, *Przestrzeń Wolności, Bezpieczeństwa i Sprawiedliwości Unii Europejskiej. Współpraca policyjna i sądowa w sprawach karnych*, Europrawo, Warszawa 2009; A. Grzelak, *Trzeci filar Unii Europejskiej – instrumenty prawne*, Wydawnictwo Sejmowe, Warszawa 2008; W. Sadowski, M. Taborowski, *Przestrzeń Wolności, Bezpieczeństwa i Sprawiedliwości Unii Europejskiej. Współpraca sądowa w sprawach cywilnych*, Europrawo, Warszawa 2009; E. Borawska-Kędzierska, K. Strąk, *Przestrzeń Wolności, Bezpieczeństwa i Sprawiedliwości Unii Europejskiej. Polityka wizowa, azylowa i imigracyjna*, Warszawa 2009.

² *Traktat z Lizbony (dalej – Traktat z Lizbony), zmieniający traktat o Unii Europejskiej i traktat ustanawiający Wspólnotę Europejską, podpisany w Lizbonie 13 grudnia 2007 r.* (teksty skonsolidowane), Dziennik Urzędowy C, 2010, nr 83, p. 17.

Changes in the policies within the area of freedom, security and justice

The Treaty extends the powers of the European Union in the area of freedom, security and justice, in particular in the judicial cooperation in criminal matters and police cooperation. It significantly modifies law-making procedures, decision-making, as well as the range of legal instruments in the area of freedom, security and justice. It also extends the powers of the European Council, the European Parliament and the Court of Justice of the European Union in this area, leaving the competences of the European Commission and the Council of the European Union essentially unchanged. Lastly, the Treaty also authorizes national parliaments to take action in this area for the first time.

The Lisbon Treaty reaffirms and extends the four basic premises meant to encourage the process of building the area of freedom, security and justice of the European Union. First, this process is carried out in compliance with fundamental rights and the different legal traditions and systems of the Member States. Secondly, the European Union is committed to the abolition of personal checks at internal borders and the development of a common policy on asylum, immigration and external border control, one that will be based on “solidarity” between the Member States and also “fair to the citizens” of third countries. Thirdly, the European Union should make the necessary efforts to ensure a high level of security through measures that prevent and fight crime, racism and xenophobia, measures ensuring coordination and cooperation between police and judicial authorities and other competent authorities, as well as through mutual recognition of judgments in criminal matters and, if necessary, the approximation of criminal laws. Fourth, the EU should also facilitate the access to justice administration, in particular based on the principle of mutual recognition of judicial and extrajudicial rulings in civil matters of one country by other Member States (Article 67 sec. 1–4 TFEU).³

³ If necessary for the achievement of the objectives referred to in Article 67 TFEU,

On the other hand, under the safeguard clause, derived from the Treaty of Maastricht, the Member States still have the sole responsibility for maintaining law and order and preserving internal security (Article 72 TFEU). Still, the Lisbon Treaty strengthens the clause stating that the Union shall respect essential state functions, including maintaining law and order and safeguarding national security, which should be the sole responsibility of each Member State (Article 4 sec. 2 TEU). In addition, Member States may organize cooperation and coordination of the administrative departments responsible for national security between themselves and on their own responsibility (Article 73 TFEU).⁴ The doctrine emphasizes that the latter provision can give rise to a future development of new forms of cooperation between Member States outside the European Union, according to the “Prüm model.”⁵

The new provisions of the TFEU which also point to the strengthening of the competences of the Member States in the area of freedom, security and justice, are: first, the provision stating that in the judicial cooperation in criminal matters the measures adopted by the European Parliament and the Council of the European Union in order to prevent crime may not relate to any harmonization of the laws and regulations (Article 84 TFEU); second, in the course of judicial cooperation in criminal matters and police cooperation appeal procedures discussed below can be used; third, formal

in relation to the prevention of terrorism and related activities and to combat these phenomena, the Lisbon Treaty provides for the first time a clear legal basis for the adoption by the European Parliament and the Council of regulations setting out a frame for administrative measures relating to capital movements and payments, which belong to natural or legal persons, groups or entities other than the state, and are in their possession or disposal (Article 75 TFEU); see the Treaty of Lisbon, op. cit. pp. 73, 75.

⁴ Ibidem, p. 18, 73–74 .

⁵ See: J. Barcz, *Unia Europejska na rozstajach. Traktat z Lizbony. Dynamika i główne kierunki reformy ustrojowej*, Europrawo, Warszawa 2010, p. 219. See also: A. Gruszczak, *Współpraca policyjna w Unii Europejskiej w wymiarze transgranicznym. Aspekty polityczne i prawne*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2009, pp. 87, 189–227. One example of such cooperation may be the Prüm Convention, concluded by the foreign ministers of Germany, France, Spain, Austria and the states of the Benelux outside Union’s legal order on 27 May 2007, which specified cross-border cooperation in fighting terrorism, cross-border crime and illegal migration. See: D. Kietz, A. Maurer, *Der Vertrag von Prüm: Vertiefungs- und Fragmentierungstendenzen in der Justiz- und Innenpolitik der EU*, „Integration”, 2006, H. 3, p. 201–212.

acts of judicial procedure in matters relating to the prosecution of offenses against the financial interests of the Union by Eurojust (Article 85 sec. 2 TFEU) and coercive measures applied during the operational activities of Europol (Article 88 sec. 3 TFEU) are reserved to the exclusive competence of the Member States; fourth, the issue of determining the number of third-country nationals entering the territory of the European Union in search of employment or self-employment is reserved to the exclusive competence of the Member States (Article 79 sec. 5 TFEU).⁶

In parallel with the strengthening of the the powers of the Member States, the Lisbon Treaty extends the powers of the European Union in the area of freedom, security and justice. And so, in the policies regarding visas, asylum and immigration – which should be based on the principle of solidarity and fair distribution of responsibility between the Member States (Article 80 TFEU) – the Treaty provides for a progressive implementation of an integrated management system for external borders, which may be a first step toward the establishment of a mechanism for future control (Article 77 TFEU), adopting measures leading to the future establishment of the European Asylum System (Article 78, sec. 2 TFEU) as well as ensuring the effective management of migration flows, preventing illegal immigration and human trafficking (Article 79 sec. 1–2 TEU).⁷

The most important changes, however, regard judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation. Judicial cooperation in civil matters of cross-border implications should be based on the principle of mutual recognition of judicial and non-judicial rulings as well as on the principle of approximating laws and regulations of the Member States (Article 81 sec. 1 TFEU). In the fields of judicial cooperation in civil matters the Lisbon Treaty also gives the European Union the aforementioned powers in the field of family law with cross-border implications (Article 81 sec. 3 TFEU).⁸

⁶ *Traktat z Lizbony*, op. cit., pp. 77, 81–82, 84; more on that issue: A. Grzelak, *Reforma*, op. cit., pp. 275–276.

⁷ *Traktat z Lizbony*, op. cit., pp. 75–78.

⁸ *Ibidem*, pp. 78–79.

Judicial cooperation in criminal matters should likewise be based on the principle of mutual recognition of judgments and judicial rulings and the principle of approximation of the laws and regulations of the Member States. In order to facilitate mutual recognition of judgments and judicial rulings and police and judicial cooperation in criminal matters having a cross-border dimension, the Treaty grants the European Parliament and the Council of the European Union the right to establish minimum standards, by means of directives and in accordance with the ordinary legislative procedure (Article 82 sec. 2 TFEU), as well as the definition of criminal offenses and sanctions for particularly serious crimes of cross-border implications (Article 83 sec. 1 TFEU). The Treaty also extends the powers of Eurojust, which can henceforth launch investigations and request the initiation of prosecutions by competent national authorities, particularly in matters relating to offenses against the financial interests of the Union (Article 85 sec. 1–2 TFEU). Furthermore, the Treaty provides for the establishment of a European Public Prosecutor to combat this type of crime. Regulations in this case are passed by the Council of the European Union, acting unanimously by a special legislative procedure, after obtaining the consent of the European Parliament. The European Public Prosecutor's Office shall, in liaison with Europol when necessary, be responsible for investigating, prosecuting and bringing to judgment perpetrators or accomplices in offenses against the financial interests of the European Union. It also has the power to prefer charges of these crimes before appropriate courts of the Member States. At the same time, the European Council may, at the time of the establishment of a European Public Prosecutor or later, accept the abovementioned decision to include in its competences serious crimes with cross-border implications, inflicting one or more Member States (Article 86 sec. 1–4 TFEU).⁹

As far as police cooperation goes, the Lisbon Treaty extends the powers of Europol, which is now responsible, among other things, for supporting the activities of the police and other law enforcement agencies of

⁹ *Ibidem*, pp. 79–83.

the Member States in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime affecting the common interest of the Union, as well as for the coordination, organization and implementation of investigative and operational actions carried out jointly with the competent authorities of the Member State or States, or in joint investigative teams, in liaison with Eurojust when appropriate. Operational actions by Europol must be carried out in consultation and cooperation with the authorities of the Member State or States. Moreover, the existing Europol Convention is to be replaced by a new regulation, which will determine Europol's structure, functioning and responsibilities (Article 88 sec. 1–3 TFEU).¹⁰

In the area of freedom, security and justice, the ordinary legislative procedure becomes the basic legislative procedure. A special legislative procedure may be used only in exceptional cases that directly relate to the criminal justice systems of the Member States or to the matters dealing with their sovereignty.¹¹ In the wake of this, legislative acts in the area of freedom, security and justice, as it was assumed in the Constitutional Treaty, shall be adopted by the Council of the European Union by a qualified majority as a rule, and unanimously only in special cases. TFEU expressly provides the Council with the possibility of deciding unanimously and in accordance with a special legislative procedure; in the following cases, among others: passing regulations on passports, identity cards, residence permits or any other such document (visa policy – Article 77, sec. 3 of the TFEU); adopting measures concerning family law with cross-border implications (judicial cooperation in civil matters – Article 81 sec. 3 TFEU); the establishment of a European Public Prosecutor (judicial cooperation in criminal matters – Article 86 sec. 1 TFEU); adopting measures for operational police cooperation between police, customs and other law enforcement agencies (police – Article 87 sec. 3 TFEU); and determining the conditions under which the competent agencies of the Member States may

¹⁰ *Ibidem*, p. 84.

¹¹ A. Grzelak, *Reforma*, op. cit., p. 268.

operate in the territory of another Member State, in liaison and in agreement with the authorities of that country (judicial cooperation in criminal matters and police cooperation – Article 89 TFEU). In addition, the Treaty provides that the Council may unanimously decide to extend the ability to adopt directives which establish minimum standards (directives relating to facilitating mutual recognition of judgments and judicial rulings in criminal matters, as well as police and judicial cooperation in criminal matters with a cross-border impact) so as to include other specific aspects of criminal procedure (Article 82 sec. 2 point. d TFEU) and the extension of the areas of particularly serious crime with a cross-border dimension, about which the directives would establish minimum standards (Article 83 sec. 1 TFEU).¹²

In the whole area of freedom, security and justice, legislative acts, i.e. regulations, directives and decisions adopted under the ordinary or special legislative procedure are in force. In addition, the TFEU expressly provides for cases of non-legislative acts, or acts passed outside the ordinary or special legislative procedure.¹³ The placement of judicial cooperation in criminal matters and police cooperation essentially under the same legislative acts as other policies regarding the area of freedom, security and justice for the first time, results in the abandonment of the use of framework decisions, decisions, conventions and common positions in relation to these two policies, and in the allocation of a direct effect to standards in this field. Up till then it was excluded under Article 34 sec. 2 TEU.¹⁴

However, pursuant to Article 9 of Protocol No 36 on transitional provisions, the legal consequences of acts of judicial cooperation in criminal matters and of police cooperation before December 1, 2009 shall remain legal until they are repealed, annulled or amended by the use of treaties. The same shall apply to agreements concluded between Member States.¹⁵

¹² *Traktat z Lizbony*, op. cit., pp. 75–76, 78–84.

¹³ A. Grzelak, *Reforma*, op. cit., p. 268.

¹⁴ More on that issue: *ibidem*, p. 260.

¹⁵ *Protokół w sprawie postanowień przejściowych*, [in:] *Traktat z Lizbony*, op. cit., p.325.

This means the exclusion of all legal effect of framework decisions and decisions until they are changed: decision frameworks into directives and decisions into regulations or new decisions. Therefore, the doctrine argues that all legal consequences, including the principle of direct legal effect or the principle of the primacy of EU law over national law, can be applied only in relation to the newly adopted legislative acts or to old, but amended legislation.¹⁶ Some authors emphasize, however, that the perpetuity of maintaining the legal effects of the current third pillar will not matter much, because “the vast majority (if not all)” will be changed, replaced or repealed by the new legislative acts on the basis of Declaration No 50 on the transitional provisions which is annexed to the Final Act of the Intergovernmental Conference 2007.¹⁷

The Lisbon Treaty strengthens the position of the European Council, the European Parliament and the Court of Justice of the European Union in the area of freedom, security and justice. For the first time it gives the European Council the right to adopt “strategic guidelines” in the field which define the planning of legislative and operational action (Article 68 TFEU). The European Council also obtained for the first time the position of the “court of appeal” within the four appeal procedures mentioned below. Finally, it may also, acting unanimously after obtaining the consent of the European Parliament and after consulting the Commission, decide to extend the powers of the European Public Prosecutor in such a way that the latter can not only fight crime against the financial interests of the European Union, as provided for in the current provisions of the TFEU, but also prosecute serious cross-border crime (Article 86 sec. 4 TFEU).

Making the ordinary legislative procedure the dominant legislative procedure in the area of freedom, security and justice results in strengthening the powers of the European Parliament as the legislator in this

¹⁶ A. Grzelak, *Reforma*, op. cit., p. 266.

¹⁷ C. Herma, *Likwidacja „struktury filarowej” Unii – podmiotowość prawnomiędzynarodowa UE oraz reforma systemu aktów prawa pierwotnego i wtórnego*, [in:] *Traktat z Lizbony. Główne reformy ustrojowe Unii Europejskiej*, op. cit., p. 131.

field. In cases of a special legislative procedure the European Parliament is consulted, and agrees in the abovementioned extension of the powers of the European Public Prosecutor's Office. The European Parliament will be informed of the content and results of the evaluation of the implementation of policies within the area of freedom, security and justice by the Member States, and of the activities of the Standing Committee on Operational Cooperation on Internal Security (COSI) (Articles 70–71 TFEU).¹⁸ Moreover, the powers of the European Parliament in the conclusion of international agreements in the policies within the area of freedom, security and justice are increased (see Section III. 6.7).

The present Treaty abolishes the existing differences in the jurisdiction of the Court of Justice of the European Union with regard to policies within the area of freedom, security and justice. However, the powers of the Court of Justice of the European Union extend only to the law enforcement actions that are taken on the basis of EU law. Still, same as before, it cannot control the legality and proportionality of actions undertaken by police or other law enforcement agencies of the Member States, or rule on the exercise of rights relating to maintenance of public order and internal security, since these activities are subject to the national law of the Member States (Article 276 TFEU).¹⁹

Unlike before, the Court of Justice of the European Union may, however, rule on measures or decisions regarding the lack of control when crossing internal borders, even if they relate to the maintenance of public order or internal security. The Court of Justice of the European Union (like the European Commission) gains full powers over the existing third pillar legislation that was converted into new directives, regulations or decisions before the expiry of the five-year transitional period, and after that period it holds those powers in every case,

¹⁸ In the course of implementation of the Lisbon Treaty provisions, by a decision of the Council of the European Union on 25 February 2010, the Standing Committee on Operational Cooperation on Internal Security (COSI) was established within it.

¹⁹ *Traktat z Lizbony*, op. cit., p. 217.

including those acts which have not been changed.²⁰The Lisbon Treaty also for the first time grants powers within the area of freedom, security and justice to national parliaments. Apart from the aforementioned specific privileges (see Section III.7.4), the Treaty, based on general rules, also gives them the competence to prepare draft legislative acts originating from the European Commission or a group of Member States (Article 1–2 of Protocol No. 1), and includes them in the newly set up early-warning mechanism, in particular in the yellow and orange card procedures (Article 1–7 of Protocol No. 2).²¹

Judicial cooperation in criminal matters and police cooperation, as envisaged in the Constitutional Treaty, are still characterized by some peculiarities which distinguish them from other policies in the area of freedom, security and justice. In this area, the right of legislative initiative is attributed to the Commission or to ¼ of the Member States (Article 76 TFEU), whereas the qualified majority for decisions taken on the collective request of Member States must equal at least 72% of the members of the Council of the European Union, representing at least 65% of the population of the European Union (Article 238 sec. 2 TFEU). Moreover, the implementation of certain competencies by the European Union in both these areas is limited by four appeal procedures available to the Member States (Article 82 sec. 3 TFEU, Article 83 sec. 3 TFEU, Article 86 sec. 1 TFEU and Article 87 sec. 3 TFEU).²²

When it comes to procedures, the Treaty simplifies the two of them that were already included in the Constitutional Treaty, and establishes two

²⁰ A. Grzelak, *Reforma*, op. cit., pp. 274–275.

²¹ *Protokół w sprawie roli parlamentów narodowych w Unii Europejskiej*, [in:] *Traktat z Lizbony*, op. cit., pp. 203–204; *Protokół w sprawie stosowania zasad pomocniczości i proporcjonalności*, [in:] *Traktat z Lizbony*, op. cit., pp. 206–207.

²² *Traktat z Lizbony*, op. cit., p. 79–84. In addition to judicial cooperation in criminal matters and police cooperation, the Lisbon Treaty, as already envisaged in the Constitutional Treaty, also establishes an appeal procedure in the field of social security. It can be initiated by a Member State which considers that a draft legislative act on the free movement of workers threatens to undermine the basic principles of the social security system or the financial balance of the system (Article 48 TFEU).

new ones. The simplified procedures are: appeal procedures in judicial cooperation in criminal matters, i.e. the procedure for facilitating mutual recognition of judgments and judicial rulings in criminal matters, as well as police and judicial cooperation in criminal matters with a cross-border aspect (Article 82 sec. 2 TFEU) and the procedure relating to particularly serious crimes with a cross-border impact (Article 83 par. 1–2 TFEU).²³ And so, when one Member State does not agree to the introduction, by a qualified majority, of minimum standards in these areas, the draft of a legislative act in question is submitted to the European Council, and the legislative procedure in the Council of the European Union is suspended. If a consensus is reached within a period of four months, the European Council refers the draft back to the Council of the European Union to pass it. If, however, a consensus within the European Council cannot be achieved, a minimum of nine Member States may establish an enhanced cooperation on the basis of the draft legislative act.

However, unlike the Constitutional Treaty, these procedures preclude the possibility of developing a new draft legislative act by the European Commission or 1/4 of the Member States that initiated it, and so said procedures have been simplified (Article 82 sec. 3 TFEU, and Article 83 sec. 3 TFEU).²⁴ As for the two new appeal procedures, one of them concerns judicial cooperation in criminal matters, and the other police cooperation. The first procedure regards the establishment of the European Public Prosecutor, and the other is relevant to the operational cooperation between police, customs and other proper law enforcement agencies involved in police cooperation between the Member States of the European Union. If the Council of the European Union is unable to make a unanimous decision on these matters, then a group of at least nine Mem-

²³ The Treaty recognizes the following as particularly serious crimes with a cross-border aspect: terrorism, human trafficking, sexual exploitation of women and children, illicit drug trafficking and illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime (Article 83 sec. 1 TFEU); see: *Traktat z Lizbony*, op. cit., pp. 81.

²⁴ *Ibidem*, pp. 80–81.

ber States may request the draft of the measures be transferred to the European Council. Then the special legislative procedure of the Council of the European Union is suspended. If a consensus is reached within four months, the European Council refers the draft back to the Council of the European Union with a view to its adoption. If, however, a consensus within the European Council will not be achieved, a minimum of nine Member States may establish an enhanced cooperation on the basis of this project (Article 86 sec. 1 TFEU, and Article 87 Sec. 3 TFEU).²⁵ Whilst the first two procedures allow for the suspension of the ordinary legislative procedure and for the submission of a draft legislative act to the European Council upon application by one Member State in danger of being outvoted by a qualified majority; the last two procedures make possible the suspension of the special legislative procedure and presenting a draft legislative act to the European Council upon application by a minimum of nine Member States, should reaching an unanimous decision in the Council of the European Union be impossible.

The Treaty of Lisbon introduces further changes in judicial cooperation in criminal matters and police cooperation, which did not feature in the Constitutional Treaty. Firstly, under Protocol No. 36 on transitional provisions, a five-year transition period in these two areas is set, regarding the right of lodging complaints by the European Commission (Article 258 TFEU) and the jurisdiction of the Court of Justice of the European Union. During this period, i.e. from 1 December 2009 to 1 December 2014, the competence of the European Commission regarding complaints and the jurisdiction of the Court of Justice of the European Union with respect to acts adopted before 1 December 2009 will remain limited, as before.²⁶ In any case, however, temporary measures no longer apply after the expiry of the transition period. A change of each of these acts before the end of the

²⁵ *Ibidem*, pp. 82–84.

²⁶ The jurisdiction of the Court of Justice of the European Union on the issue of preliminary rulings, as put forward in Article 35 sec. 2–3 TEU (in the version of the Nice Treaty), remains the sole exception to this rule; i.e. should the Member State in question present a declaration recognizing the jurisdiction of the Court in this regard.

five-year transition period entails the use of the new powers of these institutions, as envisaged in the Lisbon Treaty (Article 10 sec. 1–3 of Protocol No. 36). Declaration No. 50 on transitional provisions clarifies the regulations of Protocol No. 36, calling on the European Parliament, the Council of the European Union and the European Commission to “do their best” to pass legislative acts amending or replacing the existing third pillar instruments before the end of the five-year transition period. On the other hand, Protocol No. 36 contains provisions unique to the United Kingdom, which the UK strongly demanded during the Intergovernmental Conference in 2007. With these, the United Kingdom may refuse to accept the European Commission’s prerogatives regarding complaints and the jurisdiction of the Court of Justice of the European Union concerning acts of the former third pillar, even after the five-year transitional period. If the United Kingdom does so (at least six months before the expiry of the transitional period), then all acts dealing with judicial cooperation in criminal matters and police cooperation, adopted before 1 December 2009, will automatically cease to apply on 1 December 2014, unless they were changed after the Lisbon Treaty came into force. For this reason this country may also be liable for financial costs. At the same time, the United Kingdom may at a later date, or in fact “at any time,” notify the Council of the European Union of its will to apply the legislation as well as to accept the European Commission’s competence concerning complaints and the jurisdiction of the Court of Justice of the European Union, which no otherwise longer apply to the United Kingdom. In this case, relevant provisions of Protocol No. 19 on the Schengen acquis, as it was incorporated into the European Union, and Protocol No. 21 on the position of the United Kingdom and Ireland in relation to the area of freedom, security and justice are to be applied (Article 10 sec. 4–5 of Protocol No. 36).²⁷ It is worth noting that the establishment of a five-year transition period for these pieces of legi-

²⁷ *Protokół w sprawie postanowień przejściowych*, op. cit., pp. 325–326; *Deklaracja dotycząca artykułu 10 Protokołu w sprawie postanowień przejściowych*, [in:] *Traktat z Lizbony*, op. cit., pp. 354.

slation is the result of a political compromise between the countries that agreed for the change in their status as early as the Lisbon Treaty came into force, and the majority of EU Member States that strongly opposed this (including Poland, the United Kingdom, the Czech Republic and Malta). Moreover, Protocol No. 21 on the position of the United Kingdom and Ireland in relation to the area of freedom, security and justice extends – at the request of the two countries – the provisions of the Amsterdam Protocol No. 4 to include judicial cooperation in criminal matters and police cooperation as well as acts furthering the Schengen acquis. This means that the United Kingdom and Ireland will be able to freely enter and leave the cooperation within the entire area of freedom, security and justice, just as it was before December 1, 2009, with respect to the cooperation provided for in Title IV of the TEC. This also applies to legislative acts amending the acts that already bind both countries. However, if the Council of the European Union, acting by a qualified majority, (without the participation of the interested states), upon application by the European Commission, determines that such an exemption could cause failure of the legislative act in other Member States or in the European Union as a whole, it must encourage them to adopt it. If none of these countries do so, the “original” piece of legislation ceases to be obligatory.²⁸ In addition, the Council of the European Union, acting by a qualified majority on a proposal from the European Commission, may determine that the United Kingdom or Ireland, or both at the same time, bear the direct financial consequences arising from the cessation of the use of the legislative act (Articles 1–4a of Protocol No. 21).

Ireland’s position on this issue is further illustrated by the unilateral declaration annexed to the Final Act of the Intergovernmental Conference 2007. In it, Ireland expresses its “firm intention” to take part in adopting acts within the area of freedom, security and justice “in as wide a range as it is considered possible,” but “as far as possible... in the field of police cooperation.” At the same time Ireland states that within three

²⁸ See: C. Herma, *Likwidacja „struktury filarowej”*, op. cit., pp. 153.

years of the Lisbon Treaty's entry into force, that is, before 1 December 2012, it will weigh the possibility of derogation from the provisions of the aforementioned Protocol (Declaration No. 56).²⁹ In relation to the newly acquired prerogatives or strengthening the existing powers of the European Union in the area of freedom, security and justice, the German Federal Constitutional Court in its judgment of 30 June 2009, noted that the EU institutions must exercise their powers in such a way as to still afford the Member States "with tasks of major relevance, which are the legal and practical premises of a living (*lebendige*) democracy."³⁰ The Federal Constitutional Court primarily objected the provisions of Article 83 sec. 1 TFEU, Article 82 sec. TFEU and Article 83 sec. 3 TFEU (judicial cooperation in criminal matters).

In particular, the Court considered the "blanket authority" of the Council of the European Union to expand the catalog of especially serious crimes with a cross-border impact, as put forward in Article 83 sec. 1 TFEU ("depending on the development of crime") may lead to the extension of the powers of the European Union, and as such it is subject to statutory claim pursuant to Article 23 sec. 1 sentence 2 of the Basic Law. While with regard to the procedures provided for in Article 82 sec. 3 TFEU and Article 83 sec. 3 TFEU, which allow for the suspension of the ordinary legislative procedure and submitting a draft legislative act to the European Council, upon application by a Member State in danger of being outvoted, when the state's vital national interests may be violated, the Federal Constitutional Court has ruled that the German government's representative in

²⁹ *Protokół w sprawie stanowiska Zjednoczonego Królestwa i Irlandii w odniesieniu do przestrzeni wolności, bezpieczeństwa i sprawiedliwości*, [in:] *Traktat z Lizbony*, op. cit., pp. 295–298; *Deklaracja Irlandii w sprawie artykułu 3 Protokołu w sprawie stanowiska Zjednoczonego Królestwa i Irlandii w odniesieniu do przestrzeni wolności, bezpieczeństwa i sprawiedliwości*, [in:] *Traktat z Lizbony*, op. cit., pp. 356–357. Prerogatives similar to those of the United Kingdom and Ireland were obtained by Denmark upon the Constitutional Treaty. See: *Protokół w sprawie stanowiska Danii*, [in:] *Traktat z Lizbony*, op. cit., pp. 299–303. Szerzej na ten temat por. C. Herma, *Likwidacja „struktury filarowej”*, op. cit., pp. 153–154.

³⁰ BVerfG, Vertrag von Lissabon – 2 BvE 2/08 – Urteil vom 30. Juni 2009, <http://www.bverfg.de/>, p. 100.

the Council of the European Union may act only in accordance with the instructions of the Bundestag and, when it relates to the legislative powers of the federal states, they must also do so in accordance with the instructions of the Bundesrat.³¹

Final remarks

By making changes to the TEU and the TFEU, the Lisbon Treaty significantly strengthens the legal basis for the future establishment of the area of freedom, security and justice. At the same time, it reaffirms some of the peculiarities of the current judicial cooperation in criminal matters and police cooperation, which distinguish these policies from other policies within this area. The Treaty extends the powers of the European Union in the area of freedom, security and justice, in particular in judicial cooperation in criminal matters and police cooperation. On the other hand, it gives new powers to the Member States in the whole area of freedom, security and justice. The Treaty significantly modifies law-making procedures, decision-making procedures, as well as the catalog of the legislation concerning the area of freedom, security and justice. It also extends the powers of the European Council, the European Parliament and the Court of Justice of the European Union in this area, while leaving the prerogatives of the European Commission and the Council of the European Union essentially unchanged. Finally, the Treaty also grants powers in that respect to national parliaments for the first time.

³¹ *Ibidem*, pp. 100–107, 116.

Modernity, Tradition and Security in Budo Karate

Abstract:

The authors describe budo karate as one of the aspects of safety culture. Nowadays, there are three pillars of karate: traditional karate, sports and self-defense. Karate is a particular field of physical culture that forms the foundation for all three pillars of safety culture: the mental, organizational and material pillar. Karate meets the modern expectations of increasing the quality of life, feeling of security and protection against the dangers of the modern world. The authors also note that all style karate is a system that symbiotically combines tradition with appropriately construed modernity, while simultaneously enabling self-fulfillment.

Key words: all style karate, budo karate, physical culture, safety culture, security

Budo karate,¹ including its branch most popular worldwide – karate as a discipline within physical culture, is deeply rooted in the history of mankind, from ancient times and the Middle Ages, to Far-Eastern cultural circles, to the universal, “globalized” karate.² Karate is the basis for the growing expansion of a great domain of motor exercises, with a broad psychophysical dimension inherent in them. The master, who is the teacher, attests for the quality of transfer of martial arts. The effects of her/his work are evident in the progress and successes of his/her pupils. There are three pillars of budo karate:³ the traditional martial art, sport, self-defense. These

¹ *Budō* is a Japanese term that refers to numerous kinds of martial arts; *budō* karate, or Karate- dō, is a lifestyle with both physical and spiritual manifestations.

² J. Piwowski, W. Czajkowski, *Administrowanie jakością życia człowieka poprzez system Modern Bushidō*, „IDO – Ruch dla kultury”, Rzeszów 2010, p. 19.

³ J. Piwowski, *Samodoskonalenie i bezpieczeństwo w samurajskim kodeksie Bushidō*.

three form the broadly-construed martial art that combines tradition and modernity. It guarantees three effects: efficacy, holism and universality. Also we must note that the martial art, when defined that way, has a “side effect” after a fashion, which is the aesthetics of movement. Well-honed skills, the perfection execution and efficiency aestheticize the movements of a master in budo karate, even inadvertently. While seemingly useless in combat, aesthetics contributes to building security culture, both in the individual and social aspect, as well as interior design, which used to be an art in which Far-Eastern knightly elites were well versed. In the everyday existence of today aesthetics is an inalienable factor of enhancing the quality of human life.⁴ The set of motor techniques and strategies of budo karate favors the improvement of fitness and efficacy, which transfers to psychological well-being of a human person. Man’s basic needs include (and always have included) the need for self-fulfillment and the need for safety, which increases in modern times.⁵ Safety in its many aspects defines the field of interest of security studies; however, it is danger, threat that is the main category of security studies.⁶ In relation to a subject, there are two types of threats: internal and external. We should stress that the proper level of fitness achieved through the training in budo karate can decrease the feeling of threat and thus enhance security in both aspects. By considering budo karate to be a way of protecting one’s own existence in a holistic manner from external threats and of strengthening one’s own psyche (the internal aspect of security), we try to treat the universal values inherent in martial arts as factors of a utilitarian character. Karate addresses the desire to improve the quality of life by satisfying the need

Filozofia Budō: Jūdō • Jū-Jitsu • Karate-dō • Kendō • Ken-Jitsu • Aikidō, Kraków 2011, p. 19.

⁴ D. Ambroży, *Wielowymiarowość estetyki codzienności*, „Zeszyt Naukowy Apeiron”, no. 5, p. 11; see: J. Piwowarski, D. Ambroży, *Aesthetic Factor as a Determinant for Local Environment Management*, „Journal on Law, Economy & Management”, 2012, vol. 2.

⁵ J. Piwowarski, A. Zachuta, *Pojęcie bezpieczeństwa w naukach społeczno-prawnych*, Kraków 2013, p.11.

⁶ W. Fehler, *Zagrożenie – kluczowa kategoria teorii bezpieczeństwa*, [in:] *Współczesne postrzeganie bezpieczeństwa*, K. Jałoszyński, B. Wiśniewski, T. Wojtuszek (ed.), Wyższa Szkoła Administracji, Bielsko-Biała 2007, p. 34.

for self-fulfillment and safety, and helps protect man from the dangers of modern world that loom from the laws of nature, civilization, man's own vices and from the negative human factor in the form of a potential assailant. Budo karate is a system that symbiotically combines tradition with an appropriately defined modernity.

Hand-to-hand combat, which has its place within broadly construed safety culture⁷ has long been an inseparable element of human existence. It was closely connected to the development of mankind and affected both the individual progress and many facets of social development, which combine to form the entirety of material and immaterial civilizational output known as culture.

In its long evolution, hand-to-hand combat has become one of the many ways of improving one's fitness and mental well-being, as well as one of the elements influencing social stratification. The social station of members of the warrior class (in India: *Kshatriya*, in China: *wuxia*; in Japan: *bushi*, samurai) was generally very high, second only to priests. Regardless of that, monks also practiced war skills, which were aimed at the psychophysical support of spiritual growth (for instance, the famed Buddhist monk Bodhidharma put a strong emphasis on that). Also the situation necessitated such skills as monks had to possess the ability to defend themselves and their fellows during pilgrimages and when temples were threatened. Among knights, especially in the Far-Eastern cultural circles, good skills with weapons as well as good skills in hand-to-hand combat determined the rank and income of a warrior. They could also help him rise in rank.⁸

In modern times, since the 19th century, and specifically since the Meiji Reform which began in 1868, Far-Eastern martial arts have become available to members of all social classes and strata. The decisiveness of the then Emperor of Japan contributed to that: in 1882 he issued an ad-

⁷ J. Piwowarski, *Kultura bezpieczeństwa*, [in:] „Kultura Bezpieczeństwa”, no. 12, Kraków 2012, p. 6.

⁸ M. Butrym, Orlińska W., *Tajemnice kung-fu*, Sport i Turystyka, Warszawa 1983, p. 11.

dress to his soldiers which was in fact a modern version of the Bushido code and of the noble moral and philosophical attitude that were affirmed by it. Recently martial arts and combat sports have become an in-demand element of pro-health education and leisure activities. Numerical data pertaining to the scale of this phenomenon proves it.⁹ Martial arts and combat sports are relevant components of the modern development of amateur and professional sports. Moreover, they are the ever current and timeless supporting factors in improving the skills of security professionals, i.e. officers of uniformed services and other disposable groups. Those examples of the utility of martial arts and combat sports aside, they also stimulate the intellectual growth of the youth (as evidenced by the effects of employing certain symmetrical and asymmetrical moves in the training of Far-Eastern combat systems¹⁰), as well as inspire attentiveness and orderliness which are important factors in achieving success in education.¹¹ Order and attentiveness cause the increased effectiveness of acquiring various kinds of knowledge and practical skills, and of combining practical skills with theoretical information.

Universal, all style karate is one of the modern versions of budo that join tradition and modernity. It was shaped in the 1950s in the U.S. and resulted, among others, from the policy of mitigating strain in the international relations between Americans and the Japanese following World War II. One of the measures employed were the numerous shows by Japanese martial arts masters who came to the U.S. Karate gained popularity as early as the American occupation of Okinawa (where medieval karate was born) after World War II. Sadly, the events of Pearl Harbor were still fresh in America's memory. In time, the naturally practical Americans introduced certain techniques and the method of training from boxing into

⁹ W. J. Cynarski, *Sztuki walki budō w kulturze Zachodu*, Wyd. WSP, Rzeszów 2000.

¹⁰ B. Simonsohn, *Przez ciało do ducha: ćwiczenia tybetańskie razem z dziećmi*, Spar, Warszawa 1996.

¹¹ T. Ambroży, *Samoobrona – podręcznik metodyczny dla instruktorów rekreacji*, UKFiS – ZG TKKF, Warszawa 2001; T. Ambroży, *Trening holistyczny – metodą kompleksowej uprawy ciała*, Wyd. European Association for Security, Kraków 2004.

karate, which led to the establishment of all style karate, or full contact karate, a sport that has enjoyed an unabated popularity in the U.S. A branch of it emerged from its evolution as all style kickboxing. With time, some players at the fore-front of all style karate rejected the philosophy, lifestyle and educational models rooted in the tradition of Far-Eastern karate. This caused all style karate to morph into kickboxing.¹² Yet the roots of the genuine Far-Eastern martial art include an important mental and spiritual component. The first Americans to be trained in karate *en masse* made good use of that.

The results of the pilot, three-month training assembly of American officers in 1952 were much appreciated. So much so that for more than ten years similar training programs were conducted (2–3 groups per year). Moreover, Japanese masters were invited to offer instruction in American military units. The first invitation of this kind was issued by the United States Air Force in 1953. Thus, the roots of the universal, or worldwide karate were slowly planted, with its representative symptom being the emergence of budo karate. In time, aside from karate, judo and aikido were introduced into the aforementioned training programs, which significantly broadened the skillset of graduates of those programs. The skillset that proved to be extremely valuable for the army and impacted not only the matters pertaining to combat itself, but also performance, efficacy, and self-confidence of soldiers.

Each martial art in its pure form has its own keynote, an idea that was of particular importance for the founder(s) of the style and that directed the emergence of its techniques and philosophy, which were later relayed to the following generations. Despite the passage of time and the changing approaches toward training and conducting combat, this keynote and the personality of the master still determine the level of development and efficacy of any martial art.

The master-teacher is the paragon and guarantee of the quality of transfer of a martial art, and the impact his/her work has is clear not only

¹² www.edukacjabezgranic.pl [02/15/2013].

in his/her own successes, but also in those of his/her students. A properly conducted process of training is one of the master's most important responsibilities. Such issues as the educational, popularizing and organizational roles, are no less relevant than the motor aspects.

So budo karate aims at shaping a psychologically and socially mature personality of its disciples. The efficacy of pursuits in this matters is based upon the proper moral, intellectual and sports standing of the master-instructor, who through his/her image should inspire the group and exert positive influence on its members. Through a personal, verbal and non-verbal influence and his/her own skill the master is able to inspire his/her students to follow the Way he/she leads. Hence the competence of the master is crucial for, as Bielski states: "the 21st century will be a century of competence. Prognoses indicate that there will be an increase in demand for people of versatile personalities and advanced and various qualifications..."¹³ The philosophy of karate can be used as a tool in everyday life and training, developing one's fighting style and personality in the pursuit of self-fulfillment.

Let us turn to simple examples located on the intersection of life and combat, for, as Stoics used to say, *vivere est militare*. A karate master will not incite conflict in trivial circumstances during a conversation devolving into a fight – he/she can achieve his/her goal by manifesting wisdom, both intuitive and intellectual. In this context, the principle of flexibility is particularly important, which also means yielding in order to achieve victory. This forms the basis for a mature fighting strategy and for conducting a conscious policy, both on high political ranks and in ordinary everyday life. One who adheres to the Chinese rule of *wu-wei*¹⁴ remains undefeated. It bears reminding that both in close combat and in everyday life avoiding a needless strife is a considerable victory, for refraining from destruction and conflict is a fundamental moral obligation. Also the optimal level of

¹³ J. Bielski, *Kompetencje nauczyciela wychowania fizycznego*, „Lider”, no. 1/119, p. 7–9, 2001.

¹⁴ *wu-wei* (Chin.) – „inaction”, submission to the natural rhythm of the course of events with the possibility of positive (effective) utilization of the knowledge of the mechanism.

forces and measures involved causes us to obtain satisfying achievements, both material and intangible. The master's intellectual progress and intuitive wisdom seem to include shaping high self-esteem and the disposition of being undefeated, while exerting a positive influence on motivation and attitudes of his/her pupils. In passing we will add that the simplified, or at times even boorish, so-called "track and ring philosophy," set solely on winning (vide the *Big Brother* reality show: someone won, someone was better, someone humiliated someone else) is in no way the same as the philosophy of being undefeated, or, as Aristotle has it, "justly proud."

This, however, is a topic of further deliberations on the philosophy of budo, which was discussed by Professor Nitobe at the beginning of the 20th century in his book *Bushido: the Soul of Japan*, or currently by Tanaka,¹⁵ and in Poland by Tokarski,¹⁶ Kalina,¹⁷ Ambroży,¹⁸ Piwowski,¹⁹ among others. It is an important component of the noble, or knightly Way of the Warrior, which cannot exist without being motivated by lofty goals and intentions. Knightly ethos is uncommonly universal. Despite its long history, it remains up-to-date. Hence it is an important element of modern safety cultures. This in turn results in the interest of security studies specialists.²⁰

¹⁵ F. Tanaka, *Sztuki walki samurajów*, Diamond Books, Bydgoszcz.

¹⁶ S. Tokarski, *Jogini i wspólnoty. Nowoczesna recepcja hinduizmu*, Wydawnictwo PAN, Wrocław 1987

¹⁷ R.M. Kalina, *Teoria sportów walki*, Centralny Ośrodek Sportu, Warszawa 2000.

¹⁸ T. Ambroży, *Trening holistyczny*, EAS, Kraków 2005.

¹⁹ Piwowski J., *Samodoskonalenie i bezpieczeństwo w samurajskim kodeksie Bushidō. Filozofia Budō: Jūdō • Jū-Jitsu • Karate-dō • Kendō • Ken-Jitsu • Aikidō*, Kraków 2011.

²⁰ L.F. Korzeniowski, *Securitologia. Nauka o bezpieczeństwie człowieka i organizacji społecznych*, EAS, Kraków 2008, p. 23 oraz 33; F. Škrvda, *Vybrané sociologické otázky charakteristiky bezpečnosti v súčasnom svete*, [in:] Čukan K., a. kol. *Mládež a armada*, MO SR, Bratislava 2005, p. 41; L. Hofreiter, *Securitológia*, Akadémia ozbrojených síl gen. M. R. Štefánika, Liptowski Mikulasz 2006, p. 19; L. F. Korzeniowski, *Securitologia na początku XXI wieku*, „Securitologia”, 2007, no. 5, p. 186; W. Jurczak, *Znannja w oblasti biezpieki – skladowa czastina uniwersitetskoj osvieteli*, „Bezpieka żyttedzialnosti”, 2007, no 5; J. Maciejewski, *Securitologia – uwagi socjologa. Bezpieczeństwo w kontekście społeczno-kulturowym*, [in:] *Bezpečnost a bespečnostna veda*, Hofreiter L. (ed.), Akademia ozbrojenych sil gen. M. R. Stefanika, Liptowski Mikulasz 2009; J. Matis, *Socialno-pedagogicke aspekty pripravu bezpečnostneho manazera*, „Securitologia” 2008, no. 7; В.И., Ярочкин, *Сек'юритология – наука о безопасности жизнедеятельности*,

Fortunately, many karate masters saw the need to maintain the values of traditional karate and to draw from its unique virtues. Budo karate is both a discipline in sports competitions and a system of obtaining degrees of involvement: *kyū* (training levels) and *dan* (master levels). Sports competition takes place both in continuous and discontinuous form, and student (*kyū*) and master (*dan*) levels are granted according to regulations which are analogous to the rules in many types of budo. Budo karate is also an objective platform for an all style competition in a wide range of martial arts and combat sports, related or similar to karate. In other words, for half a century it has been a common ground for universal sports competition and Far-Eastern martial arts with defined rules.

As we have mentioned before, budo karate has three, or rather four pillars, that guarantee the effectiveness, holism, and universality of budo karate as a system:

- martial art in the form of traditional karate, also known as classic karate;
- sports combat, with the use of boxing gloves, known as sports karate or all style (full contact) karate,
- combat karate (realistic self-defense of a decidedly non-sportive character),
- the inner moral and psychological development, rooted in the spiritual element of true karate.

The martial art, sport, self-defense and inner growth merge together in the modern budo karate to form a coherent system of self-betterment and enhancing the quality of life, with a strong emphasis on security.

According to the Japanese expert on the Way of the Warrior, Tanaka Fumon²¹ karate is categorized as *gendai budo*, or “young *budo*.” This group

Ось – 89, Moskwa 2000, p. 12; J. Janosec, *Sekuritologie – nauka o bezpečnosti a nebezpečnosti*, „Vojenské rozhledy”, 2007, no. 3.

²¹ F. Tanaka, *Sztuki walki samurajów*, Diamond Books, Bydgoszcz.

includes, as Tanaka informs, aikido, jujutsu and karate. In this groups, all style karate transcends particular styles as it is a compilation of Far-Eastern and Western methods of combat and training. This compilation in no way presumes to rank neither cultural circle from which it draws its combat and training methods and higher values (which Kalina²² underlines) as better than the other and constitutes the holism of thus construed martial art and combat sport. The term “holism” (Gr. *holos* – whole),²³ suggests that the issues at hand should be considered in their entirety and organically/²⁴ Budo karate training affects human development as a whole, including all factors, both intrinsic and extrinsic. This training comprises the development and use of genetic and environmental determinants, and most of all, a person’s own interests, psychophysical predispositions, goals, or, as Oyama puts it, consistently realized objectives that rank higher than mundane desires, as well as man’s comprehensive activity connected to them.²⁵

The notion of holism is more rooted in the culture of the East than that of the West. This notion attempts to reconnect the division between body and spirit.²⁶ We should reiterate that the comprehensiveness and universality of all style karate means it can be used both as a health-friendly leisure activity, a traditional martial art, sports competition, as well as in everyday life in its most utilitarian aspect: self-defense. What connects the pillars of budo karate is the mental element of growth. According to the meaning of Ken Wilber’s theory of a spectrum of consciousness,²⁷ said growth can assume an intellectual (ratio), psychological (psyche),

²² R.M. Kalina, *Teoria sportów walki*, Centralny Ośrodek Sportu, Warszawa 2000.

²³ J. Piwowarski, op. cit., p. 39; see: J. C. Smuts (1870–1950), the founder of holism, a notable military man, politician and philosopher. See: idem, *Holism and Evolution*, Mac Millan Co. Ltd., London 1927.

²⁴ A. Szyszko-Bohusz A., *Pedagogika holistyczna*, PAN, Kraków 1989.

²⁵ Ōyama Masutatsu, *The Kyokushin Way. Mas. Oyama’s Karate Philosophy*, Tokyo 1979, p. 11–15.

²⁶ T. Ambroży, *Trening holistyczny. Wpływ aktywności fizycznej na realizację potrzeby bezpieczeństwa osobistego i społecznego*, Wyd. European Association for Security, Kraków 2005.

²⁷ K. Wilber, *Niepodzielone. Wschodnie i zachodnie teorie rozwoju osobowości*, Zysk i S-ka, Poznań 2001.

and even spiritual form. The spiritual form is related to spirituality, which is increasingly often discussed in scientific inquiries as well.²⁸ There is a choice about how wide a range of progress will occur in any given case. Hence all style karate can also be named the spectral Way of Karate. The spiritual component, or what is moral, noble and lofty, can be construed as the fourth pillar of budo karate. It is all the more important that it balances the encroachment on the inviolability and integrity of a human body that occurs in combat sports. The point is to prevent psychologically immature, morally deficient (at times through no fault of their own) individuals from transferring behaviors acceptable in close combat and rivalry into areas where such would be inappropriate and impermissible. In this way, karate spirituality becomes not only a karate learner's noble armor, but also one of the important elements of the autonomous, broadly construed security system that the Way of Karate offers.

The three pillars of karate are strong when they are built successively and go through phases in their growth – from martial art, to sport, and finally to utilitarian, non-sportive elements.²⁹

The fourth pillar is different from the three others. It constitutes a factor of an individual's moral, or even spiritual maturation and growth. In proper forms and proportions, it should be introduced into all stages of the development of a future master of budo karate. Let us reiterate: the fourth pillar, which is an integral part of the socialization process that takes place when one follows the Way of Karate, regardless of the kind of training (martial art, sport, self-defense), safeguards a proper personality development in participants of karate classes and is internalized by them. In the concept of safety culture, which is the object of study, among others, of Cieślarczyk³⁰ and Rosa,³¹ this pillar is identical to the first – mental

²⁸ P. Socha (ed.), *Rozwój duchowy człowieka*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2000.

²⁹ J. Piwowarski, *Etapy rozwoju mistrza*, Magazyn Sztuk Walk „Samuraj”, no. 3&4, 1997.

³⁰ M. Cieślarczyk., *Fenomen bezpieczeństwa i zjawisko kryzysów postrzegane w perspektywie kulturowej*, [in:] *Jedność i różnorodność*, Reklajtis E., Wiśniewski R., Zdanowski J. (ed.), ASPRA-JR, Warszawa 2010, p. 96.

³¹ R. Rosa, *Zarys polskiej filozofii bezpieczeństwa*, Akademia Podlaska, Siedlce 2009, p. 6.

– pillar of safety culture. Sport is this field of physical culture that is the basis for a high level of motor development of those who exercise. Technical mastery in any sports discipline is founded on all-purpose work-out. Unlike another form of sports: kickboxing, budo karate, or full contact karate, combines modern and traditional elements, which allows the trainees to deepen their mastery further, outside the limits of a sports career.

The need for self-improvement is among the most important needs of man, as Maslow³² stated and documented, and as budo masters like Funakoshi³³, Uyenishi³⁴, Norris³⁵, Oyama³⁶ confirm.

Another need of modern man is the basic need for safety. As the definition implies, a need is something that is necessary, indispensable. Many modern psychologists claim that a need is a factor for dynamism in human behavior.³⁷ Needs agree with one's system of values, whose realization is felt as an inner imperative, after a fashion. Following in that direction, we should state, after Leszek Krzyżanowski, that: “there is no way... to undertake creating even an outline of axiological foundations for sciences regarding leading organizations, without first defining the central notion of these deliberations, that is value.”³⁸

It turns out that this notion is highly interdisciplinary, psychological, social and cultural.³⁹ It can be defined in this manner: “a value is a conception, explicit or implicit, distinctive of an individual or characteristic of a group, of the desirable which influences the selection from available modes, means and ends of action.”⁴⁰

³² A. Maslow, *Motywacja i osobowość*, Instytut Wydawniczy PAX, Warszawa 1990.

³³ See: G. Funakoshi, *Karate-dō: My Way of Life*, Kodansha International, Tokyo 1981.

³⁴ Master Uyenishi, *Textbook of Ju Jitsu: In Early 1900's Japan*, Rising Sun Productions, New York 2008.

³⁵ C. Norris, *Autobiografia. Na przekór wszystkiemu*, Polski Instytut Wydawniczy Erica, Warszawa 2006

³⁶ Ōyama Masutatsu, *The Kyokushin Way. Mas. Oyama's Karate Philosophy*, Tokyo 1979.

³⁷ J. Reykowski, *Motywacja, postawy społeczne a osobowość*, Warszawa 1986.

³⁸ L. Krzyżanowski, op. cit., p. 199.

³⁹ See: M. Misztal, *Problematyka wartości w socjologii*, PWN, Warszawa 1980, ISBN 83-01018-03-8.

⁴⁰ C. Kluckhohn, *Values and Value – Orientations in the Theory of Action. An Exploration in Definition and Classification*, [in:] *Toward a General Theory of Action*, T. Parsons,

Krzyżanowski sums up his deliberations on the concept of value, while the authors of this paper supplement them with following remarks:

1. A value is directly connected to the act of valuation, or forming judgments.
2. Moral judgment leads to the discrimination between right and wrong. This judgment may be expressed explicitly, or simply in thought.
3. Subjects who form judgments are either individuals or collectives of people, of different sizes and various common traits, for instance families, local or larger communities, and teams of professionals.
4. Both concepts and actual elements of reality are subject to judgment: from ideas, relationships, certain states and events, to particular traits of people and objects. What distinguishes a good warrior is: extraordinary attentiveness and integrity, the lack of which turns a warrior into a villain.
5. Ethical culture. Hence one might say that a value is the product of a judgment of an object by a subject who judges, or estimates it, if you will. In a way, a warrior's subjectivity can be "measured" by the level of his/her ethical culture, which is an element of safety culture.
6. Hierarchy of values. We should note that the notion of value is strictly about positive judgment, unlike the cases of estimating where the estimate can be negative, neutral or positive. So the notion is connected to defining the hierarchy of needs, to preferring something over available alternatives; from an ethical standpoint, integrity is likely to be the highest value that corresponds with the entire system of values of a self-respecting warrior.

E. A. Shils (ed.), Harper&Row, Nowy Jork 1962, p. 395, after: L. Krzyżanowski, op. cit.

7. It should also be underlined that the judgment that leads to defining a value may be individual or collective. Creating values is connected to rational and emotional intelligence, where the emotional factor should be active in the inner, emotional pursuit of improving one's worth through adhering to a moral imperative even in dire situations. Kant called this internal imperative the categorical imperative.

Krzyżanowski's considerations are concluded by the following thesis: "Values that a subject strives to realize, directly or through attitudes and motives influence behavior, including human behavior, and constitute the criteria in the selection of goals, both individual and internalized, collective, common goals."⁴¹

The world of karate and its Way is a world of values. Through constant training, supported by its fourth, mental pillar, we bear testimony to values inherent in practicing martial arts: "Martial art (Far-Eastern martial art) is an area of culture connected to combat systems defined by precise codification that usually stems from Far-Eastern inspirations, which relates to techniques, methods, traditions and custom, rooted in philosophical and religious premises, and at the same time – utilitarian."⁴²

As we have mentioned before, there are two main types of threat directed at any subject: from within and from without. In the latter case, eradicating threats, and thus realizing the need for safety, falls into the range of operation of organs of state and protection forces, without detracting from the individual's important, active role. With the former type of threat, most factors determining security depend on a specific person, however, external institutions may support said individual's actions.⁴³ In the latter, external type of threat, held at bay by teams and protection sys-

⁴¹ L. Krzyżanowski, *op. cit.*, p. 206.

⁴² J. Piwowarski, W. Czajkowski, *Administrowanie jakością życia człowieka poprzez system Modern Bushidō*, „IDO – Ruch dla kultury”, Rzeszów 2010, p. 19.

⁴³ T. Ambroży, *Trening holistyczny. Wpływ aktywności fizycznej na realizację potrzeby bezpieczeństwa osobistego i społecznego*, Wyd. European Association for Security, Kraków 2005.

tems, we should consider both the activity of the person being protected, and that of the members of the aforementioned disposable groups.⁴⁴

It bears repeating that the increased level of fitness resulting from a budo karate training may effectively decrease the feeling of threat. To a point, it is substantiated by Bandura's psychological theory of efficacy,⁴⁵ where, like it is in karate (albeit in a broader range) two planes: physical and mental, intertwine. Efficacy that is one of the paragons of Karate-do, ideally increasing with each step of progress (as Bandura's theory describes) and sports experience of a martial arts learner, is one of the components of human needs that are fulfilled by versions of budo. It is at the root of self-esteem and the autonomous security system of a karate student, as well as the so-called looking glass self⁴⁶ that is connected to the level of prestige in one's own environment. Moreover, many people consider health to be the foundation of a secure life, and a well-planned, long-term and properly exercised training in karate can contribute to safeguarding health.⁴⁷

⁴⁴ A disposable group is a particular team of people, structured by the state and hierarchical so smaller groups form bigger ones. Disposable groups submit entirely to the disposer. Moreover, they are characterized by the fact that the work they perform is defined as "service" rather than "job". Compared to other teams of professionals, they exhibit an increased readiness for immediate action, even in very difficult circumstances. Their special tasks are followed by special prerogatives. "Disposable groups are organizations... of a hierarchical structure. They constitute a social environment with its own stratification. They are a set of norms and traditions. They are groups meant to resolve particular situations. Most notable traits of the members include: availability, submission to the orders of the superiors, high resistance to stress, certain predisposition to deal with stress. Disposable groups operate on the basis of law and within its limits. Their inner organization is also regulated by sets of rules and ethical codes." See: J. Skurej, *Integracja i dezintegracja społecznej struktury w wojsku w kontekście socjologicznym*, [in:] *Rekrutacja do grup dyspozycyjnych – socjologiczna analiza problemu*, J. Maciejewski, M. Liberacki (ed.), Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2011, p. 383; see also: I. Kurasz, *Grupy dyspozycyjne w strukturze społecznej. Próba analizy socjologicznej*, [in:] *Acta Universitas Wratislaviensis No 3079 Socjologia XLN*, Wrocław 2008, p. 135 ff; J. Maciejewski, *Grupy dyspozycyjne. Analiza socjologiczna*, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2012.

⁴⁵ L. A. Pervin, *Psychologia osobowości*, Gdańskie Wydawnictwo Psychologiczne, Gdańsk 2002.

⁴⁶ See: E. Aronson, T. D. Wilson, R. M. Akert, *Psychologia społeczna. Serce i umysł*, Zysk i S-ka Wydawnictwo, Poznań 1997. [*Social Psychology* (7th ed.), Upper Saddle River, NJ: Prentice Hall.]

⁴⁷ T. Ambroży, *Trening holistyczny – metodą kompleksowej uprawy ciała*, Wyd. European

By treating budo karate as a way of holistically protecting one's existence from dangers of the outer world, we attempt to take our lives into our own hands and realize the timeless, universal values in their utilitarian dimension. For we obtain the full value of safety when we also experience liberty, as only the coexistence of a high level of the two parameters constitutes high quality of life.

A joint effort of preparing a remarkably solid protective coat to match our times was undertaken in the mid 20th century by such predecessors of all style karate as Bill Wallace "Superfoot", Benny "The Jet" Urquidez,⁴⁸ Dan Anderson⁴⁹ or Chuck Norris, who was the world champion in all style karate for six long years! (1967–1973)⁵⁰

In time, multiple dojos dealing in karate and derivative martial arts have morphed into two kinds of organizations, from the point of view of the spectral Way of self-fulfillment, Karate-do. Some of them, becoming excessively, as the authors believe, fascinated by modernity (whose dominant position in human existence sadly implies numerous ahumanistic aspects), have forsaken the tradition of karate. This is true about a significant number of kickboxing clubs. More often than not it has given rise to a sort of anomie among the students of karate and kickboxing. Karate schools and clubs that have modernized their training methods while maintaining strong traditional and timeless values of budo, continue to build their safety culture and skillfully interlace tradition with modernity. This favors the holistic growth of the individual, of the dojo community and of the local community, within which the dojo operates.

Association for Security, Kraków 2004.

⁴⁸ World Champion Benny „The Jet” Urquidez, *Training and fighting skills*, Unique Publications, Inc., Hollywood, California 1980.

⁴⁹ D. Anderson, *American free style Karate: Full contact sparing*, Unique Publications, Inc., 1982.

⁵⁰ C. Norris, op. cit.

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Experiences in Defense Preparations of Selected Countries

Abstract:

The paper compares defense preparations of selected countries: Germany, Finland, the United Kingdom and Sweden. While discussing the differences, the author also points out the underlying, common basis for various administrative and legal solutions applied by the states: the need for ensuring the security of the population and the continued operation of the multi-level government apparatus.

Key words: defense preparations, international relations, security, administration

In order to lay the foundations for deliberations on the subject matter, it is necessary to define the concept of “defense preparations.”

According to *Mały słownik języka polskiego*, ‘essence’ is the “true, actual side, aspect of something; the fixed order of something, the crux of the matter.”¹ The word ‘preparations’ refers to “actions, efforts made in view of something that is to happen.”² The word ‘defensive’ means something that ‘defends against something.’³ Whereas ‘defense’ is ‘repulsing an attack, usually armed, safeguarding from danger, destruction’⁴ and “defending oneself.”⁵ The Polish word for defense, ‘obrona’, is directly connected to fighting. “It is etymologically identical to it. According to A. Brückner, ‘obrona’ (‘defense’) derives from ‘born’ (*bornis*) and the

¹ *Mały słownik języka polskiego*, W. Doroszewski (ed.), PWN, Warszawa 1999, p. 271.

² See: *ibidem*, p. 749.

³ *Ibidem*, p. 527.

⁴ *Ibidem*.

⁵ *Słownik poprawnej polszczyzny*, PWN, Warszawa 1999, p. 543.

common root *bor-* which means: ‘to fight, strike, struggle.’ In Slavic languages it also meant ‘quarrel’ (*bornis*), ‘palisade surrounding a stronghold’ (Rus. *zaboralo*), and even ‘to hit’ (*borjan, bora, bor*).”⁶

Defense preparations comprise a complex process aimed at creating conditions to counteract something which is difficult, or even impossible to accurately define. They are also characterized by another important trait: their quality is only measurable during hostilities. No one can afford to employ this method. Therefore in that regard a country must draw from the practice of other states, as well as from its own experiences, especially relatively recent ones when the state’s preparedness for war was tested. From the point of view of the subject matter, what is relevant is not the operation of armed forces but the way the state as a whole functions and the relationships between organizational assumptions and the effects of their applications.

The dynamics in the area of threat requires studies, for scientific cognition will allow for setting a proper direction of the necessary changes in the field of defense preparations and those changes that stem from the environment. Identifying defense preparations solely with the military sphere does not stand to the test of time. This approach entails a one-sided perception of the so-called “defense preparations of the state”: “It is impossible to separate military threats from non-military ones, mainly because they occur simultaneously, they supplement one another, and oftentimes the former cause the latter.”⁷ The results of these threats affect not only the civil population, but also the structures of government, administration and the territory.

All those components are included in defense preparations, which are usually undertaken by either the government or by administration. The presentation of defense preparations of selected countries is based on the

⁶ A. Skrabacz, *Samoobrona powszechna*, [in:] *Obrona cywilna (niemilitarna) w obronie narodowej III RP*, W. Kitler (ed.), AON, Warszawa 2001, p. 222.

⁷ W. Kitler, *Zagrożenia bezpieczeństwa narodowego*, [in:] *Obrona cywilna (niemilitarna) w obronie narodowej*, op. cit., p. 27.

results of the study of emergency management, conducted by the author for eight years. During the study, the issue of defense preparations seemed to surface spontaneously. The author believes that the experiences relayed below are most interesting from the point of view of competences. These are the solutions employed in Germany, Finland, the United Kingdom and Sweden.

Germany is a federal republic consisting of sixteen regional states, which have a high degree of autonomy.⁸ As it is in every federal country, Germany has three public administrations: federal, union, and local government.⁹

Germany's defense preparations comprise all the necessary constitutional aspects of the defense of the state: political, military and civil undertakings concerning the nation and allied states.

In the sphere of defense preparations, the most important parts are played by: federal president, federal chancellor, federal government, Federal Security Council.

“Federal Security Council is an inter-department committee of the federal government, operating under the chancellor. The members of the council include the ministers of: defense, foreign affairs, internal affairs, justice, finances and economy. Besides other ministers, the parties involved in the works of the Council may include: the chief of the President's Office, the chief of the Chancellery, the chief of the Press and Information Office, the general inspector of the Bundeswehr, the representative of the government for disarmament and arms control, chief of the secretariat and chief of protocol in the Chancellery, chief of the Chancellor's Bureau and a constant representative of the FRG at NATO. Federal Security Council... considers questions of security and coordinates the operation of all federal ministries in the field of common defense, decides on matters of military policy and the state's military preparations, as well as sets the ge-

⁸ *Nowa Encyklopedia Powszechna*, t. IV, PWN, Warszawa 1995, p. 457.

⁹ More: A. Borodo, *Samorząd terytorialny. System prawnofinansowy*, PWN, Warszawa 2000, p. 15.

neral guidelines of internal security, provided these issues do not fall onto the government. The Council is serviced by the Chancellery that, on behalf of the Chancellor, coordinates the issues of internal security... protecting the population, [organizing] civil defense, and, to an extent, economic defense.”¹⁰

In wartime, the federal chancellor assumes the role of commander-in-chief and head of civil defense. At the same time, federal government defines the policy in the field of defense and realizes its constitutional tasks which do not fall within the gestion of Federal Security Council (legislation, foreign policy, international agreements, directives in the national dimension).¹¹

The civil component of Germany’s defensive system, as part of defense preparations, undertakes actions of civil defense regarding expected operations during external threat to the security of the state and war. “It consists in preparations for:

- maintaining the continuity of the functions of the state and administration (legislation, legal care, functions of the state and administration, security and public order, public relations.) Colloquially this undertaking is known as »defending constitutional order «;
- defending the population – civil defense (self-defense, warning service, building defensive objects, evacuation, health care, defense of cultural property, extended protection in cases of catastrophes);
- delivering commodities and services – supplying the society with essential commodities and services (commodities and services in agriculture, forestry, food economy; in small-scale commodity economy; delivery of power and water, sewage disposal; safeguarding postal services and communication; safeguarding work

¹⁰ W. Kitler, *Zadania administracji publicznej z zakresu obrony narodowej wybranych państw europejskich*, [in:] *Administracja publiczna a bezpieczeństwo państwa*, Z. Piątek, B. Wiśniewski, A. Osierda (ed.), Wyższa Szkoła Administracji, Bielsko-Biała 2007, p. 163.

¹¹ See: *ibidem*.

efficiency; social insurance; financial and monetary insurance);

- supporting armed forces (of the state and its allies) – delivery of foodstuffs, power, supplementing and delivering means and transport services, communication services, preparing workforce, restoration services, securing road passage.”¹²

Finland is a republic with a three-level system of government.¹³ On the central level, the executive power is held by the government, consistent of the president, State Council and the prime minister’s cabinet. As far as the organization of institutional administration goes, the solutions applied in Finland are influenced by Sweden, because “until 1809, it was a part of Sweden, and after it came under the rule of tsarist Russia, as Grand Duchy of Finland, the old Swedish law was kept...”¹⁴ In the context of these deliberations, we should note that the president has the decisive role in matters of foreign policy and defense. Moreover, he or she serves as commander-in-chief and appoints the government, upon agreement from the parliament and high officials.

“Regional administration is divided into provincial and state administrative districts. As a result of the reform of 1996, Finland was divided into five big provinces and the Åland Islands which constitute an autonomous region. On the provincial level, executive power is held by the administration of a local government, that is a provincial government with its own administration, selected by civic centers; and by governmental administration that manages the ninety state administrative districts, which comprise, e.g., units of the police. Local government, consisting in 452 civic centers, is responsible for education, municipal service and health care.

¹² W. Kitler, *Obrona narodowa w wybranych państwach demokratycznych*, AON, Warszawa 2001, p. 146.

¹³ *Nowa Encyklopedia Powszechna*, op. cit., p. 363.

¹⁴ H. Izdebski, M. Kulesza, *Administracja publiczna. Zagadnienia ogólne*, Liber, Warszawa 2004, p. 52.

The highest executive power on the local level is held by the municipal committee elected by the city council.”¹⁵

Finland’s defense preparations, like their Swedish counterparts, are based on the concept of total defense. The Council of Defense is the body responsible for their coordination. It consists in: ministers directing departments of top importance for the security of the state; Chief of Defense; and Chief of Staff of Defense. “In order to ensure the cooperation between relatively independent ministries, within each of them a Director of Preparedness is appointed, whose job is to prepare a plan of reaction in emergency situations, detailing the competencies and responsibilities of particular offices and to maintain a proper level of readiness of any given office to react in such situations, as well as to ensure cooperation between various offices in this field. Main secretaries of particular ministries serve as Directors of Preparedness. Secretary-in-Chief of the Prime Minister Office is the head of the Chiefs of Preparedness, and the Prime Minister’s Office coordinates the process of planning in cases of special threats and defines such other undertakings that are not included in the legal system and are necessary under states of emergency. Moreover, within a few branches of the administration there are advisory and coordinative committees, like the National Board of Economic Defense) and Planning Commission for Defense Information.”¹⁶ On the regional level, defense preparations are coordinated by provincial governments. Whereas on the local level the responsibility for actions in this field falls to the appropriate mayor.

Defense preparations of public administration in Finland comprise: issues of ensuring the survival of the nation and support of the armed forces in situations of external threat to the state and war.

The United Kingdom¹⁷ is a hereditary constitutional monarchy. The Queen is the head of state, commander-in-chief and the head of the An-

¹⁵ W. Kitler, J. Prońko, B. Wiśniewski, *Zarządzanie kryzysowe w wybranych państwach*, [in:] *Administracja publiczna a bezpieczeństwo państwa*, op. cit., p. 96.

¹⁶ *Ibidem*, p. 97.

¹⁷ Based upon: W. Kitler, B. Wiśniewski, J. Prońko, *Problemy zarządzania kryzysowego w państwie. Studium*, AON, Warszawa 2000, p. 87–89; and the presentation of the British delegate Peter Tallentire in PCM-95 (NATO–Brussels) on 25th October 1995.

glican Church. The British parliament is comprised of the House of Commons and House of Lords. The United Kingdom consists of four countries, respectively divided into:

- England: 9 regions, 46 counties (including 7 metropolitan counties);
- Scotland: 12 regions, 32 administrative units (called counties);
- Wales: 3 cities, 9 counties, 10 municipal counties;
- Northern Ireland: 26 districts.

In the system of power the prime minister plays the unquestioned leading role. He or she is also the Minister of Civil Service.¹⁸ From the point of view of these deliberations, we should note that beginning in 1988, the reforms introduced by Margaret Thatcher have proved relevant, which “consist in separating from the ministries [those] government agencies [that were] subject to them, appointed to deal with precisely defined civil issues and managed with a degree of financial independence.”¹⁹

“The United Kingdom is a state in which observing certain leading rules is obligatory, rules that are in force when serving management functions, including during emergency situations. The first such rule is the collective responsibility for any decisions made, and the requirement of defending any decision that was made. Another rule is political control, conducted continually and on all levels... Coordination is yet another rule. It essentially requires representatives of the state to assume the same positions, in certain situations, in various forms of activity in an international forum (within such institutions as UN, NATO, EU, WEU, etc.). It calls for realizing various tasks in the field of coordination of activities (consulting, explaining) between the representatives of the state and various organizations on different levels of the government machine. Flexibility is a rule that demands the adjusting measures of reaction to match varied

¹⁸ H. Izdebski, M. Kulesza, *Administracja publiczna...*, op. cit., p. 33.

¹⁹ Ibidem.

circumstances...”²⁰ Units participating in the United Kingdom’s defense preparations are:²¹

- Foreign Affairs and the Commonwealth Office, responsible for shaping the policy of cooperation of the state with other countries;
- Ministry of Defence, responsible for armed forces and defense policy;
- The Cabinet, responsible for coordinating the policy of the government and three subcommittees:
 - Defence and Overseas Secretariat, responsible for publishing and comprehensively relaying decisions to proper implementations;
 - The Joint Intelligence Committee, responsible for coordinating the activities of intelligence agencies;
 - Civil Contingencies Unit, responsible for directing and coordinating the activities of specialized rescue services (concerns industrial accidents, floods, fires, etc.).

During the first Gulf War, besides permanent institutions for emergency management, others were appointed, the most important of which was the Defence and Overseas Policy Committee. During this crisis various crisis centers were established, e.g. the Joint Operations Centre of the Ministry of Defence (charged with informing military and civil employees of the current situation), Department for Dangerous Situations of Foreign Affairs and the Commonwealth Office (charged with coordinating diplomatic activities), Centre for Activities in Dangerous Situations (overseeing the activities of particular departments).²²

²⁰ W. Kitler, B. Wiśniewski, J. Prońko, *Problemy zarządzania kryzysowego...*, op. cit., p. 88.

²¹ See: *ibidem*.

²² *Ibidem*.

We should also note that the abovementioned solutions were supplemented by the activities of British civil defense, whose responsibilities include ensuring the necessary conditions for maintaining the continuity of operation of authorities and administration, safeguarding the effective functioning of the economy, defending crucial objects and devices, performing tasks pertaining to the protection of the population and gathering supplies.²³

In light of the analysis of the available literature, it is evident that the objective scope of the United Kingdom's defense preparations does not diverge from those discussed before.

Sweden²⁴ is a constitutional monarchy whose constitution is not a single legal act as it comprises four documents: the Instrument of Government, Freedom of the Press Act, the Act of Succession, and the Fundamental Law on Freedom of Expression.

In Sweden, executive power is wielded by the government. Public administration in Sweden is characterized by originality. "As far as central administration goes, the main feature of the Swedish model is the separation of the government from central administration... This separation results... in the scantiness of the ministry apparatus, as well as the focus on legislation in the operation of the ministries – they concentrate on drafting bills and administrative acts... Another Swedish tradition is the wide range of collegially made decisions."²⁵

Sweden adhered to the concept of total defense, which essentially means the coordination and cooperation between civil and military resources, enabling the increased efficiency and the defensiveness of the country in a broad sense of the term. "According to the intent of bill of Total De-

²³ More: *Obrona Cywilna Wielkiej Brytanii*, [in:] *Informator o obronie i ochronie cywilnej niektórych państw europejskich*, Urząd Szefa Obrony Cywilnej Kraju, Warszawa 1997, poz. 15.

²⁴ The part of this paper concernign Sweden does not include the changes in Swedish defense system which came into force in 2009. This was done deliberately for comparison and research purposes.

²⁵ H. Izdebski, M. Kulesza, *Administracja publiczna...*, op. cit., p. 52–53.

fense, amended in 1996, the crucial issues of the new approach toward this field are: reaffirming the rule of action of combining civil (non-military) defense with military defense (contrary to commonly maintained, erroneous opinion of their separation); ensuring a quick adaptability of total defense to the changing threats to security; a new and extended definition of security, including dangerous threats in the time of peace and a greater attention to international threats.²⁶

The abovementioned document defined the main task of total defense, that is opposing armed aggression which was assessed to be the biggest threat to Swedish security. It is notable that in Sweden defense (and not national defense) was viewed in a way similar to Polish, that is, as defense against armed aggression, maintaining independence and neutrality, ensuring political stability, protection from conflicts and preventing them, promoting peace and humanitarian help, participating in the international cooperation in the field of security (including defense), promoting the abilities and preparations to counteract various threats and war among the society (including external threats to the state's security). What should be underlined is the emphasis on objectives relating to security of people and citizens in all circumstances and states of operations of the country. These included, among others, protecting civil population from the results of military actions, safeguarding supplies (commodities necessary for the survival of the population), and supporting humanitarian missions. Undoubtedly, however, a "stiff" perspective on the state's defense and on building a defensive system strictly in military aspects was already gradually fading for a few years. It was evidenced, among others, by documents issued by the Swedish Agency for Civil Emergency Planning.²⁷

In Sweden's defense preparations, a particular role was played by defined coordination based on strict rules, the most important of which

²⁶ W. Kitler, J. Prońko, B. Wiśniewski, *Zarządzanie kryzysowe w wybranych...*, op. cit., p. 78 and next.

²⁷ *Robustness in the physical environment*, The Swedish Agency for Civil Emergency Planning, Stockholm 1999, p. 9.

resulted from “the preparedness of the state and the entire society to efficiently and economically use all resources in order to maintain independence and minimize the consequences of war. Therefore war is considered to be a special kind of challenge, defining the ability to keep national activity, for in a time like that all subjects of the state (regardless of their legal status) cooperate to ensure the survival of the society. Also in a time like that one of the most fundamental objectives of civil activity, that is the support for armed forces, gains particular importance.”²⁸ The Ministry of Defence remained the key, central office of the state, both for military and civil defense. It was divided into three fundamental elements: Department for Civil Affairs, Department for Military Affairs and Department for Security and International Affairs.²⁹ On the central level, situated lower in the hierarchy than Ministry of Defence, were: the Swedish Agency for Civil Emergency Planning, authorities responsible for certain functions in the civil sphere and commander-in-chief as well as the staff of the armed forces in military defense³⁰ that was aimed at counteracting conditions of external threat to the state’s security and war. The higher regional level comprised directors of regions for civil defense and commanders of combined commands. On the lower regional level the responsibility fell to governors of the counties (who represented government administration), county councils (who represented local government) and commanders of defense districts. The local level consisted in city and communal executive boards as well as military commanders.

The fundamental duties of the civil component of the state’s defense preparations include tasks in:

- protecting civil population in times of war;
- ensuring basic commodities in situations of external threat to the security of the state and war;

²⁸ W. Kitler, *Zadania administracji publicznej z zakresu obrony narodowej...*, op. cit., p. 130.

²⁹ Ibidem.

³⁰ See: W. Kitler, *Obrona narodowa w wybranych państwach demokratycznych*, AON, Warszawa 2001, p. 101–102.

- protecting objects relevant to the state's security;
- ensuring the continuity of operation of public services;
- supporting armed forces during operational deployment and hostilities.

To conclude these deliberations, we should state that in the many various, independent solutions regarding the issues of defense preparations, there are numerous similarities. It is noteworthy that in fulfilling tasks in the field of defense preparations, specific countries maintain their individual character that results from their history, tradition, geopolitical location, administrative division. These analogies concern mainly the fact that defense preparations are based on commonly applicable law of the highest rank; that public administration operates with the notion of executing power in the state's interest and in view of the values which are fundamental to the state as a whole; that responsibilities and competences of on any given level of administration are unequivocally defined; and that there are formulas for cooperation between particular bodies of government and public administration.

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Krzysztof Jankowiak

**Selected Cultural and Historical Aspects of Development
of the Samurai Ethos with a few Remarks about the Typology of
Martial Arts**

Abstract:

Japan belongs to those countries that arouse more attention in other parts of the world. Despite the fascination that inspires rich culture of Japan and being its essential part, the possessions in the field of martial arts Budō, this country has not yet been thoroughly understood by the people of the West. Japanese “martial arts” laymen associated with monolithic, but it does not constitute solid system. All their values are based on man’s relation to nature. High impact on them also have ancient concepts developed in the circles of ancient cultures of Asia (Far East) in different periods of its history. The very concept of “martial arts” until recently, it was not precisely defined.

Key words: martial arts, culture, Budō, Asia, Japan, Far East, combat systems

Japan belongs to those countries that arouse more attention in other parts of the world. Despite the fascination that inspires rich culture of Japan and being its essential part, the possessions in the field of martial arts Budō, this country has not yet been thoroughly understood by the people of the West. Japanese “martial arts” laymen associated with monolithic, but it does not constitute solid system. All their values are based on man’s relation to nature. High impact on them also have ancient concepts developed in the circles of ancient cultures of Asia (Far East) in different periods of its history. The very concept of “martial arts” until recently, it was not precisely defined. Currently, one of the definitions is given by Wojciech J.Cynarski: “Martial Arts is a way of self-discovery, close to the

mystical experience of reality. Favored by: struggle and utmost experience, meditation and overcoming weakness of the flesh nature, and finally, the positive impact of the master of this »spiritual journey«. A more extensive definition of Martial Arts is given by Juliusz Piwowarski. He says that the Martial Arts (Far Eastern Martial Arts) is the sphere of culture associated with combat systems described by a detailed codification, resulting mostly from the Far East inspiration, which deals with techniques, methods, traditions and customs, based on philosophical and religious grounds, yet utilitarian. It is used as effectively maintaining and enhancing a high level of protection of individuals as well as teams of human, through exercises and multi-faceted development of the following elements:

- 1) the possibility of activity and prevention of threats from people and other adverse circumstances of a military, civil, forces of nature or the confrontation of sports,
- 2) the possibility of maintaining, saving and improving the quality of life, including health safety and moral and aesthetic values transcend and mutually reinforcing in sizes: individual and social,
- 3) possibilities support during the course of a lifetime to engage the mind and body a perfect method of self-improvement,
- 4) level of combat skills determining also to take of internal struggle against adversity, such as negative intentions and emotions¹.

Japanese martial arts, today known as Budo², are a reflection of the way followed by a student of Martial Arts. Budo is derived from bujutsu that was shaped in the hustle and bustle of the battlefield. Japan, with its long isolation from the world, could keep the tradition of martial arts. It is an in-depth study which combines tradition, philosophy and training. In one of the conversations, Soke Toshimichi Takeuchi said that the basis of teaching every student of the martial arts has to be a balance between “technique, theory and philosophy”³. Masters of Martial Arts believe that if

¹ J. Piwowarski, W. Czajkowski, *Administrowanie jakością życia człowieka poprzez system Modern Bushidō*, „IDO – Ruch dla kultury”, Rzeszów 2010, p. 19.

² M. Ueshiba, *Budo Nauki twórcy aikido*, transl. M. Matusiak, Bydgoszcz 2005, p. 27.

³ *A part of my talk with Soke Takeuchi - 04.12.2004*, Namysłów.

one of these elements is omitted, then the student will not want to progress in self-improvement. Master Taika Seiyu Oyata says: “The true bushi has a good education, to respect the principles of discipline, characterized by integrity, is modest and helpful, he can cultivate the land and build houses, and most of all - his gentleness raises general confidence. Here is the complete face of a brave warrior”⁴.

It is commonly believed that there are no differences in the training of students and the effects of martial arts training, player in the fight sports, and an officer and a soldier in combat systems. Presented above martial arts division, however, is necessary because the differences can be seen even at the stage of the training of human practices the martial arts, fight sports and combat systems. If we are talking about martial arts it is worth remembering the difference between the term Budo and Bujutsu. Both terms have much in common, but derive from other historical periods of Japan. The term “martial arts”, there are three basic categories corresponding to the relations: - Sensei - deshi (student - student of martial arts), coach - athlete (fight sports) and the expert, the specialist (instructor) - the uniformed services (combat systems):

1. Martial Arts - not for killing, but for protection of life, like says Master Taika Seiyu Oyata⁵. In the martial arts there is no enemy, in many cases the enemy is us, martial arts student takes up the fight with himself. He has before him the way that shows his master - Sensei, where the student overcome his own weaknesses. Follows it to achieve perfection, and thus strengthens its own personality. Through theoretical and practical training as well as during exercise student, under the guidance of master, receives the opportunity to learn techniques, theory and philosophy. Traditional martial arts for the

⁴ T. S.Oyata, Ryu-Te No Michi, *Klasyczna sztuka walki z Okinawy*, transl. W. Nowakowski, Warszawa 2001, p. 64.

⁵ T. S. Oyata, Ryu-Te No Michi, *Klasyczna sztuka walki z Okinawy*, transl. W. Nowakowski, Warszawa 2001, p. 85.

student of the martial arts can be a journey of a lifetime. Firstly lifelong follows the path of tradition. At that time, changing the perception of the world and the environment. Throughout the training, regardless of age develops a fighting spirit. It is valuable, especially when you live to a ripe old age and still train. Sensei Hayashi Teruo says “education of fighting spirit, let us fight against all adversities in life”⁶. In his statements emphasizes that the great role in life play willpower, moral, physical and chosen path that leads to perfection.

In the martial arts there is a master (Sensei), who is responsible for the way of teaching and passing on knowledge to his disciples. He is responsible for their behavior, not only on the mat but also outside it. We are talking about morality, discipline, behavior, lack of aggression, helping the community, caring for the family, etc. In the martial arts master only shows the way for student, not sets it. Thus it should be authentic, truthful, trustworthy, fair, direct and contact. Wojciech J. Cynarski believes that the knowledge of martial arts master flow straight from his heart to the heart of disciple, therefore, has a much greater impact on adept than coach on players⁷. He has a moral obligation to teach disciple the principles of coexistence, improve his own personality and responsibility. He teaches both fighting techniques and rules of conduct and understanding of the theory and foundations of philosophy.

To sum up, martial arts run by master - Sensei are the way for a lifetime that allows you to build physical and mental health and to maintain the efficiency and independence of the rest of our days. In the martial arts are important aspects of health, exercise should strengthen vitality and to increase the degree of emotional threshold. Martial Arts run disciple with tradition to improve body and mind. One such example is the Soke Toshimichi Takeuchi, who in the last hour of his

⁶ J. M. Fraguas, *Legendarni Mistrzowie Karate*, Warszawa 2008, p. 49.

⁷ W. J. Cynarski, *Sztuki budo w kulturze Zachodu*, Rzeszów 2000, p. 49.

life taught techniques of kodachi (short sword) one of his uchi deshi (student of house).

2. Martial Arts - we have here always the enemy and we're fighting to achieve a spectacular victory that would bring other honors. Sports training develops sparring, prepares the player to perform certain tasks indicated by the coach, which aim to triumph. Sport develops only those skills that are needed in the event. Long-term training will inevitably lead to the emergence very similar techniques and skills, like traditional martial arts, in this case, however, they lose their identity. Master Hayashi Teruo claims that "The career is very difficult for them to develop in the true art of karate.

There is nothing wrong in training the basic techniques of the tournament and becoming the master of sports, but the art of karate is not a sport, it takes a self-defense and it is quite another matter. Do not build a house using only two or three tools. There is a need for a variety of tools to achieve your goal. On the other hand, the training should not end at the moment when you take off the gi. Without the proper spirit of karate will be of little use"⁸. Fighting sports competition and is always present together with the dominance over another man (player).

The martial arts frequently due to lack of skill a player "exceeds acceptable limits"⁹. But even the most attached to the tradition students are keen to take part in competitions and derive satisfaction from participating in this competition. Sensei Takayuki Mikami said that improper conduct on competition undermines the spirit of martial arts. He added that the competition will learn to cope with stress stemming from performing in front of a large group of people¹⁰.

⁸ J. M. Fraguas, *Legendarni Mistrzowie Karate*, Warszawa 2008, p. 49.

⁹ *Ibidem*, p. 41.

¹⁰ *Ibidem*, p. 174.

In this martial arts trainer directs sports career and education of the athlete. The training is to gain victory, medals, prizes or just beat your opponent. The coach should be a role model for the player, the ideal and the teacher. As Wojciech J. Cynarski writes, the coach must behave impeccably, have appropriate moral stance, it must be mandatory, disciplined, calm, cultured and have the ability to live together in a group¹¹.

In his statements sensei Takayuki Kubota concludes that player should be forced to exercise in order to discovering his weakness being under pressure. Then the weak points fills coach by using his experience. After such training, the participants become good players with educated instincts. Master Takayuki Kubota watching players on the competition, their behavior to then work on their weak points in the dojo. Yes trains a very good tournament players. This means that many of the great masters follows the way of sports and martial arts, but in most they themselves do not take up sport competition. Masutatsu Oyama¹² said that anyone who practiced karate, should be guided by the principles of Budo, and those who are not guided by these principles, treat them just as fun. Maybe masters want to test perfection of their own style carried over from the battlefield to the mat and ring sport. Spectacular performances fights that can be shown in the media, encourage people from the world of martial arts to participate in these projects. Trainings aimed at developing sportsman certainly get worse when the player seeks to maximize results. Almost always, the players are dedicated to the techniques that work in combat sports. This makes player practicing only a narrow range of techniques.

Sport leads player to continuous anxiety, uncertainty, haunting him by fears about the next fight - can never be sure of winning. It can be said that sport has a positive impact on the development of

¹¹ W. J. Cynarski, *Sztuki budo...*, *op. cit.*, p. 48.

¹² M. J. Lorden, *Oyama Legenda i Dziedzictwo*, Warszawa 2003, p. 47.

player, if the player observes the rules and regulations. Unfortunately, too often the players break the rules of fair play just to win. The road from combat sports to the world of martial arts is long and tedious, not everyone will be able to follow it. Master Richard Zieniawa says that judo involves considerable knowledge concerning ways to fight “absent” on sports mats¹³.

3. Combat systems - were created however on the basis of martial arts. Their aim is to prepare the appropriate uniformed services to ensure security in the society. From the martial arts used those techniques that offer possibilities obtain this effect. Teacher is here, expertspecialist - instructor. Their goal is to train and prepare given formation for the accomplishment of tasks. Instructor is not responsible for morality, for integrity, his goal is not to bringing up, but the efficiency in the transfer of techniques and tactics. Louis Shomer says that the Japanese have learned a lot from us, but they gave us knowledge, which we did not have.

The Japanese gave us a weapon in the form of skills to use the body¹⁴. In the collective work Mirosław Kuświk reminds about tradition of training in 1923, in self-defens prison service based on ju-jitsu in Poland¹⁵. In its book, *Intervention Techniques*¹⁶ Kuświk says that have been developed a set of techniques based on previously published book Self-Defense (jiu-jitsu). Jan Dobrzyjałowski writes that the use of a baton tonfa is essential for police officers¹⁷. The author argues, however, that the par-

¹³ R. Ruzniak, R. Zieniawa, *JUDO pomost pomiędzy tradycją i współczesnością*, Gdańsk 2003, s. 45.

¹⁴ L. Shomer, *Policyjne Ju- Jitsu*, transl. P.Obmiński, Gliwice 2008, p. 9.

¹⁵ A. Kaczmarek, M. Kuświk, S. Zasiadły, Z. Zimoch, *Samoobrona*, Kalisz 2007, p. 10.

¹⁶ M. Kuświk, P. Jarczewski, *Techniki Interwencji*, Kalisz 2011, p. 5.

¹⁷ J. Dobrzyjałowski, J. Hachulski, A. Rudnicki, *Palka typu tonfa techniki użytkowe*, Legionowo 1996, p. 11.

med forces must take into account the need to hand-to-hand fighting and even direct confrontation with the enemy¹⁸.

It is worth noting need to develop the martial arts, from which this knowledge and experience experts and specialists of uniformed services derive to perform basic techniques and its use for the purpose of creating the perfect training system uniformed services. It is a very narrow knowledge, but his self-control is necessary for the efficient operation of services. Does not deep philosophy here, and only partly we get to know importance of the theory and techniques of martial arts.

In the combat system there is an officer of appropriate services who has a specific task to perform. His training requires discipline and knowledge of the necessary fighting techniques and knowledge of rules and regulations to be able to perform the task in given professional group. From the martial arts are taken those techniques that give wide variety of action for each uniformed services. The expert, specialist - the instructor is to prepare the officer to perform specific tasks. Learning and transfer and then improvement of a narrow range of specialized techniques relevant to the scope of their duties. Many experts combat systems derived from the martial arts, hence the different services have facilitate in training their subordinates. If it were not martial arts, training of services and officers would be poor. Many of today's combat systems would never have been if the creators of systems did not reach for experience of martial arts masters.

Commonly do not distinguish between these three categories. It is believed that the teacher in all of them is the one who teaches the same, so just martial arts.

The practice of both combat sports and martial arts increases discipline with different motivations exercisers (training of harnessing our own weaknesses, training on harnessing the enemy, training to overcome the enemy). Martial arts training takes place independently of mood, the weather, difficulties faced. In the combat sports player preparing their motorics in periods of start, all his life fits into competitions and tournaments

¹⁸ P. Modrzyński, *Wojskowa Walka Wręcz*, Kalisz 1998, p. 9.

(often practiced only kata tournament - effective). In the combat systems officer should train the same way as people of martial arts must be ready to perform a task regardless of the situation in which he is located. Both the first group and the latter serve the community and that is the purpose of their training. Both groups in difficult moments will be people ready to make sacrifices and to help the community.

However, in order to better understand the essence of martial arts and its central idea, which is the samurai ethos, should trace at least a few of the conditions of its formation.

The origins of human existence in Japan dates back to 100 thousand years BC¹⁹. The Japanese have lived for centuries in complete isolation from the world and they decided about this, to which contacts have limit, and how often it may be taken. The whole island nation stretches along the coast of East Asia for 3000 km in length. Japan consists mainly of four large islands. These are Hokkaido, Honsiu, Sikoku and Kiusiu and the other with about 3600 islands of different sizes. Most of the territory of the country is covered by mountains, which account for about 80% of its surface. The Japanese islands and the waters surrounding them manifest themselves - and often in extreme form - elements. These include both dangerous meteorological phenomenon, such as hail storm, typhoons, floods, but also very typical for this area seismic activity. Despite this, the population of islands notes, however, that nature here has its own charm. Climatic conditions and the whole surrounding, beautiful and at the same time severe nature caused that the Japanese developed a two-high sensitivity to the beauty of nature and the seasons. This was reflected in literature and poetry. Stormy meteorological phenomenon sharpened the senses of the people there, and at the same over the centuries have shaped Japanese aesthetics and - most importantly - a sense of community in which the individual realizes the need for collective cooperation. Aesthetics developed in Japan from the very beginning of its history²⁰, whereas strong collective

¹⁹ S. Turnbull, *Samuraje – dzieje japońskich wojowników*, Arkady, Warszawa 2007, p. 8.

²⁰ P. Varley, *Kultura japońska*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 82

identification of Japanese was strengthened in the next stages of development of society of the Country of Cherry Blossoms.

While analyzing precisely Japanese characteristics, can be distinguished seven groups of causes of its uniqueness:

1. The Japanese islands themselves caused the natural emergence of these communities.

2. In the case of incorporation of foreign ideas in the Japanese mentality was accompanied by a process of adaptation of these concepts to the existing local cultural subsoil.

3. Island mentality was and still is the cause of a strong sense of self-identity, and even the uniqueness of inhabitants of Land of the Rising Sun.

4. Despite the strong autonomy and identity, which has already been mentioned, an important element in shaping many aspects of the islanders' culture was strong impact of the Empire of China, which possessed a very advanced civilization achievements of both their own as well as coming from the land of India²¹.

5. A crucial element of the Japanese mentality is close cooperation and care for mutual respect among islanders living in difficult living conditions also related (from natural disasters) with a small amount of natural resources.

6. In ancient history of Japan a very strong position was occupied by provinces having autonomy to measure virtually of separate states. They were the source of an intense political and military rivalry, which had a significant impact on shaping and consistent maintenance of the continuity of the chivalric ethos in the Land of the Rising Sun.

7. History and Development of Japan were and now also are heavily dominated by the ideas of service and natural hie-

2006, p. 4–7.

²¹ Por. H. G. Blocker, Ch. L. Starling, *Filozofia japońska*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2008; Xinzhong Yao, *Konfucjanizm*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków, 2009.

rarchy. This has both good sides (such as the continuity of transmission and gathering experience for new generations and a strong value system conducive to social peace) as well and some negative (there is a possibility of occurrence of Polyarchy²², where democracy of elites may try to manipulate the public²³).

The success the Japanese have today in various areas of life is the result of a shaped for thousands of years of their mentality and the accompanying workaholicism. Small areas of agricultural land in the lowlands forced them to climb up the slopes of the mountains and the creation there of small fields, specially adapted terraces. Arable land has always been and still is a precious treasure for the whole nation. Therefore much care was taken of each that inch, at the same time surrounding it with honorin accordance with the transmission of native *shintō*²⁴ religion. Inserting the enormous amount of work in its proper maintenance. So initially were created small areas of land divided into small plots. These activities have earned in Japanese people strength of character through patient irrigation, fertilization and careful scarifying soil. Through field work have developed in the Japanese features such as accuracy, reliability and habits of collective efforts to target. Wet rice cultivation requires the participation of a collective effort²⁵.

It was for land for centuries battles took place, because the Japanese mentality perpetuated, how it is a very valuable good and the fact that

²² poliarchy (z gr. *poli* – a lot of, *arche* – rule) – *definition of a democratic political regime, a modern democracy. The concept was introduced in 1953, by the American political scientist Robert Dahl. Polyarchy is characterized by the granting of political rights to a large part of the population and the ability to confront and overthrow the vote of the highest dignitaries of government - the fundamental role is being played by political rivalries.*

²³ Comp. C. Andressen, *Krótką historia Japonii*, Dialog, Warszawa 2004, p. 18–19; R. Tsunoda, W. T. de Bary, D. Keene, *Sources of Japanese Tradition*, New York 1959.

²⁴ Comp. S. Arutjunow, G. Swietłow, *Starzy i nowi bogowie Japonii*, PIW, Warszawa 1973; W. Kotański, *Opowieści o pierwszych władcach japońskich*, Iskry, Warszawa 1990.

²⁵ See. C. Andressen, *op. cit.*, p. 27; J. Tubielewicz J., *Historia Japonii*, Ossolineum, Wrocław 1984; P. Varley, *op. cit.*, p. 5; Keiji Imamura, *Prehistoric Japan*, Routledge 1996, s. 130–133; O. Ratti, A. Westbrook, *Secrets of the Samurai: A Survey of the Martial Arts of the Feudal Japan*, Booksales Publishing, New York 1999.

is the basis for establishing a power base rule. Currently, the Japanese can afford to calmer approach to caring for agriculture because of the economically strong and modern national economy. Thinking of modern people, however, retains in the memory of former frequent droughts, natural disasters, and the low level of production occurring former times considerable isolation from neighboring countries. Therefore the Japanese put on the industry today, modernity and trade, not only with Asia but also with the whole world. There is even talk about the Arc of Freedom and Prosperity as a special political initiative of Japan, where crucial role to be played by the United States and Japan and India and Australia²⁶.

Japan today is one of the most powerful countries in the world in terms of economic development. To a large extent, their position and today's success owes consistently cultivated traditions based on the samurai code of Bushidō (literally Way of Warrior, a code of ethics and etiquette samurai)²⁷.

It is not easy to define clearly the beginning of the formation of the martial arts as an autonomous cultural phenomenon - budō, in contrast to the history of other better-known areas of life the islanders. It is very difficult to get to the roots, from which grow basic rules of budō and mental foundation of Japanese Martial Arts events. Speculating guesses, linking to them certain facts, is trying to create different theories of the formation of numerous varieties of Martial Arts in Japan.

According to Tanaka, the significant components of warriors impact on shaping the Japanese mentality and code of Bushido took place as early as the sixth century BC. "Many historical sources reported that martial arts practitioners have worked 2500 years ago. However, martial arts developed in many parts of the East world and have a lot of teachers. There have been various theories about the origin of ju-jitsu. One of them

²⁶ See *A speech by Taro Aso, Minister of Foreign Affairs of Japan, presented in the Japanese Institute of Foreign Affairs*, 30 Nov. 2006, <http://www.pl.emb-japan.go.jp/policy/speech1pl.htm> (30.05.2012).

²⁷ J. Miłkowski, *Encyklopedia Sztuk Walki*, ALGO, Toruń 2008, p. 32.

- the concept of Kirby - who says that the masters of ju-jutsu came from Japan, or came from other parts of Asia. In China (2674 BC) is said about the creation of wu-shu - a system that used the body in self-defense²⁸.

The name ju-jutsu to hand combat for the first time was used by the master Akyama Shirobei Yoshitoki²⁹. Its origin can be traced whereas in complementary system of fighting that brought the Indian monk, patriarch of Zen Buddhism, Bodhidharma³⁰. The first mention of Ju-Jutsu forms come in the range of 772-481 BC. And the beginnings of a specialized martial arts, nin-jutsu date back to the period between 500-300 BC and probably have Chinese origins. Nin-jutsu term was widely used in the literature bu-jutsu (martial arts). Among other things, specialized in toiri-no-jutsu and chikairi-no-jutsu. In 230 BC, the Japan has developed chikura kurabe stocks that were later incorporated into the ju-jutsu techniques³¹.

An important role in the Japanese varieties Martial Arts has played a history of shaping the origins of Japanese state and its mythical origins giving the Japanese Islands a specific mental atmosphere and uniqueness. It all started with the beginning of the seven gods "at the forefront of Ame-no Minakanushi, Takamimusubi and Kamimusubi"³² and its subsequent descendant of the sun goddess Amaterasu, who has sent his grandson Ninigi'ego, „giving him in eternal possession of the Japanese archipelago"³³. Ninigi did not hurry to taking power, because the whole time he was busy with personal issues.

²⁸ G. Kirby, *Ju-jutsu podstawowe techniki lagodnej sztuki*, Warszawa 1994, p. 9; comp. B. A. Haines, *Karate's History and Traditions*, Charles E. Tuttle Co., Tokyo 1968.

²⁹ Zob. T. Ambroży, *Samoobrona: podręcznik metodyczny dla instruktorów*, TKKF ZG, Warszawa, 2001; *idem*, *Trening holistyczny metodą kompleksowej uprawy ciała*, EAS, Kraków, 2004.

³⁰ Zob. P. Hansen (transl.), *The Zen Teaching of Bodhidharma*, Empty Bowl, Washington 1987.

³¹ Por. *Nihongi: Chronicles of Japan from the Earliest of Times to A.D. 697*, W. G. Aston (translator), Tuttle Publishing, London 2005.

³² J. Tubielewicz, *Od mitu do historii*, Wydawnictwo TRIO, Warszawa 2006, p. 23 and others....

³³ J. Tubielewicz, *Historia Japonii, op. cit.*, p. 32.

Only his grandson Jimmu (posthumous name Kamuyamato Iwarehiko), with the support of the goddess Amaterasu, defeated all opponents and set up the capital in Kashihara. „When you move into a new residence in Kashiharze Iwarehiko made enthronement - proclaimed himself emperor.

This is the most important moment in the myths of dynastic. (...) Nihongi as the date of accession gives first Day first The month of 660 BC. The date of 660 BC, came into official mythology. In the Meiji period, was began the count the years of existence of the empire, beginning of that year. It is unclear how this day has been changed to February 11th (...) In any case, now that day is celebrated in Japan as Day of Remembrance for Assumptions of State (*Kenkoku Kinen-no Hi*)³⁴.

Such were the beginnings of the legendary Yamato state, which evolved into today's Japan. Since then, dates back to the legendary records submitted by migratory storytellers (*kataribe*³⁵), which faithfully reproduced along with the supporting documents be of a religious nature (Kaden - Pedigree messages, jinja engi - Shinto texts, Jiin engi - budsudō texts - the way of the Buddha) and administrative (*fudoki*³⁶) led to the cre-

³⁴ J. Tubielewicz, *Od mitu do historii, op. cit.*, p. 46.

³⁵ *kataribe* (Jap.) – "storyteller". "Storytellers" were entrusted at the court to store in their memory the genealogy, myths and legends about rulers, because they guaranteed a true message, as they had no right to add or remove anything of the remembered text. One of these *kataribe* was Hieda-no-Are (dates of birth and death unknown). According to some researchers, it was the name of a man. Comp. W. Kotański, *W kręgu shintoizmu*, t. I, DIALOG, Warszawa 1995.

³⁶ *fudoki* (Jap.) – descriptions of customs and land; these works contained data topographical data, geographical names, data on the economy, along with local myths, and provided descriptions of traditional customs.

ation in the early eighth century *Kojiki*³⁷ oraz *Nihongi*³⁸. According to the Kotański „the oldest chronicles of Japan will be considered a work entitled *Kojiki* in 712. This title can be translated as the Book of past events”³⁹. Another source for the study of mythology is *norito* (a collection of prayers and magic spells) written in 927 years⁴⁰. You can most likely assumed, following the heroic struggle of the mythical ancestors, the progenitors of the samurai class, that these challenges require intense combat system. To effectively train the army must be educational systems and different styles (systems) fight. Because they were preparing soldiers for the effective protection of the borders and the maintenance of order within the country. From mythological times to the present day, martial arts are an inseparable part of the culture of Japan.

One of the oldest forms of Martial Arts, according to Serge Mol, was martial art called *Koryu* of *ju-jutsu* used by warriors. „Some of us, in order to emphasize its remarkable age say that it is over ten thousand years”⁴¹. In the Edo period (1600-1868), which was a bit later than the

³⁷ *Kojiki The book of past events which was founded in 712 on the orders of the Emperor. The author (editor) was Ō-no Yasumaro - an outstanding intellectualist, educated in the way of the classics of Chinese imperial court clerks at the turn of VII / VIII century. Kojiki consists of three coils. A characteristic feature of the Kojiki is consistent reasoning and logic lecture. It is worth noting that the preface was written in Chinese, the rest in Japanese. Currently, one of the most outstanding "kojikologists" in Poland was Professor Wiesław Kotański [d. 2005], who translated into Polish Kojiki, translating also the antonyms and teonyms. Comp. J. Tubielewicz, *Od mitu do historii*, op. cit., p. 17; W. Kotański, *W kręgu shintoizmu*, t. I: *Przeszłość i jej tajemnice*, Dialog, Warszawa 1995, p. 154; W. Kotański, *W kręgu shintoizmu*, t. II: *Doktryna, kult, organizacja*, Dialog, Warszawa 1995; *idem Kojiki czyli Księga dawnych wydarzeń*, t. I, II, transl. with commentaries by Wiesław Kotański, Państwowy Instytut Wydawniczy, Warszawa 1986.*

³⁸ *Nihongi (Nihon shoki)* czyli *Kronika Japonii* (lub *Kroniki japońskie*) – founded on the orders of the Emperor in 720 r.; written and edited by prince Toneri (676–735). *Nihongi consists of thirty scrolls in chinese language*. Comp. J. Tubielewicz, *Od mitu do historii*, op. cit., p. 17–18.

³⁹ Zob. W. Kotański, *W kręgu shintoizmu*, t. I, op. cit., p. 138.

⁴⁰ *norito* – collection of prayers, incantations, invocations, whose origins date back to the preliterate, were written in the tenth century. *Norito* were created by priests, not the court elite, intellectuals, who were the authors of *Kigi* (collective name *Kojiki* and *Nihongi*).

⁴¹ S. Mol, *Japońskie Sztuki Walki. Przewodnik po koryu jujutsu*, Diamond Books, Bydgoszcz 2003, p. XI.

beginning of the dominance of military rule, during the reign of the third shogunate - Tokugawa, it was a time of peace, in which many variations of budō could be developed and systematized, and the importance gained a comprehensive education of knighthood. The well-known samurai, Daidoji Yuzan, author of budō shoshinshū not skip the opportunity for discreet, but also strongly emphasize the importance of what was the merit of Tokugawa, namely that „there is now in the empire blissful peace and although the boys from samurai families are not deprived of martial training, this, however, does not mention this to anyone, as before forcing them to start a military career before the age of fifteen or sixteen years of age”⁴². According to Yuzana, „seven or eight year old boy should become familiar with the Book Four, Five and Seven Books of Military Texts and learn calligraphy”⁴³. In the Kamakura period (1185-1333) and Muromachi (1336-1573) young samurai began teaching fencing at least 13 years of age⁴⁴. It should be noted that since the time of Minamoto Yoritomo „axis of” self-improvement samurai marked the directive ordering him to „follow the way of the sword and literature”, which was later reflected in the record of the first article Buke shohatto (rules of military families) in 1615 and is one of the inseparable elements of the Code of *Bushidō*, recognizing that in order not to become, as says Yuzan, “simpleton” is, in addition to exercise, proper study of literature, and in particular, the history and known, which could be a role model biographies.

Many martial arts experts believe that the styles of ju-jutsu is a compilation of ancient forms of budō. Ju-jutsu, the Japanese combat system, has its important place in budō Gendai (modern budō). Characterized by a high versatility of his students and a rich arsenal of combat techniques. Taking into account the Japanese mentality, ju-jutsu marked its presence in shaping the identity of the Japanese people and the strength-

⁴² Dajdoji Yuzan, *Kodeks młodego samuraja. Budō shoshinshu*, Diamond Books, Bydgoszcz 2004.

⁴³ *Ibidem*.

⁴⁴ See O Ratti, A. Westbrook, *Secrets of the Samurai, op. cit.* (Polish edition: *Sekrety samurajów*, Diamond Books, Bydgoszcz 1997, p. 79).

ening of their country by participating in the training of members of the military administration, the army and in the education system of children and young people. An indirect but highly significant evidence for such a claim can be a samurai code, which among other things would not let samurai stumble with a person of lower rank, using a sword or other weapon. Also, lower-ranking samurai rarely fought against arms against commoners. Such behavior leads to a simple conclusion - samurai was bound by a code of conduct to live in dignity, and thus possessed the spirit of Bushido. Therefore, he used perfectly in combat and in every day activities, his own body. In the chronicle the Nihongi of 720 N.E. numerous references concern competitive battle, but often these were elements of combat⁴⁵. The mention of an old chronicle of techniques is nothing like atemi (strikes his hands and kicking his legs in the sensitive areas of the opponent)⁴⁶. Atemi techniques were based on an ancient version of the Sumo belonging to Kobudo (old budō) and modern martial arts such as ju-jitsu and karate-do and Aikido - originally bearing the name Aikibudo included in budō Gendai (modern budō)⁴⁷.

It is worth adding that sumo wrestlers enjoyed and continues to enjoy considerable respect in Japan. This has deep historical reasons. Once they fight takes place, representing on the fields of battle enemy armies. Results of such a struggle between two Sumotori was treated as a decision of the battle. „It can be mentioned that even thirty years ago Sumotori stand in second place to knights caste samurai”⁴⁸.

Explaining the meaning of the Japanese term ju-jitsu, we can say that it means „gentle art of self-defense, it is a simple definition of a very

⁴⁵ *Nihongi: Chronicles of Japan from the Earliest of Times to A.D. 697, op. cit.*

⁴⁶ *Atemi* – sensitive points of the body, strikes, or compressions on sensitive areas of the human body, enabling the overpowering of the opponent (attacker); Comp. E. O. Reishauer, *Japan: Past and Present*, New York 1946; M. Tedeshi, *Essential Anatomy for Martial and Healing Arts*, Weatherhill, New York 2000; F. J. Norman, *Japoński wojownik: trening i ćwiczenie samurajów*, Diamond Books, Bydgoszcz 2006.

⁴⁷ F. Tanaka, *Sztuki walki samurajów*, Diamond Books, Bydgoszcz 2005, text from cover.

⁴⁸ F. J. Norman, *op. cit.*, p. 70.

pcomplex art”⁴⁹. We find many of the entries mainly in the form of traditional Densho talking about different types of Martial Arts, in which the body was used as an effective weapon used to defeat the enemy. Discussed with that the possibility of using both hands and feet using atemi techniques and lever on the upper and lower limbs. In the old records already mentioned rolls Densho, we find names such as, for example, Yawara⁵⁰. A large number of such texts we know thanks to the efforts of the American Serge Mola. He published his research in his book entitled Japanese Martial Arts. Guide to koryu jujutsu⁵¹

Often in the old records, the above-mentioned Densho, there is a combat martial art and combat system simply referred to as bugei or bu-jutsu⁵². The Japanese terms translated as „military affairs and the art of war”, and self-improvement by striving to master the craft of war. All open hand techniques were taught with complementary ways of combat weapons, such as sword - katana, spear - yari, bow Japanese - yumi and other weapons, which used a samurai⁵³. Such a complementary system of training of the Samurai determined *bugei juhappan* term⁵⁴ Together constituted for all the training that shaped a complete, well-prepared warrior on the battlefield clashes, as well as for the service of his sovereign.

⁴⁹ *ju* (Jap.) – soft, flexible, gentle; comp. G. Kirby, *Jujutsu podstawowe techniki lagodnej sztuki*, Warszawa 1994, p. 11; T. Ambroży (ed.), *Ju-jitsu sportowe: proces szkolenia: (podręcznik trenera)* [*Sport Ju-jitsu: schooling process: (coaches guidelines)*], European Association for Security, Kraków 2007.

⁵⁰ *yawara* – Hand combat art, which in its initial phase developed directly on the battlefield at the time of feudal Japan. Yawara, as well as subsequent ju-jitsu, used the holds, throws, locks and choking, eventually became a form of fighting with knives and short swords. It quickly became an integral part of the training of the Japanese warrior. This system was designed for those who could not boast of combat experience. The techniques were simple and usually practiced without an arm, so it was said of it *goshinjutsu* (martial arts).

⁵¹ Comp. S. Mol, *op. cit.*, F. J. Norman, *op. cit.*

⁵² D. F. Draeger, *Tradycyjne Budō*, Diamond Books, Bydgoszcz 2006.

⁵³ *Ibidem*, p. 10.

⁵⁴ *Bugei Juhappan* – complementary samurai training system comprising 18 warfare subsystems, from the sword and the bow through hand combat to the perfect use of firearms; comp. F. Tanaka, *Samurai Fighting Arts. The Spirit and the Practice*, Kodansha International Ltd, Tokyo 2003; por. J. Piwowski, *Samodoskonalenie i bezpieczeństwo w samurajskim Kodeksie Bushidō*, Collegium Columbinum, Kraków 2011.

Today the world is commonly believed that the ju-jutsu comes from Japan. But for the curious researchers and practitioners of Martial Arts seems highly probable hypothesis that the ju-jutsu can come from China, Korea, and even India. Supporters of this hypothesis include Oyama Masutatsu⁵⁵ oraz Haines⁵⁶. “Some of the techniques of jujitsu can be found in kung-fu and karate. In Asia, established over 30 different types of martial arts, which is a combination of different techniques of kung-fu, karate and ju-jutsu”⁵⁷. Far the original source, philosophical message which include based on Martial Arts is India⁵⁸. India has a historical legacy of a philosophical-religious, social, and military, which shaped at earlier than elsewhere. This was the legacy such a measure, that even in the empire of China it was India originally were called “the Middle Kingdom”. Probably comes from India Dear Emperor concept which is a noble ideal of road warrior. This concept is associated with the figure of the famous Emperor Aśoki⁵⁹. Martial Arts wandered from India to Tibet, then to China, then to Korea, Okinawa and Japan. They were an integral part of systems of thinking people of the East, which, although they have in each of these countries, specific identity, they have a lot in common. It has been said here about the unity of religions and accompanying with a philosophical systems the Far East⁶⁰.

In the history of Japan’s a major impact on the shape of Martial Arts and the mentality of the Japanese, have military and political actions of great personalities of Japanese knights - samurai. For example, one of these great individuals was Prince Shōtoku. He was not only a patron of

⁵⁵ M. Oyama, *This is karate*, Japan Publication Inc., Tokyo 1973, p. 308 and other.

⁵⁶ B. A. Haines, *Karate’s History and Traditions*, *op. cit.*

⁵⁷ K. Kondratowicz, *Jiu-Jitsu sztuka walki obronnej*, Wydawnictwa Wojskowe, Warszawa 1991, p. 15.

⁵⁸ J. Kieniewicz, *Historia Indii*, Ossolineum, Wrocław 1985.

⁵⁹ *Ibidem*, s. 78 i n.; H. Nakamura, *Systemy myślenia ludów Wschodu. Indie-Chiny-Tybet-Japonia*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2005, p. 452–457; F. Tanaka, *Sztuki Walki...*, *op. cit.*, p. 97; comp. J. Piwowarski, *Samodoskonalenie...*, *op. cit.*

⁶⁰ H. Nakamura, *op. cit.*, s. 11; comp. J. Piwowarski, J. Piwowarski, *Modern Bushidō. Prolegomena do jedności czterech religii w administracji i zarządzaniu według wzorów dalekowschodnich*, „Zeszyt Naukowy Apeiron”, nr 1, Kraków 2007, p. 20–30.

Buddhist temples, and the system of war / battle, but he is also considered as the founder of form of the Japanese constitution - Jūshichijō-Kempo (The right of seventeen articles) from the year 604.

As writes about him Tanaka, contemporary Japanese expert budō: “Prince Shotoku was a staunch Buddhist and a master of martial arts”⁶¹. „The right of Seventeen Articles” contains valuable ethical guidelines for both the samurai and the administration of the Empire of Japan⁶². „To achieve this goal [which indicated Shotoku] were intended both Confucianism and Buddhism as well as shintoizm. In the 604, the above-mentioned provisions were issued with an emphasis on the loyalty and obedience, good manners, incorruptibility and diligence - which proves their Confucian origin. In the school for officials also were taught the principles and doctrines of Buddhism⁶³. “Interestingly Jūshichijō-Kempo - a form of the Japanese Constitution (The right of seventeen articles), has never been canceled and the rules are valid to the present day, despite the fact that currently there is a modern Japanese constitution of 1947.

In the the Heian period (794-1185 r) slowly increased the potential of bushi class. This was connected both with raising combat skills, as well as the growing role of education in a successful career samurai⁶⁴. The next period in the history of Japan is Kamakura period (1185-1333). This period was for the Country Cherry Blossom crucial importance, since on the seven long centuries of supremacy in terms of political power, gained military bushi class. In the twelfth century the bakufu military government seated in Kamakura, ie half of the government. Bakufu literally means “the rule under the tent,” which refers to the tradition of command under the tent during military campaigns by the shogun - the “field” vicegerent. This government formed in the historical period known as Kamakura -

⁶¹ F. Tanaka F., *Sztuki walki...*, *op. cit.*, p. 18; J. Miłkowski, *Sztuki i sporty walki Dalekiego Wschodu*, Sport i Turystyka, Warszawa 1987, p. 9.

⁶² M. Kanert, *Buddyzm japoński*, TRIO, Warszawa 2004.

⁶³ W. Kotański, *W kręgu shintoizmu*, t. I, *op. cit.*, p. 110.

⁶⁴ See. O. Ratti, A. Westbrook, *Sekrety samurajów*, Diamond Books, Bydgoszcz 1997, p. 76.

the name of the new headquarters shogun. This period is a time of the increasing clan struggle for influence and power. Japan at the beginning of the “rule under the tent” was mired in conflicts. War after war clearly reinforced the need for good military and strengthened the position of the samurai, so their military craft has grown to rank high perfectionism in the heat of battle with the enemy.

The event constitutes a significant return for the development of the military forces of Nippon, and also martial arts budō was the year 1192 when Minamoto Yoritomo was the first permanent shogun of Japan. As a result of this event, the emperor remained still as dominant, but actually on behalf of the power exercised on behalf of the Shogun. However, were often fighting for power. An important political role in Japan have also Regents of both the Emperor (*sesshō* or *kampakū*)⁶⁵ and the Regents of the shoguns *shikken*⁶⁶. In the turbulent history of Japan, marked by rivalry for dominance having let all in one to unite the whole country at times, that providential personality turned out to be regent.

In the year 1219 the shogun was murdered, whose in some sense succeeded by the Fujiwara clan Nakatomi. In 1221, Emperor Gotoba tried to regain the power and reduce the Tokugawa rule - lost in the face of future Shogun Ashikaga Takauji (1305-1358). An important role in the skillful conduct of battles and wars strategy in samurai played by viewing their potential invasions of the Mongols Kubilaj chana (the first in 1274 and second in 1281). The Japanese won this war thanks to their determination and the favorable fate - the Mongol fleet was destroyed along with the entire army by typhoon called kamikaze “divine wind”⁶⁷. However, the role of the Organizing *kampaku* of Hojo clan was also of great importance here, as even in the administration building of fortifications on the island

⁶⁵ *Sesshō* and *kampaku* (Jap.) – Regents in the former imperial Japan. *Sesshō* held the regency during the minority of the emperor, and *kampaku* served as adviser and chief minister. Both of these offices wore a common name *sekkkan*.

⁶⁶ *Shikken* (Jap.) – an official in Japan during the Kamakura period, who held the real power instead of *shogun*.

⁶⁷ J. Tubielewicz, *Historia Japonii*, *op. cit.*, p. 169.

of Kyushu. Another providential regent - kampaku acting both as a shogun (although officially he never was) was Toyotomi Hideyoshi. That Regent began his career not as a samurai, but as a young man coming from a peasant family who has come a long way from walking warrior career ashigaru until finally to a position of kampaku. And more importantly, he is one of the three persons that are assigned to unification of Japan⁶⁸. Characteristic for the samurai virtues, for which belonged loyalty and responsibility, were for all Japanese, the most important features in the Far East culture of honor. The evidence of this may be letter Hideyoshi'ego, the commander of part of subordinate protection to kampaku Hidetsugu army chief, who is his nephew. After the defeat at the Battle of Nagakute, Hidetsugu lived to see the very harsh criticism from his uncle. This occurred in 1584, and Hideoshi wrote: "With these days, blustering that you're the nephew of Hideyoshi'ego, behaved towards people in an unworthy manner. This is unacceptable. It is important that you remember for the future that we all respect you, knowing that you are my nephew. I could not stand it anymore and I wanted to believe you to be dead, but in my heart swelled mercy, so that I write this letter. If you change your attitude, so that other people can call you a mature manthen and I will be more favorable for you. You have assigned Jozaemona and Kinoshita Kinoshita Tageyu. Although you should feel ashamed that you killed them. Do not show it [properly] (...) if you improve your posture, you will be able to one day be vicegerent any province. Mindless bumpkin as you are now, though, and escaped with his life, is for me as my nephew stain on the honor. I should cut you. By nature, I do not like [however] to kill people"⁶⁹. You can see at a glance that Hideyoshi'emu, the stranger was nepotism, you must add one thing, because even a fuller explanation of the situation and understanding of the specific ethos of the samurai. Subjected to merciless and legitimate criticism, nephew kampaku - Hidetsugu, he was a young leader and warrior,

⁶⁸ Zob. J. Mendyk, *Wielcy wojownicy Japonii: Toyotomi Hideyoshi (1537–1598)*, TRIO, Warszawa 2009.

⁶⁹ T. Kuwata, *Taiko-no Tegami*, Tokio 1959, s. 88–89, after: J. Mendyk, *op. cit.*, p. 49.

because at the time of the disaster suffered by him was only 16 years old. Men in this age thought at the time as full warriors. And the young samurai took up the responsibility of this scale.

As previously mentioned, the military training was aimed towards total control over the body and arms serving as a tool to fight. It should first of all pay attention to why and What was the significance of training in the use of the body without the use of additional weapons. Of course, dominate here, the concept of simultaneity of body and mind, in other words - the mind and weapons. This weapon could be just the human body or person having the equipment, such as a sword. It is precisely because there was this unity of mind and body or mind and arms, they began to say that the sword is the soul of the samurai. A piece itself, even the most perfect of steel, there appears to be just as serious for kratofanii fetish⁷⁰. The sword in this case is an object which allows the occurrence of so-called. single-pointed meditation (in this case it is just “meditation in motion”). The human mind “fills” (passes) weapon that it uses man (regardless of whether the weapon is the same body, or whether there is also a weapon such as a sword). In this case, the metaphor being mental shortcut “the sword is the soul of the samurai” is a true statement⁷¹. As for practical reasons dealing with precious human body weapons as such, need to be clarified.

The first reason was that the samurai did not always use the weapon, using it in relation to the lower levels of society to defend one’s honor. Also on the battlefield could be that bushi lost his weapon - then its survival and preservation of honor decided his training in the field of combat. In addition, the use of one’s own body was used for self-defense and to protect in the service of the daimyo (feudal prince).

The places of the palace and defense has always been a relevant etiquette taking into account the ruling hierarchy. In case of exceeding etiquette

⁷⁰ kratofania (*Gr: kratós* – strength, power, *phainein* – presenting) – term used to describe the phenomenon of manifestation to the world as a sacred power, a form of hierophany; term popularized by M. Eliade. Comp. Eliade M., *Sacrum i profanum*, Wydawnictwo KR, Warszawa 1999, p. 5.

⁷¹ Comp. Leeuw (van der) G., *Fenomenologia religii*, Książka i Wiedza, Warszawa 1978.

by senior, should recognize aggressive or behaving inappropriately person. If anyone crossed the rules of conduct bodyguard had to stop and incapacitate rowdy and hold on to explain the causes of offending behavior.

One should know that among the guests were also highly born (elite), so should treat them so that, overpowering, do not hurt them, and do not exceed the limit of serious offending dignity.

Another obvious reason is that as soon as we are surprised by an attacker, then you do not always just have a weapon, we can also find themselves in the struggle in a difficult situation and the sudden loss previously owned weapons. In such an eventuality should also try to be well prepared.

All this is always the case samurai helps exercises resulting in the unity of body and mind - verifiable and well-trained and yet having support in the form of numerous references to the guidance contained in the rules of the Code of Bushido

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Paulina Ledwoń

The Historical Background as Factor Favoring the Occurrence of Mercenaries and the Contemporary Role of Mercenarism in the Context of International Law

Abstract:

The article analyses the phenomenon of mercenarism, it focuses on the historical background and the origin of mercenaries from ancient times, throughout medieval period to modern times in the context of usage of mercenaries, the forms of military conflicts as well as factors favoring their occurrence as warriors. The article describes the most significant international legal acts concerning mercenaries and examine the elements of the present legal definition of mercenary found in Additional Protocol I to Geneva Convention presenting weaknesses of the regulation and proves that in fact mercenary is able to avoid responsibility for his illegal actions.

Key words: mercenary, military service, Geneva Convention, armed conflicts

1. Introduction

War, violence and military conflicts have always been part of human life. The complete elimination of war is impossible, despite all the efforts of the international community and anti-war movements, there are constantly places in the world where military conflicts last. The only one things that change are the forms of abovementioned conflicts, weapons and people involved in the process.

As long the wars accompany the human beings, such long armed forces of many nations used foreign volunteers, who were motivated to fight by material reasons, rather than for a cause or out of legal or moral obligation to his country, and for a long time mercenary was defined as a soldier who fights for money¹.

2. History of mercenaries

Over the years of history mercenary work has been considered as the second oldest profession in the world.² The history of the phenomenon of mercenary dates back to ancient times, specifically to ancient Egypt when during the VII century BC pharaohs used mercenaries in their battles. Pharaoh Psametyk I employed Greek soldiers in order to weaken the influence of traditional Egyptian warriors, known from Greek as *machimoi*. Such Policy of the pharaoh caused dissatisfaction among native Egyptians. The proof of the presence of mercenaries in ancient Egypt is the inscription dated back VI century BC, carved on the left leg of the giant monument of Pharaoh Ramses II in Abu Simbelu by Greek soldiers.

The Bible also mentions about kings David and Saul, who have been using mercenary soldiers during their wars and created professional army of them³.

Greek contracted foreigners were in ancient times respected and known as highly trained professionals. Athens were considered not as the home of art and culture but as the home of mercenaries. Greeks proud of

¹ T. Dugdale-Pointon, *Mercenaries*, http://www.historyofwar.org/articles/concepts_mercenaries.html (20.05.2013)

² R. Uessler, *Wojna jako usługa (Krieg als Dienstleistung: private Militärfirmen zerstören die Demokratie)*, Wydawnictwo Sic!, Warszawa 2008, p. 7.

³ J. Rzepka, *Najemnicy w świecie śródziemnomorskim*, [in:] *Starożytne cywilizacje*, B. Zagórski (ed.), nr 111, Polskie Media Amer.Com S.A., Poznań - Warszawa 2005, pp. 3-4.

their soldiers *poleis* adopted many resolution in honor of their soldiers who served for barbarian kings⁴. Medieval mercenaries, also known as condotierres, have also been used in warfare numerous times, the use of condotierres was not unusual up to and throughout the medieval period, by French kings at both Crecy (1346) and Poitiers (1356).

The most sophisticated and professional form of the system of mercenary reached in medieval Italy, and was an effect of an unique combination of specific military and social factors on the Italian peninsula in XIV century. In the middle ages Italy was divided into many independent cities, states and princedoms, which have been constantly fighting for supremacy over the Italy. The *condotierri* dominated the Italian military scene, yet only small number of their leaders have been remembered till present times.

During abovementioned period we may observe a great development of city states that were supported by their agricultural hinterland, known as *contados*. Italian cities constantly have been participating in military conflicts which were initiated in order to defend themselves from other similar states and often to punish subordinate *contados*. Italian cities were rich. It is estimated that in middle ages, the kingdom of Naples was as wealthy as the kingdoms of England. Many factors created the necessity of employing condotierres, the most important of them was the protection the wealth of the cities. The frequency of occurrence of the mercenaries was also tempting for local individuals, who used them to increase their influence and gain the position of the only one ruler of the state - *signori*. The medieval Italy, as the wealthiest and also the most disunited country in Europe, created the perfect environmental for condottiere and the constant state of war between many states allowed the system to flourish⁵.

Mercenaries also played crucial role in medieval Anglo-Saxon England, although in these regions the mercenary military service was not treated with respect, as the widespread ideals of lordship and loyalty to

⁴ *Ibidem*, p. 17.

⁵ D. Murphy, *Condotierre 1300-1500, Infamous medieval mercenaries*, Osprey Publishing, Oxford 2007, p. 4-6.

one ruler militated against its respectability⁶. During the XVII and XVIII century in Europe, national armies were extremely bled. In XVII century Thirty Years' War took many lives and it was inevitable to employ external military support. According to the great British historian specializing in military history of the early modern era, Geoffrey Parker, "Between 1618 and 1640 some 40,000 Scotsmen – perhaps 15% of the total adult males in the kingdom – crossed to Europe to fight in the Thirty Years' War."⁷ Great numbers of national armies were recruited outside its country. About a third of the regiments of the French army were recruited from outside France. What is worth to mention, the largest single group were the twelve Swiss regiments and the famous Swiss Guard, which at present is serving as ceremonial guards in Vatican, and began its history precisely in 1506 when the first Swiss soldier arrived on request of the Pope Julius II⁸.

3. Modern mercenaries

Above examples show that the phenomenon of mercenaries often appeared in the history of modern countries. And what is the situation and popularity of mercenaries nowadays? Herfried Münkler, the excellent German political scientist and researcher of the phenomenon of war tries to answer this question in his book *Die neuen Kriege* (2002), in which he analyses the main trends of evolution of military conflicts, their history and evolution beginning from the nationalization of war to the privatization of war, He emphasizes that modern wars even more than in the old days use mercenaries. The Author justifies his thesis by observing the ten-

⁶ R. Abels, *Household Men, Mercenaries and Vikings in Anglo-Saxon England*, [in:] *Mercenaries and Paid Man. The mercenary identity in the middle-ages*, Proceedings of a Conference held at University of Wales, Swansea, 7th – 9th July 2005, Brill, Leiden – Boston 2008, p.161.

⁷ G. Parker, *Europe in crisis, 1598–1648*, Wiley-Blackwell, p.17.

⁸ The official web page of the Swiss Guard: <http://www.swissguard.va/index.php?id=258&L=3> (20/05/2013)

gency constituted by the fact that the governments of western countries in order to minimize losses among their own soldiers use mercenaries as in their opinion, death of those, who are not bound by civic duty but only by financial contract has less political meaning, for example only in 2002 according to U.S. sources, there were 15.000 of mercenaries in Iraq.

The Author also notes that developed countries more pays their attention on economic aspects of war, such as the location of natural resources, which does not mean that ideological and religious factors has no influence on conflicts but for developed countries that have stabilized ethnic situation, they are much less significant⁹.

Further factors influencing the prevalence of the usage of mercenaries are the nature of modern conflicts and the phenomenon of the privatization of war, which is possible thank to low prices of weapons and their commonness, the new nature of war violence – there are no open battles, the opponents destroy each other slowly, they are saving their military strength, acts of war and military act penetrate each other, violence is gaining autonomy and the meaning of modern mercenaries is growing¹⁰.

4. Legal definition of mercenaries in international law

Together with the development of civilization and the huge number of war victims, what especially took place after the alarmingly experience of the Second World War but also earlier in XIX century, the nations desire to take legal measures in order to regulate acceptable behaviors during the military conflict, what created the laws of war. After the Second World War (1939–45) the vast majority of civilized countries decided to establish the firm and stable standards of international law for the humanitarian treatment of war. The most significant of legal acts regulating laws of war is *Geneva Convention*, which implementation was inspired by the

⁹ H. Münkler, *Wojny naszych czasów (Die neuen Kriege)*, WAM, Kraków 2004, p. 3.

¹⁰ *Ibidem*, p. 10.

actions of United Nations. The problem of mercenaries was first raised during the meeting of United Nations in 1961. The participants of the organization called for the withdrawal of mercenaries from Congo after very violent internal fights¹¹. The fights took place during the Katangese secessions. The famous leader of Katangese airforce was Jan Zumbach, Polish veteran of 303 Squadron, who having vast experience from elite military unit recruited pilots and mechanics¹².

In 1968 in the face of extremely serious situation in Africa, the United Nations General Assembly has adopted a severe position and decided that employing mercenaries against national liberation movements is a criminal act¹³. The term *Geneva Convention* denotes the agreements from 1949, which updates the previous three treaties implemented on 1864, 1906 and 1929 and also added a new treaty.

To the above mention acts were added three additional protocols. The *Protocol Additional to Geneva Convention implemented in 1977* describes the most widely accepted international definition of a mercenary, although not endorsed by some countries, for example the United States of America. The *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977 states:

”Art 47. Mercenaries

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

¹¹ Security Council Resolutions 161A of 21 February 1961, and 169 of 24 November 1961, and General Assembly Resolution 1599 (XV) of 15 April 1961, calling for the withdrawal of mercenaries from the Congo, See: J. Preux, “Article 47”, [in:] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Y. Sandoz, C. Swiniarski, and B. Zimmermann (ed.), ICRC, Geneva 1987, p. 572.

¹² R. Uessler. *Wojna...*, p. 8.

¹³ Resolution 2465 (XXIII) of 20 December 1968, confirmed in particular by Resolutions 2548 (XXIV) of 11 December 1969, 2708 (XXV) of 14 December 1970, 3103 (XXVIII) of 12 December 1973, 33/24 of 8 December 1978. See A.A. Yusuf, *Mercenaries in the Law of Armed Conflict*, in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflicts* Giuffrè, Naples 1979, pp. 119-121

2. A mercenary is any person who:

- (a) is especially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces”¹⁴

All the above criteria must be met, according to the Geneva Convention, for a combatant to be described as a mercenary. The analyses of sub-paragraph (a) “is especially recruited locally or abroad in order to fight in an armed conflict” leads to conclusion that this condition excludes individuals, whose service is long-lasting or a permanent (French Foreign Legion) or is based on an agreement concluded by their national authorities (the Swiss Guard), only volunteers specially recruited to participate in military conflict can be considered as a mercenary.

The contents of sub-paragraph (b) introduces a requirement of taking a “direct part in the hostilities”, which caused interpretative doubts. In order to explain the formulation of direct participation, the International Committee of the Red Cross published in 2009 *Interpretive Guidance on the notion of direct participation in hostilities under IHL*, where was described constitutive elements of qualifying an act as direct participation in hostilities, „specific act must meet the following cumulative criteria:

1. The act must be likely to adversely affect the military operations

¹⁴ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977.

or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and

2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and

3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another)¹⁵.” As a result, foreign advisers, technicians and similar employers are excluded.

The sub-paragraph (c) is crucial, it makes the difference between volunteers and patriot fighting for noble ideal and mercenary who kills for highest bidder, additionally in contrast to other soldiers, his remuneration is excessively higher. Present article also is criticized as not all of the mercenaries are motivated by financial reasons, some of them are fanatics and fundamentalist, moreover extremely hard to prove is the condition since mercenaries’ remuneration are paid either in their own countries or into bank accounts in other countries. The sub-paragraph (d) can be easily omitted by confirming citizenship of a mercenary by the party of the conflict, the sub-paragraph (e) is considered as meaningless. In fact states which uses mercenaries have to incorporate soldiers as members their military forces.

Nevertheless, implementing of present provision was inevitable as a vast majority of states enlisted foreigners into their forces and without making these into corps. The last sub-paragraph (f) excludes persons sent by a state which is not a party to the conflict on official duty as a member of its armed forces, as a mercenary is a volunteer it is illegal to classify troops sent by other countries as mercenaries even if they fulfill other requirements of the protocol¹⁶.

¹⁵ Melzer N., *Interpretive Guidance on the notion of direct participation in hostilities under IHL*, ICRC, Geneva 2009, p. 20.

¹⁶ Preux J., “Article 47” [in:] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Y. Sandoz, C. Swiniarski, and B. Zimmermann (ed.), ICRC, Geneva 1987, pp. 578-581.

According to the Third Geneva Conventions¹⁷, a captured soldier must be treated as a lawful combatant and, therefore, as a protected person with prisoner-of-war status until facing a competent tribunal, the tribunal may decide that he is a mercenary, the consequence is that he has a status of an unlawful combatant which means that still he must be “treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial” according to art. 5 of The Fourth Geneva Convention¹⁸, after the trial when he is found to be mercenary the consequences are severe. The mercenary is treated as a common criminal and may be sentenced even for execution.

Mercenary is deprived the status of prisoner of war, as a result of that he has no right to be repatriated after the end of war as well. The example of above was the famous trial that took place in Africa, after the 13 men were hired to fight in the civil war that broke out when Angola was fighting for independence from Portugal in late seventies. Mercenary, John Derek Barker as a leader of mercenaries in Angola led the judges to send him to face the firing squad. „Ernesto Teixeira da Silva, one of five judges presiding over the case, said: »Africa feels mercenaries are a danger to the people, the children and to the security of the state. They spread fear, shame and hatred in Angola.«¹⁹

The definition of mercenaries provided in art. 47 of the additional protocol, although was an effect of consensus adopted by plenary meeting, is still criticized for being timorous, incomplete and doubtful orientation. Nevertheless it defines the phenomenon and what is even more important, penalize his action. The second important act which defines mercenary is *International Convention against the Recruitment, Use, Financing and Training of Mercenaries* adopted in 1989 by the General Assembly of United Nations, who mostly repeats the previous definition²⁰.

¹⁷ *Convention (III) relative to the Treatment of Prisoners of War*, Geneva, 12 August 1949.

¹⁸ *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949.

¹⁹ http://news.bbc.co.uk/onthisday/hi/dates/stories/june/28/newsid_2520000/2520575.stm (20.05.2013)

²⁰ *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, A/RES/44/34, 4 December 1989, General Assembly UN.

5. Conclusion

As war is an integral part of human life, mercenaries have been evolving together with society because military conflict since forever creates opportunity to get richer and in the opinion of the Author nowadays vast majority of conflicts are motivated by financial reasons. The private military companies of unexplained status – heirs of classical mercenaries are being created all around the world. Although laws introducing severe responsibility for mercenaries has been adopted, the demand for different professional military service is still growing and in the atmosphere of free market economy they specialize and start to offer wide selection of services from V.I.P protection to provided airlift, security, logistics, and transportation services, as well as humanitarian support, even inventing their own weapons and play substantial role in military conflict as the *Blackwater* in Iraq. Moreover modern jurisprudence has difficulties with qualifying employers of private military services as mercenary and assigning responsibility, as the components of the legal definition may be easily omitted. The most famous of the companies is *U.S. Blackwater* (at present *Academi*), which was described by Jeremy Scahill - national security correspondent for *The Nation* magazine - as the world's most powerful mercenary army²¹, and many similar organization do not complain about the lack of employment and are not afraid of the crisis. But in the end, why have they to be afraid, if history proves that especially in times of crisis military services of any kind are able to earn the most.

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Kaja Kowalczevska

**Self-regulation of Private Military Corporations
– the Optimal Solution?**

Abstract:

The article carries out the two track analysis. The first part discusses the complexity of the private military companies' regulation in the light of modern changes of the warfare and concerns raised on the possible violations of international humanitarian law and human rights. The second part describes the Swiss Initiative (with focus to the Montreux Document and the International Code of Conduct for Private Security Service Providers) established by the main stakeholders. The article aims to present to which extent the bottom-up initiatives may satisfy the legal standards of industry regulation.

Key words: code of conduct, private military societies, international humanitarian law, social corporate responsibility

**Implication of the evolution of warfare on international
humanitarian law**

Recent evolutions in international politics, like emergence of the war against terrorism, the concept of responsibility to protect or growing outsourcing of military services have affected the modern warfare and therefore the nature of modern international humanitarian law (IHL). At the beginning IHL was elaborated to protect wounded persons of the battlefield, then it shifted its focus to the protection of combatants to finally place civilians in centre of its interest. Nevertheless, during all these

transformations war definitely remained in the imperium of state and IHL preserved its interstate and state-centred nature. Previous centuries were much more influenced by protection of citizens and construction of the legal framework of treatment of enemies of the country; yet, the 21st century showed that it is no longer a case. Along with the developments in international public law and especially the emergence of the human rights doctrine (HR), a progressive redirection from the state-centred to the individual-centred approach was observed.

The law of armed conflicts was altered as well, especially due to the development of warfare technique and methods of conduct of hostilities. The issue of private military companies (PMC) contracted to provide its services in the zone of armed conflict or the growing usage of unmanned aerial vehicle (drones) displayed the growing loophole of the IHL adjustment to the modern reality.

On the other side, the international society of sovereign equals is constantly colliding with the emerging role of multinational corporations as the important and powerful actors on the international scene. Thus, private entities, traditionally „*objects*” of the international law, are as well gradually becoming subjects of „*direct*” obligations under international law and the growing demand of the regulations of private enterprises becomes crucial. The traditional approach, bridging HR and IHL, focuses on acts of governments and public authorities which surprisingly are no longer the only real agents in the battlefield. Therefore, the traditional approach doesn't really do the justice to the richness of acts that are undertaken in both, peace and wartime, when individuals and legal entities are no longer that indifferent and where the business meets war.

It seemed that the attribute of the state such as monopoly of use of violence would never be waived on behalf of the private sector but recent asymmetric armed conflicts revealed that the military had to adapt and effectively respond to the new conditions of war and nature of the enemy which was channelled through the privatisation of the warfare. The following paper describes the status and subsequent liability of new corporate

actors of IHL - the private military companies and bottom-up initiative of self-regulation of this growing sector. The analysis is based on the study of the Swiss Initiative which initiated a transnational discussion on future of the privatisation of the war and issue of the state and individual liability for the possible breaches of international and domestic law,¹ and the work of International Code of Conduct for Private Security Service Providers (ICoC) strongly inspired by the Montreux Document spirit.²

Consequently, it raises the important question of the redefinition of subjects of modern international law which cannot be any longer limited to state actors. Only recently, the international community became supportive of greater recognition of contribution of „*non-state actors*” and their international personality, not in terms of „*objects*” or „*subjects*” of international law, but „*participants*”³. Since the attribution of international legal personality is functional, and depends on the area of regulations, the following paper focuses on the activity of PMC under the regime of international public law and IHL. The role of PMCs in armed conflicts, conferred powers, aims and needs of the armed conflict situation require clear regulation and classification of their activities. In particular, it will focus on qualification of these corporations under the Geneva Conventions (GC) to further discuss the possible accountability under international law and the elaboration of bottom-up regulation providing with good practices that should be implemented into the strategies of this specific industry and service providers.

Status of PMC under international humanitarian law

Contrary to possible first impressions, PMC under IHL do not act in a legal vacuum. Their unclear status has a political, rather than a legal

¹ More available at : <http://www.eda.admin.ch/psc> (consulted on 21/05/2013).

² More available at : http://www.icoc-psp.org/Home_Page.html (consulted on 21/05/2013).

³ R. Higgins, *Conceptual Thinking about the Individual in International Law*, Brit., I Int 'I Stud. 4 (1978), pp. 48-55.

nature. IHL provides us with comprehensive regulation of the status of actors in the situation of armed conflicts, therefore one can be combatant or civilian with no other possibility.⁴ This is due to the essential feature of armed conflict – the clear distinction between those who can be legally targeted and killed and those who shall remain under protective regime.⁵ Thus, to correctly classify PMC, one should consider their functions and entrusted tasks in the zone of armed conflict. Also, it should be noted that given the definition of mercenaries including six cumulative conditions,⁶ the latter status is hardly assignable to the personnel of PMC. Hence we shall treat them in terms of civilians or combatants depending on their specific tasks encompassing or not direct participation in hostilities.⁷

Firstly, these companies operate across several jurisdictions under the contracts financed by governments, international organizations, NGO's or individuals. They provide wide range of services starting with logistics, training, facility and consulting support to end with typical security services in hostile environment of international armed conflict but also of peacetime, at the side of commercial industries worldwide. One of the most influential attempts to categorize PMC was by Singer (2003) who divided them into military support, provider or consultant firms.⁸ Since IHL

⁴ Mixed status of war medical personnel, chaplains and war correspondents, art. 33 of the Geneva Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

⁵ Art. 51. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

⁶ Art.47 (2) Protocol I : „*A mercenary is any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) is not a member of the armed forces of a Party to the conflict; and (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces*”.

⁷ N. Melzer, *Interpretive Guidance on the notion of direct participation in hostilities under IHL*, Int'l Comm. of the Red Cross, 2009.

⁸ P. W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, 2003.

is applicable only in the case of armed conflict, when it comes to PMC, the problem appears as for these employees who are taking direct participation in hostilities and thus are exposed to enemy fire, but at the same time are not officially incorporated to the armed forces of one party to the conflict. If the latter was the case, their status would be perfectly clear and all provisions of GC relating to combatants and prisoners of war would apply.⁹ Also they would be under official military command and in the eventual case of breaches of IHL, punished by military jurisdiction.

Nevertheless, the non-linear nature of modern conflicts and increasing number of tasks carried out by PMC outside the military structure, but traditionally assumed by armed forces, blur the whole picture. The difficulty emerges when civilians wear weapon and military-like uniforms which consequently impede their distinction from combatants, thus endangering their security. Moreover, the potential to become engaged in the combat with enemy (the concept of direct participation) is aggravated due to the sole proximity of provided services to the battlefield, regardless of their nature (translators, trainers, and guards are equally exposed).

The prospect of integrating PMC under one military command is highly unlikely due to the core incentives of privatisation of war. Therefore, the cost efficiency, flexibility and other means by which to relieve the state of certain duties play in favour of PMC setting in the shadow zone of warfare, where the status of civilian doesn't provide efficient and adequate protection.¹⁰ Finally, the mere fact of certain governmental tasks being outsourced may incite subsequent abuses and issue of the liability under IHL, ICL or domestic criminal law. That is why the self-initiative of the PMC regulation merits a discussion.

⁹ Art. 4 Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950.

¹⁰ Art. 51(3) of Additional Protocol I: „*Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities*”.

International liability of PMC

For the moment, the only solution to be accepted under the regime of IHL is the liability of a state that failed to prevent a harmful act. Although the recent conflicts in Iraq and Afghanistan showed that due to the unclear role of PMC, serious problems occur when it comes to an effective mechanism of punishment to enable the personnel of PMC to be prosecuted when serious breaches of the law occur. Such concrete measures should be undertaken by states whose legitimacy and authority may, and actually is, undermined because of the spill-over effect of impunity and governmental backing for this business sector. As abovementioned, the state actor is, as the subject of international law and party to the conflict, the one ultimately held reliable for all abuses and violations of HR and IHL.¹¹ The commitments under international law oblige the state to accept this responsibility or to undertake all necessary steps to punish the actual perpetrators.

Regrettably, the rapid growth of PMC was not accompanied by the concurrent regulation and control of their activities in the international or national legal orders,¹² which currently triggers certain difficulties as to the accountability of natural persons in the context of both international and non-international armed conflicts. This new phenomenon, provoking thoughts about modern mercenaries, raises important issues about the future of the international criminal and civil liability, the authority of state and also the future development of the PMC sector.

Since international law is an interstate law, with recent emergence of individual criminal responsibility for serious breaches of international law, to deliberate about corporate criminal liability is precarious. Although the international liability of corporations can be treated from different per-

¹¹ The Geneva Convention law is considered as part of customary law, biding despite the lack of official ratification of the instrument by a state in question.

¹² Several exceptions as to the domestic regulation of PMC can be found in the United States, the United Kingdom, South Africa, New Zealand and Switzerland.

spectives: international law, IHL or HR, only the latter is supported on part of scholars, mainly involved in HR movements fostering corporate social responsibility (CSR) and consecutive international civil liability. The main premise of CSR is the high mobility and growing corporate power on the international market, which assigns the international corporations a role in delivering the HR standards to the local communities. However, because of their complex nature and multilevel structure,¹³ the allocation of liability causes some problems when it comes to identification of a separate corporate personality to be held responsible for the committed crime or civil tort. The same is applicable to the PMC industry which, not only being endorsed by government policies, but also benefiting from its dispersed premises, protects its own personnel by sheltering them outside of the competent jurisdiction and making the conduct of proceedings impossible.¹⁴

It has to be highlighted that corporate liability as such does not exist either under international law or under IHL. In the current state of law, corporate liability is translated into state liability for the specific actions of state agents (host state, home state or hiring state),¹⁵ and individual liability of the personnel under competent criminal order, or, exceptionally for the most serious breaches, the individual criminal liability for international crime can also be evoked. However, the lack of national regulation framework and difficulties of carrying out investigations in failed countries have widely contributed to serious lacks of responsibility for HR violations. Since to the knowledge of the author, there is no on-going or adjudicated case against a company for violation of core international criminal law, therefore certain states may be accused of failure „*to exercise due diligence to prevent, punish, investigate or redress the harm caused*”.¹⁶

¹³ They managed to create a numerous layers of subsidiaries or subcontracts in diverse countries.

¹⁴ Professional Overseas Contractors, *New Proposals to Increase Oversight for Security Contractors*, April 2, 2013, available at: <http://www.your-poc.com/new-proposals-to-increase-oversight-for-security-contractors/> (consulted on 20/05/2013).

¹⁵ H. Tonkin, *State control over private military and security companies in armed conflict*, Cambridge University Press, 2011, pp. 123-260.

¹⁶ United Nations Human Rights Committee, General Comment 31, paragraph 8, United

Among others, the lack of individual accountability of PMC personnel may result from a disturbing granting of immunities during the conflicts in Iraq and Afghanistan by the USA government. In Iraq, from 2004 and 2007, all private U.S. contractors including PMC were granted immunity status under the Coalition Provisional Authority Order 17.¹⁷ However, the legal situation of PMC operating in the country, and in particular whether some PMC still benefit from the immunity clause contained in Order 17, remains unclear. This diplomatic status has been one of the main arguments of the defence of the five private guards of Blackwater charged with manslaughter and weapons violations and allegedly responsible for the massacre which took place in Baghdad's Nissour Square, in 2007.¹⁸ In author's opinion, this abuse of absolute immunity from criminal and civil jurisdiction should be condemned and for obvious reasons remain restrained.¹⁹

Finally, the issue of civil international liability of corporations has recently emerged at the occasion of the *Kiobel v. Royal Dutch Petroleum* landmark case discussing the international personhood of transnational corporations. Despite the lack of inherent obstacle under international law which would prevent states from addressing obligations, and not only prohibitions directly to the legal person, the Supreme Court in its decision of April 17, 2013²⁰ rejected the universal jurisdiction and possibility for multinational corporations to be sued under The Alien Tort Statute for busi-

¹⁷ Coalition Provisional Authority Order No. 17 (Revised), Status of the Coalition Provisional Authority, MNF - Iraq, Certain Missions and Personnel in Iraq (Iraq), No. 17 (Revised), 27 June 2004, available at: <http://www.unhcr.org/refworld/docid/49997ada3.html> (consulted on 26/02/ 2013).

¹⁸ Judge R. M. Urbina of Federal District Court, Memorandum of Dismissal of Charges against Blackwater Guards, December 31, 2009.

¹⁹ M. Frulli, *Immunity for Private Military Contractors: Legal Hurdles or Political Snags?* [in:] *War by Contract – Human Rights, Humanitarian Law, and Private Contractors*, F. Francioni and N. Ronzitti (eds.), Oxford University Press, 2011, p. 469.

²⁰ Supreme Court Of The United States, No. 10–1491, *Esther Kiobel, Individually And On Behalf Of Her Late Husband, Dr. Barinem Kiobel, Et Al., Peti-Tioners V. Royal Dutch Petroleum Co. Et Al., On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit*, April 17, 2013.

ness activities overseas causing violations of HR.²¹ One more time it was proved that the political nature of international law is the main impediment to ensure an effective remedy to human rights victims, which is also clearly demonstrated in the Statutes of the ICC, the ICTY or the ICTR that don't provide for the prosecution of corporate entities.²²

Therefore, the issues raised in this part clearly illustrate the mismatch of modern security politics and corresponding limits of international law, which leads us to the second part on the future of the international corporate liability and its self-regulation initiatives.

The Self-regulation Initiatives

Given the fact that neither the international nor the domestic regulations embrace in a complete and comprehensive way the control over the PMC industry, the informal regulation plays an important role. There are five types of informal regulation that can be taken into consideration” *“the use of market and reputational pressures, the use of civil actions against contractors, the pressures created by the insurance industry, the use of specifically designed contracts, and the collective self-regulation”*,²³ due to the limited scope of this article, only the latter will be discussed. The government of Switzerland decided to undertake the concrete actions in order to, from one side, clarify international standards for the PMC indus-

²¹ The Alien Tort Statute, 28 U.S.C. § 1350, is a section of the United States Code: *“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”*

²² J.D. Ohlin, *Kiobel and Criminal Law Norms*: „*One can treat the reluctance to prosecute corporations at Nuremberg, the ICTY, ICTR, and the ICC, as purely a matter of jurisdiction. And just because these tribunals don't have jurisdiction over corporations does not mean that corporations cannot violate international legal norms. And just because the ICC does not have jurisdiction over corporations does not entail that a US court does not have jurisdiction over them either. Each court or tribunal has separate jurisdictional rules. And one has to separate the jurisdictional point from the underlying legal norm.*”, January 6, 2012, available at: <http://www.liebercode.org/2012/01/kiobel-and-criminal-law-norms.html> (consulted on 25/02/2013).

²³ S. Percy, *Regulating the private security industry, Informal Regulation*, Routledge for the International Institute for Strategic Studies, 2010, pp. 53-63.

try operating in different environments (during peace and war time) and from the other, to improve the accountability of such companies.

Swiss Federal Council reacted as the foreman and already in 2005 adopted a report on private military and security companies. Consequently, an international initiative aimed at the promotion of compliance with IHL and human rights by PMC operating in conflict zones was launched and resulted in adoption of the Montreux Document on September 17, 2008.²⁴ Furthermore, the Swiss Initiative encompasses as well the registration of the private business with the International Code of Conduct for Private Security Service Providers (ICoC).

The Montreux Document consists of two parts, the first is composed of 27 obligations of the signatory states, PMCs and their employees, the second provides for the catalogue of 73 good practices addressed to the signatory states and complying with the obligations under international law as for the oversight and administration of the PMC industry. Given the mixed nature of authors, including the representatives of the private sector, the Montreux Document embodies a genuine representation of interests at stake, from both, public and private perspective. The document doesn't discuss the legitimacy of the outsourcing of the state monopoly of the use of force or its legality but is focuses on the provision of good practices which implementation should secure the legality and obedience to IHL and HR standards. While the Montreux Document is most of all directed to the signatory states,²⁵ the ICoC is the instrument elaborated with a view to be signed and adopted by the PMC themselves.

The ICoC was signed by the 58 PMC on November 9, 2010 and provides with important commitments of signatory parties as for the respect of all applicable legal regimes, of international, regional and domes-

²⁴ Unpublished master thesis: K. Kowalczevska, *Individual Liability and State Responsibility of Private Military Companies in International Law*, the Jagiellonian University, 2011, pp. 99-101.

²⁵ 45 states and the European Union support the Montreux Document as for May 21, 2013, available at: <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html> (consulted on 21/05/2013).

tic nature. Also, it specifies the explicit prohibitions on certain activities like the use of force (except in self-defence), torture, discrimination and human trafficking. The very important part lays down the commitments of management boards aiming to ensure that the personnel observe the ICoC and implement good practices regarding the recruitment and training of personnel as well as requires reporting and monitoring mechanisms. The success of this instrument is illustrated by the impressive number of more than 600 PMCs that became signatories of ICoC by May 2013.²⁶

Furthermore, the whole process is monitored and reviewed by the Steering Committee composed of the representatives of three sectors: PMCs, NGO's and governments, where the Swiss government and Geneva Centre for the Democratic Control of Armed Forces (DCAF) play the role of facilitators. Besides, there were created three working groups composed of representatives of aforementioned stakeholders and charged with discussion and elaboration of reports on: (1) Assessment, Reporting, and Internal & External Oversight, (2) Resolution of Third Party Grievances and (3) Independent Governance & Oversight Mechanism Structure, Governance, and Funding. As a result of intense consultations and discussions, in February 2013 the Steering Committee managed to draft the final charter of the governance and oversight mechanism established to oversee and govern the ICoC implementation and administration. It provides for the four types of monitoring: (1) verification and assessment through auditing, monitoring, and certification, (2) report assessment and review (3) complaint verification and remediation and (4) Code administration.

While the process is still evolving, it is still too precocious to assess the impact of such a self-regulation on the practice, nevertheless such a bottom-up initiative, backed by the most interested governments and

²⁶ Complete List as of 1 May 2013 available at: http://www.icoc-psp.org/uploads/Signatory_Companies_-_May_2013_-_Composite_List_SHORT_VERSION.pdf (consulted on 22/05/2013).

NGO's is praiseworthy. It is a measure to circumvent the unwillingness of the governments to elaborate a legally binding comprehensive legal framework which may be counter effective as for the benefits stemming from the outsourcing of the relevant services. Moreover the Swiss Initiative enables the introduction and operationalization of the UN Guiding Principles on Business and Human Rights,²⁷ also it acknowledges the expectations of public opinion following the HR movement and inclined on CSR, especially the impact and influence of multinational corporations on the protection of HR standards.²⁸ Given the mixed nature of the Steering Committee members the Swiss Initiative is empowered to recognize the interests of all stakeholders and take into consideration the pressure particularly exerted by the civil society keen on the CSR.

Last but certainly not least, given the lack of international or domestic legally binding regulation, the adhesion to such a code of conduct is propitious when it comes to the economic and marketing dimensions of the PMC industry. The internalisation of ICoC reveals efforts of the companies to comply with the highest standards and intention to satisfy the due diligence paradigm. The oversight mechanism procured by the ICoC and accommodating the protective screen may play a role of attraction for more important clients. The latter involve not only the private actors and governments but also international organisations like UN, often afraid of the stigma in the case of the alleged violations of HR by the PMC employees, which often gets mediatised and may harm the reputation of the hiring party.²⁹ Also, the participation in the ICoC may be set as the prereq-

²⁷ J. Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN, 2011, available at: www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf (consulted on 22/05/2013).

²⁸ B. Faracik, Address during Human Rights & Business Seminar: From Armed Privates To Private Armies: Regulating Private Military And Security Companies, 31 October 2012, Allerhand Institute, Cracow, Poland.

²⁹ C. Hoppe and O. Quirico, *Codes of Conduct for Private Military and Security Companies*, [in:] *War by Contract – Human Rights, Humanitarian Law, and Private Contractors*, F. Francioni and N. Ronzitti (eds.), Oxford University Press, 2011, pp. 363-376.

uisite for licensing or awarding public and private contracts,³⁰ therefore, it becomes less surprising why the ICoC benefits of such an endorsement from the industry itself. Therefore, the ICoC is set up in order to foster business opportunities of lawful companies while excluding the non-complying ones. It enhances the level of accountability due to its obligatory reporting mechanism but also fosters the transparency with regard to such issues as torture, discrimination, arm trafficking, dual-use technologies and resort to armed force.

Conclusion

To conclude, the self-regulation initiative, due to its novelty cannot be assessed in a satisfactory way but for sure consists of an important improvement of the regulatory framework of the PMC industry. Given the accountability hardships, the realm of the diplomatic negotiations and complexity of the issue which at the moment don't give any prospects for the fast international legally binding settlement, the bottom-up initiative is much appreciated.

However, the lack of state imperium as for the enforcement combined with the voluntary nature of adhesion, inhabit the two main drawbacks of informal regulation mechanisms. Using the leverage of due diligence and presumption of complying with the HR and IHL standards, the self-regulation gives important incentives for the business stakeholders to sign the document in order to gain on reliability in this highly competitive environment. However, the informal regulation seems to be just a temporary solution countering the loophole of the international law and requires the government guarantees of enforcement in case of failure of industry goodwill Therefore the legally binding framework providing for minimum

³⁰ N. Rosemann, *Code of Conduct: Tool for Self-regulation for Private Military and Security Companies*, DCAF Occasional Paper no 15 (2008).

standards shall be considered in a long-term perspective. Moreover, the voluntary nature of adhesion to the Swiss Initiative doesn't protect from the activities of corporations willing to contribute to the illegal actions and aiding or abetting the perpetrators of international crimes, especially the armed groups and authoritarian regimes not refraining from the recourse to the mercenary.

The informal regulation of PMC still evokes many questions to be examined in near future. To which extent the oversight mechanism will be effective? Will the signatory states implement good practices and will the domestic courts take into account the informal regulation as an important commitment of corporations to the due diligence standards? Therefore, will the industry succeed in regaining its reliability?

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