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Streszczenie

Świat w ogniu. Kulturowe, społeczne i prawne aspekty zjawiska migracji

Contents

The World on Fire – Cultural, Social and Legal Aspects of the Migration Phenomenon

Wprowadzenie

Zjawisko migracji od wieków kształtowało historię ludzkości, ale w XXI wieku nabrało nowego wymiaru, stając się jednym z najbardziej złożonych wyzwań społecznych, politycznych i prawnych. W kontekście dynamicznie zmieniającego się świata, migracje wymuszają na społeczeństwach konieczność ciągłej adaptacji do nowych realiów – zarówno tych wewnętrznych, jak i globalnych. Problem ten dotyczy nie tylko kwestii bezpieczeństwa, integracji kulturowej czy demograficznej, lecz także coraz częściej przyczynia się do powstawania nowych regulacji prawnych i strategii politycznych.

Zrozumienie kulturowych, społecznych i prawnych aspektów migracji wymaga spojrzenia na problem z wielu perspektyw. Z jednej strony, mamy do czynienia z migracjami dobrowolnymi, motywowanymi głównie chęcią poprawy warunków życia i poszukiwania pracy, z drugiej strony nierzadko są to migracje przymusowe, wynikające z działań wojennych, prześladowań politycznych, katastrof naturalnych czy zmian klimatycznych. Współczesne

Introduction

The phenomenon of migration has shaped human history for centuries, but in the 21st century it has taken on a new dimension, becoming one of the most complex social, political, and legal challenges. In the context of a dynamically changing world, migration forces societies to constantly adapt to new realities – both internal and global. This problem concerns not only security, cultural, and demographic integration but also increasingly contributes to the creation of new legal regulations and political strategies.

Understanding the cultural, social, and legal aspects of migration requires looking at the problem from many perspectives. On the one hand, we are dealing with voluntary migration, motivated mainly by the desire to improve living conditions and looking for a job; on the other hand, forced migration resulting from warfare, political persecution, natural disasters, or climate change. Contemporary challenges related to migration, such as the so-called migration crisis, migration due to climate change, and the resulting social tensions, require a new, interdisciplinary approach.

wyzwania związane z migracją, takie jak tzw. kryzys migracyjny, migracje z powodu zmian klimatycznych, a także wynikające z tego napięcia społeczne, wymagają nowego, interdyscyplinarnego podejścia.

Europejski kontekst migracji, zwłaszcza ten dotyczący relacji między kontynentem afrykańskim a UE, stanowi szczególnie istotny obszar badań i dyskusji. Migracje wpływają na różnorodność kulturową i dynamikę społeczną, jednakże rodzą również szereg wyzwań związanych z integracją cudzoziemców, akceptacją ich obecności przez społeczności przyjmujące oraz ochroną ich praw. W kontekście prawa migracje przyczyniają się do tworzenia nowych regulacji międzynarodowych i krajowych, które mają na celu zarządzanie przepływami migracyjnymi, ale także ochronę praw człowieka. Współczesne prawo migracyjne ewoluuje, starając się odpowiedzieć na wyzwania związane z bezpieczeństwem, a jednocześnie nie naruszyć podstawowych wolności i praw jednostki.

W niniejszym numerze „Civitas Hominibus. Rocznika Filozoficzno-Społecznego" autorzy przyglądają się zjawisku migracji z różnych perspektyw – społecznej, prawnej i kulturowej. W dobie globalnych zmian migracje stają się nieuniknionym elementem rzeczywistości, której wyzwania musimy zrozumieć i na które powinniśmy odpowiednio reagować. Publikowane artykuły mają na celu zainicjowanie dyskusji, która pomoże lepiej zrozumieć skomplikowaną naturę migracji oraz ich konsekwencje dla współczesnych społeczeństw.

The European context of migration, especially that relating to the relationship between the African continent and the EU, is a particularly important area of research and discussion. On the one hand, migration affects cultural diversity and social dynamics, and on the other, it raises a number of challenges related to the integration of foreigners, acceptance of their presence by host communities, and protection of their rights. In the context of law, migration contributes to the creation of new international and national regulations that are aimed at managing migration flows but also at protecting human rights. Contemporary migration law is evolving, trying to respond to security challenges without violating fundamental freedoms and individual rights.

In this issue of "The Philosophical and Social Yearbook Civitas Hominibus", we would like to look at the phenomenon of migration from various social, legal, and cultural perspectives. In the era of global changes, migration is becoming an inevitable element of reality, the challenges of which we must understand and respond to appropriately. The published articles aim to initiate a discussion that will help us to better understand the complicated nature of migration and its consequences for contemporary societies.

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The migration phenomenon in the context of the principle of state sovereignty: selected issues

Zjawisko migracji w kontekście zasady suwerenności państwa – wybrane zagadnienia

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Abctract

The phenomenon of migration on a scale previously unknown after World War II shocked the countries belonging to the European Union. The surge of people seeking protection from persecution, better jobs, educational opportunities, and a desire to be reunited with families already living in the EU has led governments to consider fundamental issues. One of them was the principle of sovereignty and its impact on governments' compliance with accepted international obligations. In many discussions, in my opinion, there was an erroneous juxtaposition of the idea of human rights with the principle of sovereignty, which led to an increase in nationalist sentiments and an escalation of hate speech against foreigners. This article aims to explain the key differences between the concepts of migrant and foreigner, the essence of the principle of sovereignty and its consequences, and the influence of the European Union on the traditional understanding of the state.

Keywords: sovereignty, migration, refugees, state obligations, EU, human rights

Streszczenie

Zjawisko migracji na dotąd nieznaną po II wojnie światowej skalę wstrząsnęło krajami należącymi do Unii Europejskiej. Przypływ ludności, która szukała ochrony przed prześladowaniami, lepszej pracy, możliwości edukacji oraz chęci połączenia się z rodzinami

już żyjącymi w UE, spowodowały, że władze państw zaczęły rozważać fundamentalne kwestie. Jedną z nich była zasada suwerenności i jej wpływ na przestrzeganie przez rządy przyjmowanych zobowiązań międzynarodowych. W wielu dyskusjach pojawiało się w mojej opinii błędne zestawianie idei praw człowieka z zasadą suwerenności, co doprowadziło do wzrostu nastrojów nacjonalistycznych oraz eskalacji mowy nienawiści wobec cudzoziemców. Niniejszy artykuł ma na celu wyjaśnienie kluczowych różnic między pojęciami migrant i cudzoziemiec, istotę zasady suwerenności i jej konsekwencje oraz wpływ Unii Europejskiej na tradycyjne pojmowanie państwa.

Słowa kluczowe: suwerenność, migracja, uchodźcy, zobowiązania państwa, UE, prawa człowieka

Introduction

Migration on a scale unseen since World War II, has shaken the states belonging to the European Union. The influx of people seeking international protection from persecution, as well as better employment opportunities, education, or the desire to reunite with families already living in the EU, has prompted governments to ponder fundamental matters. Among them, a key issue is the principle of sovereignty and its impact on the respect for international obligations undertaken by governments. In many narratives, there has been, in my view, an erroneous, juxtaposition of the idea of human rights with the principle of sovereignty. This has led to a rise in nationalist sentiments and an escalation of hate speech directed at foreigners. In this article, I will attempt to explain the key differences between the concepts of *migrant* and *refugee*, the essence of the principle of sovereignty and its consequences, and the influence of the European Union on the traditional concept of states. This article aims to explain the key differences between the concepts of migrant and foreigner, the essence of the principle of sovereignty and its consequences, and the influence of the European Union on the traditional understanding of the state.

Scope of the concepts of migrant and refugee

Refugee, *migrant*, and *foreigner* – these three concepts function in the social consciousness as synonymous. From the perspective of legal provisions, both national and international, each of these concepts has a different meaning. Depending on the subject to which legal norms apply (especially in the context of differences between a refugee and a migrant), their protection will be different, as will the rights and obligations that apply to them. Legal regulations concerning foreigners are both international and national, with the latter being expected to comply with the former. The term *migration* is defined as the movement of people, which involves crossing a border to settle in another state.[1] A migrant is a person who undertakes immigration, meaning an action through which they establish their place

[1] P. Muus, *International migration and the European Union, trends and consequences*, "European Journal on Criminal Policy and Research" 2001, No. 9, p. 32.

of residence in the territory of a member state for a period of at least twelve months, or which is expected to last that long, having previously been a resident of another member state or a third country. The phenomenon of migration can be considered from various perspectives, such as the causes and effects of migration, the geographical-political nature of the phenomenon, the direction and duration of migration, or the character of the settlement of the migrating population.[2] Currently, the analysis of migration often employs the so-called *push/pull migration* theory, according to which migrations are the result of push factors present in the migrants' current place of residence and pull factors in the destination where migrants are headed.[3] Pull factors in migration include:

- democracy,
- an effective system for protecting basic human rights,
- opportunities for better employment,
- opportunities for obtaining adequate education,
- access to medical care,
- social welfare,
- prospects for economic development,
- political stability,
- a stable labor market,
- the state of the legal system.[4]

On the other hand, factors causing push migration include lack of political stability, poverty and hunger, dictatorships, natural disasters, violations of basic human rights, and environmental destruction.[5] The most significant factor distinguishing between the two phenomena, refugee status and migration, is motivation. A refugee leaves their country of origin because circumstances related to a well-founded fear for their life compel them to seek protection in another country, as will be discussed later in this paper. In contrast, a migrant voluntarily (not coerced by factors such as war, persecution, or fear for their life) leaves their country of origin because they want to settle, pursue education or employment, or reunite with family in a foreign (often more developed) country.

In light of Article 1A of the Geneva Convention, a *refugee* is any person who, due to a well-founded fear of persecution because of their race, religion, nationality, membership in a particular social group, or political beliefs, is outside the country of their nationality and is unable or unwilling to avail themselves of the protection of that country, or who, not having a nationality and being outside the country of their former habitual residence due to similar events, is unable or unwilling to return to that country due to such fears.[6]

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[2] M. Kotowska, W. Pływaczewski, *Przemyt imigrantów jako obszar zainteresowania członków zorganizowanych grup przestępczych. Studium przypadku*, [in:] W. Pływaczewski, M. Ilnicki (eds.), *Uchodźcy – nowe wyzwania dla bezpieczeństwa europejskiego na tle standardów praw człowieka*, Katedra Kryminologii i Polityki Kryminalnej Wydział Prawa i Administracji Uniwersytet Warmińsko-Mazurski w Olsztynie, Olsztyn 2015, p. 78.

[3] P. Kolasa, *Ochrona praw uchodźców w Unii Europejskiej w świetle wytycznych Stolicy Apostolskiej*, Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego, Warszawa 2010, p. 30–31.

[4] M. Kotowska, W. Pływaczewski, *Przemyt imigrantów*…, op. cit., p. 78.

[5] Ibidem, p. 78.

[6] Art. 1A Geneva Conventions, 30.04.2024, https://www.icrc.org/en/doc/resources/documents/treaty/geneva-convention-1864.htm [access: 20.08.2024].

G. Stenberg asserts that "for an individual to be classified as a refugee, it is necessary to establish a rift between them and the authorities of their home country".[7] There must be a risk of serious harm to that individual as a consequence of political circumstances (e.g., oppositional activities). The act or acts constituting persecution must be carried out by state authorities, other public authorities, or private individuals in situations where state authorities are unable or unwilling to intervene in protecting the individual who is being persecuted.[8] Fear of persecution is considered well-founded when, based on the overall circumstances of the specific case, it is evident that the life, freedom, social status, or living conditions of the individual have been threatened or will suffer serious harm, and if for the stated reasons, they cannot avail themselves of basic human rights and freedoms.[9]

The Principle of Sovereignty and the influx of foreigners

The authority of a state to determine the rules for admitting foreigners (including a special category of foreigners, refugees) and for the departure of its own citizens abroad directly stems from its sovereignty. Following J. Białocerkiewicz, it should be emphasized that admitting a foreigner onto the territory subject to the state is an expression of an act of authority, representing the state's attitude towards outsiders, a stage in the development of international relations, and the extent of permeation of various spheres of social life across state borders.[10] Sovereignty is a theoretical-legal category that is characteristic of various fields of law.[11] The concept of sovereignty is interpreted in various ways, resulting in diverse views regarding sovereignty as a characteristic of a state, a set of competencies, or a certain state of relations with other states.[12] W.J. Wołpiuk even wrote that *the existence of disputes over sovereignty is a fact*.[13] The evolution of the perception of sovereignty can be traced by reading the works of creators of social contract ideas, such as J. Bodin, H. Grotius, T. Hobbes, J. Locke, and J.J. Rousseau. These concepts share the fact that they describe sovereignty through *the supremacy of power*. The concept of sovereignty in this sense was first used by J. Bodin in the 16th century. He clarified the concept of sovereignty: it no longer concerned just power as such, i.e., power having no one and nothing above it, but it dealt with the nature of relations within the state.[14] Bodin's sovereignty meant power; it was the absolute with and perpetual power of the republic. It

[7] G. Stenberg, *Non-Expulsion and Non-Refoulment*, Iustus Förlag, Stockholm 1989, p. 65.

[8] Ibidem, p. 66.

[9] B. Wierzbicki, *Uchodźcy w prawie międzynarodowym*, Wydawnictwo Naukowe PWN, Warszawa 1993, p. 36.

[10] J. Białocerkiewicz, *Status prawny cudzoziemca w świetle standardów międzynarodowych*, Uniwersytet Mikołaja Kopernika, Toruń 1999, p. 101.

[11] A. Pieniążek, *Suwerenność – problemy teorii i praktyki*, Książka i Wiedza,Warszawa 1979, p. 46.

[12] M. Domagała, *Suwerenność a procesy integracji transnarodowej i decentralizacji*, [in:] W. Kaute, P. Świercz (eds.), *Demokracja, liberalizm, społeczeństwo obywatelskie. Doktryna i myśl polityczna*, Wydawnictwo Uniwersytetu Śląskiego, Katowice 2004, p. 156.

[13] W.J. Wołpiuk, *Spór o suwerenność*, Wydawnictwo Sejmowe, Warszawa 2001, p. 5.

[14] R. Rosicki, *O suwerenności*, "Przegląd Naukowo-Metodyczny" 2010, nr 4, p. 63.

was constant, indivisible, and supreme, it could belong to the monarch or to the nation.[15] However, internal and external sovereignty did not imply the possibility of unilateral release from obligations, in accordance with the principle of trust. Internal competencies were limited by the framework of the social contract, which Bodin supported.[16]

In light of Ludwig Erlich's classical concept, the essence of sovereignty consists of two most significant characteristics: autarchy, which is the legal independence from any external factors (primarily from other states), and plenitude, which is independence from internal factors, manifested in the state's competence (and its authorized bodies) to regulate all internal affairs of the state. Sovereignty is characterized by rights and privileges arising from customary law that are independent of any consent from another state.[17] It is precisely the attribute of sovereignty that enables the differentiation of a state from other subjects of international law.[18] K. Skubiszewski describes sovereignty as "the independence of the state from any other authority in its relations with other subjects of international law and its autonomy in regulating internal affairs, i.e., the right to decide on its internal affairs and foreign relations in a manner not limited by any external factor, but without violating the rights of others and in accordance with the fundamental principles of international law".[19] T. Łoś-Nowak emphasizes the importance of principles of international law in defining the concept of *sovereignty as a factor limiting its scope*. He pointed out that the traditional understanding of sovereignty presumes that "state power is supreme, not subject to any external authority, and limited at most by the principles of international law. This is a legal understanding of sovereignty, assuming international independence, supremacy of power over the territory of the state, its indivisibility, equality of rights, and equality before the law".[20] Sovereignty is one of the fundamental characteristics of statehood, along with territory and population.[21] The term sovereignty is used in various ways to describe the legal competencies inherent to the state, to refer to the specific function of a given competency, or to justify a particular exercise of that competency.[22] Among the attributes of sovereignty, the following are listed:

– exclusive jurisdictional competence regarding its own territory and citizens,
– exercise of competencies in foreign policy,
– decision-making on war and peace,
– freedom to recognize states and governments, establish diplomatic relations, decide on military alliances, and membership in international political organizations

[15] J. Bodin, *Sześć ksiąg o Rzeczypospolitej*, Państwowe Wydawnictwo Naukowe PWN, Warszawa 1958, p. 88.

[16] W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, C.H. Beck, Warszawa 1999, p. 11.

[17] L. Erlich, *Prawo narodów*, Księgarnia Stefana Kamińskiego, Kraków 1947, p. 104.

[18] J. Crawford, *Brownlie's Principles of International Law*, Oxford University Press, Oxford 2012, p. 448.

[19] K. Skubiszewski, *Zarys prawa międzynarodowego publicznego*, t. 1, Warszawa 1955, p. 158.

[20] T. Łoś-Nowak, *Państwo jako uczestnik stosunków międzynarodowych*, [in:] A.W. Jabłoński, L. Sobkowiak (eds.), *Studia z teorii polityki*, Wrocław 1998, p. 82.

[21] S. Sowiński, *Suwerenność, ale jaka? Spór o suwerenność Rzeczypospolitej w polskiej euro debacie*, "Studia Europejskie" 2004, nr 1, p. 23.

[22] J. Crawford, *Brownlie's Principles*…, op. cit., p. 448.

– conducting independent financial, budgetary, and fiscal policies.[23]

The consequences of the principle of state sovereignty include the prohibition of the use of force, the principle of non-interference in internal affairs, the right to self-determination, and the principle of sovereign equality of states. State sovereignty implies its independence from other entities, and this independence is protected by international law, which treats states as equals in terms of sovereignty.[24] The consequence of states' independence is their historical equality, expressed by the maxim *par in parem non habet imperium* (an equal has no power over an equal). In international law, this maxim is often invoked as the basis of state immunity, the essence of which, nowadays in limited application, is the concept of equality among sovereigns. This equality has further implications: it relates to the legal conceptualization of the division of power among states.[25] The mentioned classical concept of sovereignty is the result of a long-term evolution that found its full expression only in the 18th and 19th centuries with the emergence of the modern nation-state.[26]

International law and its impact on state obligations

International law, considered a creation of states themselves, is regarded as an element that protects the state, including its sovereignty. This does not change the process of limiting state competencies, as it is usually the result of voluntarily undertaking international legal obligations. The state gains new opportunities to pursue its national interests.[27] The activity and efficiency of the state in various international interdependencies, including in integration processes, simultaneously become conditions for maintaining independence and pursuing its own interests.[28] Already in the judgment concerning the *Lotus case* in 1923,[29] the Permanent Court of International Justice perceived the ability of a state to enter into international obligations as an expression of its sovereignty.[30] The essence of the matter was that the German authorities did not allow a ship, which was supposed to transport weapons to Poland, to pass through, citing their domestic law. In its decision, the PCIJ emphasized that "the essence of some treaties limiting sovereignty is the fact that parties can undertake to perform or refrain from performing a specific act".[31] However, this does not mean a limitation of sovereignty but rather its exercise in a treaty-bound

[23] W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne*…, op. cit., pp. 113–114.

[24] J. Kranz, *Unia Europejska – zrozumienie konieczności i konieczność zrozumienia*, "Sprawy Międzynarodowe" 2006, nr 1, p. 38.

[25] J. Crawford, *Brownlie's Principles*…, op. cit., pp. 448–449.

[26] D. Greig, *International Community, Interdependence and All That. Political Correctness*, [in:] G. Kreijen, M. Brus, J. Duursma, E. De Vos, J. Dugard (eds.), *State, Sovereignty and International Governance*, Oxford University Press, Oxford 2002, p. 524.

[27] J. Kranz, *Suwerenność w dobie przemian*, [in:] Idem (ed.), *Suwerenność i ponadnarodowość a integracja europejska*, Prawo i Praktyka Gospodarcza, Warszawa 2006, p. 32.

[28] J. Barcz, M. Górka, A. Wyrozumska, *Instytucje i prawo Unii Europejskiej. Podręcznik dla kierunków prawa, zarządzania i administracji*, Wolters Kluwer, Warszawa 2012, p. 34.

[29] S.S. Wimbledon (France, Italy, Japan, United Kingdom v. Germany), 1923 PCIJ Series A No. 1.

[30] R. Kwiecień, *Suwerenność państwa w Unii Europejskiej: aspekty prawnomiędzynarodowe*, "Państwo i Prawo" 2003, nr 2, p. 28.

[31] S.S. Wimbledon (France, Italy, Japan, United Kingdom v. Germany), 1923 PCIJ Series A No. 1.

manner.[32] The PCIJ held that "undoubtedly, every convention creating such an obligation imposes a restriction on the exercise of sovereign rights by the state, in the sense that it requires their exercise in a specified manner. However, the right to enter into international obligations is an attribute of state sovereignty".[33] The Court clearly defined the essence of state sovereignty in the *Lotus case*. The PCIJ held that when states engage in international relations, they are not obliged to present their legal basis for those actions. This is because a consequence of state sovereignty is that states have the freedom to act and may take whatever measures they deem appropriate and necessary in a given situation. The PCIJ emphasized that "international law regulates relations between independent states. The binding legal provisions for states directly result from their own free will, expressed in conventions or customs universally recognized as principles of law, established to regulate relations between these coexisting independent communities or to achieve common goals".[34] The only limitations on state sovereignty are the sovereign rights of other states and norms of international law of a prohibitive nature. States must consent to the application of these norms, with the exception of peremptory norms (ius cogens). Sovereignty can be considered the foundation of the international legal system and the functioning of the international community.[35] Currently, it is impossible to separate the concept of sovereignty from its place in the system of international law.[36] J. Kranz emphasizes that "sovereignty can be viewed as a fundamental organizing concept based on common and universal values, the system of international law, and the international community".[37] R. Kwiecień highlights the fact that "the concepts of sovereignty and international law stem from the same source: the limit of one is the end of the other".[38] Therefore, sovereignty must be regarded as a regulatory idea of international law, i.e., an idea without which the existence and understanding of the structure of this law would be impossible. It can be concluded that sovereignty is the starting point for considerations regarding state obligations arising from acts of international law.

The state possesses specific competencies in international law under the principles of international law. International law regulates these competencies and delineates their boundaries. The most significant characteristic of the state is sovereignty, which implies numerous state competencies – rights – that constitute fundamental principles of customary law.[39] State authorities consciously undertake international legal obligations, thereby accepting that certain issues (e.g., mechanisms related to the protection of human rights) cease to be solely internal matters and become a universal aspiration of the international community. Consequently, there arises a need to establish such legal frameworks and

[32] W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne*…, op. cit., p. 114.
[33] S.S. Wimbledon (France, Italy, Japan, United Kingdom v. Germany), 1923 PCIJ Series A No. 1.
[34] S.S. Wimbledon (France, Italy, Japan, United Kingdom v. Germany), 1923 PCIJ Series A No. 1.
[35] S. Besson, *Sovereignty in Conflict*, "European Integration online Papers" 2004, Vol. 8, No. 15, p. 25.
[36] W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne*…, op. cit., p. 135.
[37] J. Kranz, *Pojęcie suwerenności we współczesnym prawie międzynarodowym*, Elipsa Dom Wydawniczy, Warszawa 2015, p. 50.
[38] R. Kwiecień, *Suwerenność państwa. Rekonstrukcja i znaczenie idei w prawie międzynarodowym*, Wydawnictwo Zakamycze, Kraków 2004, pp. 88, 92.
[39] W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne*…, op. cit., p. 135.

mechanisms in domestic law that correspond to international standards resulting from undertaken international obligations.

The European Unions Influence on the traditional concept of the State

Contemporary processes are causing the traditional conception of the state and sovereignty, as unlimited external and indivisible power, to diminish in significance. Five fundamental areas where phenomena are evident in the modern world are: economy, politics, law, security, and energy. They illustrate the forces and trends blurring the boundaries between the sphere of the nation-state and the international order.[40] An increasingly complex international order limits the autonomy of individual states and increasingly necessitates a departure from traditionally understood sovereignty. A prime example of such changes is the phenomenon of the European Union. D. Milczarek notes that "the EU appears as an original entity with no precedent in the history of international relations and, at the same time, as a syncretic or even hybrid entity, going beyond the framework of traditionally understood federations or confederations of states and still in a state of formation".[41] J. Barcz emphasizes that the EU constitutes a specific integrative structure of a *sui generis nature*. The specificity of the EU manifests in "its unique status within international relations, which does not align with the status of a state or a classical international organization.[42] M. Zirk-Sadowski points out that integration in the social, economic, and political dimensions largely occurs through the use of legal instruments".[43] However, it is important not to forget that building a European identity, while simultaneously not undermining the sense of identity of individual European nations, remains the greatest challenge that the EU continues to face.[44] The Union serves as an example of the most advanced regional system in the world.[45] This is due to its specific legislative system and the continuous impact of European law on the internal legal systems of member states. On February 5, 1963, the Court of Justice issued a judgment[46] in the Van Gend & Loos case in response to a preliminary ruling by a Dutch court. The Van Gend & Loos company transported a certain chemical substance from Germany to the Netherlands in 1960. The Dutch Customs Office ordered the company owners to pay an increased customs duty, which the representatives of Van Gend & Loos disagreed with. They pointed out the inconsistency of

[40] D. Held, *The Decline of the Nation State*, [in:] S. Hall, M. Jacques (eds.), *New Times. The Changing Face of Politics in 1990s*, Verso, London 1999, p. 202.

[41] D. Milczarek, *Status Unii Europejskiej w stosunkach międzynarodowych*, "Stosunki Międzynarodowe" 2001, nr 3–4, p. 26.

[42] J. Barcz, *Charakter prawny i struktura Unii Europejskiej. Pojęcie prawa Unii Europejskiej*, [in:] Eadem, *Prawo Unii Europejskiej. Zagadnienia systemowe*, Wolters Kluwer, Warszawa 2002, p. 50.

[43] M. Zirk-Sadowski, *Instytucjonalny i kulturowy wymiar integracji prawnej*, [in:] L. Leszczyński (ed.), *Zmiany społeczne a zmiany w prawie. Aksjologia, konstytucja, integracja europejska*, UMCS, Lublin 1999, p. 36.

[44] W. van Gerven, *The European Union. A Polity of States and Peoples*, Hart Publishing, Oxford–Portland 2005, p. 47.

[45] P.J. Borkowski, *Polityczne teorie integracji międzynarodowej*, Difin, Warszawa 2007, p. 33.

[46] Case *Van Gend en Loos v Administratie der Belastingen*, 26/62, 1963 ECR 1.

the customs regulations with the provision of Article 12 TEWG. In the judgment, we find one of the fundamental principles of European Union law: the principle of direct effect. The Court ruled "that the Community constitutes a new legal order, in pursuit of which member states have, to a certain extent, limited their sovereign rights. Both member states and their citizens are subjects of this legal order".[47] Therefore, EU law not only entails mutual obligations among member states but also has direct effects on citizens and businesses, granting them individual rights subject to protection by national authorities and courts. In the context of the influence of EU law on the legal systems of member states and the associated issue of sovereignty, it is also worth noting the judgment of the Court dated July 15, 1964, in the case of Flaminio Costa v. E.N.E.L.[48] The Italian government nationalized the production and distribution of electricity in 1963. The Ente Nationale Energia Elettrica (ENEL) was established, and the assets of companies operating in the electricity market were transferred to it. Flaminio Costa was both a consumer of electricity and a shareholder in one of the nationalized companies. The Court emphasized that "by incorporating rights and obligations arising from the Treaty into the Community legal order, which were previously regulated by domestic law, the member states permanently limited their sovereign rights and consequently could not enact regulations contrary to the essence of the Community".[49] This has tremendous significance, especially regarding mechanisms and regulations relating to respect for human rights. No member state can introduce provisions into its national law that are inconsistent with EU law, nor can it offer a lower level of protection and respect for human rights, including the rights of foreigners. Thanks to the establishment of the European Union, we can observe the realization of Immanuel Kant's dream of a world where a violation of law in one place is felt everywhere. The philosopher emphasized that creating a community of states respecting human rights is the best way to achieve the idea of eternal peace (*Foedus Pacificum*). Therefore, it is essential for international law to exist alongside domestic law to protect all individuals. The level of respect for human rights and the quality of the mechanisms created to protect them are evidence of the EU's strengths and weaknesses. Through the lens of compliance with the regulations of the internal laws of individual member countries with European law, we can perceive the level of development of the Union as a community of democratic and rule-of-law states.

The legal basis for admitting foreigners to the territory of a state is of immense importance because, depending on whether the refusal to accept a particular foreigner is due to a lack of courtesy or a violation of existing legal norms, the consequences of non-admission by the state will be quite different. By exercising sovereign power, state authorities can establish rules regarding border crossings.[50] As a general rule, a state is not obliged to

[47] P. Mikłaszewicz, *Zasada pierwszeństwa prawa wspólnotowego w krajowych porządkach prawnych według orzecznictwa ETS i Sądu Pierwszej Instancji. Omówienia wybranych orzeczeń (1963–2005)*, Biuro Trybunału Konstytucyjnego Zespół Orzecznictwa i Studiów, Warszawa 2005, p. 3.

[48] Case *Flaminio Costa v E.N.E.L.*, 6/64, 1964, ECR 585.

[49] Ibidem.

[50] E. Dynia, *Cudzoziemcy w prawie międzynarodowym. Status cudzoziemców w Pol*sce, PFSM, Warszawa 1988, p. 4.

admit foreigners (individuals who are not its citizens) to its territory if there is no international agreement regulating this matter.[51] States regulate the conditions for admitting foreigners to their territory either based on relevant domestic law provisions or on the basis of concluded international agreements, acting in accordance with the commitments made in this regard.[52] The legislator of a EU member state also does not have complete freedom in determining the conditions for the entry and stay of foreigners on the national territory, as they must take into account the provisions of European Union law concerning:

– entry and residence of third-country nationals,

– the privileged position of EU citizens enjoying the right to free movement and residence on the territory of the EU, and

– the special status of their family members who move with them, and norms of international law relating to foreigners.

Therefore, the legal situation of foreigners is shaped not only by domestic law but also, to a significant extent, by international law.[53] A key act in this regard was undoubtedly the Treaty of Amsterdam, which incorporated the Schengen acquis into EU law and granted the EU competence to shape immigration and asylum policies through binding legal instruments.[54] One of the EU's designated objectives became the development of an area of freedom, security, and justice, ensuring the free movement of persons combined with appropriate measures regarding the control of the external borders of the Community area, asylum, immigration, as well as the prevention and combating of crime.[55] The principle of the primacy of applying norms of international law over norms of national law has been confirmed in treaties and in the case law of European and Polish courts.[56] According to the case law of the CJEU, in the event of a conflict between the norms of EU law and the norms of the national law of a given state, the Court advocates the primacy of applying EU law.[57] J. Barcz and A. Wyrozumska point out that although the issue of primacy is not fully regulated in the content of the Constitution of the Republic of Poland, it follows from EU law that there is a primacy of applying both primary law and secondary law derived from EU institutions in relation to all national legal norms, including also in relation to the fundamental law.[58] It must be firmly stated that norms of international law concerning the protection of human rights, refugee protection, and related to common asylum policy, which result from ratified international agreements or are the result of the work of the

[51] S. Sawicki, *Prawo państwa do regulowania międzynarodowego ruchu osobowego*, Wydawnictwo Prawnicze, Warszawa 1986, p. 59.

[52] E. Dynia, *Cudzoziemcy w prawie międzynarodowym*…, op. cit., p. 7.

[53] J. Chlebny, *Komentarz do art. 1. ustawy z dnia 12 grudnia 2013 r. o cudzoziemcach*, [in:] Idem, *Ustawa o cudzoziemcach. Komentarz*, C.H. Beck, Warszawa 2015, p. 7.

[54] The Amsterdam Treaty, 30.04.2024, http://europa.eu/eu-law/decisionmaking/treaties/pdf/treaty_of_amsterdam/treaty_of_amsterdam_en.pdf [access: 20.08.2024].

[55] I. Wróbel, *Wspólnotowe prawo imigracyjne*, Wolters Kluwer, Warszawa 2008, p. 36.

[56] Case *Van Gend en Loos v Administratie der Belastingen*, 26/62, 1963 ECR 1.

[57] Wyrok TSUE z dnia 17 grudnia 1970 r. w sprawie 11/70 Internationale Handelsgesellschaft mbH przeciwko Einfuhr- und Vorratsstelle für Getreide und Futtermittel.

[58] J. Barcz, M. Górka, A. Wyrozumska, *Instytucje i prawo Unii Europejskiej*…, op. cit., p. 471.

bodies of international organizations of which Poland is a member, have a real impact on national standards in this area.

Conclusion

The so-called migration crisis has become the source of serious internal problems within the European Union. The influx of refugees and migrants has caused not only humanitarian problems but, above all, has exposed the ineffectiveness of asylum procedures, border controls, and protection mechanisms previously employed within the framework of migration and refugee policies. It turned out that the European Asylum System, established since 1999, was not prepared for a crisis situation, and its ineffectiveness only confirmed existing discrepancies of interest among member states.[59] As emphasized by Cecilia Wikström, a Member of the European Parliament during the seventh and eighth terms, new regulations should ensure that:

1. All states share responsibility for asylum seekers.
2. Member states with the external borders of the EU (which serve as the first point of arrival in Europe for most asylum seekers) take responsibility for registering arriving individuals as well as for protecting and maintaining the EU's external borders.
3. Persons in need of international protection obtain it much faster than currently, and those found not eligible for asylum are quickly and humanely returned to their countries of origin.[60]

The creation of new regulations applicable to refugee and migration phenomena should be based on previous experiences related to mechanisms for granting (or denying) international protection. The process of verifying whether a person meets the criteria for refugee status or other forms of international protection should be expedited. This would allow those who do not meet the conventional criteria to be returned more quickly to their countries of origin. This would reduce the burden on states located in parts of Europe that constitute the EU's external borders. A separate issue is the fight against organized crime and groups that enable illegal border crossings for foreigners. Only efficient communication between the services of individual EU member states can ensure faster detection of this activity and the apprehension of perpetrators. Members of criminal groups not only facilitate border crossings but also engage in human trafficking and sexual exploitation. The existence of such groups poses a huge challenge not only for individual member states but, above all, for the entire EU.

[59] H. Wyligała, *Strategiczny rozwój narzędzi polityki migracyjnej UE w obliczu kryzysu migracyjnego*, "Rocznik Bezpieczeństwa Międzynarodowego" 2016, Vol. 10(2), p. 185.

[60] *Kryzys uchodźczy: Posłowie pracują nad reformą systemu azylowego w UE (wideo)*, European Parliament, 30.04.204, http://www.europarl.europa.eu/news/pl/headlines/society/20171012STO85934/kryzys-uchodzczy-poslowie-pracuja-nad-reforma-systemu-azylowego-w-ue-wideo [access: 20.08.2024].

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Prawne aspekty przeciwdziałania handlowi ludźmi w Polsce

Measures against human trafficking in Poland

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Streszczenie

Artykuł porusza zagadnienia dotyczące przestępstwa handlu ludźmi w Polsce. Autorka opisuje regulacje prawa krajowego i międzynarodowego oraz przybliża najważniejsze wyzwania związane z przeciwdziałaniem handlowi ludźmi. Celem tego opracowania jest próba odpowiedzi na pytanie o skuteczność istniejących regulacji i wskazanie obszarów, które wymagają zmian zarówno na poziomie legislacyjnym, jak i dotyczącym praktyki stosowania obowiązujących przepisów.

Słowa kluczowe: handel ludźmi, praca przymusowa, migracje, przestępczość zorganizowana

Abstract

This article deals with different aspects relating to the crime of human trafficking in Poland. The author describes relevant national and international instruments and presents the most important challenges relating to combating human trafficking. The article attempts to answer the question about the effectiveness of existing regulations, pointing to the areas that require changes – in regards to legislation and in the practice of applying existing norms.

Keywords: human trafficking, forced labour, migration, organized crime

Wprowadzenie – handel ludźmi w prawie międzynarodowym

Zjawisko handlu ludźmi nie jest bynajmniej nowym fenomenem. W wieku XIX termin *handel ludźmi* używany był niekiedy w literaturze przedmiotu jako synonim handlu niewolnikami, z czasem jednak zyskał nowe znaczenie[1]. Do języka prawnego pojęcie handlu ludźmi weszło na początku XX wieku, kiedy pojawiły się pierwsze umowy międzynarodowe dotyczące tego procederu. Analiza pięciu umów przyjętych w latach 1904–1949 wskazuje wyraźnie, że termin *handel ludźmi* rozumiany był wówczas przede wszystkim w kontekście werbowania kobiet do celów „nierządu"[2]. Instrumenty te wyrosły bowiem z tak zwanej koncepcji białego niewolnictwa, stworzonej przez aktywistów dążących do wprowadzenia prawnego zakazu prostytucji[3]. Na początku lat dziewięćdziesiątych ubiegłego wieku w obliczu nasilenia dynamiki międzynarodowych migracji oraz działalności zorganizowanych grup przestępczych państwa zaczęły dostrzegać konieczność określenia na nowo znamion przestępstwa handlu ludźmi. Ukoronowaniem tego procesu było przyjęcie w 2000 roku Protokołu o zapobieganiu, zwalczaniu oraz karaniu za handel ludźmi, w szczególności kobietami i dziećmi, uzupełniającego Konwencję Narodów Zjednoczonych przeciwko międzynarodowej przestępczości zorganizowanej z 15 listopada 2000 r. (dalej: Protokół z Palermo)[4]. Przyjęcie definicji handlu ludźmi zapoczątkowało nowy rozdział w przeciwdziałaniu rozmaitym formom wykorzystywania drugiego człowieka, określanym niekiedy mianem współczesnych form niewolnictwa. Przez dwadzieścia lat obowiązywania Protokół z Palermo ratyfikowały 182 państwa, a zawarta w nim definicja handlu ludźmi została zaimplementowana do ich wewnętrznych systemów prawa karnego. Wkrótce potem powstały regionalne umowy dotyczące handlu ludźmi, a definicja handlu ludźmi pojawiła się między innymi w orzecznictwie Europejskiego Trybunału Praw Człowieka[5].

Poprzez termin *przeciwdziałanie*, użyty w tytule niniejszego opracowania, należy rozumieć zarówno ściganie oraz karanie sprawców handlu ludźmi, jak i zapobieganie temu przestępstwu oraz podejmowanie działań mających na celu ochronę pokrzywdzonych. Tak szerokie ujęcie, obejmujące wszelkie aspekty zwalczania handlu ludźmi, zgodne jest z założeniami i celami najważniejszych umów międzynarodowych dotyczących tego zjawiska[6]. Handel ludźmi trzeba bowiem traktować nie tylko jako przestępstwo, ale także

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[1] C. Gareis, *Das Heutige Völkerrecht und der Menschenhandel – Eine völkerrechtliche Abhandlung, zugleich Ausgabe des deutschen Textes der Verträge vom 20. Dezember 1841 und 29. März 1879*, Giessen 1879, s. 8.

[2] T. Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach*, Martinus Nijhoff Publishers 2006, s. 13.

[3] Konwencja w sprawie zwalczania handlu ludźmi i eksploatacji prostytucji z 2 grudnia 1949 r., Dz.U. 1952, nr 41, poz. 278 uznawała prostytucję za „sprzeczną z godnością i wartością człowieka oraz zagrażającą dobru jednostki, rodziny i społeczeństwa". Zob. A. Głogowska-Balcerzak, *Standardy zwalczania handlu ludźmi w prawie międzynarodowym*, Wydawnictwo Uniwersytetu Łódzkiego, Łódź 2019, s. 53 i nast.

[4] Dz.U. 2005, nr 18, poz. 160.

[5] A. Głogowska-Balcerzak, *Wyrok Europejskiego Trybunału Praw Człowieka w sprawie Rantsev v. Cypr i Rosja – handel ludźmi a artykuł 4 EKPC*, [w:] A. Wyrozumska (red.), *Swoboda orzekania sądów międzynarodowych*, Wydział Prawa i Administracji Uniwersytetu Łódzkiego, Łódź 2014, s. 51–64.

[6] M.A. Nowicki, *Europejski Trybunał Praw Człowieka. Wybór orzeczeń 2010*, Wolters Kluwer, Warszawa 2011, s. 18.

jako naruszenie praw człowieka, dlatego silny akcent kładzie się na konieczność rozwijania standardów dotyczących prewencji, a także zapewniania wsparcia pokrzywdzonym[7].

Handel ludźmi w Polsce

Polska jest stroną najważniejszych umów dotyczących przeciwdziałania handlowi ludźmi, w tym: Protokołu z Palermo i Konwencji Rady Europy w sprawie działań przeciwko handlowi ludźmi, sporządzonej w Warszawie dnia 16 maja 2005 r. (dalej: Konwencja warszawska)[8]. Państwo Polskie wdrożyło też większość z postanowień Dyrektywy 2011/36/UE, której okres transpozycji upłynął w kwietniu 2013 roku[9]. Tekst tego aktu został zmieniony 13 czerwca 2024 i obecnie państwa należące do UE stoją przed koniecznością ponownego dostosowania swoich przepisów do wymogów tego instrumentu[10]. Przestępstwo handlu ludźmi ścigane jest na mocy art. 189a kodeksu karnego, a jego definicja znajduje się w artykule 115 par. 22[11]. Składa się ona z trzech elementów: wskazanych czynów, użytych środków oraz celu polegającego na wykorzystaniu i jest zgodna z założeniami powyższych instrumentów prawa międzynarodowego[12]. W polskim ustawodawstwie brakuje natomiast definicji pracy przymusowej, stanowiącej jeden ze sposobów wykorzystania w ramach trzeciego elementu definicji handlu ludźmi. Zapowiedzi wprowadzenia tego pojęcia do kodeksu karnego pojawiają się od wielu lat, jednak jak dotąd zmiana ta nie nastąpiła[13]. Wobec powyższego w dalszym ciągu bezpośrednie zastosowanie powinna mieć definicja pracy przymusowej wywodząca się z konwencji Międzynarodowej Organizacji Pracy (nr 29) z 1930 roku[14].

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[7] Z. Lasocik, *Handel ludźmi jako przestępstwo i naruszenie praw człowieka – wyzwania dla kryminologii*, „Archiwum Kryminologii" 2007, t. XXVIII, s. 233–254; J. Reznikowski, *Trafficking in human beings as a crime and as a human rights violation*, [w:] R. Piotrowicz, C. Rijken, B. Uhl (red.), *Routledge Handbook of Human Trafficking*, Routledge, 2017, s. 13–20.

[8] Dz.U. 2009, nr 20, poz. 107.

[9] Dyrektywa Parlamentu Europejskiego i Rady 2011/36/UE z dnia 5 kwietnia 2011 r. w sprawie zapobiegania handlowi ludźmi i zwalczania tego procederu oraz ochrony ofiar, zastępująca decyzję ramową Rady 2002/629/WSiSW, Dz.U.UE.L.2011.101.1.

[10] Dyrektywa Parlamentu Europejskiego i Rady (UE) 2024/1712 z dnia 13 czerwca 2024 r. w sprawie zmiany Dyrektywy 2011/36/UE w sprawie zapobiegania handlowi ludźmi i zwalczania tego procederu oraz ochrony ofiar, Dz.U.UE.L.2024.1712.

[11] Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny, Dz.U. 1997, nr 88, poz. 553 ze zm.

[12] W rozumieniu Protokołu z Palermo handel ludźmi stanowią „czynności polegające na: werbowaniu, transporcie, przekazywaniu, przechowywaniu lub przyjmowaniu osób; z zastosowaniem: gróźb lub z użyciem siły, lub też z wykorzystaniem innej formy przymusu, uprowadzenia, oszustwa, wprowadzenia w błąd, nadużycia władzy lub wykorzystania słabości, wręczenia lub przyjęcia płatności, lub korzyści dla uzyskania zgody osoby mającej kontrolę nad inną osobą oraz w celu wykorzystania, które obejmuje, jako minimum, wykorzystywanie prostytucji innych osób, lub inne formy wykorzystania seksualnego, pracę lub usługi o charakterze przymusowym, niewolnictwo lub praktyki podobne do niewolnictwa, zniewolenie, albo usunięcie organów" (art. 3).

[13] Zob. *Pismo RPO do Ministra Spraw Wewnętrznych z dnia 30 lipca 2021 roku*, XI.071.7.2021.AS, https://bip.brpo.gov.pl/sites/default/files/Do_MSWiA_handel_ludzmi_30.07.2021.pdf [dostęp: 1.09.2024], s. 2.

[14] Konwencja nr 29 dotycząca pracy przymusowej lub obowiązkowej, przyjęta w Genewie dnia 28 czerwca 1930 r., Dz.U. 1959, nr 20, poz. 122, art. 2.

Statystyki

Choć handel ludźmi najczęściej kojarzy się z wykorzystaniem seksualnym, to dominującym w Polsce obszarem eksploatacji jest właśnie praca przymusowa[15]. W 2023 roku do świadczenia pracy przymusowej wykorzystanych zostało 213 z 295 osób objętych wsparciem Krajowego Centrum Interwencyjno-Konsultacyjnego dla ofiar handlu ludźmi (dalej: KCIK), w 2022 roku osób takich było 167 spośród 254 wszystkich objętych wsparciem[16]. Dane te dotyczą ujawnionych przypadków, stanowiących jedynie pewien procent rzeczywistej liczby pokrzywdzonych[17]. Jednym z wyzwań stojących przed badaczami problematyki dotyczącej handlu ludźmi na świecie jest rozbieżność danych prezentowanych przez różne ośrodki, co związane jest też z brakiem jednolitego aparatu pojęciowego[18]. Na gruncie europejskim najbardziej wiarygodne statystyki publikuje Eurostat, którego raporty dość szczegółowo opisują sposób pozyskiwania danych oraz związane z tym problemy. Zgodnie z informacjami przekazanymi przez państwa członkowskie UE w latach 2010–2012 zostało zarejestrowanych 30 146 pokrzywdzonych[19]. W latach 2019–2020 było to 14 311 osób, a w 2022 roku – 10 093 osoby. Z danych Eurostatu wynika też, że w latach 2008–2018 wykorzystanie seksualne było dominującą formą eksploatacji, i choć wciąż tak jest, to począwszy od roku 2019, zauważalny jest wzrost procentowego udziału przypadków wykorzystania pokrzywdzonych do celu świadczenia pracy przymusowej.

W badaniach dotyczących skali zjawiska handlu ludźmi należy wziąć pod uwagę różnice występujące w ustawodawstwach poszczególnych państw oraz rozbieżności w zakresie sposobów ścigania tego przestępstwa. Niekiedy czyny wypełniające znamiona przestępstwa handlu ludźmi kwalifikowane są jako inne czyny zabronione (porwanie, uwięzienie, sutenerstwo). Jak wskazuje I. Dawid-Olczyk, kwalifikacja czynu zabronionego jako handel ludźmi bywa unikana przez prokuratorów i sędziów[20].

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[15] Jak wskazuje MOP – w skali globalnej niemal 21 milionów osób świadczy pracę przymusową lub obowiązkową (*Global Estimate of Forced Labour*, ILO, Genewa 2012), zob. też P. Kostyło, *Handel ludźmi: aspekty społeczne, normatywne i edukacyjne*, „Roczniki Pedagogiczne" 2024, nr 16(1), s. 63.

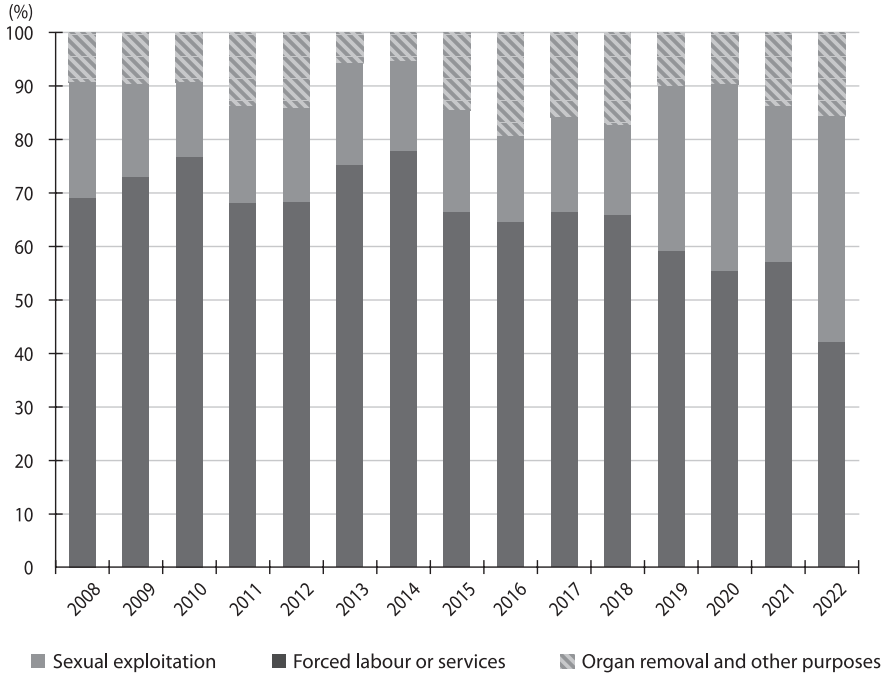
[16] *Sprawozdania roczne*, La Strada, 2017–2022, https://strada.org.pl/index.php/sprawozdania-roczne/ [dostęp: 1.09.2024].

[17] *Statistics and trends in trafficking in human being in the European Union in 2019-2020 accompanying the Report on the progress made in the fight against trafficking in human beings (Fourth Report)*, European Commission, Brussels, 19.12.2022.

[18] Zob. inicjatywę *Global Slavery Index*, która publikuje dane na temat „współczesnych form niewolnictwa", które to pojęcie jest pojęciem zbiorczym, obejmującym rozmaite formy wykorzystania, takie jak praca przymusowa, handel ludźmi, przymusowe małżeństwa – https://www.walkfree.org/global-slavery-index/ [dostęp: 1.09.2024].

[19] *Trafficking in human beings*, *Statistical working papers*, Eurostat, Luxemburg 2015, s. 13. Raport obejmuje wiele zestawień dotyczących różnych aspektów handlu ludźmi, w tym płci pokrzywdzonych i form eksploatacji.

[20] I. Dawid-Olczyk, *Uwagi do prokuratorów na temat współpracy z ofiarami handlu ludźmi z punktu widzenia praktyka*, [w:] L. Mazowiecka (red.), *Ofiary handlu ludźmi*, Wolters Kluwer, Warszawa 2014, s. 116.



Rysunek 1. Formy wykorzystania ofiar handlu ludźmi zarejestrowane w latach 2008–2022 w UE
Źródło: Eurostat.

Od niedawna w Polsce zauważalny jest wzrost liczby ofiar handlu ludźmi pochodzących z krajów Ameryki Środkowej i Południowej. Według raportów Fundacji La Strada, prowadzącej KCIK na zlecenie Ministra SWiA, w roku 2022 pomocą zostało objętych 50 obywateli Gwatemali, 52 obywateli Kolumbii, 18 obywateli Meksyku i 32 obywateli Wenezueli. To ponad 60% wszystkich osób objętych pomocą (152 z łącznej liczby 254 osób). W 2023 roku dominowali obywatele Kolumbii – 115 osób, podobna do poprzedniego roku była liczba osób pochodzących z Meksyku i Wenezueli (odpowiednio 17 i 32)[21]. Przyczyny tego zjawiska nie są do końca jasne, jednak wskazuje się między innymi na fakt, że większość krajów tego regionu podpisała z Unią Europejską porozumienia o ruchu bezwizowym w celach turystycznych. Ta droga jest wykorzystywana do rekrutowania migrantów, którym obiecuje się, że formalności związane z podjęciem pracy zostaną załatwione już po przybyciu na miejsce.

Środki prawne

W corocznych raportach Departamentu Stanu USA oceniających zaangażowanie poszczególnych państw w przeciwdziałanie handlowi ludźmi wskazywano na problemy

[21] *Sprawozdania roczne*, dz. cyt.

z identyfikacją ofiar w Polsce. Autorzy raportu z 2022 roku rekomendowali między innymi wzmocnienie kompetencji Państwowej Inspekcji Pracy, której urzędnicy powinni zostać przeszkoleni tak, aby byli w stanie rozpoznać osoby pokrzywdzone przestępstwem handlu ludźmi. W raporcie zwrócono także uwagę na niską liczbę zakończonych postępowań karnych przeciwko sprawcom, brak oferty szkoleń dla sędziów i przedstawicieli organów ścigania uwzględniającej potrzeby osób pokrzywdzonych, czyli opartej na tak zwanym *victim-centered approach*. Powyższe okoliczności sprawiają, że od 2019 roku działania Polski oceniane są jako zadowalające, aczkolwiek nie spełniają one minimalnych standardów wyznaczanych przez amerykańską ustawę *Trafficking Victims Protection Act*[22].

Handel ludźmi dotyka niemal wszystkich państw na świecie, niezależnie od tego, czy stanowią one państwa pochodzenia pokrzywdzonych, państwa tranzytu, czy państwa docelowe. Wiele z nich – w tym Polska – występuje w każdej z tych ról. Wśród osób pokrzywdzonych handlem ludźmi są zarówno Polacy, jak i cudzoziemcy. Obywatelstwo nie ma znaczenia z punktu widzenia ścigania sprawców za przestępstwo z art. 189a kodeksu karnego, jednak sytuacja pokrzywdzonych będących obywatelami państw trzecich jest trudniejsza w wymiarze prawnym (konieczność legalizacji pobytu) i faktycznym (nieznajomość języka, zwyczajów, trudności w poszukiwaniu pomocy). Jednym ze środków mających zapewnić wsparcie cudzoziemskim ofiarom handlu ludźmi było wprowadzenie tak zwanego okresu do namysłu (ang. *reflection period*), kiedy to osoba, co do której „istnieje domniemanie, że jest ofiarą handlu ludźmi", może przebywać legalnie w danym państwie i podjąć w tym czasie decyzję, czy będzie współpracować z organami ścigania[23]. Zgodnie z art. 170 i nast. ustawy o cudzoziemcach osoba taka może przebywać w Polsce przez trzy miesiące (cztery miesiące, gdy jest to małoletni)[24]. Przepisy umożliwiają też cudzoziemcom, którzy podejmą współpracę z organami ścigania, ubieganie się o zezwolenie na pobyt czasowy, a w pewnych sytuacjach także na pobyt stały[25].

Analizy Biura Narodów Zjednoczonych ds. Narkotyków i Przestępczości (dalej: UNODC) wskazują, że konflikty zbrojne stwarzają dogodne warunki dla handlarzy ludźmi. Walki, jakie toczyły się od 2014 roku w obwodach donieckim i ługańskim, spowodowały, że w Europie odnotowano czterokrotny wzrost ofiar handlu ludźmi wśród obywateli Ukrainy[26]. Jednak wbrew przewidywaniom liczba ujawnionych w Polsce przypadków przestępstwa handlu ludźmi wśród obywateli Ukrainy nie zwiększyła się po dokonaniu w 2022 roku pełnoskalowej agresji przez Rosję. W 2019 roku były to 24 osoby, w 2020 – 19 osób, w 2021 – 15 osób, w 2022 – 14 osób, a w 2023 – 19 osób. Zauważalny jest wręcz spadek liczby osób objętych wsparciem KCIK wobec lat 2017 i 2018, kiedy to obywatele Ukrainy stanowili większość cudzoziemskich ofiar handlu ludźmi na terytorium Polski

[22] *2022 Trafficking in Persons*, https://www.state.gov/reports/2022-trafficking-in-persons-report/ [dostęp: 1.09.2024].

[23] Konwencja Rady Europy w sprawie działań przeciwko handlowi ludźmi, sporządzona w Warszawie dnia 16 maja 2005 r., Dz.U. 2009, nr 20, poz. 107, art. 13.

[24] Ustawa z dnia 12 grudnia 2013 r. o cudzoziemcach, Dz.U. 2013, poz. 1650.

[25] Tamże, art. 176 i 195, ust. 5.

[26] *Global report on trafficking in persons*, United Nations Office on Drugs and Crime, 2022, https://www.unodc.org/documents/data-and-analysis/glotip/2022/GLOTiP_2022_web.pdf [dostęp: 1.09.2024].

(48 osób). Przyczyn takiego stanu rzeczy można upatrywać między innymi w regulacjach przyjętych w 2022 roku. Tak zwana specustawa przyznała uchodźcom prawo pobytu w kraju na zasadach równych obywatelom UE[27]. Obywatele Ukrainy otrzymali dostęp do rynku pracy, systemu edukacji i opieki zdrowotnej. Uzyskali też prawo do otrzymania wyżywienia i zakwaterowania oraz pobierania różnych świadczeń, w tym środków z programu Rodzina 500+. Powyższe okoliczności sprawiły, że osoby te znajdowały się w relatywnie dobrej sytuacji materialnej, przez co były mniej podatne na wykorzystanie. Pomocniczą rolę odgrywało wsparcie ofererowane przez organizacje pozarządowe zajmujące się pomocą obywatelom Ukrainy, wiele z nich powstało lub rozwinęło się po wybuchu wojny i wciąż kontynuuje swoją działalność. Jednocześnie powyższe okoliczności mogły sprawić, że osoby, które doznały jakiejś formy wykorzystania, nie decydowały się na zgłoszenie tego faktu organom ścigania i poprzestawały na uzyskaniu wsparcia oferowanego przez podmioty państwowe lub organizacje pozarządowe. Niewątpliwie jednak sytuacja finansowa obywateli Ukrainy, którzy opuścili państwo w wyniku wojny, jest lepsza niż sytuacja migrantów ekonomicznych pochodzących spoza państw UE. Możliwe jest jednak jej pogorszenie w momencie planowanego ograniczenia przez Polskę dotychczasowej pomocy, która ma trwać do 30 czerwca 2024 roku. Odtąd grupa ta może na nowo stać się bardziej podatna na rozmaite formy wykorzystania.

Wyzwania

Wśród istotnych problemów związanych z szeroko pojętym zwalczaniem przestępstwa handlu ludźmi wskazuje się również na konieczność zapewnienia szczególnego wsparcia i ochrony dla małoletnich pokrzywdzonych oraz zapewnienia pokrzywdzonym mechanizmów ochrony przed ściganiem za przestępstwa, do popełnienia których zostali zmuszeni (na przykład zmuszanie do kradzieży czy przemytu narkotyków). Zgodnie z art. 8 Dyrektywy 2011/36/UE właściwe organy krajowe powinny być uprawnione do odstąpienia od ścigania lub nakładania sankcji na pokrzywdzonych handlem ludźmi za ich udział w działalności przestępczej, do której zostali zmuszeni w bezpośredniej konsekwencji tego, iż padli ofiarą tego przestępstwa. *Ratio legis* takiego rozwiązania znajdziemy w Preambule, która stanowi, iż ma ono na celu „ochronę praw człowieka przysługujących ofiarom, zapobieżenie dalszej wiktymizacji oraz zachęcenie ich do zeznawania w postępowaniu karnym przeciwko sprawcom". „Ofiary handlu ludźmi należy […] chronić przed ściganiem oraz karaniem za działania przestępcze, takie jak korzystanie z fałszywych dokumentów, oraz przestępstwa na podstawie przepisów dotyczących prostytucji oraz imigracji, do których popełnienia osoby te zostały zmuszone w bezpośredniej konsekwencji tego, iż stały się ofiarą handlu ludźmi". Ochrona taka nie powinna jednak wykluczać ścigania lub

[27] Ustawa z dnia 12 marca 2022 r. o pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa, Dz.U. 2023, poz. 103 ze zm. Ustawa ta podniosła też kary wobec sprawców, którzy dopuścili się przestępstwa handlu ludźmi „w czasie trwania konfliktu zbrojnego na terytorium Ukrainy" (art. 72).

karania za przestępstwa popełnione z własnej woli[28]. Przesłankami przemawiającymi za odstąpieniem od ścigania są zatem: przymus i bezpośredni związek pomiędzy byciem osobą pokrzywdzoną handlem ludźmi a popełnieniem przestępstwa. Warto jednak podkreślić, że omawiany przepis nie kreuje uprawnienia po stronie pokrzywdzonych, a jedynie upoważnia właściwe organy do odstąpienia od ścigania lub niestosowania wobec nich sankcji[29].

Pełne wdrożenie Dyrektywy 2011/36/UE w jej pierwotnym brzmieniu wymagałoby ponadto przyjęcia skutecznego reżimu odpowiedzialności karnej osób prawnych[30]. Instrument ten przewiduje odpowiedzialność podmiotów zbiorowych i proponuje sankcje w postaci kar pieniężnych, pozbawienia prawa do korzystania ze świadczeń publicznych, czasowego lub stałego zakazu prowadzenia działalności gospodarczej, umieszczenia pod nadzorem sądowym, likwidacji sądowej czy też czasowego lub stałego zamknięcia zakładów wykorzystywanych do popełnienia przestępstwa[31]. Środki takie można by stosować między innymi wobec agencji pracy, które obecnie nie ponoszą odpowiedzialności za sprowadzanych z zagranicy pracowników. Przed państwami należącymi do UE stoi ponadto wyzwanie związane z dostosowaniem wewnętrznych przepisów prawa do nowego brzmienia Dyrektywy zgodnie ze zmianami przyjętymi w czerwcu 2024 roku[32]. Wymaga ona między innymi rozszerzenia definicji handlu ludźmi, tak by uwzględniała także wykorzystanie „do macierzyństwa zastępczego, przymusowego małżeństwa lub nielegalnej adopcji”[33]. Na wprowadzenie w życie przepisów ustawowych, wykonawczych i administracyjnych niezbędnych do wdrożenia Dyrektywy państwa członkowskie mają czas do 15 lipca 2026 roku.

Wnioski końcowe

Choć od czasu przyjęcia Protokołu z Palermo wiele państw, w tym Polska, przyjęło szereg przepisów dotyczących przeciwdziałania handlowi ludźmi, to jednak trudno uznać wysiłki podejmowane w tym obszarze za zadowalające[34]. Obszarem wymagającym zwiększonej uwagi – zarówno w skali krajowej, jak i globalnej – jest przeciwdziałanie handlowi ludźmi. Nadmierne koncentrowanie się na ściganiu i karaniu sprawców tego przestępstwa powoduje odwrócenie uwagi od problemów leżących u jego podstaw. Nie umniejszając

[28] Zob. D. Derenčinović, *Comparative Perspectives On Non-Punishment Of Victims Of Trafficking In Human Beings*, „Annales de la Faculté de Droit d’Istanbul” 2014, vol. XLVI, no. 63, s. 3–20.

[29] Z. Lasocik (red.), *Niekaralność ofiar handlu ludźmi – wstępna diagnoza problemu*, Ośrodek Badań Handlu Ludźmi. Uniwersytet Warszawski, Warszawa 2013.

[30] Zob. art. 16 ust. 1 pkt 9 Ustawy z dnia 28 października 2002 r. o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary, Dz.U. 2002, nr 197, poz. 1661.

[31] Dyrektywa Parlamentu Europejskiego i Rady 2011/36/UE, dz. cyt., art. 6.

[32] Dyrektywa Parlamentu Europejskiego i Rady (UE) 2024/1712 z dnia 13 czerwca 2024 r. w sprawie zmiany Dyrektywy 2011/36/UE w sprawie zapobiegania handlowi ludźmi i zwalczania tego procederu oraz ochrony ofiar, dz. cyt.

[33] Tamże, art. 2, ust. 3.

[34] A.T. Gallagher, *Four dangerous assumptions about human trafficking*, 2017, https://www.weforum.org/agenda/2017/08/4-fallacies-slowing-the-fight-against-human-trafficking/ [dostęp: 1.09.2024].

roli, jaką w zwalczaniu handlu ludźmi odgrywają organy wymiaru sprawiedliwości, trzeba podkreślić, że należałoby zwrócić się ku lekceważonym zazwyczaj systemowym przyczynom tego procederu. Stwierdzenie to jest szczególnie aktualne w odniesieniu do handlu ludźmi w celu wykorzystania do świadczenia pracy przymusowej – wiele osób decyduje się bowiem na bycie wykorzystywanym, nie widząc żadnej realnej lub akceptowalnej alternatywy[35]. Wskazuje się, że eliminacja handlu ludźmi wymaga przemyślanych i długoterminowych rozwiązań, gdyż walka z tak zwanymi współczesnymi formami niewolnictwa jest w dużej mierze kwestią związaną ze sprawiedliwością społeczną[36]. Zwalczanie ubóstwa, bezrobocia, nierówności płci, połączone z promowaniem zasad uczciwego zatrudnienia, dostępu do pomocy społecznej i wymiaru sprawiedliwości uznać należy za konieczne elementy systemowego przeciwdziałania handlowi ludźmi[37].

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[35] Zob. K. Skrivankova, *Between decent work and forced labour: examining the continuum of exploitation*, The Joseph Rowntree Foundation, 2010.

[36] J. Quirk, *Trafficked into slavery*, „Journal of Human Rights" 2007, vol. 6, s. 186.

[37] Konieczność eliminacji handlu ludźmi została też uwzględniona w ramach agendy Zrównoważonego Rozwoju ONZ. Target 5.2:„Eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation"; target 8.7: „Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour"; target 16.2: „End abuse, exploitation, trafficking and all forms of violence against and torture of children". Rezolucja Zgromadzenia Ogólnego ONZ z 25 września 2015 r. *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, United Nations. Więcej na temat socjoekonomicznych czynników wpływających na podatność na handel ludźmi zob. B. Gebrewold, *Human Trafficking and Structural Violence*, [w:] B. Gebrewold, J. Kostenzer, A. Müller (red.), *Human Trafficking and Exploitation: Lessons from Europe*, Routledge, Londyn 2017.

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Creative agency in resistance processes to militarized sexual violence in the Colombian armed conflict

Agencja kreatywna w procesach oporu wobec zmilitaryzowanej przemocy seksualnej podczas kolumbijskiego konfliktu zbrojnego

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Abstract

This article considers the dynamics of resistance against the militarization of sexual violence in the context of the Colombian Armed Conflict, spotlighting the creative agency inherent in the struggles of those who resist, specifically women and LGBTQI+ people. The study explores power geographies and the militarization of daily life, emphasizing how sexual violence is weaponized in war. Drawing on the concepts of agency and power in Foucault, Narrative Identity in Ricoeur, and Critical Pedagogy in Paulo Freire, the research examines testimonies and examples of resistance processes from the interactive project *Lives in Re-Existence*, created by the Colombian Truth Commission. The essay investigates how power dynamics and the militarization of daily life structure sexual violence as a weapon of war, while highlighting the creative resistance efforts of women and LGBTQI+ people in their pursuit of justice. By shedding light on the body as a contested territory and the intersections of race, class, and gender, this study aims to contribute to a deeper understanding of the complexities surrounding sexual violence in the Colombian Armed Conflict.

Keywords: creative agency, resistance processes, sexual violence, Colombian Armed Conflict, power geographies

Streszczenie

Artykuł zgłębia temat oporu przeciwko militarnej przemocy seksualnej w kontekście kolumbijskiego konfliktu zbrojeniowego, a także naświetla rolę podmiotu kreatywnego włączonego w problemy ludzi oporu, w szczególności kobiet i osób ze społeczności LGBTQI+. Badanie eksploruje geografie władzy i militarne aspekty codziennego życia, akcentując sposób, w jaki przemoc seksualna jest używana jako broń wojenna. Opierając się na koncepcji władzy i podmiotu Foucalta, koncepcji tożsamości narracyjnej Ricoeura i pedagogice krytycznej Paula Freire'a artykuł analizuje zeznania i przykłady procesów oporu z interaktywnego projektu „Życie w Re-Egzystencji" stworzonego przez kolumbijską Komisję Prawdy. Analizie zostaje poddane, w jaki sposób dynamika władzy i militaryzacja życia codziennego strukturyzują przemoc seksualną jako broń wojenną. W artykule podkreślono również kreatywne wysiłki oporu kobiet i osób ze społeczności LGBTQI+ w dążeniu do sprawiedliwości. Rzucając światło na ciało jako teren sporny oraz na przecięcia ras, klas społecznych i płci, niniejsze badanie ma na celu przyczynienie się do głębszego zrozumienia złożoności zagadnienia przemocy seksualnej w kolumbijskim konflikcie zbrojnym.

Słowa kluczowe: podmiot kreatywny, procesy oporu, przemoc seksualna, konflikt zbrojny w Kolumbii, geografie władzy

Introduction

The Colombian Armed Conflict has taken place since 1954, and it is deep-rooted in a complex geopolitical and historical context. The main involved actors are the Colombian government, the Revolutionary Armed Forces of Colombia (FARC), among other guerrilla groups, the paramilitary (as the United-self Defense Forces of Colombia AUC) and other organized armed groups. With the demobilization of the paramilitary structures of the AUC and the FARC-EP guerrilla, the intensity of the conflict has decreased. Nevertheless, other groups remain active, such as the ELN guerrilla, Criminal Gangs (Bacrim), dissidents of the FARC-EP, and the EPL guerrilla, among others. As the main causes of the Armed Conflict, we could talk about the weakness of the State and its absence in the peripheric and rural areas of the country, land disputes, social and economic gaps, polarization, and persecution of the civil population due to their political orientation, lack of democratic spaces and political representation of diverse social groups, among others. In that sense, it is impossible to deny that the main reasons of the conflict have been structural causes related to inequality and social, economic, and political exclusion, that deeply affect an important part of the population. In this setting, sexual violence has been used as a weapon of war within the militarization of daily life in certain regions of the country, affecting mainly women and LGBTQI+ people (around 30,086 registered victims).[1]

This article aims to explore which dynamics of resistance exist against the militarization of sexual violence, spotlighting the creative agency inherent in the struggles of those

[1] Corporación Sisma Mujer, *En 2021 no es hora de callar: por la erradicación de la violencia sexual contra las mujeres en el marco del conflicto armado*, "Boletín" 2021, No. 26, p. 2, https://www.sismamujer.org/wp-content/uploads/2021/08/Boletin-25M-2021.pdf [access: 15.10.2024].

who resist, specifically women and LGBTQI+ people. It examines how power geographies, the concept of the body as a territory, and the militarization of daily life operate to structure sexual violence as a weapon of war, while groups of women and LGBTQI+ people resist creatively in a continuous struggle for justice. On the one hand, the concept of the creative agency is supported by the idea of agency and power in Foucault, Narrative Identity in Ricoeur, and Critical Pedagogy in Paulo Freire. On the other, the testimonies and examples of resistance processes will be extracted from different narratives of the conflict developed by the Truth Commission such as the Graphic Novel *My Body Says the Truth*, the interactive project titled: "Lives in Re-Existence"[2] and their report on sexual violence: "The War Inscribed in the Body."[3]

Power geographies and the militarization of daily life

Power geographies within the Colombian Armed Conflict are very important for understanding the militarization of daily life and its impact on the body as a contested territory. According to Grosz, power is a substrate of forces in play within a given socio-personal constellation in which the body is its primary object.[4] The body is, therefore, a territory; it is the stage for multiple relationships of power and knowledges. In Grosz's words, the body is the strategic target of systems of codification, supervision and constraint. What makes it the target, she explains, are its energies and capacities which exert an "uncontrollable and unpredictable threat to a regular systematic node of social organization."[5] As well as being the site of knowledge-power, the body is thus also a site of resistance, because it entails, according to Grosz, the possibility of creating counter-strategic re-inscriptions, being self-marked, self-constructed and self-represented in alternative ways.[6]

The war in the Colombian Armed Conflict is not against an "external enemy of the nation" but against an "internal enemy of the State." Contrary to World Power logics, in Latin American countries the consolidation of the nations has been weak, they lack a strong national identity, and the State has always been first. According to Rodríguez-Hernández, "for no expert in Latin America, the scarce national identity with which Latin American countries were consolidated is a secret. Historically, the lack of a properly formed national sense has been seen as one of the greatest obstacles for the entire population of each of these countries to march along a common path of collective well-being and prosperity, regardless of socioeconomic differences."[7] The Army was built as an institution that was responsible for defending the State and, since the beginning, there were the poorest

[2] Original title in Spanish, translated by the author: *Vidas en Re-Existencia*.

[3] Original title in Spanish, translated by the author: *La Guerra Inscrita en el Cuerpo*.

[4] Grosz E. *Inscriptions and body-maps: representations and the corporeal*, [in:] T. Threadgold, A. Cranny-Francis (eds.), *Feminine, Masculine, and Representation*, Allen and Unwin, Sydney–London 1990. p. 64.

[5] Ibidem

[6] Ibidem.

[7] Quote originally in spanish, translated by the author for this article. S.M. Rodríguez-Hernández, *Fuerzas Armadas y Derechos Humanos en Colombia: Algunas reflexiones sobre el tema*, "Revista Latinoamericana de Derechos Humanos" 2013, Vol. 24(1–2), p. 147.

citizens, the ones for whom serving in the military was mandatory. Under this structure, in Colombia, it was established that the enemies of the State were not outside the Nation's borders, but within it. This is how the military must fight against the insurgent groups and the paramilitary do what in theory the State cannot do in a "legit" way. The setting of the conflict is always in rural and peripheral areas, inhabited by peasants, indigenous peoples, and Afro-descendant communities, which not by coincidence are the poorest of the country. These are the main targeted bodies of this war. In these regions the civil population coexists with the armed groups. Many times, trying to survive in a violent context in which the lack of resources and opportunities is constant, people are forced to be part of one group or another, otherwise they are displaced or assassinated. Ironically, there is no armed group that publicly does not condemn sexual violence and yet, all of them use it strategically to assert power and discipline bodies that go against "the norm."

To understand rather than justify the logic behind sexual violence against women and LGBTQI+ bodies in the Colombian Armed Conflict, we can take as a starting point the fact that they are subordinated as spoils of war and territories to be controlled, taken, besieged, and destroyed. This occurs as a consequence of a cultural, political, and economic model of a patriarchal society, that exalts the normative masculine values usually associated with war. In the hegemonic narratives of wars, women and female bodies are invisible. As Jennifer Turpin states, women also "…do remain invisible in the military-policy making, reflecting taken-for-granted international assumptions about the maleness of the war."[8] In the Colombian case, Consuegra Peña explains that this kind of cultural framework inherently brings a series of micropolitics and technologies of power that place women and feminized bodies in a place of subordination to men, in which tasks of care and domestic work are assigned to them.[9] Apparently, sexual availability is assumed as part of these tasks, but it is more a matter of control and power than a matter of affording male sexual needs.

My Body Says The Truth: the body as a territory

We can see how this framework is the perfect setting for the militarization of sexual violence and how factors such as race, class, and gender are intertwined in a testimony based on a real story in the graphic novel titled *My Body Says the Truth*.[10] The main character and narrative voice of this story is a black 22-year-old woman who used to live with her family in a rural area. She narrates that in her town they started to get used to the guerrillas' presence and coexisted with them. One day, flyers and graffiti with threats from the AUC started to appear on the streets and the walls of the houses of the people. Each day their

[8] L.A. Lorentzen, J.E. Turpin (eds.), *The Women and War Reader*, NYU, New York 1998, p. 3.

[9] C.L. Consuegra Peña, *La violencia sexual como una estrategia de guerra en el marco del conflicto armado colombiano: una aproximación a los mecanismos político-jurídicos de atención y reparación de las mujeres víctimas*, Universidad Católica De Colombia – Università Degli Studi Di Salerno, Bogotá 2021, p. 47.

[10] Original title: *Mi cuerpo dice la verdad*. Produced at the First Meeting for Truth that recognized the dignity of women and LGBTIQ+ people who are victims of sexual violence. It is based on testimonies offered on June 26, 2019 to the Truth Commission in Cartagena de Indias, Colombia.

presence was more visible. There was no place where they did not make everyone notice them. They demanded the people not to support the guerrillas in any way. Eventually, they settled down permanently in the town and asked for women who could serve them via cooking and washing their clothes and offering a good amount of money as payment. Her family was big, and they needed the money, so she started to work for them.

After a while, the paramilitaries started to harass her and one day they raped her. When her 15-year-old brother learned the truth, he went to face them, and they killed him in the central town square as an act of terror to scare the population and show their power. She could not stop working for them because the life of her family was compromised, so they kept raping her systematically for 10 years. She and her family could not mourn the brother, she got depressed, her mom was in a constant state of fear and the town condemned her and blamed her for the rape and her brother's death. She thought nothing could be worse until she survived an impalement, and she could not even report that because the positions in the health centers and the mayor's office were set up by the paramilitaries. No place was safe. She had to leave her land with the rest of her family to save their lives and they never could come back. She was terrified and was constantly struggling with her mental health until she found an organization of women that survived similar experiences, and she could start to transform her pain. That is how she offered her testimony to the project *My Body Says the Truth*, because she believed that telling her experience was good not for changing the past, but for transforming the future, and because today she can yell that she is alive and that her body says the truth.[11]

In many cases, sexual violence does not come only from armed groups, but it is naturalized in the core of the families. This naturalization is somehow transferred to the public sphere in the Armed Conflict, where every male actor normalizes, due to their military training, but also their education, the ownership of the female bodies. There is a generalized assumption that men can subordinate not only the female bodies, but also their behaviors, feelings, and thoughts.[12] According to Consuegra Peña, in different regions, it is possible to observe how the presence of armed groups shapes the behavior and the existence of the people. For instance, young women, around 25 years old, must follow strict norms that determine the way they dress, the kind of relationships they are allowed to have, the places they can inhabit and the places they cannot, and even schedules for all their activities, among other control measures. If they do not follow these rules, the consequences can be torture, public scandal, sexual violence, or death. Therefore, this author affirms that "those women who, in contexts of war, assume roles different from those hegemonically assigned by patriarchal culture as political and community leaders, are transgressors of their bodies, or those who join or belong to opposing legal and illegal armed groups, as well as those feminized bodies that perform sex work, are precisely the

[11] Complete story in the short film with the same title: *"Mi cuerpo es la verdad", el capítulo del Informe Final de la Comisión de la Verdad que evidencia los crímenes sexuales durante el conflict*, Infobae, 4.07.2022, https://www.infobae.com/america/colombia/2022/07/04/mi-cuerpo-es-la-verdad-el-capitulo-del-informe-final-de-la-comision-de-la-verdad-que-evidencia-los-crimenes-sexuales-durante-el-conflicto/?outputType=amp-type [access: 20.12.2023].

[12] C.L. Consuegra Peña, *La violencia sexual como una estrategia*…, op. cit., p. 47.

reproducers of specific identities and social imaginaries, targeted by body terror technologies that execute and discipline through this economy of punishment."[13]

Speaking of behaviors, thoughts, bodies and feelings' control, Frye (1983) poses a parable about anger, domain and respect. The parable takes place in the space of a house, apparently inhabited by a traditional heteronormative marriage, and tells how one woman realizes that the only place for the viability of her anger would work effectively and take uptake in the kitchen but would not work in the bedroom.[14] This parable evinces how, depending on who we are, we are allowed, or not, to feel anger about certain things and in certain places. Gillian Rose (2002) quotes this parable to highlight how feminism, through its awareness of the politics of the everyday geography of kitchens, bedrooms, streets, workplaces, and neighborhoods, has led us to the realization of the intersection of space, power and knowledge.[15] Space, therefore, is a power structure. Rage, on the other hand, as shown in the parable, draws the borders of who we are and what do we want and what we do not. As shown, in the Colombian Armed Conflict there are territories in which certain bodies are not allowed to decide who they are, what they want and what they do not, because if they do, they are risking their lives or the lives of their loved ones. Hence, rage could be understood as an instrument of cartography, as it can delimit and shape bodies' behaviors and interactions in space.

In rape culture, rage is not a feeling socially allowed to survivors, and this is part of the reason why it is silenced. In the Armed Conflict, the silence is bigger. Battering and rape, according to Crenshaw (1991), once seen as something that happened indoors, inside the home, in the private sphere, and that was considered as an errant sexual aggression, are now largely recognized as part of a broad-scale system of domination that affects women as a class.[16] Politicizing the space of the home transformed the way in which we understand violence against women. The fact of recognizing as social and systemic what was conceived as isolated and individual has also taken a big role in characterizing the identity politics of people of color in general, as well as queer people, among others, which is crucial for analyzing sexual violence in the Colombian Armed Conflict. This has been possible in part thanks to movements of women organized against daily violences that shape their lives, as Crenshaw contends, drawing from the strength of shared experiences and the realization that the political demands of millions speak more powerfully than the pleas of a few isolated voices.[17] This is what many survivors of the conflict as the ones of the stories narrated in this article are doing right now.

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[13] Ibidem, p. 48.

[14] M. Frye, *The Politics of Reality: Essays in Feminist Theory*, NY: Crossing Press, Trumansburg 1983, pp. 93–94.

[15] Rose G., *Feminism and Geography: The Limits of Geographical Knowledge*, [in:] *The Spaces of Postmodernity*, Blackwell, Oxford 2002, p. 215.

[16] K. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, "Stanford Law Review" 1991, Vol. 43, No. 6, p. 1241, http://www.jstor.org/stable/1229039 [access: 20.12.2023].

[17] Ibidem.

Sexual violence as a weapon of war

One of the effects of sexual violence is that it breaks almost all the borders that are possible to draw. Sohaila Abdulali[18] illustrates it in her book *What We Talk About When We Talk About Rape.* She explains that a boundary is like a border, which is a place where you stop, and the other person starts. But when boundaries are invaded, she states, a person has entered a territory belonging to the other person. In that sense, she concludes, sexual abuse is a power exercise which violates almost all conceivable boundaries of a human being.[19] According to the national report published by the National Center of Historical Memory, titled *The Inscribed War in the Body*,[20] sexual violence in the context of the Armed Conflict has been always indistinctly strategical among all the armed groups, which implemented it as a practice of appropriation of the bodies and populations, that contributed to reaffirm their authority in the territories.[21] The report states that "sexual violence in the Armed Conflict as an expression of gender inequalities has constituted one of the fundamental mechanisms to maintain, on the one hand, a masculine position of domination and power on the part of the armed actors, and, on the other, a subrogated and subjugated female position on the side of the victims and the civilian population."[22] This statement reflects how the dynamics of the Armed Conflict have been developed within an unequal and hierarchical gender structure that is endorsed by sexual violence, and that marks an asymmetric relationship between the armed actors and the population. Therefore, it is concluded that, whenever sexual violence has been exerted, it has been fundamental to draw the power geographies that determine the control of the territories, the sovereignty of the populations, and the discipline of the bodies. Based on Rita Segato,[23] the report shows how sexual violence has worked here to expropriate the control of the people over their own body and space, in an exercise of territorialization through a practice of domination. For Segato, this is the key to the message of sexual violence: The possibility of holding absolute and sovereign control (both as an exercise of physical and moral power) over the body of people who are victims of sexual violence and their territories. In the report, it is stated that from the cases in which the contexts could be identified, 44 correspond to sexual violence exercised by all armed actors in scenarios of territorial dispute, and most of them occurred between 2000 and 2006, a period of profound transformations in the dynamics of the conflict. During this period, several armed groups generated territorial expansion strategies that formed geographical corridors that

[18] Mumbai-based writer, activist and counselor to rape survivors, who made of her survival a creative act, manifested in her thesis, her book, and her activism.

[19] S. Abdulali, *What We Talk about when We Talk about Rape*, New Press, New York 2018, p. 155.

[20] Original title: *La guerra inscrita en el cuerpo*.

[21] *La guerra inscrita en el cuerpo: informe nacional de violencia sexual en el conflicto armado*, Centro Nacional de Memoria Histórica, Bogotá 2017, p 35.

[22] Ibidem.

[23] R.L. Segato, *Territorio, soberanía y crímenes de segundo Estado: la escritura en el cuerpo de las mujeres asesinadas en Ciudad Juárez*, "Série Antropologia (Brasília, Distrito Federal, Brazil)" 2004, No. 362, p. 21.

were central to the military and economic dynamics of the conflict, some connected to the control of coca-growing and drug trafficking areas.[24]

Resignifying the body as a setting for resistance

Consuegra Peña concludes in her work that it is in the bodies where the pain is inscribed, processed, and daily experienced. Following a similar idea, in the report, they quote Butler's (2010) statement that the body is not only a material or biological reality, but the product of different norms and regulatory practices that shape it, mark it, classify it, and give it meaning. Butler understands the body as a material and symbolic space in which processes of meaning, construction, creation, and resistance occur.[25] If we have this understanding of the body, then we can comprehend what other authors (García, 2000; Nahoum-Grappe, 2002; Blair, 2010) quoted in the report argue about the capacity of agency and resistance of the body: The reason why it is declared a target of power, a military objective, which from different expressions resists being controlled and annihilated, is precisely because there are these bodies the ones that misplace and transgress the social, political and economic order, unbalancing the force of fear and the threat of sexual violence. García let us understand this better while affirming that the body that is the object of violence "is always a body that is called to disappear but that always leaves a trace of its presence behind the surfaces that try to erase it […]. If the body works as a surface where violence is inscribed, it also can return and be reborn again as living memory."[26]

From the body, individuals and communities can resist the militarization of sexual violence. There exist various forms of resistance ranging from grassroots activism to community-building initiatives, where creative expression, art, and cultural practices become powerful tools for resistance, challenging the oppressive forces that seek to marginalize, silence, and, therefore, oppress and suppress the bodies. Here is where creative agency appears: We can understand it as the ability of individuals or groups to actively shape and transform their realities through innovative and critical thinking, expression, and action. Based on Foucault (1980) and his theory on power dynamics, we could state that creative agency involves the strategic use of power and knowledge to challenge and transform existing systems, resisting dominant norms and structures. On the other hand, Paul Ricoeur's (1992) work on narrative identity suggests that individuals build their identities through storytelling. In that sense, for him, creative agency involves the capacity to build one's narrative, shaping and reshaping it in the retelling of personal stories, in ways that reflect the autonomy and the ability to transcend the circumstances. Finally, Paulo Freire's (1993) critical pedagogy emphasizes the role of education in fostering critical consciousness and transformative action through creative agency, which involves individuals critically engaging with their social realities, questioning oppressive structures, and actively participating in the process of social change. These perspectives help

[24] *La guerra inscrita en el cuerpo*…, op. cit., p. 39.
[25] Ibidem, p. 36.
[26] Ibidem, p. 50.

us understand creative agency as a game between individual actions, societal structures, and the potential for transformative change, letting us challenge, reimagine, and grow from individual and collective experiences in several contexts.

Lives in Re-Existence analysis

This is what several initiatives and women and LGBTIQ+ people have managed to accomplish throughout the country. In the National Centre of Historical Memory report, we can identify 8 resistance strategies that imply creative agency. They are: Actively deciding to forget as a mechanism of survival to keep going; facing the aggressors and defending the territory; implementing traditional knowledge and spirituality as a mechanism to face pain and build solidarity; resisting within the family; abortion as a way of facing the aggressions; rebuilding sexuality and erotism as a facing strategy; retelling the testimonies beyond the category of victims; different forms of solidarity that contribute to the survival and resistance within the Armed Conflict. *Lives in Re-Existence*[27] is an interactive project established by the Truth Commission, with testimonies in different formats (animation, documentary, oral stories), as diverse as the Colombian territory and its people, where all these strategies can be found.

Water Plants, Bodies and Gardens[28]: Luz Mary documentary portrait

I will analyze this short documentary as a representative example of this non-fiction project, where the concept of creative agency can be applied. I chose it because it depicts the body as a contested territory, illustrating the intersections of race, class, and gender. It is a portrait in which Luz Mary is the main character. She was born in Alto Baudó, Chocó, and she tells the story of how she survived forced displacement, child labour, and domestic and sexual violence. Through her storytelling, we can see how these three forms of violence are entangled and embedded within structural issues that go beyond the Armed Conflict and are perpetuated not only by the aggressors that provoked them, but also are intrinsic to the core of the family, the judicial system, and even the State. Therefore, institutions that are meant to protect us, instead, are part of the source of the violence and at the same time they feed it, naturalize it, marginalize it and perpetuate it.

Judith Herman, an important feminist expert on trauma, contends that it was not until the women's liberation movement of the 1970s was it recognized that the most common posttraumatic stress disorders were not those of men in war, but of women in civilian life, meaning that the real conditions of women's lives are always hidden in the sphere of the

[27] Original Title: *Vidas en Re-existencia*. Available in: https://www.comisiondelaverdad.co/mujeres-y-personas-lgbtiq# [access: 20.12.2023].

[28] Original Title: *Regar las plantas, cuerpos y los jardines*.

personal, in private life.[29] The cited testimonies in this article reveal how, in the Colombian Armed Conflict, we can see a clear intersection between the sphere of war and the private sphere, and how there is a correlation between both, which allows the violence through its normalization and marginalization.

Besides Luz Mary, the secondary characters of this short film are Akim, her grandson, and Doña Nelly, leader of a collective of women survivors of which she is part nowadays. So, her story starts when she was seven years old and one day a woman who saw her commented she was "cute". Her dad answered: "Take her" and she started to work cleaning her house until she was 15 years old. She comments that when she said that she wanted to study, she always got the answer: "Black people don't study." Every time she said she wanted to be a TV Model, she was told: "Black people cannot do that." Being allowed to dream who she wanted to be was a privilege she did not have and instead, she was kind of trapped in this crossroad of oppressions.

She says that the woman hit her when she did not clean properly because she did not know how to. Of course she didn't. She was a kid. It is not clear how she left, but she says that later she came back to her father for the second time, after escaping from her husband who also hit her repeatedly. Her dad rejected her and after that, the Águilas Negras[30] arrived in her town. She tells how she faced the boss, and she explains she was able to fight physically with him because she was somehow "trained" by the domestic violence she suffered before. After this confrontation, she was raped as a punishment, and she was not the only one. The same as in the testimony of *My Body Says the Truth*, here we can see how the armed forces used violence as a performative act to show and exert power. They also raped her stepmom, her sisters-in-law, and many other women around her to show everybody what would be the result if they tried to fight back again. Why did they do it? She asks. "Because the one that raped me said: This is sent by your government."[31]

After this, she arrived in the capital city of Bogotá, displaced and with serious injuries in her uterus, seeking medical and legal help. She tells how her womb was going out of her body, and it was getting infected. It seems as a very evident and irrefutable proof of what happened to her, and yet she was told by the female officer who was taking her declaration if she was sure she did not do anything to provoke it. She defines this as the starting point of her deepest suffering. From the way she tells it, it seems all the violence she experienced until this moment of her story was part of her daily life and she got used to it. Yet, the moment in which she decides to denounce the sexual violence exerted by the paramilitary, as part of dealing with the aftermath of rape, is the point of her plot that she identifies as the beginning of a sort of grief. Not even the moment of the confrontation and the rape were described by her as a source of suffering.

She survived the surgery; she says she feels she died for some minutes but neither the Devil nor San Pedro wanted her in hell or heaven. Because of the forced displacement, her son lost the will to live. She explains he said he did not want to be alive because he was

[29] J.L. Herman, *Trauma and Recovery*, New York 1992, Basic Books, p. 28.
[30] Narcoparamilitary organization.
[31] Original sentence: "Porque el que me violó dijo: esto te lo mandó tu gobierno".

alone, he did not have a mom or a dad, so he started to live on the streets and be involved with drug dealing. This situation was another layer of suffering, and it was at the same time a consequence of violence and another form of violence itself.

The narrative structure of this documentary short film is woven through the performative act of literally weaving protection amulets as an alternative for resisting daily the aftermath of war and sexual violence. While she tells this story, she is weaving a necklace and teaching her grandson how to do it. She tells him that through teaching him, she is giving him her knowledge so he can pass it on to other people. As in a sort of ritual, she explains that part of the process of weaving the necklace is to say out loud: "I do this to heal my body; I do this to heal my mind; I do this to heal my soul and for my own protection and the protection of my kids". Here, the act of weaving serves as a metaphor for breaking the silence while she tells her story, and, at the same time, is her way of resistance itself. The act of weaving and passing the knowledge and protection through these amulets can show how her story is not only hers but is interwoven with the stories of others who share it with her, and it is both a poetic and a political act.

The short ends with the women's collective of survivors where she found a community, a support network, and a kind of home. She says: "I'm not in my territory but I feel like if I was". This shows how through this community and her initiative of resisting and healing herself, her body becomes part of a collective body where all of them, displaced from their territories, create a new one for themselves and others that can come. The last scene is her hugging Akim, her grandson, in parallel with images of the scar from her surgery, and her collective singing an ancestral song about opening paths. In this narrative, the scarred wound is presented not as the end and consequence of violence, but as the beginning of a collective transformation through resistance. She shifts from being a hurt body that is meant to be the property of a father, a woman who exploited her, a husband, and an armed group, to own it and take care of it through ancestral knowledge and healing practices. At the same time, her body becomes part of a collective body that is constructed as a new territory. She owns her body in the owning of her story and her story is not only told by her words, but also by her body, legacy, and her amulets. In the end, she declares: "I say to these men that hurt me: I am alive to fight you back! Not with weapons but with my intelligence and my mind and what I've learned. I returned from death to live, because for me the fact of being alive one day more, is winning."[32]

Conclusion

As Greta E. Angel Hernández contends in her auto&ethnographic[33] approach to self-managed justice alternatives, there is no single path to the aftermath of rape or sexual abuse, as

[32] Original sentence: "Lo que yo le digo a los señores esos que me hicieron tanto daño: ¡Estoy viva para darles la pelea! Pero no con armas sino con mi inteligencia y mi mente y lo que he aprendido. Yo salí de la muerte a vivir. Porque yo el hecho de estar viva un día más, eso es una ganancia."

[33] The author writes it like this intentionally.

well as there is no single path to justice.[34] In the cited cases, these women create their own paths in different ways. Anzaldúa talks in *Borderlands* about how in the ethnopoetics and performance of the shaman the Indians did not separate the artistic from the functional, the art from everyday life, and the sacred from the secular. For them, the religious, social, and aesthetic were intertwined in art. For this reason, she claims that "the ability of story (prose and poetry) to transform the storyteller and the listener into something or someone else is shamanistic. The writer, as shape-changer, is a *nahual*, shaman."[35] Following this same line, she talks about silence as a tradition that needs to be overcome.

I want to relate this to Paul Ricoeur's (1992) work on narrative identity, which suggests that individuals build their identities through storytelling. In that sense, for him, creative agency involves the capacity to build one's narrative, shaping and reshaping it in the retelling of personal stories, in ways that reflect the autonomy and the ability to transcend the circumstances. On the other hand, Paulo Freire's (1993) critical pedagogy emphasizes the role of education in fostering critical consciousness and transformative action through creative agency, which involves individuals critically engaging with their social realities, questioning oppressive structures, and actively participating in the process of social change. Borrowing these three concepts, I would like to highlight how *Lives in Re-Existence* is a non-fiction interactive storytelling project, that reflects in its materiality how this works. Through the composition of diverse formats, narratives, and narrators, who bravely decided to break the silence to share their resistance processes to sexual violence intertwining art, storytelling, and social activism, *Lives in Re-Existence* build plural counternarratives that dignify the particularity of each testimony and context, going against the erasure of their realities in History and hegemonic and universalizing narratives published in news and more conventional media. Cvetkovich understands trauma as an event that alters one's perception and identity, and the disturbance that is provoked produces, at the same time, new knowledge about the self and the external world. According to her, in the reorientation of consciousness caused by traumatic events, an ambiguous referentiality as well as determinate meaning may coexist. This means that, when trauma is no longer universalized, and it is allowed to be variable in terms of causes and effects, as well as to have representative potential, it is possible to see the diversity of values accorded to a traumatic event and its remembrance.

In this research, I showed how power dynamics and the militarization of daily life structure sexual violence as a weapon of war while highlighting the creative resistance efforts of women and LGBTQI+ people in their pursuit of justice. By shedding light on the body as a contested territory and the intersections of race, class, and gender, this study aims to contribute to a deeper understanding of the complexities surrounding sexual violence in the Colombian Armed Conflict. In many cases, sexual violence not only comes from armed groups, but it is naturalized in the core of the families. This naturalization is somehow transferred to the public sphere in the Armed Conflict, where every male actor

[34] G.E. Angel Hernández, *Life after rape: auto&ethnographic approach to self-managed justice alternatives for people who have suffered sexual violence in México*, thesis, University of Granada, Granada 2023. p. 75.

[35] G. Anzaldúa, *Borderlands: The New Mestiza*, Aunt Lute Books, San Francisco 1987, p. 66.

normalizes, due to their military training, but also their education, the ownership of the female bodies. These stories represent thousands of women and LGBTIQ+ people, as well as non-hegemonic masculinities that share their struggles and truths and show different ways in which they gave new meaning and transformed the pain. This paper tries to provide an understanding of sexual violence in the Armed Conflict as a structural and systematic power exercise, underscoring the significance of acknowledging and celebrating the resilience of those who resist, as well as resignifying, and placing the body and its creative agency in the center. As a general conclusion, we could say that recognizing and amplifying the voices of those affected by militarized sexual violence would be important to contribute to the continuation of processes of resistance and awareness related to the topic. This is why further and detailed analysis of war testimonies as the ones collected in *Lives in Re-Existence,* as well as related artistic projects, can be encouraged by this research.

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Wojna w feministycznym obrazie stosunków międzynarodowych. Casus migracji kobiet, dzieci i osób starszych z Ukrainy do Polski w wyniku napaści Rosji na Ukrainę w 2022 roku[1]

Women's rights and war in the feminist image of international relations. The case of migration of women, children and elderly people from Ukraine to Poland as a result of the Russian assault on Ukraine in 2022

https://doi.org/10.25312/2391-5145.198/2024_04pre

Czasem brak jednej osoby sprawia, że świat zdaje się wyludniony.
Alphonse de Lamartine[2]

[1] Artykuł powstał w ramach projektu „Polityki władz samorządowych województw łódzkiego i śląskiego wobec imigracji", który finansowany jest przez Narodowe Centrum Nauki na lata 2021–2024 (nr UMO-2020/39/D/HS5/03186).Więcej informacji o projekcie: https://www.csm.uni.lodz.pl/projekty.

[2] A. de Lamartine – francuski polityk, pacyfista, twórca francuskiego romantyzmu. Cyt. za: *Quotes about Immigrants and Refugees*, b.r., https://www.globalrefuge.org/quotes-immigrants-refugees/ [dostęp: 1.10.2024].

Streszczenie

Artykuł poddaje analizie zmianę zachodzącą na przestrzeni lat w postrzeganiu zjawiska wojny w stosunkach międzynarodowych. W szczególności skupia się na teorii feministycznej w nauce o stosunkach międzynarodowych. Jako przykład została omówiona migracja kobiet, dzieci oraz osób starszych z Ukrainy do Polski po wybuchu wojny rosyjsko-ukraińskiej w 2022 roku. W artykule postawiono dwie tezy: teoria feministyczna reinterpretuje stosunki międzynarodowe i postrzeganie wojny oraz wojna to nie tylko konflikt dwóch państw, lecz także tragedia ludzka. Tezy te potwierdzono na podstawie teoretycznych rozważań autora na temat zjawiska wojny oraz analizy tekstów źródłowych dotyczących migrantów ukraińskich w Polsce.

Słowa kluczowe: wojna, feminizm, gender, stosunki międzynarodowe, Ukraina, Rosja, migracja, prawa człowieka

Abstract

This article analyzes the change in the perception of the phenomenon of war in international relations over the years. In particular, it focuses on feminist theory of international relations. As an example, the migration of women, children, and the elderly from Ukraine to Poland after the outbreak of the Russian-Ukrainian war in 2022 is discussed. The article puts forward two theses: feminist theory reinterprets international relations and the perception of war, and war is not only a conflict between two states, but also a human tragedy. These theses are confirmed based on the author's theoretical considerations regarding the phenomenon of war and the analysis of source texts on Ukrainian migrants in Poland.

Keywords: war, feminism, gender, international relations, Ukraine, Russia, migration

Wstęp

Wojna, która rozpoczęła się od napaści Rosji na Ukrainę 24 lutego 2022 roku, jest bez wątpienia jednym z najbardziej przełomowych momentów w historii współczesnego świata oraz współczesnych stosunków międzynarodowych. Zapoczątkowanie przez prezydenta Federacji Rosyjskiej Władimira Putina pełnoskalowego konfliktu w Ukrainie sprawiło, że do Europy po 70 latach pokoju powróciła regularna wojna[3]. Wydarzenie to zakwestionowało stosunki wypracowane do tej pory pomiędzy Zachodem a Wschodem oraz dało początek nowej zimnej wojnie[4]. Znamienne było też przemówienie wygłoszone rankiem 24 lutego przez Putina, w którym obwiniał Stany Zjednoczone o kampanie wojskowe w byłej Jugosławii i Iraku oraz o ekspansję NATO na wschód (chodzi o próby włączenia Ukrainy do NATO i wynikające z tego zagrożenia dla Rosji), stwierdził też,

[3] C. Burdeau, *Ukraine conflict exposes dangers of a new Cold War*, 2022, https://www.courthousenews.com/ukraine-conflict-exposes-dangers-of-a-new-cold-war/ [dostęp: 1.10.2024].

[4] Tamże.

że są one „imperium kłamstw”[5]. W odpowiedzi przewodnicząca Komisji Europejskiej Ursula von der Leyen powiedział, że „Cel Rosji to […] stabilność Europy i całego pokoju międzynarodowego”[6].

Wydarzenie to stało się przyczyną tragedii milionów ludzi z Ukrainy, ale wpłynęło także na postrzeganie bezpieczeństwa w Polsce na całym Starym Kontynencie. Przede wszystkim atak Rosji jest miażdżącym pogardzeniem praw człowieka. Siły rosyjskie dopuściły się wielu naruszeń międzynarodowego prawa humanitarnego, jak również zbrodni wojennych, takich jak masowe bombardowania obszarów cywilnych (domów, placówek opieki zdrowotnej, placówek edukacyjnych), tortury, zbiorowe egzekucje czy przemoc seksualna na okupowanych terytoriach ukraińskich[7]. Wiele osób musiało opuścić swoje domy w związku z konfliktem i szukać schronienia poza ojczyzną, między innymi w Polsce.

Podstawowym celem artykułu jest analiza, jak wojna w Ukrainie wpłynęła na życie zwykłych ludzi, zwłaszcza kobiet, dzieci i osób starszych. Tekst ukazuje, że zjawisko wojny jest nie tylko konfliktem pomiędzy państwami, ale także tragedią ludzką. Stawiane są przy tym dwie hipotezy: 1) stosunki międzynarodowe w ujęciu teorii feministycznej są reinterpretowane na nowo i jest im dodana „ludzka twarz”; 2) migracje kobiet, dzieci i osób starszych z Ukrainy do Polski w wyniku konfliktu rosyjsko-ukraińskiego po 2022 roku są przykładem tego, że wojna to nie tylko konflikt dwóch państw i walczących po ich stronach sił zbrojnych, lecz także tragedia zwykłych ludzi. Aby zweryfikować te hipotezy, przeanalizowano statystyki dotyczące uchodźców, którzy od momentu rozpoczęcia wojny opuścili Ukrainę i wyjechały do Polski. Wyniki tych analiz są zestawione z teoretycznymi rozważaniami autora na temat tego, jak stosunki międzynarodowe były postrzegane na przestrzeni dekad oraz jak są postrzegane obecnie przez paradygmat feministyczny.

W pierwszej części artykułu autor przybliża cechę stosunków międzynarodowych, jaką jest interdyscyplinarność. Analizuje, jak ewoluowało postrzeganie tych stosunków na przestrzeni lat w zależności od zastosowanej teorii (od realizmu do feminizmu). W drugiej części autor wyjaśnia, w jaki sposób wojna może być reinterpretowana przy pomocy feministycznej teorii stosunków międzynarodowych oraz jak to wpływa na prawa człowieka, w tym prawa kobiet. W trzeciej części został podjęty casus migracji kobiet, dzieci i osób starszych z Ukrainy do Polski w wyniku konfliktu rosyjsko-ukraińskiego po 2022 roku. Analiza ta posłuży zobrazowaniu, jak wojna wpływa na życie ludzi. Wiedzy na ten temat dostarczają także między innymi: raport *Uchodźcy wojenni z Ukrainy – życie w Polsce i plany na przyszłość* autorstwa Piotra Długosza, Liudmyly Kryvachuk oraz Dominiki Izdebskiej-Długosz z 2022 roku, raport Amnesty International o życiu osób starszych w Ukrainie z 2024 roku, doniesienia medialne o sytuacji kobiet, dzieci i osób starszych w Polsce. Czwartą część stanowi podsumowanie i sprawdzenie prawdziwości postawionych hipotez.

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[5] C. Burdeau, *Russia attacks Ukraine, bringing war back to Europe*, 2022, https://www.courthousenews.com/russia-attacks-ukraine-bringing-war-back-to-europe/ [dostęp: 1.10.2024].

[6] Tamże.

[7] *Russia-Ukraine War*, Human Rights Watch, b.r., https://www.hrw.org/tag/russia-ukraine-war [dostęp: 1.10.2024].

Interdyscyplinarność stosunków międzynarodowych

Stosunki międzynarodowe w najprostszej definicji są po prostu kontaktami między państwami. O takim stanie rzeczy możemy mówić dopiero od pokoju westfalskiego w 1648 roku, który był końcem wojny trzydziestoletniej. Jako „punkt zwrotny" w historii powstało wtedy także pojęcie scentralizowanego państwa. W stosunkach międzynarodowych wyodrębnia się trzy etapy kształtowania: 1) etap przedwestfalski – okres do 1648 roku, kiedy zwracano uwagę na stosunki między autonomicznymi wspólnotami społecznymi, na przykład państwami-miastami znajdującymi się w starożytnej Grecji; 2) etap westfalski – kiedy powstawały scentralizowane państwa narodowe; 3) etap późnowestfalski – kiedy stosunki międzynarodowe są warunkowane zmianami środowiska, jakie niesie ze sobą na przykład proces globalizacji. Istota stosunków międzynarodowych przesunęła się zatem w stronę uznania też niepaństwowych aktorów. Są to więc stosunki między państwowymi i niepaństwowymi podmiotami w środowisku zewnętrznym[8].

W środowisku naukowym stosunki międzynarodowe zostały uznane za osobną dyscyplinę naukową po pierwszej wojnie światowej. Od tego czasu mamy do czynienia także z czterema wielkimi debatami na ich temat, w których ścierały się odrębne nurty teoretyczno-metodologiczne. Pierwsza wielka debata odbyła się pomiędzy liberalizmem utopijnym a realizmem (tutaj triumf odniósł realizm i stał się wiodącym nurtem podczas zimnej wojny). Druga debata dotyczyła metody badań, czyli tego, jak analizować stosunki międzynarodowe, rozważano podejścia tradycyjne w opozycji do behawioryzmu (behawioryzm w odróżnieniu od podejścia tradycyjnego nie skupia się na moralności czy etyce, tylko na metodach ilościowych w badaniu stosunków międzynarodowych, interpretowaniu suchych faktów). Przedmiotem trzeciej debaty był neorealizm i neoliberalizm wobec neomarksizmu (neomarksizm zwracał uwagę na grupy uprzywilejowane i nieuprzywilejowane oraz nierówności społeczne). Czwarta dyskusja odbyła się zaś między tradycyjnymi podejściami do stosunków międzynarodowych a postpozytywistycznymi podejściami alternatywnymi (takimi jak konstruktywizm czy feminizm)[9].

Niektórzy badacze stoją na stanowisku, że stosunki międzynarodowe nie są osobną dyscypliną naukową, lecz raczej subdyscypliną nauk o polityce. Wydzielenie stosunków międzynarodowych z nauk o polityce może nie być jednak w żaden sposób pomocne dla badaczy tych zjawisk[10]. Aby zobrazować zmianę w myśleniu o relacjach poszczególnych podmiotów w stosunkach międzynarodowych, należy przeanalizować trzy najważniejsze nurty: realizm, liberalizm oraz konstruktywizm. Różnice te prezentuje tabela 1.

[8] E. Cziomer (red.), *Współczesne stosunki międzynarodowe. Wprowadzenie do stosunków międzynarodowych*, Krakowskie Towarzystwo Edukacyjne – Oficyna Wydawnicza AFM, Kraków 2014, s. 11–15.

[9] R. Jackson, G. Sorensen, *Wprowadzenie do stosunków międzynarodowych. Teorie i kierunki badawcze*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2001, s. 56–57.

[10] J. Menkes, *Jedność nauk versus wielość nauk*, [w:] A. Gałganek, E. Haliżak, M. Pietraś (red.), *Wielo- i interdyscyplinarność nauki o stosunkach międzynarodowych*, Wydawnictwo Rambler, Warszawa 2013, s. 211–212.

Tabela 1. Zestawienie głównych teorii stosunków międzynarodowych

Paradygmat	Stosunki międzynarodowe	Wojna i siła militarna	Czas
Realizm	Przestrzeń rywalizacji i walki państw w anarchicznym środowisku. Państwo jako najważniejszy uczestnik systemu międzynarodowego. Wartości są nieważne, często marginalne. Jest jeden nadrzędny cel dla całego państwa.	Państwo polega głównie na sobie oraz na swoim potencjale militarnym. Ważna jest maksymalizacja swojej zdolności militarnej.	Najstarsze podejście teoretyczne w stosunkach międzynarodowych. Realizm rozwijał się także po drugiej wojnie światowej.
Liberalizm	Utopizm postrzegania stosunków międzynarodowych. Ważne są preferencje państwowe reprezentowane przez określone grupy. Ważne są wartości, jakie dane państwo wyznaje.	Wojna jest nie do pogodzenia z liberalnym podejściem w stosunkach międzynarodowych – jest pogwałceniem prawa międzynarodowego i harmonijnej koegzystencji państw.	Rozwój po pierwszej wojnie światowej – w szczególności po podpisaniu traktatu wersalskiego w 1919 roku.
Konstruktywizm	Stosunki międzynarodowe są kształtowane przez wzorce i znaczenia nadawane przez poszczególnych ludzi lub grupy ludzi. Nie ma jednej obiektywnej prawdy, a wszystko jest relatywne. Rzeczywistość jest konstruktem wynikającym ze świadomości danego społeczeństwa.	Wojna i siła to elementy stosunków międzynarodowych powiązane ściśle z wiedzą, ideami czy poglądami danej społeczności.	Rok 1992 jako data powstania konstruktywizmu (próba zrozumienia rozpadu ZSRR).

Źródło: opracowanie własne na podstawie R. Zięba, S. Bieleń, J. Zając (red.), *Teorie i podejścia badawcze w nauce o stosunkach międzynarodowych*, Wydział Dziennikarstwa i Nauk Politycznych. Uniwersytet Warszawski, Warszawa 2015.

Analizując zestawienie przedstawione w tabeli 1, można zaobserwować pewne symptomatyczne tendencje:

1. Postrzeganie stosunków międzynarodowych ewoluowało od formy bardzo zamkniętej do otwartej; chodzi o to, kto wpływał na ich kształt. Realizm wskazywał, że państwa narodowe są jedynymi aktorami na arenie międzynarodowej, inaczej niż w konstruktywizmie pomijano w realizmie znaczenie jednostek i społeczeństwa.
2. Konstruktywizm zaczął kwestionować wcześniejsze zasady realistyczne mówiące o tym, że państwo ma jeden, niezmienny cel. W konstruktywizmie cel, jaki ma osiągnąć państwo, zależy od danej grupy, czyli ludzi. Konstruktywizm zaczął większą wagę przykładać do czynnika ludzkiego w stosunkach międzynarodowych.

3. Realizm jako sposób przetrwania państwa na arenie międzynarodowej odwoływał się do jedynego środka, czyli wojny. Ważna była zatem pełna maksymalizacja swojej zdolności militarnej. Zjawisko wojny natomiast było nie do pogodzenia z liberalnym postrzeganiem stosunków międzynarodowych. Z kolei konstruktywizm opowiada się za tym, że wojna to element służący danej grupie społecznej i jej interesom.

W latach dziewięćdziesiątych XX wieku w debacie nad stosunkami międzynarodowymi doszedł do głosu nurt dekonstruktywistyczny. Nurt ten jest tworzony przez cząstkowe podejścia, między innymi konstruktywizm czy feminizm (*gender study*). Podejścia te relatywizowały wszystkie dotychczasowe paradygmaty[11].

Feminizm, migracje, wojna, prawa człowieka

Feminizm często jest kojarzony wyłącznie jako termin odnoszący się do szerokiego ruchu kobiet, w ramach którego nakładają się na siebie płaszczyzny o charakterze politycznym, społecznym, kulturowym i intelektualnym. Łączy się z tym przekonanie, że kobiety były i są nadal przedmiotem dyskryminacji ze strony mężczyzn. Idealnym zobrazowaniem tej definicji są słowa wypowiedziane przez Catharine A. MacKinnon – amerykańską radykalną feministkę i prawniczkę: „Feminizm wyróżnia pogląd, że różnica płci jest problemem; to, co istnieje teraz, nie jest równością między płciami”[12]. Feminizm nie odnosi się tylko do relacji jednostek (kobieta–mężczyzna), lecz także do struktur makro – państwa, narody. Feminizm również tłumaczy zasady funkcjonowania stosunków międzynarodowych.

Feministyczna teoria stosunków międzynarodowych rozwijała się po zakończeniu zimnej wojny. Zaczęto wówczas kwestionować dotychczasowe badania nad polityką i relacjami państw oraz stawiać w centrum zainteresowań pojęcie *gender*, czyli płci kulturowej. Podobnie jak nurt konstruktywistyczny w feministycznym podejściu zaczęto zwracać uwagę na ludzki czynnik w stosunkach międzynarodowych. Podkreślano, że wydarzenia na świecie, a zwłaszcza w polityce światowej, nie powinny być analizowane jedynie przez pryzmat abstrakcyjnych pojęć, takich jak państwo, system, obrona militarna czy nuklearne odstraszanie. Kolejne świeże spojrzenie w kwestii relacji międzynarodowych zasugerowała feministka Cynthia Enloe, wskazując, iż „to, co jest osobiste i polityczne, jest także międzynarodowe”. Enloe stawia też tezę, że kobiety zawsze były częścią stosunków międzynarodowych, między innymi były częścią całego procesu militaryzacji. Od zawsze były „rezerwową armią w przemyśle, transnarodowymi aktywistkami pokojowymi, żołnierzami, jak również matkami żołnierzy, a także rewolucjonistkami w walce o wyzwolenie narodowe i w wojnach domowych”[13]. Również nauka feministyczna zwraca uwagę na to, jak bardzo wojna jest „zgenderyzowana”. Wcześniej wojnę interpretowano w kontekście

[11] T. Łoś-Nowak, *Nurty i paradygmaty w nauce o stosunkach międzynarodowych*, [w:] tejże (red.), *Współczesne stosunki międzynarodowe*, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2008, s. 51.

[12] K. Dziubka, B. Szlachta, L.M. Nijakowski, *Idee i ideologie we współczesnym świecie*, Wydawnictwo Naukowe PWN, Warszawa 2008, s. 76.

[13] J. True, *Feminizm*, [w:] S. Burchill, R. Devetak, A. Linklater, M. Paterson, Ch. Reus-Smit, J. True (red.), *Teorie stosunków międzynarodowych*, Książka i Wiedza, Warszawa 2006, s. 297, 301, 315.

mężczyzn idących bronić swojego domu (utożsamianego jednocześnie z przestrzenią macierzyńską). Kobiety w tym czasie, wraz z dziećmi, jako cywile były ofiarami przemocy, gwałtów, znęcania się czy morderstw. Coraz bardziej nasilająca się militaryzacja oraz prześladowania podczas wojny skutkują także pogłębiającym się uchodźstwem kobiet i dzieci poza granice państw[14].

Wojna w stosunkach międzynarodowych jest czasem, kiedy zrywane są pokojowe stosunki między państwami i następuje przejście na stosunki wojenne. Należy nadmienić, że nie jest to jednoznaczne z prowadzeniem działań wojennych. Erhard Cziomer opisał wojnę jako „gwałtowny konflikt masowy, w którym dwie strony (w tym przynajmniej jedna przy użyciu regularnych sił zbrojnych) są zorganizowane według jakiegoś schematu/porządku i prowadzą planowe/celowe działania zbrojne, kierowane przez centrum dowodzenia"[15]. Wojna jest także jednym z elementów analizowanych w ujęciu międzynarodowych stosunków wojskowych czy militarnych. W tym rozumieniu analizuje się współpracę międzypaństwową na polu militarnym[16].

Podczas wojny niewątpliwie łamane są prawa człowieka. Są one prawami przysługującymi każdemu człowiekowi bez względu na jakiekolwiek przepisy prawne w danym państwie[17]. Tym samym jest łamane także prawo międzynarodowe, które jest zespołem norm regulujących wzajemne stosunki między podmiotami systemu prawa. *Ius in bello* (prawo wojenne, prawo konfliktów zbrojnych czy też międzynarodowe prawo humanitarne konfliktów zbrojnych), opierając się na najważniejszych umowach międzynarodowych, na przykład Konwencji genewskiej o polepszeniu losu rannych żołnierzy w armiach w polu będących z 1864 roku, czterech konwencjach genewskich z 1949 roku, między innymi o polepszeniu losów rannych i chorych, także zakłada poszanowanie praw człowieka oraz ich przestrzeganie. Zasada poszanowania praw człowieka i podstawowych wolności jest również jednym z elementów wchodzących w skład ogólnych zasad prawa międzynarodowego[18].

Casus migracji kobiet, dzieci i starszych z Ukrainy do Polski w wyniku napaści Rosji na Ukrainę po 2022 roku

Wojna w Ukrainie jest jednym z największych kryzysów humanitarnych w historii współczesnej Europy. Jej początki sięgają 2014 roku, gdy kontrolę nad częścią wschodnich terenów Ukrainy, między innymi Donbasu, przejęli kontrolowani przez Rosję separatyści (choć władze w Moskwie oficjalnie odcinają się od odpowiedzialności za zainicjowanie tego konfliktu). Odtąd działania te określane są mianem *proxy war* – wojny zastępczej

[14] Tamże, s. 316.
[15] E. Cziomer, *Współczesne stosunki międzynarodowe*…, dz. cyt., s. 17.
[16] Tamże, s. 26.
[17] D. Robertson, *Prawa człowieka*, [w:] tegoż, *Słownik polityki*, Wydawnictwo Sic!, Warszawa 2009, s. 343.
[18] J. Barcik, T. Srogosz, *Prawo międzynarodowe publiczne*, Wydawnictwo C.H. Beck, Warszawa 2019, s. 1, 70, 687–691.

prowadzonej przez Rosję[19]. Po *de facto* eskalacji konfliktu w 2022 roku wiele cywilów opuszczało swoje miejsca zamieszkania, które zaatakowali Rosjanie – przykładem było opuszczanie Charkowa 24 lutego przez mieszkańców[20]. Jak donosiło BBC: „ONZ twierdzi, że ponad pół miliona ludzi opuściło swoje domy, aby uciec przed wojną na Ukrainie, podczas gdy w całym kraju trwają ciężkie walki"[21].

Wedle szacunków instytucji europejskich i organizacji humanitarnych jedna trzecia Ukraińców została zmuszona do opuszczenia swoich domów, tym samym do relokacji w ramach samego kraju (głównie w kierunku potencjalnie mniej zagrożonych atakami Rosjan obszarów na zachodzie Ukrainy) lub ucieczki do państw sąsiednich. Według stanu na lipiec 2022 roku nie tylko w państwach Unii Europejskiej, ale także w innych rejonach Europy przebywało ponad 5,6 mln uchodźców z Ukrainy, między innymi w Polsce (1 207 650), w Niemczech (867 000), w Czechach (388 097), w Turcji (145 000) i we Włoszech (141 562). Szacuje się, że blisko 90% z nich stanowiły kobiety i dzieci, które są również bardziej narażone na przemoc i wykorzystywanie, w tym handel ludźmi, przemyt i nielegalną adopcję[22]. Według portalu Visit UKRAINE.today w lipcu 2023 roku, czyli półtora roku po rozpoczęciu pełnoskalowej wojny przez Rosję, w Polsce mieszkało około 1,2 miliona uchodźców ukraińskich. Inne szacunki pokazują, że w okresie pomiędzy lutym 2022 roku a lipcem 2023 roku do Polski łącznie przyjechało około 12,5 miliona Ukraińców, z czego w międzyczasie około 10,5 miliona opuściło terytorium naszego kraju. Najczęstszymi miejscami ich osiedlenia okazały się największe miasta, takie jak Warszawa, Kraków, Wrocław, Łódź, Poznań czy Gdańsk[23]. Polska, a w szczególności pojedyncze jednostki terytorialne, takie jak województwa, powiaty czy gminy, stanęła przed ogromnym wyzwaniem masowej i nagłej imigracji tysięcy Ukraińców. Pierwszymi reakcjami była pomoc ze strony zwykłych obywateli[24].

Polska stała się krajem kojarzonym z dobrą i szybką – jak na skalę ucieczek uchodźców – odpowiedzią na wywołany wojną kryzys humanitarny[25]. W okresie od lutego 2022 roku do kwietnia 2023 roku ponad 90% uchodźców wojennych z Ukrainy w Polsce stanowiły kobiety. Wynikało to między innymi z obowiązku służby wojskowej, jaki jest nakładany na ukraińskich mężczyzn w wieku od 18 do 60 lat, którzy muszą zostać i bronić

[19] F. Bryjka, *Rosyjska wojna zastępcza w Donbasie*, „Ante Portas – Studia nad Bezpieczeństwem" 2016, nr 1(6), s. 206, https://anteportas.pl/wp-content/uploads/2018/08/AP.VI_Bryjka.pdf [dostęp: 1.10.2024].

[20] *In pictures: Two years of war in Ukraine, People wait in a traffic jam as they leave the city of Kharkiv*, 2024, https://apple.news/AJaoreMnITZKcSZhrn-swWA [dostęp: 1.10.2024].

[21] *Ukraine conflict: Half a million flee as fighting rages*, BBC, 2022, https://www.bbc.com/news/world-europe-60551688 [dostęp: 1.10.2024].

[22] *The EU response to the Ukraine refugee crisis*, 2022, https://www.europarl.europa.eu/topics/en/article/20220324STO26151/the-eu-response-to-the-ukraine-refugee-crisis [dostęp: 1.10.2024].

[23] *Polish women have worsened their attitude towards Ukrainian refugees: what is the reason?,* b.r., https://visitukraine.today/blog/2484/polish-women-have-worsened-their-attitude-towards-ukrainian-refugees-what-is-the-reason#google_vignette [dostęp: 1.10.2024].

[24] M. Myśliwiec, M. Madej, K. Tybuchowska-Hartlińska, *Local Government in Poland Facing the Ukrainian Refugees Crisis*, [w:] A. Kasińska-Metryka, K. Pałka-Suchojad (red.), *Russian aggression against Ukraine in 2022. Faces of modern war*, Routledge, Londyn–Nowy Jork 2023.

[25] I. Bil, *More than a neighbour in need: Polish and EU support to Ukraine*, [w:] L. Andor, U. Optenhögel (red.), *Europe and the war in Ukraine*, Foundation for European Progressive Studies (FEPS), London Publishing Partnership, 2023, s. 128.

kraju. Ponadto w październiku 2022 roku w Polsce wśród zarejestrowanych uchodźców było około 41% osób nieletnich. Wskazuje się także, iż kobiety, migrując, są narażone na dyskryminację oraz mają utrudniony proces samej migracji nie tylko ze względu na bycie imigrantem, ale też z powodu bycia zmuszoną do migracji (są nieprzygotowane i zmuszone do tego procesu) oraz ze względu na płeć – czyli bycie kobietą[26]. Należy odwołać się przy tym do dwóch pojęć: feminizacji współczesnej migracji oraz intersekcjonalności, na które stawia się w feministycznej teorii stosunków międzynarodowych. Termin *feminizacja migracji* opisuje procesy migracyjne zachodzące na świecie w XX i na początku XXI wieku. On najlepiej charakteryzuje współczesną migrację oraz zwraca uwagę na fakt, że migrująca kobieta często pozostawia swoje dzieci, męża czy starszych rodziców bez opieki[27]. Natomiast intersekcjonalność wskazuje, iż kobiety są narażone na wielokrotną dyskryminację wynikającą z nałożenia się na siebie wielu cech danej osoby, na przykład tego, że jest osobą migrującą, kobietą, obywatelem innej narodowości czy osobą należącą do odmiennej klasy społecznej[28].

Według raportu *Uchodźcy wojenni z Ukrainy – życie w Polsce i plany na przyszłość* średnia wieku kobiet przybywających do Polski z dziećmi wynosiła 37 lat. Aż trzy czwarte tych kobiet miało dzieci. Większość z nich posiadała wykształcenie wyższe magisterskie lub inny stopień naukowy. Kobiety te zazwyczaj przybywały bez mężów czy partnerów, którzy musieli zostać między innymi po to, aby wstąpić do ukraińskich wojsk obrony terytorialnej. Rozłąka z partnerem powodowała traumę wojenną, co negatywnie wpływało na zdrowie psychiczne. Posiadanie dziecka także rzutowało na poczucie bezpieczeństwa finansowego w związku z niemożnością podjęcia pracy na pełen etat czy adaptacją do zastanej rzeczywistości, przejawiającą się na przykład kłopotami z wynajęciem mieszkania[29]. Największymi problemami wśród kobiet z Ukrainy są: brak bliskich, którzy zostali w Ukrainie, brak wystarczających środków finansowych na życie czy bariera językowa. Ponad połowa uchodźczyń – aż 53% – przyjechała do Polski z dziećmi[30]. Kobiety z Ukrainy są także obiektem nowo powstających fake newsów. Najczęściej odnoszą się one do rzekomej dyskryminacji, której doświadczają polskie kobiety z powodu kobiet z Ukrainy. Te nieprawdziwe doniesienia dotyczą między innymi lepszego traktowania uchodźczyń czy zapewnienia im korzystniejszych warunków w porównaniu z sytuacją Polek. Fake

[26] *What are the integration challenges of Ukrainian refugee women?*, 2023, https://www.oecd.org/en/publications/what-are-the-integration-challenges-of-ukrainian-refugee-women_bb17dc64-en.html [dostęp: 1.10.2024].

[27] T. Zbyrad, *Współczesne oblicza feminizacji migracji i jej skutki*, „Studia Polonijne", t. 39, Lublin 2018, s. 315–316.

[28] K. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, „Stanford Law Review" 1991, vol. 43, no. 6, s. 1241–1299.

[29] P. Długosz, L. Kryvachuk, D. Izdebska-Długosz, *Uchodźcy wojenni z Ukrainy – życie w Polsce i plany na przyszłość*, 2022, s. 6, 33, 41, https://omp.academicon.pl/wa/catalog/view/uchodzcy-ukraina/173/352 [dostęp: 1.10.2024].

[30] I. Kacprzak, *Blisko połowa Ukrainek, które uciekły przed wojną do Polski, chce tu zostać*, 2024, https://www.rp.pl/spoleczenstwo/art39857061-blisko-polowa-ukrainek-ktore-uciekly-przed-wojna-do-polski-chce-tu-zostac [dostęp: 1.10.2024].

newsy, rozprzestrzeniane przez media społecznościowe, takie jak TikTok, mówią na przykład o rzekomym szybszym przyznawaniu mieszkań komunalnych matkom z Ukrainy[31].

Kolejną grupą migrantów wojennych są dzieci ukraińskie. Po wybuchu wojny w lutym 2022 roku do Polski przyjeżdżały dzieci z ukraińskich domów dziecka czy dzieci, których opiekunowie prawni z jakichś względów zostali w Ukrainie. Dzieci te w Polsce napotykały wiele problemów, z których największym był proces edukacji w nowym państwie. W czerwcu 2022 roku województwo łódzkie znajdowało się na ósmym miejscu, a śląskie na trzecim miejscu, jeśli chodzi o ogólną liczbę uczniów i uczennic, będących uchodźcami z Ukrainy. Bariera językowa powodowała, że ukraińskie dzieci, adaptując się do nowej rzeczywistości, pobierały lekcje języka polskiego. Musiały borykać się z trudnościami, takimi jak obcy język, obca kultura, a przede wszystkim oddzielenie od rodziny, rodziców i opiekunów[32]. Wśród nich były też dzieci z niepełnosprawnościami. Było to szokiem dla polskich placówek opiekuńczych, gdyż duże grupy dzieci przybywały z jednego ośrodka. Dzieci doświadczały nie tylko problemów adaptacyjnych, lecz także były narażone na zespół stresu pourazowego (PTSD). Zaczynały one funkcjonowanie w Polsce z towarzyszącą im traumą wojenną, która objawiała się w postaci koszmarów sennych, zaburzeń mowy, kompulsji, zachowań agresywnych, depresji czy prób samobójczych[33].

Z perspektywy teorii feministycznej ciekawy wydaje się również fakt, że prezydent Federacji Rosyjskiej Władimir Putin oraz rzeczniczka praw dziecka w Kancelarii Prezydenta Federacji Rosyjskiej Maria Alekseyevna Lvova-Belova, decyzją Międzynarodowego Trybunału Karnego (MTK) zostali objęci nakazem aresztowania. W dniu 17 marca 2023 roku MTK uznał Putina oraz Lvovą winnymi za „bezprawne wysiedlenie ludności (dzieci) oraz nielegalne przesiedlenie ludności (dzieci) z okupowanych obszarów Ukrainy do Federacji Rosyjskiej (na podstawie art. 8, ust. 2, lit. a, ppkt vii i art. 8, ust. 2, lit. b, ppkt viii Statutu Rzymskiego)”[34]. Należy pamiętać, że misją MTK jest pociąganie do odpowiedzialności za ludobójstwo, zbrodnie wojenne, zbrodnie przeciwko ludzkości i agresję. Według Szymona Zaręby z Polskiego Instytutu Spraw Międzynarodowych jest to „gest”, który wskazuje, że sprawiedliwości nie unikną nawet najwyżsi rangą urzędnicy. Czyny, o jakie jest oskarżany Putin, to między innymi rosyjska praktyka wysyłania do Rosji dzieci ukraińskich bez opieki, potem nadawanie im obywatelstwa rosyjskiego i poddawanie procesowi naturalizacji[35].

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[31] *Ukrainki dostają wyższe zasiłki niż polskie matki? Sprawdzamy to*, 2024, https://demagog.org.pl/fake_news/ukrainki-dostaja-wyzsze-zasilki-niz-polskie-matki-sprawdzamy-to/ [dostęp: 1.10.2024].

[32] A. Krawczak, *Sytuacja dzieci ukraińskich w Polsce*, [w:] *Dzieci się liczą 2022. Raport o zagrożeniach bezpieczeństwa i rozwoju dzieci w Polsce*, Fundacja Dajemy Dzieciom Siłę, 2022, s. 357–361, https://fdds.pl/_Resources/Persistent/5/e/8/9/5e8940d252b5fdcadd95e8a2d5a2daea07b11e29/Dzieci%20si%C4%99%20licz%C4%85%202022%20-%20Ukraina.pdf [dostęp: 1.10.2024].

[33] A. Krawczak, *Tysiące ukraińskich sierot już trafiło do Polski. I co dalej?*, 2022, https://oko.press/tysiace-ukrainskich-sierot-juz-trafilo-do-polski-i-co-dalej [dostęp: 1.10.2024].

[34] *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, 2023, https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and [dostęp: 1.10.2024].

[35] Sz. Zaręba, *ICC Issues Arrest Warrant for Vladimir Putin*, 2023, https://pism.pl/publications/icc-issues-arrest-warrant-for-vladimir-putin [dostęp: 1.10.2024].

Duży odsetek wśród uchodźców wojennych ubiegających się o nadanie numeru PESEL w Polsce stanowiły osoby starsze – 12%[36]. Amnesty International opublikowała raport *Amnesty International Report 2022/2023: The state of the world's human rights* dotyczący bieżącej sytuacji praw człowieka w Ukrainie, w którym zwraca uwagę na łamanie praw kobiet i osób starszych jako jeden z najważniejszych problemów. Wiele kobiet zgłaszało przestępstwa gwałtu i napaści na tle seksualnym na terenach okupowanych. Śmierć i obrażenia związane z wojną nieproporcjonalnie dotknęły osoby starsze, aż 34% zgonów stanowiły zgony osób powyżej 60. roku życia (trzeba zaznaczyć, że procent ten został podany w odniesieniu do zgonów osób, których wiek był znany). Osoby starsze, szczególnie te z niepełnosprawnością lub problemami zdrowotnymi, często nie mogły uzyskać dostępu do służby zdrowia bądź miały problemy z ewakuowaniem się z obszarów dotkniętych konfliktem[37]. Z kolei według raportu Amnesty International *Życie w zapomnieniu: Izolacja osób starszych i ograniczony dostęp do mieszkań w związku z inwazją Rosji na Ukrainę* osoby starsze, które zostały zmuszone do pozostania w Ukrainie po 24 lutego 2022 roku, stanowią „nieproporcjonalnie dużą część ofiar cywilnych"[38]. W większości przypadków jest to wynikiem braku możliwości ucieczki albo głębokiego przywiązania do swojego miejsca zamieszkania. Sytuacja takich osób jest bardzo złożona – na skutek konfliktu zbrojnego mają one utrudniony dostęp do opieki społecznej i medycznej, ponadto cierpią z powodu poczucia izolacji[39]. Drugą grupą osób starszych są te, którym udało się wyemigrować z Ukrainy, na przykład do Polski. Jednak także ci obywatele Ukrainy spotykają się z trudnościami, związanymi między innymi z problemami mieszkaniowymi czy złą sytuacją finansową. Otrzymując przysługującą im ukraińską emeryturę, często nie są w stanie samodzielnie się utrzymać. Napotykają też takie problemy, jak bariera językowa czy trudności z integracją społeczną[40].

Według raportu przygotowanego przez International Rescue Committee dotyczącego sytuacji uchodźców z Ukrainy w Polsce w okresie od stycznia do marca 2024 roku grupą uchodźców szczególnie narażoną są osoby starsze. Migracja spowodowana rozpoczęciem wojny jest uważana także za „jedną z najstarszych w historii" ze względu na duży procent osób starszych w ogólnej liczbie migrantów. Raport przywołuje dane ONZ o ponad 70 tysiącach starszych uchodźców (60 lat i więcej) z Ukrainy przebywających w Polsce. Osoby te borykają się z wieloma problemami, takimi jak utrudniony dostęp do służby zdrowia i lekarstw, brak wystarczających środków finansowych i materialnych (chodzi

[36] *Ukraine Refugee Pulse report*, 2023, https://www2.deloitte.com/pl/pl/pages/zarzadzania-procesami-i--strategiczne/articles/Ukraine-Refugee-Pulse-report.html [dostęp: 1.10.2024].

[37] *Amnesty International Report 2022/2023: The state of the world's human rights*, s. 377–381, https://www.amnesty.org/en/documents/pol10/5670/2023/en/ [dostęp: 1.10.2024].

[38] *Raport „Życie w zapomnieniu: Izolacja osób starszych i ograniczony dostęp do mieszkań w związku z inwazją Rosji na Ukrainę"*, Amnesty International, 2024, https://www.amnesty.org.pl/raport-zyjac-w-zapomnieniu-izolacja-osob-starszych-i-ograniczony-dostep-do-mieszkan-w-zwiazku-z-inwazja-rosji-na-ukraine/ [dostęp: 1.10.2024].

[39] Tamże.

[40] D. Woroniecka-Krzyżanowska, B. Urbańska, *„Każdy ma swoją historię, ale ból jest ten sam". Doświadczenia i potrzeby osób starszych z Ukrainy w Polsce*, 2023, s. 14, 28, https://pcpm.org.pl/wp-content/uploads/2023/10/We-all-have-our-own-story-POLISH_final.pdf [dostęp: 1.10.2024].

między innymi o zaspokojenie podstawowych potrzeb, jak posiadanie okularów czy ciśnieniomierza), potrzeba nauki języka polskiego. Język stanowi dodatkową barierę w odniesieniu do korzystania na przykład z usług medycznych czy urzędowych. Osoby starsze także często wracają do Ukrainy, aby skorzystać z usług lekarzy specjalistów, gdyż w Polsce są zbyt długie kolejki lub za wysokie ceny usług medycznych. Dostęp do lekarza jest ważny, ponieważ osoby te, oprócz tego, że są w zaawansowanym wieku, to borykają się często z niepełnosprawnością lub chorobami przewlekłymi[41].

Podsumowanie

Wojna w Ukrainie jest wydarzeniem bezprecedensowym, które kształtuje najnowszą historię świata. Wcześniej, w szczególności w perspektywie realistycznego postrzegania stosunków międzynarodowych, wojnę widziano jako konflikt dwóch państw. Wraz z rozwojem tej dyscypliny naukowej zaczęto dostrzegać więcej elementów, które składają się na relacje na arenie międzynarodowej, oraz to, że wydarzenia w polityce światowej są wielowymiarowe. Dzięki feministycznej teorii stosunków międzynarodowych wojnę interpretuje się na nowo: jak pokazuje przypadek napaści Rosji na Ukrainę, wojna nie jest tylko konfliktem interesów państw narodowych, ale też zdarzeniem głęboko „zgenderyzowanym". Nie tylko mężczyźni „płacą wysoką cenę", będąc żołnierzami, ale także kobiety, które często są obiektem mordów, tortur czy zbrodni seksualnych popełnianych przez wojsko państwa najeżdżającego. Termin *intersekcjonalność w stosunkach międzynarodowych* dobrze obrazuje, jak kobiety są dyskryminowane nie tylko ze względu na płeć. Migracja Ukrainek do Polski spowodowana wojną pokazuje, że kobiety są narażone na dyskryminację i niebezpieczeństwo ze względu na płeć, pochodzenie, język, którym się posługują, przynależność do danej klasy społecznej.

Można zatem stwierdzić prawdziwość postawionych we wstępie dwóch hipotez. Stosunki międzynarodowe w ujęciu teorii feministycznej są reinterpretowane na nowo i dodana jest im „ludzka twarz". Migracje kobiet, dzieci i osób starszych z Ukrainy do Polski w wyniku konfliktu rosyjsko-ukraińskiego po 2022 roku są przykładem tego, że wojna to nie tylko konflikt dwóch państw i walczących po ich stronach sił zbrojnych, lecz także tragedia zwykłych ludzi oraz procesy migracyjne. W tym przypadku wojna w Ukrainie to „niespotykany w historii powojennej Europy exodus ludności", w którym przeważającą grupą są kobiety, dzieci i osoby starsze. Odznacza się on także bezprecedensową skalą i krótkim czasem, skłaniając badaczy do uznania go za kryzys humanitarny[42]. W Polsce wśród przybyłych z Ukrainy większość stanowią kobiety w wieku produkcyjnym[43].

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[41] *Monitoring Sytuacji Uchodźców z Ukrainy w Polsce. Raport. Q1 2024 Styczeń – Marzec*, 2024, s. 31–33, https://www.rescue.org/sites/default/files/2024-06/IRC%20Q1%20PM%20Report%20PL.pdf [dostęp: 1.10.2024].

[42] M. Gońda, M. Socha, *Japonia wobec kryzysu humanitarnego w Ukrainie – raport Ośrodka Spraw Azjatyckich UŁ i Centrum Studiów Migracyjnych UŁ*, 2023, s. 11–12, https://wydawnictwo.uni.lodz.pl/wp-content/uploads/2023/07/Socha_Gonda_Japonia-wobec-kryzysu.pdf [dostęp: 1.10.2024].

[43] Tamże, s. 15.

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The gendered crisis of care in the UK through the lens of immigration policy impacts on migrant workers

Kryzys opieki ze względu na płeć w Wielkiej Brytanii przez pryzmat wpływu polityki imigracyjnej na pracowników migrujących

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Abstract

The social care sector in the United Kingdom is grappling with a severe crisis due to successive governments' failure to adequately fund and plan for rising care needs. This crisis has profound and wide-ranging implications, disproportionately affecting women, who constitute the majority of both the care workforce and the population in need of care services. Immigration policies play a pivotal role in shaping the dynamics of the social care sector, with migrants comprising a significant 16% of the workforce. These policies are inextricably intertwined with the broader global care crisis, exacerbating existing challenges and inequalities that disproportionately impact women across borders. Moreover, the UK's "hostile environment" measures aimed at irregular migrants have created additional vulnerabilities and barriers for migrant women, including those with legal status working in the care sector.

Keywords: care crisis, United Kingdom, immigration, social policy, migrant workers

Streszczenie

Sektor opieki społecznej w Wielkiej Brytanii zmaga się z poważnym kryzysem spowodowanym brakiem odpowiedniego finansowania i planowania rosnących potrzeb w zakresie opieki przez kolejne rządy. Kryzys ten ma głębokie i szeroko zakrojone konsekwencje, nieproporcjonalnie wpływając na kobiety, które stanowią większość zarówno pracowników opieki, jak i populacji potrzebującej usług opiekuńczych. Polityka imigracyjna odgrywa kluczową rolę w kształtowaniu dynamiki sektora opieki społecznej, a migranci stanowią znaczące 16% siły roboczej. Polityka ta jest nierozerwalnie związana z szerszym globalnym kryzysem opieki, zaostrzając istniejące wyzwania i nierówności, które nieproporcjonalnie oddziałują na życie kobiet w różnych krajach. Co więcej, brytyjskie środki „wrogiego środowiska" wymierzone w nielegalnych migrantów stworzyły dodatkowe słabości i bariery dla migrantek, w tym tych o legalnym statusie pracujących w sektorze opieki.

Słowa kluczowe: kryzys opieki, Wielka Brytania, imigracja, polityka społeczna, pracownicy migrujący

Introduction

The United Kingdom faces a mounting crisis in care provision, characterised by an aging population, increasing care demands, and severe staffing shortages. This crisis is deeply gendered, rooted in the historical devaluation of caregiving as "women's work." Recent data underscores the gravity of this situation: Age UK reports 2.6 million individuals over 50 with unmet social care needs, while the social care sector grapples with a record 165,000 vacancies as of 2022 marking a 50% increase from the previous year.[1] Concurrently, according to the 2021 census, there are approximately 5.7 million unpaid carers across the UK.[2]

Into this landscape of inadequate state provision has stepped an integral yet precarious workforce – migrant care workers, disproportionately women from the Global South. Their labour has become vital in delivering essential services and filling staffing gaps, a dynamic further intensified during the COVID-19 pandemic. However, the UK's increasingly restrictive immigration policies rooted in the "hostile environment" approach have erected significant barriers undermining this workforce's welfare and capacities.[3] Fundamentally, the UK's immigration policies targeting its overseas care workforce exemplify how the

[1] T. Gentry, K. Jopling, C. Reeves, *Fixing the foundations: Why it's time to rethink how we support older people with health problems to stay well at home*, Age UK, 17.02.2023, https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/health--wellbeing/fixing-the-foundations/FTF-feb-2023.pdf [access: 28.03.2024].

[2] *Unpaid care, England and Wales: Census 2021*, Office for National Statistics, 19.01.2023, https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/healthandwellbeing/bulletins/unpaidcareenglandandwales/census2021#cite-this-statistical-bulletin [access: 28.03.2024].

[3] J. Kirkup, R. Winnett, *Theresa May Interview*, The Telegraph, 25.05.2012, https://www.telegraph.co.uk/news/uknews/immigration/9291483/Theresa-May-interview-Weregoing-to-give-illegal-migrants-a-really-hostile-reception.html [access: 28.03.2024].

"crisis of care" is innately shaped by intersecting structures of gender, racial and economic oppression perpetuated on a global scale.

The purpose of this article is to examine the gendered dimensions of the UK's care crisis through the lens of increasingly restrictive immigration policies targeting overseas care workers. In doing so, it situates this national dilemma within the broader transnational dynamics of a global "crisis of care" rooted in patriarchal, racial capitalist structures devaluing feminised labour. The central argument posits that the UK's immigration policies exemplify how the "crisis of care" is innately shaped by intersecting structures of gender, racial and economic oppression perpetuated on a global scale.

The analysis explores how recent policy changes affect the recruitment, retention, and working conditions of migrant care workers. It investigates how these policies interact with and potentially exacerbate existing gender inequalities in the care sector, both for care workers and care recipients. Furthermore, the article examines how the UK's approach to migrant care workers reflects and perpetuates broader global patterns of devaluing feminised labour from the Global South, particularly through the lens of "global care chains."

By critically examining the gendered implications of the UK's immigration policies on care provision, this study aims to offer insights that can inform more equitable and sustainable approaches to addressing the care crisis. It considers the implications of these policies for the quality and accessibility of care services in the UK, particularly for vulnerable populations and women who disproportionately require elder care. Therefore, this research calls for a fundamental reorientation in how society understands, resources, and collectively upholds the vital work of caregiving as a public imperative – one that challenges rather than entrenches intersecting inequalities.

The gendered expectation of care

Care work has long been socially coded as an inherently feminine role, with women conditioned from a young age to embody nurturing and self-sacrificing qualities associated with caregiving. This deeply entrenched gendered perception has directly shaped the demographics of the social care workforce, resulting in it being overwhelmingly dominated by female professionals. For example, data from Skills for Care in 2021 indicates that women comprise a staggering 82% of the adult social services workforce in the United Kingdom.[4] Gahwi and Walton-Roberts point out that because women's caring characteristic is considered natural, it is seen as 'unskilled', which 'facilitates it's devaluation'.[5] However, feminist scholars have challenged this perception, claiming care as a fundamental

[4] *The State of the Adult Social Care Sector and Workforce in England,* Skills for Care, 2021, https://www.skillsforcare.org.uk/Adult-Social-Care-Workforce-Data/Workforce-intelligence/documents/State-of-the-adult-social-care-sector/The-State-of-the-Adult-Social-Care-Sector-and-Workforce-2021.pdf [access: 28.03.2024].

[5] L. Gahwi, M. Walton-Roberts, *Migrant Care Labour, Covid-19, and the Long-Term Care Crisis: Achieving Solidarity for Care Providers and Recipients*, [in:] A. Triandafyllidou (ed.), *Migration and Pandemics Spaces of Solidarity and Spaces of Exception*, Springer, New York 2022, pp. 105–121.

prerogative of a feminist care ethic that recognises the interdependence of human lives and the motivation to care as arising from feelings of reciprocity and responsibility.[6]

According to Comas-d'Argemir the provision of care in society relies on a "mosaic of resources" comprised of public services, private services, the family environment, and community efforts.[7] However, within families, which are considered the primary source of caregiving regardless of state social services, women disproportionately shoulder the burden of unpaid care work. This sexual division of labour, where women's invisible and undervalued care labour has been a driving force underpinning capitalist society, is fundamental to understanding women's economic and social disadvantages in the current care crisis. Pérez-Orozco critiques how feminist economics has often failed to account for the experiences of working-class women who were already present in the labour market even before greater entry of women into paid employment.[8] For these working-class women having to provide income for their families, their care responsibilities at home were supplemented by other women's support networks.

As more women crossed into the paid labour force, Comas-d'Argemir describes this as creating "a double crisis of care" – maintaining their traditional unpaid care duties while also entering employment.[9] The assumption of a nuclear, heterosexual, white middle-class family norm provides an inaccurate and narrow understanding that does not reflect the diverse realities and intersecting inequities shaping women's experiences within the care crisis across class, racial, and other lines. Any comprehensive analysis of the current care crisis must centrally reckon with the longstanding sexual division of labour burdening women with invisible unpaid care work, even as their economic roles have shifted over time. It must also adopt an intersectional lens attentive to how class, race, and other factors structure divergent experiences rather than treating women's relation to care as a universal, homogenous condition.

The so-called "crisis of care" is linked to the pressures of time poverty, work-family imbalance, and social depletion – referring to the strains on vital social capacities like childbirth, caring for family, maintaining households and communities, and sustaining interpersonal connections. Feminist scholar Nancy Fraser identifies several major factors contributing to the 21st century care crisis, including women's increasing participation in the paid labour force, an aging population, and changes in living arrangements like more single-parent households.[10] At its core, the care crisis speaks to the changing material

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[6] E. Dowling, *The Care Crisis: What Caused It and How Can We End It?*, Verso, London 2021.

[7] D. Comas-d'Argemir, *Cuidados, Derechos and Justicia*, [in:] *Sentidos de injusticia, sentidos de crisis: tensiones conceptuales y aproximaciones etnográficas*, Edicions Universitat de Barcelona, Barcelona 2020, pp. 119–136.

[8] A. Pérez-Orozco, *Amenaza tormenta: la crisis de los cuidados y la reorganización del sistema económico*, "Revista de Economía Crítica" 2006, Núm. 5, pp. 3–37.

[9] D. Comas-d'Argemir, *Cuidados, Derechos and Justicia*, [in:] *Sentidos de injusticia, sentidos de crisis: tensiones conceptuales y aproximaciones etnográficas*, Edicions Universitat de Barcelona, Barcelona 2020, pp. 119–136.

[10] N. Fraser, *Contradictions of Capital and Care*, "New Left Review" 2016, NLR 100 [no page numbers], https://newleftreview.org/issues/ii100/articles/nancy-fraser-contradictions-of-capital-and-care [access: 28.03.2024].

conditions for caregiving and the widening gap between mounting care needs and available care resources and support systems. Fraser and other theorists contend that the care crisis stems from capitalism "externalising" care work onto families and communities while simultaneously diminishing their capacities to perform this crucial labour. With neither the state nor markets fully assuming responsibility for caring needs, the burden falls disproportionately on domestic spheres – meaning women bear the brunt.

Moreover, highlighting an additional gendered dimension, studies show women live longer than men globally.[11] Their greater longevity combined with more involvement across all life stages means the total "life span" of providing and receiving care is extended for women compared to men (ibid). Consequently, women are not only more likely to work in underpaid caring professions but also to require elder care later in life, facing the impacts of the very crisis they upheld through their labour. Feminist economists like Nancy Folbre characterise these economic penalties and disadvantages stemming from care as a "care penalty" – encompassing income losses from unpaid caregiving duties as well as poor wages and job quality for paid care work that women are overrepresented in.[12] This caring labour is consistently devalued due to its gendered associations.

The UK care sector and the reliance on migrant workers

The UK is grappling with a deepening social care crisis that threatens to leave many vulnerable individuals without adequate support. This crisis is characterised by increasing demand for care services coupled with systemic underfunding and lack of strategic planning by successive governments. The implications reverberate across both those in need of care and the workforce responsible for providing it, with women disproportionately affected. Firstly, the demand for care services in the UK is surging due to several intersecting factors. An aging population, combined with advances in medical technology and increased life expectancy, has led to a greater number requiring long-term care and support. Additionally, there is expanding public recognition of the vital role social care plays in addressing a range of health and wellbeing needs beyond just aging – including mental health support, disability care, and assistance for those with chronic illnesses.

However, despite this escalating demand, the sector has been severely hampered by decades of chronic underfunding and strategic policy negligence. According to Age UK, in just the two years between 2017–2019, a staggering three older people per hour died as a direct result of lack of access to social care.[13] Successive governments have simply failed to allocate sufficient resources to meet the population's growing care needs. According to the UK Women's Budget Group, local authorities experienced a significant

[11] A. Ophir, J. Polos, *Care Life Expectancy: Gender and Unpaid Work in the Context of Population Aging*, "Population Research and Policy Review" 2022, Vol. 41, pp. 197–227.

[12] N. Folbre, *The Care Penalty and Gender Inequality*, [in:] L. Averett, S. Argys, S. Hoffmann (eds.), *The Oxford Handbook of Women and the Economy*, Oxford University Press, Oxford 2018, pp. 749–766.

[13] T. Gentry, K. Jopling, C. Reeves, *Fixing the foundations*…, op. cit.

reduction in social care budgets, amounting to over £7 billion between 2010 and 2019.[14] Despite short-term funding measures, such as the allocation of £11.5 billion to adult social care from 2017/18 to 2019/20, including an additional £1.5 billion in the 2019 Spending Round, these funds fail to fully address the budgetary shortfall.[15] Moreover, relying on funding social care through council tax or local business rates may exacerbate regional inequalities, as areas with the greatest need for services often have limited capacity to generate revenue through local taxation. This lack of investment has led to a fragmented and overstretched care system, with many individuals struggling to access the support they need in a timely and dignified manner.

Additionally, the UK care sector is also grappling with a severe workforce crisis, marked by over 100,000 unfilled roles due to low pay, poor working conditions, and job insecurity.[16] With an aging population and rising demand for care services, the situation is projected to worsen, requiring an additional 400,000 jobs over the next decade.[17] Despite efforts by the government to attract more Britons to care jobs, including plans to curb immigration, the demand for carers continues to rise, driven by an ageing population.

Migrant workers play a vital role in the UK's social care workforce, comprising 16% of the sector's employees.[18] In 2022, nearly one in five workers born outside the EU (19%) were employed in the health and care sector – almost double the share in the next largest industry of retail at 10%.[19] Migrants from Sub-Saharan Africa and East/Southeast Asia had particularly high representation, with 42% of Sub-Saharan African workers in care roles and 40% of East/Southeast Asian workers as nurses (ibid). Overall, the share of foreign-born workers in the UK labour force has steadily increased over the past two decades, rising from 9% in 2004 to 19% by the end of 2022. Non-EU migrants have consistently outnumbered EU migrants and become the primary driver of migrant workforce growth recently, especially after EU net migration declined following the COVID-19 pandemic.[20]

The COVID-19 pandemic served as a poignant reminder of the social care system's dependence on migrant labour to deliver essential services, particularly during periods of staffing shortages exacerbated by illnesses or the need for isolation among workers. As routine procedures were postponed and chronic care needs exacerbated, the pandemic cast a glaring spotlight on the longstanding issues of inadequate staffing and chronic underfunding that have fuelled an ongoing care crisis in the UK. This reliance on migrants is not new, however. Dowling notes that migrant workers have made considerable contributions

[14] *Social Care and Gender: A Pre-Budget Briefing, Women's Budget Group*, 2020, https://wbg.org.uk/analysis/uk-policy-briefings/2019-wbg-briefing-social-care-and-gender/ [access: 28.03.2024].

[15] Ibidem.

[16] V. Gayle, *Why the UK Needs Migrant Care Workers*, 11.03.2024, https://www.thebureauinvestigates.com/stories/2024-03-11/why-the-uk-needs-migrant-care-workers/#:~:text=Migrant%20workers%20have%20been%20part,the%20Office%20for%20National%20Statistics [access: 28.03.2024].

[17] Ibidem.

[18] *Social Care and Gender*…, op. cit.

[19] *Social Care Sector Continues to Drive Demand for Overseas Workers as New Data Shows Public Sector Roles Dominate Work Visas*, The Migration Observatory at the University of Oxford, 29.02.2024, https://migrationobservatory.ox.ac.uk/press/social-care-sector-continues-to-drive-demand-for-overseas-workers-as-new-data-shows-public-sector-roles-dominate-work-visas/ [access: 28.03.2024].

[20] Ibidem.

to Britain's health and social care sectors dating back to the post-World War II period and establishment of the National Health Service (NHS).[21] In fact, between 1998 and 2008 alone, the number of migrant workers in these care fields doubled.[22]

The UK's immigration policies affecting migrant care workers

UK immigration policies play a crucial role in shaping the composition and dynamics of the care workforce, influencing recruitment, retention, and working conditions for migrant workers. In a well-known interview from 2012, Home Secretary Theresa May articulated her intention to establish a 'highly unwelcoming environment' for 'undocumented' migrants in the UK, aiming to prevent a scenario where individuals believe they can remain in the country without legal status while accessing various essential services.[23] This marked a shift towards stricter regulations on residency, employment, and access to services for individuals unable to prove their legal status in the UK, commonly referred to as 'undocumented migrants' in official discourse. In 2020, the UK government announced the Health and Care Worker visa aimed to address staffing shortages in the health and social care sectors. This visa route allows qualified health professionals, including nurses, doctors, and care workers, to come to the UK to work in the NHS or social care settings. However, the visa is restrictive, tying the visa holder's right to live and work in the UK to a specific job and employer, limiting their mobility and bargaining power. In 2021, the government introduced a new immigration system that effectively ends the free movement rights previously enjoyed by EU workers and introduces a points-based system for all individuals seeking employment in the UK. This new system imposes stricter criteria and limits on the entry of migrant workers, including requirements such as demonstrating English language proficiency and securing a job offer in a skilled occupation with a minimum salary threshold of £25,600 (or £20,480 for roles on the shortage occupations list). However, this policy fails to consider the current social care crisis and the existing challenges within the sector, which heavily relies on migrant care workers to fill critical staffing gaps.

In 2024, the UK government is implementing significant changes to its legal migration system, aiming to "bolster border security and drive down unsustainable and unfair levels of migration."[24] Starting from 11th March 2024, care workers and senior care workers migrating to the UK are no longer allowed to bring dependents with them.[25] Additionally, only Care Quality Commission-registered providers in England can sponsor Health and Care Visa applicants. Meanwhile, starting 4th April 2024, Certificates of Sponsorship is-

[21] E. Dowling, *The Care Crisis*…, op. cit.
[22] Ibidem.
[23] J. Kirkup R. Winnett, *Theresa May Interview*…, op. cit.
[24] T. Pursglove, J. Cleverly, H. Whately, *Home Secretary Underlines Commitment to Cut Net Migration*, UK Government, 30.01.2024, https://www.gov.uk/government/news/home-secretary-underlines-commitment-to-cut-net-migration?utm_medium=email&utm_campaign=govuk-notifications-topic&utm_source=cd88a5cb-983a-48bd-9d7f-4fe23692fffa&utm_content=daily [access: 28.03.2024].
[25] Ibidem.

sued for Health and Care Visa applicants must meet the new minimum salary threshold of £23,200 or the national pay scale for their role (whichever is higher) and for those not on a national pay scale, the general salary threshold increases to £29,000. The Immigration Health Surcharge increased to £1,035 per person per year as of 6th February 2024 and the minimum income requirement for family visas will incrementally rise to £38,700 by early 2025, with only dependents who can be financially supported allowed into the UK.[26]

This new immigration system compounds the challenges already created by the UK's "hostile environment" policies implemented through various Immigration Acts since 2012. Yet in particular, the decision to ban care workers from bringing their dependents to the UK will have significant implications for migrant workers and their families. Many care workers choose to work in the UK to support their families financially, and the inability to reunite with their loved ones can have detrimental effects on their mental health and overall well-being. Being separated from their families can lead to feelings of loneliness, isolation, and homesickness, which may impact their job satisfaction and performance. The policy creates barriers to recruitment and retention within the care sector. Prospective migrant workers considering job offers in the UK may be deterred by the prospect of family separation. The inability to bring their dependents to the UK not only affects their personal lives but also raises concerns about their long-term commitment to working in the country. As a result, care providers may struggle to attract and retain skilled migrant workers, exacerbating existing staffing shortages in the sector. Furthermore, the ban on bringing dependents may disproportionately affect female migrant care workers, who often play crucial roles in caregiving and supporting their families. For these women, the inability to reunite with their children or spouses in the UK can create significant emotional distress and strain on their familial relationships.

The implications of these policies extend beyond the UK. The care crisis and its burdens are ultimately perpetuated through transnational "global care chains" where care deficits are displaced from wealthier to poorer nations based on intersecting gender, racial, and economic inequalities. According to Pérez-Orozco's theory 'the problems of the care crisis are transferred from one woman to another, based on axes of power, in a long chain from which men are systematically absent – or, at any rate, present only in the final links'.[27] One end of the chain may be a woman in a poor country who cares (paid or unpaid) for the family members of another woman who has had to migrate and who, in turn, cares for the family members of a woman in a rich country in order to get to work.[28] Gahwi and Walton-Roberts argue that in wealthier nations, 'care work has effectively been outsourced: from being the responsibility of women within the household, it is now racialised women from developing nations who leave their own families to care for others'.[29] The concept of the global chain of chairs is therefore linked to the UK context, as the care crisis is exacerbated by the limitations imposed on the entry of migrants into the country.

[26] Ibidem.
[27] A. Pérez-Orozco, *Amenaza tormenta*…, op. cit.
[28] Ibidem.
[29] L. Gahwi, M. Walton-Roberts, *Migrant Care Labour, Covid-19, and the Long-Term Care Crisis*…, op. cit.

The global care crisis exacerbates existing inequalities, as women from marginalised communities bear the brunt of care responsibilities while facing limited access to resources and opportunities for advancement. At its core, this crisis revolves around the increasing demand for care services, inadequate resources, and systemic inequalities. Understanding the interconnectedness between the UK's social care crisis and the broader global context requires examining international migration patterns and the provision of care across borders. To address the current crisis effectively, a feminist approach must analyse the gendered aspect of care as well as the global structures of capitalism and domination.

The treatment of migrant care workers in the UK

Despite the reliance on migrant workers in the UK care sector, they often face exploitation and intimidation. It is important to acknowledge this reality for the migrant care workers in the UK. Not only from a human rights perspective, but also a gendered lens given that the majority of care work is carried out by women. Gahwi and Walton-Roberts highlight the argument that 'immigration and employment policies, alongside structural forms of gendered and racial discrimination, create precarious employment conditions for immigrant workers in this sector'.[30] Dowling highlights that 'too often, workers face chaotic and inconsistent shift patterns, long hours, insufficient breaks, staff shortages, high staff turnover and low pay, even below minimum wage standards'.[31] The public service union UNISON has raised serious concerns about the treatment of migrant staff coming to the UK to work in the social care sector, highlighting instances of exploitation, abuse, and appalling working conditions.[32] According to the UNISON, many migrant workers are forced to pay back exorbitant fees for job placement and accommodation, with some being chased for thousands of pounds in fees if they resign.[33] Moreover, migrant workers often find themselves in sub-standard accommodation, with rent deducted from their wages, and are subjected to unpaid work, racist remarks, harassment, and intimidation. Shockingly, some workers are even made to share bedrooms and beds, with instructions from employers not to discuss their circumstances.[34]

A report from Citizens Advice highlights the plight of migrant care workers in the UK, particularly those on the Health and Care Worker visa, who face exploitation and abuse due to restrictive visa conditions.[35] The report outlines cases of workers being underpaid, overworked, and subjected to poor treatment, with limited avenues for recourse.[36] The

[30] Ibidem.
[31] E. Dowling, *The Care Crisis*…, op. cit.
[32] *Migrant care staff in UK 'exploited and harassed' by employers says UNISON*, UNISON The Public Service Union, 10.07.2023, https://www.unison.org.uk/news/press-release/2023/07/migrant-care-staff-in-uk-exploited-and-harassed-by-employers-says-unison/ [access: 28.03.2024].
[33] Ibidem.
[34] Ibidem.
[35] *Spotlight Report: 'I Feel Like We're Being Treated as Slaves'. Benefits and Work*, Citizens Advice, 11.03.2024, https://www.citizensadvice.org.uk/policy/publications/spotlight-report-no-1-how-work-visa-design-is-driving-exploitation/ [access: 28.03.2024].
[36] Ibidem.

visa ties workers to specific employers, making them vulnerable to dismissal and deportation if they complain or leave their jobs. Additionally, workers often face financial constraints due to recruitment fees and lack of access to public funds, further trapping them in exploitative situations. Despite efforts by advisers to provide support, the root of the problem lies in the visa system and enforcement mechanisms. The report calls for reforms to empower workers, prevent harm through better supervision and enforcement, and ensure access to justice for migrant care workers.

Moreover, by preventing overseas care workers from bringing their families to join them in the UK, these policies create additional vulnerabilities and barriers for migrant workers, exacerbating systemic inequalities within the care sector. This decision has sparked criticism from care workers and support organisations, who deem it a dehumanising move that could lead to destitution for workers.[37] Firstly, the restriction on bringing dependents imposes emotional and financial strain on migrant care workers who rely on familial support networks. Separated from their families, these workers face loneliness, isolation, and heightened stress, which can adversely affect their mental health and job performance. The policy undermines workers' ability to sustain long-term commitments to their jobs, as the inability to reunite with loved ones may prompt them to seek employment opportunities elsewhere. Additionally, the visa's tie to specific employers renders workers vulnerable to exploitation and abuse, as they fear dismissal and deportation if they voice concerns or leave their jobs. This power dynamic perpetuates a culture of silence and further marginalises migrant care workers within the sector. The policy exacerbates existing challenges faced by migrant workers, including low pay, poor working conditions, and limited access to support services.

Conclusion

The social care crisis afflicting the United Kingdom is ultimately one facet of a broader, transnational "crisis of care" shaped by entrenched structures of gender, racial, and economic inequality. As this analysis has demonstrated, the UK's increasingly restrictive immigration policies targeting its essential care workforce risk exacerbating the very staffing shortages and provision deficits fuelling the crisis. From the new prohibition on migrant care workers bringing dependents, to rising income thresholds and fee increases, these measures threaten to deter prospective workers, undermine retention of existing staff, and perpetuate a deterioration in working conditions and quality of care within the sector. Fundamentally, they reinforce the devaluation and marginalisation of care labour inextricably linked to its gendered cultural framing.

Migrant care workers in the UK, overwhelmingly women and disproportionately from racially marginalised groups, find themselves at the nexus of compounding inequities and precarity tied to their gender, race, class, and immigration status. The decision to ban them

[37] V. Gayle, E. Mellino, N. Bloomer, *Ban on Family Members 'Will Force Migrant Care Workers into Poverty'*, "The Bureau of Investigative Journalism", 7.12.2023, https://www.thebureauinvestigates.com/stories/2023-12-07/ban-on-family-members-will-force-migrant-care-workers-into-poverty/ [access: 28.03.2024].

from bringing families imposes immense emotional and financial strain, jeopardising their mental health, job performance and long-term retention in roles providing crucial care services. Family separation policies exacerbate existing vulnerabilities and marginalisation facing migrant women in the workforce. Moreover, these immigration restrictions directly disrupt transnational "global care chains" that have emerged to fill care deficits in wealthier nations by drawing migrant women workers from poorer countries of the Global South – often leaving their own families behind. By limiting the entry of this labour pipeline from the developing world, the UK's policies risk shifting greater care responsibilities back onto domestic spheres and unpaid female labour within households. This dynamic could increase the "double burden" on British women having to balance paid employment with informal unpaid caregiving duties for loved ones. For care recipients as well, who are predominantly women, the reduced availability of migrant care workers resulting from stricter immigration policies may severely constrain their ability to access professional home-based care, personal assistance, and other essential support services. This has the potential to undermine their health, wellbeing, and quality of life.

Addressing the dire state of social care provision in the UK necessitates reckoning with these systemic, intersectional dynamics through a feminist analytical lens. It requires a paradigm shift away from the externalised, privatised policy mindset that has rendered the sector so reliant on an exploited migrant workforce in the first place. An approach rooted in collective responsibility and robust public investment is urgently needed to revalue care labour as essential social infrastructure warranting legal protections and equitable resourcing.

Only through this fundamental reorientation centred on universal, rights-based principles can the UK's cascading care crisis be resolved in a manner conducive to social justice. As Dowling argues, 'the root of the problem is not too little or too much migration, but the structural conditions of work in the care sector and the low value placed on care work and carers.'[38] Constructing an equitable care model hinges on challenging the very gendered socioeconomic hierarchies and racialised global divisions of reproductive labour that have precipitated this crisis in the first place.

This demands facilitating ethical migration pathways and family reunification policies to uphold the rights of migrant workers already playing an indispensable role within the UK's care infrastructure. It necessitates dismantling restrictive visa regimes, providing firewalls against deportation for reporting workplace violations, ensuring access to essential services regardless of status, and empowering migrant women rendered vulnerable through the intersections of gender, race, immigration status and labour exploitation.

The moral, economic, and human costs of perpetuating the current iniquitous policy paradigm marginalising migrant care workers are simply too monumental to countenance. Only by valuing this socially reproductive labour as a public good requiring sustained investment can the UK build a care system resilient enough to meet its obligations to all – today's aging population, those with disabilities and chronic conditions, and future generations alike. The status quo has proven unacceptable and unsustainable; realising this

[38] E. Dowling, *The Care Crisis*…, op. cit.

generational imperative of restructuring how we resource, and provision care is critical to dismantling intersecting inequalities and achieving social justice.

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Immigration speeding social landscape transformations: the case of Portugal

Imigracja jako czynnik przyspieszający transformacje społeczne: przypadek Portugalii

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Abstract

This article presents the significant and rapid transformation that Portuguese society is currently undergoing. A high level of immigration has been registered over the last several years. This is a significant wave that has never been experienced in the country before and represents an opportunity to meet labour force needs in different economic sectors and a chance to improve demographic sustainability. Traditionally known as a welcoming society, with a favourable integration approach, this is a test moment to confirm this perception of Portugal. The article examines the main data and trends of this transformation, discusses citizens' perception of immigration compared with the situation of other European societies, and highlights difficulties that are already emerging. The article also discusses the role of public policies on the topic.

Keywords: Portugal, immigration, integration, public policies

Streszczenie

Artykuł prezentuje ważną i szybko zachodzącą transformację, której obecnie doświadcza portugalskie społeczeństwo. W ostatnich latach odnotowano wysoki poziom liczby migrantów, który wydaje się znaczącą falą w kraju, który wcześniej czegoś takiego nie doświadczył. Owa fala stanowi zarazem szansę w kontekście potrzeb siły roboczej w różnych

sektorach gospodarki oraz zrównoważenia demograficznego. Tradycyjnie uznawana za otwartą społeczność portugalska miała przychylne podejście do integracji. Jednak obecny moment jest kluczowy i testowy – potwierdzi bowiem (lub nie) taki profil rdzennych mieszkańców. Autor w artykule analizuje główne dane i trendy transformacji, omawia postrzeganie migracji przez obywateli Portugalii w porównaniu z sytuacją innych społeczeństw europejskich oraz wskazuje trudności, które już się pojawiają, a także wskazuje rolę polityk publicznych w tej materii.

Słowa kluczowe: Portugalia, migracja, integracja, polityki publiczne

Context and recent trends

In recent years a major transformation has occurred in Portugal's social landscape due to the increasing number of immigrants arriving in the country. This is a significant trend because Portugal has always been a country of emigration.

The different emigration waves from the beginning of the 20th Century resulted in a total of 2.1 million nationals living in different parts of the world in 2020,[1] one of the largest European diasporas considering the 10 million population of the country. For decades, Portuguese citizens went abroad to look for better life conditions. It is important to focus on two emigration waves: a first one running till the 50's of the last century, called the transatlantic or the American wave, with major relevance to Brazil; and a second one known as the European wave, after II World War and till the democratic revolution (1974), a period of less than three decades when more than one million citizens went to live mainly to France and Germany. Europe's reconstruction opportunities, poor life conditions in the country, the ongoing political regime, and Portuguese Colonial War (1961–1974), were the factors that promoted very high emigration rates.

In the last quarter of the 20th century Portugal transitioned to a modern democracy and joined the EU. This stable and prosperous period saw emigration fall and the beginning of an immigration tendency, with a significant number of new citizens arriving from former African colonies like Cabo Verde, Angola, Mozambique and Guinea-Bissau, but also from some Eastern European countries like Ukraine and Romania. This period saw industrialisation and significant public investments in new infrastructure, with associate workforce needs.

As we can observe from figure 1, during the last 15 years, many Portuguese citizens leaving the country each year, especially during the economic crisis between 2011 and 2015. From a low qualified emigration, applying for jobs with no specialization profiles, the country is now facing the departure of a highly qualified generation, applying for high level careers and better salaries in Central Europe countries.

[1] International Organisation for Migration (OIM), Migration Data Portal, n.d., www.migrationdataportal.org/ [access: 11.02.2024].

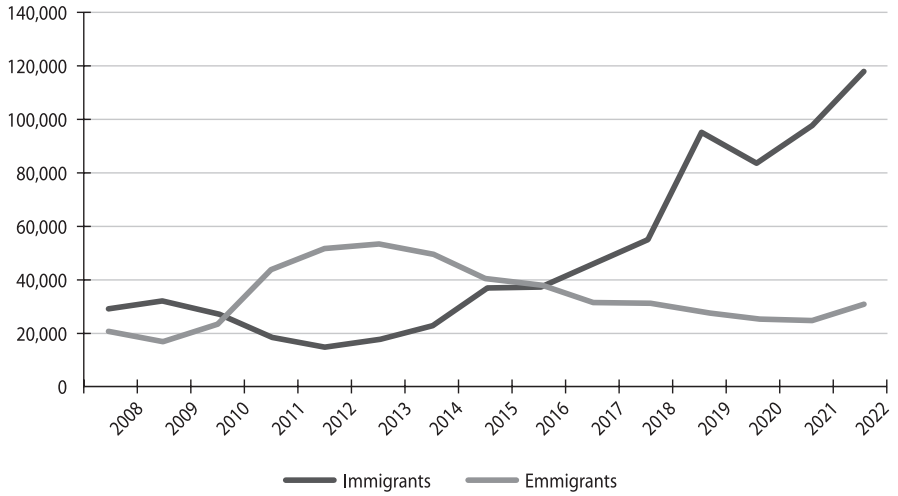

Figure 1. Portugal annual variation of permanent emigrants and immigrants (n.º)

Source: Pordata, www.pordata.pt, access: 6.01.2024.

It is relevant to mention the continuous and fast rising number of new immigrants arriving Portugal in the last decade, and particularly in the last two years, with more than 100,000 arrivals a year, numbers that the country has never experienced. In total, Portugal now has 700,000 residents from other countries – around 7% of its total population.

This new immigration movement includes people from the same origin countries that were already present in the past, plus some significant arrivals from European countries like UK, France or Italy. These are largely retired people taking advantage of the tax regime for non-habitual residents. There is also a fast growing community from Asia, mainly India, from Africa with Angola on the top, but with a large majority of new comers from Brazil, the biggest group, with almost 30% of all foreign residents in Portugal.[2]

Considering the Portuguese demographic context, this immigration wave is an opportunity to solve major demographic challenges: Portuguese population is one of the oldest in the world, birth rates are extremely low and the natural increase has been negative for several years; social and economic dynamics are not well balanced in the territory, and there are several sectors in need for workers that are not available, like agriculture and tourism. With low birth rates and a large number of young citizens going abroad, Portuguese population increase depends on new arrivals as we can see in figure 2.

[2] C.R. Oliveira, *Imigração em Números*, Observatório da Imigração, 2023, p. 15, https://www.om.acm.gov.pt/documents/58428/179573/Estat%C3%ADsticas+de+Bolso+da+Imigra%C3%A7%C3%A3o+2023_CRO_online.pdf/54dae394-0343-444b-809c-c1b6bd3a2433 [access: 11.02.2024].

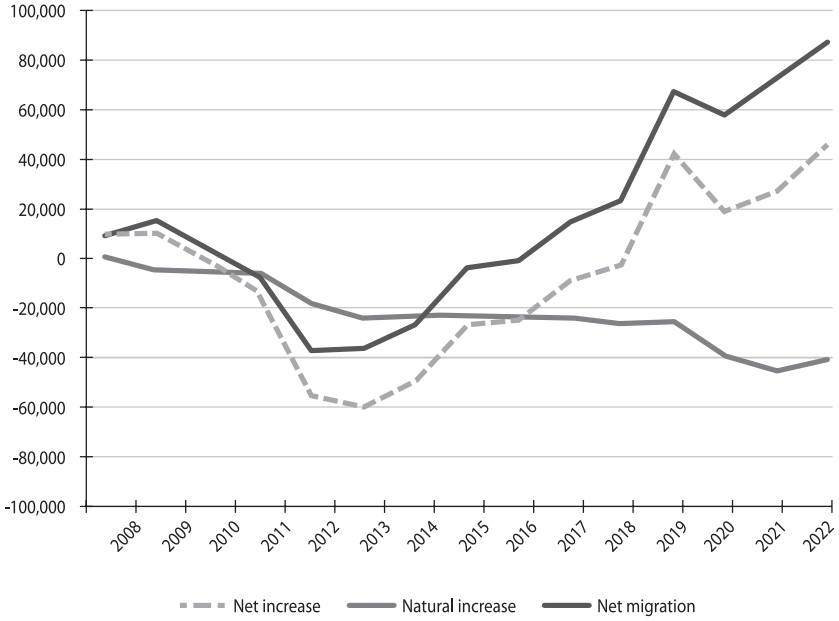

Figure 2. Annual population growth: total, natural and migratory

Source: Pordata, www.pordata.pt, consulted: 6.01.2024.

After a cycle of effective depopulation between 2011 and 2018, coinciding with the major economic crises period, in the recent years the net increase is very close to the net migration figure. Also, the natural increase started to recover in the last two years, and that is because of the increase of new births from immigrant mothers. In 2022 16.7% of the country total births were from foreign mothers, comparing with 12.3% in 2019, and 8.8% registered in 2016.[3]

Citizens' perceptions

Portuguese citizens' perception of immigration has stimulated public discussion on the topic. There are two main currents: one is that the multicultural context from the past and the colonial history produced a friendly environment for cultural exchange in a way that Portuguese people are generally open to the integration of immigrants, with no visible xenophobia or discrimination against different cultures; and the other one is that, as a society, Portugal has the same difficulties in welcoming and integrating citizens from other nationalities like any other European society. Rather than a sociological discussion this question often appears as a political and ideological debate.

From the available data on people's perception of immigration it's important to mention the results from the study carried on by the European Commission in 2022, in the Special

[3] *Live births of mothers resident in Portugal: total and by mother's nationality*, Pordata, www.pordata.pt [access: 26.02.2024].

Eurobarometer 519.[4] If as a general result Europeans seem to overestimate the real share of immigrants in the population, this is a fact that crosses all EU-27 countries and with no major differences in the Portuguese case, as we can see from tabele 3.

Tabele 3. Foreigners as resident population vs perception of the proportion of immigrants 2021

Countries	To your knowledge, what is the % of immigrants in the total population in our country?					Foreigners as a % of resident population
	0 < 9	9 < 20	20 < 35	35+	NA	
RO – Romania	54	14	4	2	26	0.3
HR – Croatia	57	19	8	5	11	0.9
SK – Slovakia	51	19	6	3	21	1.1
PL – Poland	52	31	5	0	12	1.2
LT – Lithuania	58	22	4	2	14	1.2
BG – Bulgaria	38	17	5	3	37	1.8
HU – Hungary	60	22	6	2	10	2.1
CZ – Czech Republic	53	33	9	2	3	5.1
FI – Finland	62	27	4	1	6	5.3
PT – Portugal	12	36	10	2	40	6.8
NL – Netherlands	46	35	13	4	2	7.0
EL – Greece	24	49	13	3	11	7.1
FR – France	24	37	15	11	13	7.8
SI – Slovenia	25	35	23	13	4	8.2
SE – Sweden	27	52	16	2	3	8.3
EU-27	30	35	16	6	13	8.3
IT – Italy	21	37	22	10	10	8.5
DK – Denmark	43	45	8	2	2	9.6
ES – Spain	12	34	19	8	27	11.4
BE – Belgium	19	39	29	10	3	12.8
DE – Germany	26	40	19	6	9	13.1
LV – Latvia	70	18	8	4	0	13.1
IE – Ireland	29	37	23	5	6	13.3
EE – Estonia	53	21	8	2	16	15.2
AT – Austria	14	40	30	9	7	17.5
CY – Cyprus	18	37	24	7	14	18.8
MT – Malta	24	34	17	9	16	20.6
LU – Luxembourg	21	28	14	28	9	47.1

Source: Special Eurobarometer 519, consulted 15.01.2024, author's treatment.

[4] *Special Eurobarometer 519: integration of immigrants in the European Union*, European Comission, Directorate-General for Migration and Home Affairs, 2022, https://europa.eu/eurobarometer/surveys/detail/2276 [access: 10.01.2024].

Although, we have to mention that when answering the question "to your knowledge, what is the proportion of immigrants in the total population in your country?" Portugal is the member state with the lowest number of answers pointing the first group (0–9%), which it would be the nearest to the real proportion of foreigners in the total population (7%). This apparent lack of knowledge of the country's reality is corroborated by the proportion of participants not answering this particular question, 40%, the highest between all the 27 EU countries.

When asked about the level of success of immigrants' integration, Portuguese citizens feel very optimistic in comparison with citizens of other countries, as showed by figure 3. A large majority consider that there is a *totally successful* situation (73%). Only Ireland recorded a higher figure. The number of those believing that integration is *totally not successful* is the lowest in Europe.

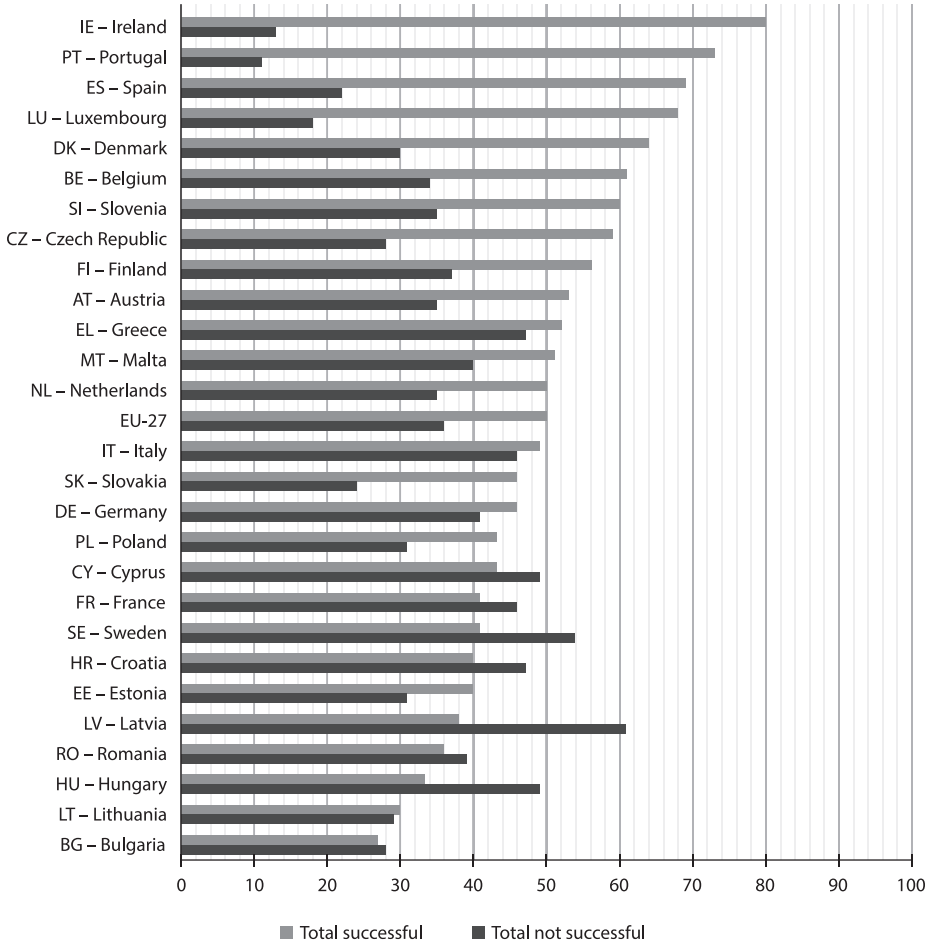

Figure 3. How successful or not is the integration of most immigrants living in the city or area where you live

Source: Special Eurobarometer 519, consulted: 15.01.2024, author's treatment.

Considering the feelings about immigration from outside EU and the question about if it *is more of a problem* or *is more of an opportunity*, showed in figure 4, we can conclude that this optimistic Portuguese approach is still significant, with more than 50% of the respondents considering it *more of an opportunity*, and the fourth lowest level of answers considering it is *more of a problem*, just higher than Ireland, Luxembourg and Spain. Nevertheless, looking to the same figure and considering the proportion of respondents answering that immigration from outside EU *is equally a problem and an opportunity*, Portugal is on the top of the list, representing that Portuguese respondents have no strong feelings about the question, or, again, a relative indifference or lack of knowledge on the topic.

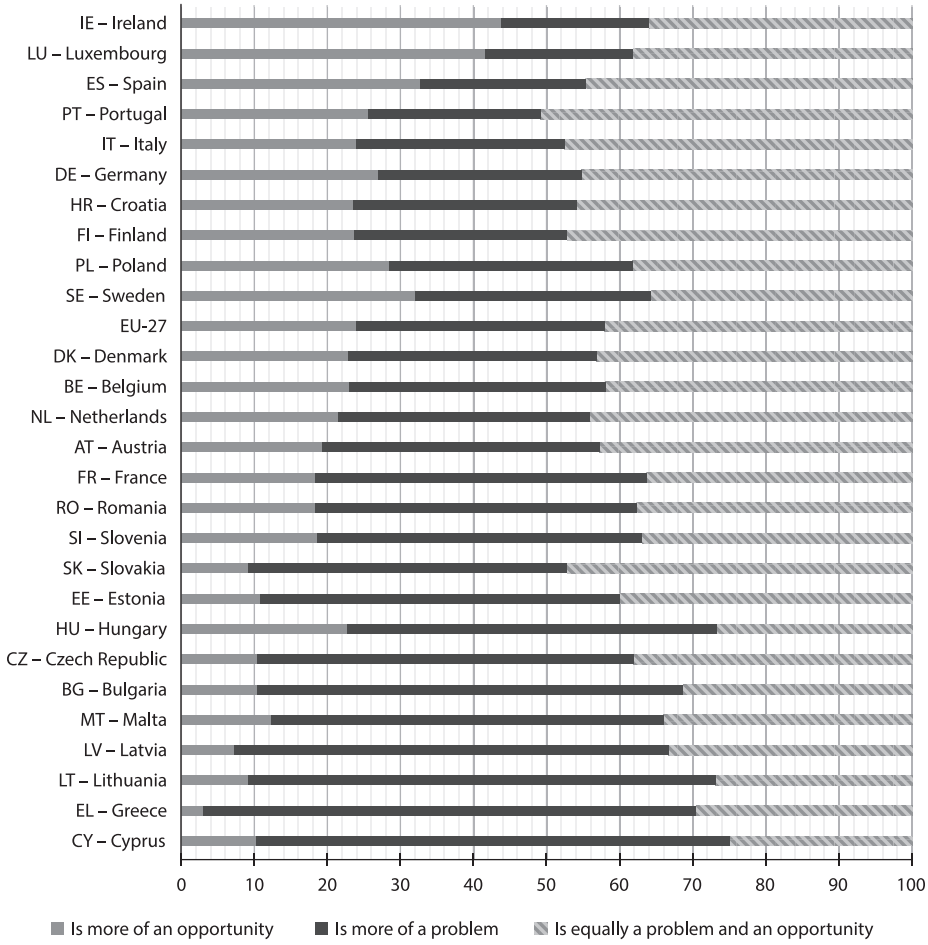

Figure 4. Immigration from outside the EU is more of a problem or more of an opportunity for our country today?

Source: Special Eurobarometer 519, consulted: 15.01.2024, author's treatment.

Some analyses are also being developed at a national scale, with some interesting conclusions on citizens' perceptions about the actual immigration wave. The investigation project on "Sustainable Immigration in a Social State of Law",[5] presented in December of 2023 from a large survey conducted at the end of September 2023, is an example, and with some differing results: 68.7% saying that receiving immigrants from Europe and third countries is important for Portugal, and 71.1% believing that immigrants have been well received and integrated; but in another direction, 55.2% feeling that immigration is under control, and 48.7% believe that should be fixed immigration quotas.

With this general overview is fair to conclude that, in general, immigration seems to be positively perceived in Portugal. This deduction is aligned with the optimist point of view that affirms the general openness of Portuguese society to the integration of other cultures. However, we must consider that the country had very low immigration rates until few years ago – the rapid increase of immigrants has occurred only in the last couple of years. As other countries have experienced, Portuguese society just might be facing the same process of adjusting to a more multicultural landscape. This seems to be corroborated by other studies that are being carried out, and by some signs becoming more visible in the recent times.

What's going on

Forty year old Ukrainian citizen Ihor Homenyuk died on the 12th of March of 2020, two days after arriving at Lisbon Airport with a tourist visa, and being detained at the temporary installation centre managed by the Foreigners and Borders Police. During the night of 29th of March, all the country got to know by TV news that he has been violently beaten and killed by three inspectors. The next day those inspectors were arrested, the top directors of the special police for borders inspection were fired, and some weeks after it was announced that this police branch would be closed and its functions would be transferred to a new public agency dedicated to migration and inclusion. That new agency was created in 2024.

We have to say that a couple of racist and violent episodes also took place during the first immigration wave in the last decade of 20th century, and that some very segregated neighbourhoods around Lisbon metropolitan region still exist, with immigrants from the former African colonies. But at the present, the case of Ihor Homenyuk is the most dramatic and well known in a context where other occasional episodes of violence against immigrants in Portugal are also being noticed. Some of them are even related to a visible presence of some racist and xenophobic movements among the police - small groups that are far from representing the majority of this professional group, but clearly inspired by fake news about insecurity and other hate speech messages that quickly spread on social networks and other digital channels.

[5] C.B. de Morais, A.R. Gil, *Relatório final do projeto de investigação: Imigração Sustentável num Estado Social de Direito*, Lisbon Public Law Research Centre, Lisboa 2023: https://lisbonpubliclaw.pt/publicacoes/imigracao-sustentavel-num-estado-social-de-direito/ [access: 7.03.2024].

It's also important to mention that in 2019 a new populist political party, defined as conservative, nationalist and right-wing, was founded and which has achieved success in all elections occurred so far. It won one seat to the Portuguese Parliament in 2019, 12 in the 2022 elections, and 50 in the 2024 elections. Like in other European democracies, this challenging context is happening now in Portugal, with populist forces using the rapid increase of immigrant communities to gather supporters to a new discourse based on fear and against immigration.

Other problematic situations that immigrants face in the country are becoming known. Economic exploitation due to illegal schemes, unscrupulous intermediaries and extremely bad working and living conditions that some arriving workers are forced to endure, are some of the most current situations reported so far. These are taking place both in an urban context, which is associated with a lack of housing and high prices of those houses available, and also in less urbanised and rural areas, where immigrants find work opportunities related to agriculture, agro-food industry or other industrial sectors.

In April 2021, during the COVID-19 pandemic, the country got to know of a large infection area in the municipality of Odemira, Alentejo Region, mainly among the large immigrant community working in the agriculture sector. With all the media focused on the situation it was not possible to hide the fact that many immigrants were living in very poor conditions. Public institutions set up an emergency plan to relocate a large number to public and even tourist accommodation.

In February 2023, a fire in the centre of Lisbon, showed another face of the same housing problem. In an overcrowded flat, where twenty-two immigrants lived, mainly from India, Pakistan, Bangladesh and Nepal, two people died and fourteen were injured. Both episodes made the problem visible and put public authorities under major pressure from public opinion, but there is no evidence that an effective change has taken place.

Another point of analyse is that no specific data of aggression or discrimination against immigrants are available from Portugal's official statistical bodies. However, the new *Commission for Equality and Against Racial Discrimination*, a public organisation working in association with the National Parliament and the Government reports a rising number of complaints on racial and ethnic basis, that is correlated with the increase of immigrants in the country.

This doesn't necessarily mean that citizens' feelings about welcoming new communities are changing, but exposes the need to reinforce public policies about immigrants' integration, something that is particular clear from the adoption of the *National Plan to Combat Racism and Discrimination 2021–2025*[6] by the Portuguese Government.

This plan has defined important initiatives in ten intervention areas: *Governance, information and knowledge for a non-discriminatory society*; *Education and Culture*; *Higher Education*; *Labour and Employment*; *Housing*; *Health and Social Welfare*; *Justice,*

[6] Secretary of State for Citizenship and Equality, Portuguese Government National Plan to Combat Racism and Discrimination 2021–2025. Full English version available at: *Commission for Equality and Against Racial Discrimination*, 2021, https://www.cicdr.pt/documents/57891/1531801/National+Plan+to+Combat+Racism+and+Discrimination+2021-2025.pdf/29f311d2-ac06-44b3-830e-fca9460edb3b [access: 2.03.2024].

Security and Rights; *Participation and Representation*; *Sport*; *and Means of Communication and the Digital*. But even considering that the designed actions are being successfully executed, we have to mention that the plan is not well known by the majority of society. The mid-term evaluation of implementation (to the first quarter of 2023), if already done, is still available to the public.

Generally speaking, Portugal ranks well on key areas of integration policies already in the field, as we can conclude from, for example, the 2020 Migrant Integration Policy Index (MIPEX).[7] Although, facing this immigration wave, it would be important to know what's happening in different areas; what is being done in order to improve public services facilities, centralised and decentralised ones, regarding education, health, justice or responsible services to promote the legalization and regularization of immigrants and their families; or, for example, if public providers are being prepared with language or inclusive competences in order to avoid discrimination and to facilitate a favourable integration environment.

Conclusion

Arriving late to a more multicultural society compared with other European member states, Portugal is now welcoming a major wave of immigration, a significant transformation that is changing the country's social landscape in many aspects. From Brazil, Angola, India, Pakistan or other origins, new communities are arriving to different regions, not only to Lisbon and Porto metropolitan areas, and are supporting economic activities with a lack of labour force. This transformation is occurring in a fast-forward mode, and special attention to integration policies is required to avoid discrimination or anti immigrants' feelings.

Portugal is usually considered as an open society, with no problems integrating citizens from other cultures. The available data reflects a general positive perception about immigration, but at the end, this seems more of a later adjustment to a multicultural society, rather than an effective national trait. Positive effects to the economy coming from immigration, the opportunity of demographic renovation, or even immigrants' contribution to the sustainability of the national social insurance system, are sensible topics supporting the idea of a good welcoming environment.

However, some problematic situations are already being reported. Monitoring and opening new reporting or complaint channels, or defining action plans, are relevant measures to fight against all possible abuse situations that immigrants can face in Portugal nowadays. But this fast change and new social context in the country definitely demands a holistic approach to effective public policies that can grant equal rights and a friendly context to all citizens.

[7] *The 2020 Migrant Integration Policy Index* available at: https://www.mipex.eu/ and the Portugal figures at https://www.mipex.eu/portugal [access: 10.12.2023].

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Notaries' activities during the war: Ukrainian experience

Działalność notariuszy w czasie wojny: doświadczenia ukraińskie

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Abstract

During wartime, notaries face a number of complex legal and organisational challenges that require the adaptation of traditional procedures and approaches to the changed conditions of wartime. This study focuses on ensuring the availability of notarial protection during wartime and the need to develop a legal framework for a regulatory response to challenges that require new approaches and solutions.This article examines the issues of access to notarial services and preservation of confidentiality of documents during war and armed conflicts. In particular, the author examines the difficulties faced by notaries in preserving documents, as well as the security issues of the notary and his/her clients. The author analyses the practice of law enforcement and changes in the regulatory framework in the field of notary during the military operations in Ukraine. The author analyses the right of military personnel, rank-and-file and senior civil defence officers, employees of critical infrastructure facilities, civil servants, local self-government officials and police officers to a personal order under current Ukrainian legislation, which is an important tool for their social protection and support. This article focuses on the Ukrainian experience, but the knowledge gained in the course of the analysis may be useful for other countries facing similar problems. The study reflects the relevance and importance of the problem of ensuring the functioning of the notary during wartime and suggests ways to address these complex challenges.

Keywords: notary, notary public, notarial protection, notarisation of transactions, personal order, war, Martial Law

Streszczenie

W czasie wojny notariusze stają przed szeregiem złożonych wyzwań prawnych i organizacyjnych, które wymagają dostosowania tradycyjnych procedur i podejść do zmienionych warunków wojennych. Niniejszy artykuł koncentruje się na zapewnieniu dostępności ochrony notarialnej w czasie wojny oraz potrzebie opracowania ram prawnych dla regulacyjnej odpowiedzi na wyzwania, które wymagają nowych podejść i rozwiązań. Omówiono w nim kwestie dostępu do usług notarialnych i zachowania poufności dokumentów w czasie wojny i konfliktów zbrojnych. Autorka w szczególności analizuje trudności napotykane przez notariuszy w zabezpieczaniu dokumentów, a także kwestie bezpieczeństwa notariusza i jego klientów. Przytacza także praktykę egzekwowania prawa i zmiany w ramach regulacyjnych w dziedzinie notariatu podczas operacji wojskowych w Ukrainie. Autorka analizuje również prawo personelu wojskowego, szeregowych i wyższych oficerów obrony cywilnej, pracowników obiektów infrastruktury krytycznej, urzędników służby cywilnej, samorządowców i funkcjonariuszy policji do osobistego zamówienia na mocy obowiązującego ustawodawstwa ukraińskiego, które jest ważnym narzędziem ich ochrony socjalnej i wsparcia. Niniejszy artykuł koncentruje się na doświadczeniach ukraińskich, ale wiedza zdobyta w trakcie analizy może być przydatna dla innych krajów borykających się z podobnymi problemami. Opracowanie odzwierciedla aktualność i wagę problemu zapewnienia funkcjonowania notariatu w czasie wojny oraz wskazuje sposoby sprostania tym złożonym wyzwaniom.

Słowa kluczowe: notariat, notariusz, ochrona notarialna, notaryzacja transakcji, porządek osobisty, wojna, stan wojenny

Introduction

During wartime, notaries face a number of complex legal and organisational challenges that require the adaptation of traditional procedures and approaches to the changed conditions of wartime. In this sense, notaries become important participants in the system of ensuring law and order and protecting the rights of individuals and legal entities and their property. As the Ukrainian experience shows, notarial services are becoming an important tool in dealing with military losses and compensation for damage caused by war. Notaries often act as intermediaries in resolving these issues, but they also face difficulties in determining the amount of damage and conducting compensation procedures.[1]

One of the main challenges that arise in times of war is maintaining access to notarial services, as the forced displacement of the population, destruction of infrastructure and restrictions on free movement can complicate the process of ensuring the availability of notarial protection. In addition, an additional challenge is to ensure the safety of the notary and his/her clients in times of war and active hostilities. Notaries have to work in dangerous conditions, which may endanger their lives and health, and may make it difficult to carry out the normal notarial process.

[1] M.L. Closen, *The public official role of the notary*, „UIC Law Review" 1998, Vol. 31, pp. 651–702.

Analysing the practice of law enforcement, there are also frequent cases of difficulties in maintaining the confidentiality and integrity of documents in the event of evacuation or destruction of notary offices. Therefore, today Ukrainian notaries still face problems with ensuring the safety of documents, and ensuring backup and storage of documents may be crucial for preserving the rights and interests of individuals and legal entities in times of war. Therefore, the relevance of this study is primarily determined by the growing need to understand and resolve complex situations arising from military conflicts and the need to develop a legal framework for a regulatory response to challenges that require new approaches and solutions. In the light of these problems, there is a need to develop and implement special regulations aimed at ensuring the functioning of the notary in war and conflict, taking into account all the specific requirements that arise during war. The Ukrainian legislator is trying to respond dynamically and in a timely manner to the need for legal regulation of all spheres of society and the state, so such legal acts provide for measures to ensure the safety of notaries and their clients, as well as to maintain access to notarial services even in emergency situations.

The importance of this study is also related to the fact that notaries have a special place in exercising the right of military personnel, privates and senior officers of civil protection services, employees of critical infrastructure facilities, civil servants, local government officials and police officers to a personal order, which is an important tool for social protection and support of these persons. However, there is a problem in the absence of a clear and unified approach to the drafting and use of personal orders, and the lack of a unified methodology and standards can lead to errors in the application of this mechanism, as well as to the possibility of conflicts and contradictions in the definition of the rights and obligations of the above-mentioned persons. A study of the peculiarities of the application of personal orders will help to identify the most effective practices of their use, taking into account the legal framework and the specifics of activities in the field of defence and security.

Identifying and analysing the main problems related to ensuring access to notarial services, preserving the confidentiality and integrity of documents, as well as ensuring the safety of notaries and their clients in wartime is of particular interest. The study of Ukrainian legislation, which has undergone systemic changes in approaches to the methods of legal regulation of notaries' work during the war, will serve as a solid basis for countries facing similar problems. Therefore, the purpose of this study is to analyse the changes to the current legislation of Ukraine in the field of notarial activity and the problems that arise in the process of drafting and using personal orders in the field of notary during the war.

Transformational changes in the notary's activities during the war: an overview of legal and organisational issues

The difficulties faced by notaries during the war demonstrate the importance of a thorough analysis of the legal and organisational mechanisms that would adequately guarantee the protection of the rights and freedoms of citizens and ensure safe working conditions for notaries. The unique challenges faced by notaries in the performance of their duties under Martial Law due to security threats, numerous violations of human rights and, in particular, property rights, objectively require the development of a comprehensive approach to addressing compensation for damage and restoring the situation of victims of armed conflict[2]. At the same time, the analysis of these problems allows us to better understand the role of notaries in ensuring law and order during military conflicts and to improve the mechanisms for protecting the rights of citizens in emergency circumstances. In times of war, the unique dualistic nature of the notary, which functions on the borderline of public and private interests, is better understood as a link between the state and civil society.[3]

It is known that during the Martial Law period, most public and private notaries will continue to carry out their professional activities, except for some regions where restrictions may be imposed due to circumstances that complicate the work of notaries. This is due to the fact that during the period of Martial Law, notaries may face various restrictions that affect the normal functioning of their professional activities. Therefore, the website of the Notary Chamber of Ukraine contains a list of notaries working under Martial Law.[4]

The key features of the work of notaries under Martial Law should be divided into areas of their work and the functions assigned to them by the current legislation. In particular, they should be grouped in the following order:

– regulation of the work of state registers (for example, at the beginning of the war, in order to prevent unauthorised actions with the information of the registers by the aggressor country, the work of most state registers was suspended, except for the inheritance register, the unified register of powers of attorney, the unified register of special forms of notarial documents, the state register of civil status acts, the register of agricultural receipts);

– temporary non-performance of certain notarial acts (e.g., until the state register of real rights to immovable property, the unified register of encumbrances on movable property, the state register of legal entities, individual entrepreneurs and public organisations resume operation, alienation agreements, pledges of immovable property, pledge/mortgage agreements of movable property were temporarily not certified; certificates of acquisition of ownership of immovable/movable property, including the right to inheritance, were not issued);

– changes to the period for acceptance of the inheritance (as a general rule, the period for acceptance of the inheritance is 6 months from the date of death of the testator;

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[2] O. Pis′mennij, *Sučasnì problemi ìnstitutu notarìatuv umovah voênnogo stanu*, "Publične prawo" [*Modern problems of the notary institution in the conditions of Martial Law*, "Public Law"] 2023, № 1(49), pp. 23–30, https://www.publichne-pravo.com.ua/files/49/3.pdf [access: 15.04.2024].

[3] V.G. Šišlenko, *Pravove Regulûvannâta Organìzacìâdìâl'nostì Notarìatuukraïni*, "Forum Prava" [Legal regulation and organization of activities of the notary of Ukraine, "Law forum"] 2010, № 4, pp. 971–975, https://dspace.univd.edu.ua/server/api/core/bitstreams/72234ae4-648c-4c26-b23d-7afb0488a2ca/content [access: 15.04.2024].

[4] List of notaries of Ukraine who work under Martial Law: *Perelìk notarìusìv Ukraïni, âkì pracûût' v umovah voênnogo stanu*, Notarìal′na Palata Ukraïni, 10.03.2022, https://npu.ua/news/notary/ [access: 15.04.2024].

however, during the period of Martial Law, the period for acceptance of the inheritance is suspended, and after the cancellation or termination of Martial Law, it is extended);

– peculiarities of the use of special forms (for example, under Martial Law, the use of special forms by notaries is not mandatory for notarial acts such as certification of a power of attorney, will or authentication of signatures on documents);

– transfer of certain notarial functions to commanders (chiefs) of military formations or their authorised persons (during Martial Law, commanders (chiefs) of military formations or their authorised persons may certify powers of attorney (except for powers of attorney for the right to dispose of immovable property, management and disposal of corporate rights) and wills of military personnel, employees of law enforcement (special) bodies, civil protection bodies involved in deterring armed aggression of a foreign state);

– restrictions for citizens and residents of the aggressor country (for example, strict restrictions have been introduced and are currently in force for Russian citizens and legal entities directly related to the aggressor country; in fact, almost the only possible notarial act of a Ukrainian notary at the request of a Russian citizen is to certify the authenticity of the signature on the application for renunciation of Russian citizenship).

From a legal point of view, the effective activity of notaries during the war is of great importance, since, based on the content of the Law of Ukraine "On Notaries", notaries in their activities are called upon to contribute to the maintenance of law and order and the protection of property and property rights of individuals and legal entities.[5] In times of war, the activities of notaries allow us to determine the effectiveness of their work and check how they ensure compliance with the rule of law and constitutional legal guarantees in emergency circumstances.[6] In addition, during the war, the risk of violation of property rights of citizens increases, so it is important to have a high-quality legal regulation of notaries' activities in order to apply effective measures to protect property and rights of individuals and legal entities, as well as to perform urgent notarial acts (certification of powers of attorney, wills, authenticity of signatures on applications, inheritance cases, etc.)

During the period of Martial Law, notaries cannot follow all the standard procedures required by law for notarial acts, as they did in peacetime. Therefore, in order to regulate the provision of notarial services by notaries, the Cabinet of Ministers of Ukraine approved Resolution "On Certain Issues of Notaries under Martial Law" No. 164 dated 28 February 2022, as amended (Resolution No. 164), which establishes the procedure for notaries' activities in wartime.[7] In fact, the main purpose of amending the notarial procedure is to simplify access to notarial services for individuals and legal entities. For this purpose, the requirements for notarial acts were deliberately reduced, however, only to the extent

[5] About the notary: Law of Ukraine dated September 2, 1993, No. 3425-XII. Information of the Verkhovna Rada of Ukraine, 1993, No. 39, Art. 383.

[6] S. Osipova, *Influence on Latvia's Notarial System by Occupying Powers during the World War II*, "Journal of the University of Latvia. Law" 2014, Vol. 6, pp. 20–38, https://journal.lu.lv/jull/article/view/209 [access: 15.04.2024].

[7] About some notary issues under Martial Law: Decree of the Cabinet of Ministers of Ukraine No. 164 of February 28, 2022 with changes and additions, https://ips.ligazakon.net/document/view/kp220164?an=1 [access: 15.04.2024].

that they allow for legality and do not violate the basic principles of notarial activity. It should be noted that a number of simplifications and prohibitions have now been cancelled, but their analysis will help to understand the legal and organisational measures taken by Ukraine to ensure the performance of notarial activities in times of war. Such analysis will be a good example for other countries in the event of war or other emergencies.

The first amendments introduced by Resolution No. 164 concerned the mandatory requirements for the form of notarised documents, which are usually established by Ukrainian legislation, namely the mandatory use of special forms of the established form. However, due to Russia's military aggression, the State Enterprise "National Information Systems" responsible for the supply of special forms was unable to supply notaries with the relevant forms, so during the Martial Law, notaries were allowed to certify powers of attorney and wills, and to certify the authenticity of signatures on documents without using special forms of notarial documents, on plain paper. At the same time, the notary's details must be printed on a white letterhead using computer technology: an image of the State Emblem of Ukraine, surname, full name, patronymic (if any), name of the state notary office (for a state notary), address of the workplace, telephone number, e-mail address.[8]

In order to verify the validity of a power of attorney that was drawn up without the use of standard forms of notarial documents and certified by a notary on plain white paper, the interested person has the right to submit a copy of this power of attorney to the notary. In this case, the notary is obliged to issue a certificate within two business days confirming or refuting the compliance of the notarisation of the power of attorney with the requirements of the applicable law. This procedure is important from the point of view of ensuring legal certainty and trust in notarial documents during the war, when special circumstances may arise that complicate the process of fulfilling the standard requirements for notarial practice. The mechanism proposed by the Cabinet of Ministers of Ukraine allows for effective control and compliance of notaries' actions with the law, while maintaining a high level of public confidence in the notary system in any situation.

From both a legal and organisational point of view, it is important to know who can be a notary during Martial Law, as it is not always possible to find a notary in such a situation. For such cases, Ukrainian legislation has established a range of persons who can replace a notary and perform a certain range of notarial acts. Resolution No. 164 provides that under Martial Law, the commanders of the Armed Forces of Ukraine, other military formations, law enforcement officers and civilian authorities have the ability and authority to certify powers of attorney (except for powers of attorney for the disposal of real estate, management and disposal of corporate rights) and wills of military personnel of the Armed Forces of Ukraine, other military formations, law enforcement officers and civilian authorities. Such powers of attorney and wills must be further registered in the relevant registers, so they are sent through the General Staff of the Armed Forces, the Ministry of Defence, the relevant law enforcement (special) or other body to the Ministry of Justice

[8] M. Kornìênko, *Notarìat pìd čas voênnogo stanu: klûčovì zmìni* [*Notary during Martial Law: key changes*], 15.03.2022, https://biz.ligazakon.net/analitycs/209961_notarat-pd-chas-vonnogo-stanu-klyuchov-zmni [access: 4.15.2024].

or its territorial body to ensure their registration by notaries in the Unified Register of Powers of Attorney or the Inheritance Register.[9]

Certified wills and powers of attorney are registered by the heads of these entities (bodies, institutions) or other persons authorised by such heads under a separate serial number in the register for registration of wills and powers of attorney, the form of which is approved by the Ministry of Justice. The number under which the will or power of attorney is registered is indicated in the certifying inscription. The General Staff of the Armed Forces, the Ministry of Defence, the relevant law enforcement (special) or other body (institution) shall ensure that powers of attorney and wills are submitted to the Ministry of Justice or its territorial body within five days of receipt. In its turn, the Ministry of Justice shall ensure their transfer to the territorial body of the Ministry within two business days after receiving the power of attorney and will. Within two business days after receiving a power of attorney or a will, the territorial body of the Ministry of Justice shall ensure their transfer to a notary / state notary office for further registration in the Unified Register of Powers of Attorney or the Inheritance Register. Within three business days after receiving the certified power of attorney / will, the notary / state notary office is obliged to ensure their registration (accounting), enter information about them in the Unified Register of Powers of Attorney or the Inheritance Register, store these documents and transfer them for storage to the relevant state notary archive within three months after the termination or cancellation of Martial Law. The territorial body of the Ministry of Justice shall notify the Ministry of registration of a power of attorney, will, and entry of information about them into the Unified Register of Powers of Attorney or the Inheritance Register, and the Ministry of Justice shall notify the body (institution) from which the relevant documents were received.[10]

It is worth noting that in wartime it is important to have mechanisms to ensure the continuous functioning of all spheres of society and the preservation of legal relations. Empowering military commanders to certify powers of attorney and wills is an important step in ensuring legal certainty in wartime. Firstly, it allows to ensure the continuity of legal relations during wartime, when the possibility to contact notaries may be limited due to active hostilities or other circumstances. From this point of view, ensuring legal certainty is critical in maintaining order and stability in society. Secondly, allowing commanders and other authorised persons to notarise powers of attorney and wills simplifies procedures and reduces bureaucratic barriers in times of war, allowing for a quick response to the needs of society and ensuring continuity of legal processes. In addition, the mandatory registration of such powers of attorney and wills in the relevant registers guarantees their legal effectiveness and validity, which is important for ensuring legal certainty of the parties and avoiding disputes in the future. Thus, allowing powers of attorney and wills

[9] About some notary issues under Martial Law: Decree of the Cabinet of Ministers of Ukraine No. 164 of February 28, 2022 with changes and additions https://ips.ligazakon.net/document/view/kp220164?an=1 [access: 15.04.2024].

[10] About some notary issues under Martial Law: Decree of the Cabinet of Ministers of Ukraine No. 164 of February 28, 2022 with changes and additions https://ips.ligazakon.net/document/view/kp220164?an=1 [access: 15.04.2024].

to be certified in military institutions has significant practical implications for ensuring legal stability and normal functioning of society in times of military conflict.

The current legislation of Ukraine provides that notarial acts may be performed not only in notary offices, but also in diplomatic missions and consular offices of Ukraine. In cases where there is no notary in rural settlements, such acts may be performed by local government officials authorised by the notary. The provisions of the Law of Ukraine "On Notaries" (Article 40) define the categories of persons entitled to replace a notary and certify documents that have the same legal status as notarised documents (chief doctors and their deputies, heads of medical institutions, as well as captains of vessels flying the flag of Ukraine and heads of penitentiary institutions).[11]

Despite the importance of regulatory support for human and civil rights and freedoms, the need to improve the efficiency of the organisation and functioning of the institution of public services, including in terms of public services as the subject of notaries' activities in Ukraine, is a priority task for the authorities.[12] It is important for the state to ensure adequate organisational readiness and access to legal services for notaries, as war conditions require a high level of organisational readiness and mobility from notaries, given that the need for legal services (in particular, confirmation of documents, registration of property rights and other notarial acts, etc.).[13]

The legislator also pays special attention to improving the structure of the notary system in times of war, ensuring the safety of notaries while providing notarial services, ensuring proper communication and information support, including with public authorities. In addition, the war has made adjustments to the organisational structure and mechanisms of the notary system, as notary institutions were divided by territory, taking into account their ability to function in emergency circumstances and coordination of their activities.

A separate issue concerns ensuring the security of notarial acts and the protection of notary staff and clients under Martial Law, which requires the introduction of additional security measures. It is important for notaries to be prepared to work in emergency situations and to be able to mobilise quickly in critical moments.

It is important to ensure proper communication between notary institutions, other law enforcement agencies and the public during the war in order to improve and increase the efficiency of notarial services in emergency circumstances. The interaction of notary bodies and executive authorities should be understood as legally enshrined methods of cooperation that ensure the exercise of joint powers in order to perform both general and specific functions.[14] There are the following forms of interaction between these entities:

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[11] About the notary: Law of Ukraine dated September 2, 1993, No. 3425-XII. Information of the Verkhovna Rada of Ukraine, 1993, No. 39, Art. 383.

[12] O.V. Rudčenko, *Publìčnì poslugi âk predmet dìâl'nostì notarìusìv v ukraïnì*, "Ûridičnij Naukovij Elektronnij Žurnal" [*Public services as a subject of activity of notaries in Ukraine*, "Legal Scientific Electronic Journal"] 2022, № 1, pp. 388–395, http://lsej.org.ua/1_2022/98.pdf [access: 15.04.2024].

[13] C. Janice, M. Rahayu, *Responsibilities and Authorities of the Notary for the Legalization of Authentic Deeds*, "Law Doctoral Community Service Journal" 2022, Vol. 2(1), pp. 14–19.

[14] V.G. Tišenko, *Funkcìonal'na ta organìzacijna vzaêmodìâ notarìatuz organami publičnoï vladi v Ukraïnì* "Vìsnik Černìvec'kogo Fakul'tetunacìonal'nogo Unìversitetu «Odes'ka Ûridična Akademìâ»" [*Functional and organizational interaction of the notary with public authorities in Ukraine*, "Bulletin of the Chernivtsi Faculty

exchange of information; joint control over compliance by citizens of Ukraine, foreigners and stateless persons with the requirements of Ukrainian legislation on the provision and receipt of notary services; holding joint events; joint training on notary activities.[15] We can also point to such types of interaction between these bodies as organisational and functional interaction. Organisational interaction of notaries with executive authorities is a type of interaction that is a complex and mutual connection of elements of the organisational system, which is manifested in their joint functions, and its management structure in their simultaneous and coordinated relations with the external environment. In other words, these are mutually beneficial and mutually agreed (in terms of goals, time, place, resources, etc.) actions of the notary and executive authorities as elements of the public service of Ukraine aimed at organising and streamlining their work. Organisational actions include: developing programmes, holding meetings, controlling, explaining certain activities, studying and summarising work experience, recruiting personnel, etc. Functional interaction between the notary and executive authorities is manifested in the mutually coordinated and mutually beneficial activities of these entities, which are carried out in order to properly perform their functions.[16]

Government and law enforcement agencies should facilitate the safety and normal functioning of notaries during this period, providing them with the necessary conditions to perform their duties in accordance with the law.[17]

It should be noted that Resolution No. 164 establishes a procedure for public and private notaries in the event of a possible threat of unlawful seizure or loss of special forms of notarial documents and the seal of a private or public notary. According to this document, in the event of such a threat, the notary must immediately destroy the unused forms and seal. After the destruction, the notary draws up an act, an electronic copy of which with a qualified electronic signature of the notary is sent to the State Enterprise "NAIS" (in case of destruction of forms) or to the relevant territorial body of the Ministry of Justice (in case of destruction of the seal). This procedure is aimed at ensuring security and preventing possible misuse or forgery of notarial documents in case of unauthorised access to the forms or seal.[18]

This Resolution No. 164 provides for the possibility of transferring special forms of notarial documents between notaries, including transfer outside the notary district. During such transfer, an acceptance certificate is drawn up in two copies, an electronic copy

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of the National University «Odesa Law Academy»"] 2016, № 2, pp. 158–169, http://www.jes.nuoua.od.ua/archive/2_2016/18.pdf [access: 15.04.2024].

[15] Û. Vasilik, *Vzaêmodìâ sub`êktìv notarìal'noï dìâl'nostì z deržavnimi ta nederžavnimi organami* [*Interaction of subjects of notarial activity with state and non-state bodies*], "Knowledge, Education, Law, Management" 2020, No. 3(31), Vol. 1, pp. 136–141, https://kelmczasopisma.com/viewpdf/991 [access: 15.04.2024].

[16] V.G. Tiŝenko, *Funkcìonal'na ta organìzacìjna*…, op. cit.

[17] K.Ì. Čižmar, A.Ì. Drebot, *Ìnstitut notarìatu sered ìnših organìv deržavnoï vladi: okremì aspekti*, "Naukovij Vìsnik Užgorods'kogo Nacìonal'nogo Unìversitetu" [*Notary institution among other state authorities: individual aspects*, "Scientific Bulletin of the Uzhhorod National University. Series: Law"] 2015, Vol. 32(1), pp. 149–152. http://nbuv.gov.ua/UJRN/nvuzhpr_2015_32(1)__36 [access: 15.04.2024].

[18] About some notary issues under Martial Law: Decree of the Cabinet of Ministers of Ukraine No. 164 of February 28, 2022 with changes and additions https://ips.ligazakon.net/document/view/kp220164?an=1 [access: 15.04.2024].

of which with qualified electronic signatures of notaries is sent to the State Enterprise "NAIS" or its branch within five business days after the act is drawn up. However, the current legislation does not currently provide an answer to the question of what notaries should do if they are unable to send the necessary documents to the Ministry or the NAIS due to objective circumstances.[19]

Allowing the transfer of notarial forms between notaries ensures the efficient functioning of the notary system and the exchange of the necessary documentation to perform their duties. Drawing up an acceptance certificate with electronic signatures of notaries ensures the authenticity and legal weight of this process. However, a disadvantage is the lack of defined procedures in case notaries face difficulties in further transferring documents to the competent authorities due to objective obstacles, which may complicate their work and cause delays in resolving legal issues.

It is important to note that under Martial Law, Ukrainian legislation is actively changing and continues to adapt to new realities. The legal acts regulating the notary sphere are no exception. From a legal and organisational point of view, the activities of notaries during the war help to ensure the protection of the rights and property of individuals and legal entities, promote the observance of law and order, and improve the organisational readiness of notary institutions to act in emergency situations. Obviously, the notary's activities in wartime open up opportunities for improving the regulatory environment, enhancing the quality and efficiency of notarial services and protecting the rights of citizens both during Martial Law and in the post-war period.

Personal order as a novelty of Ukrainian legislation in the field of notarial activity

A personal order is a document by which servicemen, privates and officers of civil protection services, employees of critical infrastructure facilities, civil servants, local government officials and police officers can exercise their right to dispose of a one-time financial assistance in the event of their death. The possibility of issuing such a document is provided for by the Law of Ukraine No. 3515-IX "On Amendments to Certain Legislative Acts of Ukraine on the Appointment and Payment of One-time Financial Assistance."[20] It is worth noting that a personal order is an important legal mechanism for ensuring social protection and support for persons serving in the field of defence, security and public order. This tool provides an opportunity to quickly and efficiently provide financial assistance to the families of fallen servicemen and women in the event of their loss, which is important for ensuring their social well-being and support after their death.

[19] About some notary issues under Martial Law: Decree of the Cabinet of Ministers of Ukraine No. 164 of February 28, 2022 with changes and additions https://ips.ligazakon.net/document/view/kp220164?an=1 [access: 15.04.2024].

[20] On amendments to some legislative acts of Ukraine regarding the appointment and payment of one-time cash assistance: Law of Ukraine No. 3515-IX of December 9, 2023, https://zakon.rada.gov.ua/laws/show/3515-20#Text [access: 15.04.2024].

According to the current legislation of Ukraine, a personal order is drawn up in a free-written form, the document specifies the person(s) who will receive the said assistance, with the percentage of such persons' share. The personal order must be made on special forms of notarial documents, taking into account the special nature of the personal order and the need to minimise the risks associated with forgery of the said document and, as a result, the illegal receipt of a one-time financial assistance paid in connection with the loss of life by a serviceman, which, in accordance with Article 3 of the Constitution of Ukraine, is the highest social value. The second copy of the personal order should be attached to the file 02-54 "Other transactions" of the nomenclature of files of the state notary's office and private notary provided for in Annex 32 to the Rules for Notarial Record Keeping.[21]

It should be noted that the use of special forms makes it more difficult to forge a document and reduce the risk of illegal receipt of financial assistance. Additionally, placing the second copy of the personal order in the file 02-54 "Other transactions" of the nomenclature of files of a state notary's office or private notary is important to ensure the systematisation and preservation of legal documents, as well as for further control and verification of their legality and authenticity.

The authenticity of the signature of the person who has signed the personal order on this document is certified by the head of the civil protection body or unit or a notary. The original of the personal order shall be kept in the personal file of the person holding the rank of private or commander of the civil protection service who drew it up.

The law stipulates that military personnel, members of the rank-and-file and senior staff of civil defense services, employees of critical infrastructure facilities, civil servants, local self-government officials, and police officers have the right to cancel a personal order or make a new one at any time.[22] Therefore, each new personal order cancels the validity of the previous personal order.

It is important that the Law prohibits disclosing the content of a personal order until the fact of death (death) of the person who made it is established[23]. In general, the prohibition of disclosing the content of a personal order until the fact of the death of the person who made it is established is justified for several key reasons. First, this approach ensures compliance with the principle of confidentiality and personal privacy, given that the personal disposition usually contains confidential information about financial and personal plans, which may not be permissible to disclose to third parties. In this case, the ban on disclosing the content until the fact of death is established guarantees the protection of the individual's personal interests. Secondly, it helps prevent possible misuse of information. If the content of a personal directive becomes known before the death of the

[21] Letter of the Ministry of Justice dated 10.04.2024, https://npu.ua/wp-content/uploads/2024/04/or24.pdf [access: 15.04.2024].

[22] On amendments to some legislative acts of Ukraine regarding the appointment and payment of one-time cash assistance: Law of Ukraine No. 3515-IX of December 9, 2023, https://zakon.rada.gov.ua/laws/show/3515-20#Text [access: 15.04.2024].

[23] On amendments to some legislative acts of Ukraine regarding the appointment and payment of one-time cash assistance: Law of Ukraine No. 3515-IX of December 9, 2023, https://zakon.rada.gov.ua/laws/show/3515-20#Text [access: 15.04.2024].

person who made it, this may lead to an attempt to commit fraudulent acts or physical or psychological pressure on the person who made the directive. Thirdly, restricting access to information about the content of a personal directive until the fact of death is established helps to preserve its legitimacy and compliance with the law, as it avoids possible illegal attempts to change or cancel the directive during the life of a person, violating his inner will. Therefore, objectively, the ban on disclosing the contents of a personal order until the fact of death is established is justified from the point of view of privacy protection, prevention of improper use of information and preservation of the legitimacy of this legal document.

Worthy of attention is the rule that stipulates that, regardless of the content of the personal order, minors, minors, adult disabled children, disabled widows (widowers) and disabled parents of a deceased (deceased) person are entitled to one-time financial assistance in the amount of 50 percent of the share that would have belonged to each of them in the case of appointment and payment of one-time cash assistance in the absence of a personal order. Refusal to appoint and receive one-time monetary assistance on behalf of minors, minor children of a deceased (deceased) person, as well as incapacitated persons and persons whose civil capacity is limited, who have the right to appoint and receive one-time monetary assistance, is not allowed. In all other cases, the share is distributed among other persons who have the right to be assigned and receive one-time cash assistance, in equal shares.[24]

It should be noted that the norm, which provides for the right to a one-time financial assistance for vulnerable categories of persons (minors, adult disabled children, disabled widows (widowers) and disabled parents of a deceased (deceased) person) without taking into account the content of the personal disposition, is important from view of social protection and justice. This is due to the fact that ensuring the right to one-time cash assistance for minors, adult disabled children, disabled parents and widows and widowers of deceased persons in the amount of 50% of their share, without taking into account the content of personal disposition, is an important step to ensure their social well-being and avoiding financial difficulties that may arise due to the loss of a family member (breadwinner). In addition, the assignment and receipt of assistance in cases where a person is unable to work or incapacitated is necessary to protect his rights and interests, as it allows avoiding possible cases of abuse of these rights. In general, the norm, which provides for the right to one-time cash assistance without taking into account the content of personal disposition, is an important element of social protection and justice, aimed at supporting the most vulnerable categories of the population and ensuring their social well-being.

Also, special attention should be paid to the impossibility of refusing the appointment and receipt of one-time monetary assistance on behalf of minors, minor children of the deceased (deceased) person, as well as incapacitated persons and persons whose

[24] On amendments to some legislative acts of Ukraine regarding the appointment and payment of one-time cash assistance: Law of Ukraine No. 3515-IX of December 9, 2023 https://zakon.rada.gov.ua/laws/show/3515-20#Text [access: 15.04.2024].

civil capacity is limited, who are entitled to the appointment and receipt of one-time monetary assistance. Actually, the prohibition of refusal of assistance is not allowed for several reasons, which have significant social and legal justification. First, minors and persons whose civil capacity is limited are persons who cannot independently decide on issues related to their rights and interests. Refusal to grant assistance on their behalf is intended to protect them from possible abuse and malpractice that may arise from a lack of ability to assess the situation and make informed decisions. Secondly, the refusal to assign assistance on behalf of persons who do not have full civil legal capacity excludes the possibility of conflicts and disputes related to the use of this assistance. This in turn helps ensure legal accountability and prevents potential wrongdoing by trustees or others who may try to take advantage of these funds. Another factor that the legislator obviously took into account is the special vulnerability of these categories of persons, therefore, the refusal to grant assistance may be justified from the point of view of maintaining financial stability and protecting the interests of the child or a person with limited civil capacity.

Persons who are entitled to a one-time financial aid can refuse to receive it by submitting an application, the authenticity of the signature on which is notarized. Confirmation of the authenticity of the signature on the application by a notary avoids possible attempts at fraud or forgery of documents, which have become especially widespread in wartime conditions. Such an order contributes to ensuring legal certainty and protection of the rights and interests of all parties, avoiding misunderstandings or conflicts. The notarization of the signature on the application complies with the principles of legitimacy and legal responsibility, which ensures trust in the procedure of refusing to receive assistance and protects against possible abuse or illegal actions.

Conclusions

During the war, the notary is an important element of the law and order system, ensuring the protection of the rights of individuals and legal entities and their property. The activity of notaries during the war from a legal and organizational point of view helps to ensure the protection of the rights and property of individuals and legal entities, to promote compliance with law and order, and to improve the organizational readiness of notary institutions to act in emergency conditions. In addition, the Ukrainian experience shows the significant role of notaries in solving issues related to ensuring legal certainty and compensation for war damage in order to restore the rights of victims.

Ukrainian notaries successfully cope with ensuring the availability of notarial protection in conditions of displacement of the population and destruction of infrastructure, as well as preservation of confidentiality and integrity of documents during the evacuation or destruction of notary offices. In this context, it is important to implement special legal acts that take into account the specific requirements of wartime and ensure the safety and accessibility of notarial services. In this work, it is proposed to group all changes in the legislation of Ukraine that had an impact on the work of notaries during the war, according to the areas of their work and performed functions: regulation of the work of

state registers; temporary failure to perform certain notarial actions; changes regarding the expiration of the term for acceptance of inheritance; features of using special forms; transfer of certain notarial functions to commanders (chiefs) of military formations or persons authorized by them; restrictions for citizens and residents of the aggressor country. It is important that in the conditions of Martial Law, the legislation of Ukraine continues to change and adapt to new realities.

As for the certification by notaries of a personal order, which must be drawn up in writing on special forms of notarial documents, today it is an effective and safe legal mechanism for ensuring social protection and support for persons performing service in the field of defense and security.

In general, the activity of the notary in wartime opens up opportunities for improving the regulatory environment, improving the quality and efficiency of the provision of notarial services, and protecting the rights of citizens both during Martial Law and in the post-war period.

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