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Evolution or Entropy of the Concept of Chilling Effect? – Polish Perspective

Katarzyna Kos

PhD student
Jagiellonian University
Faculty of Law and Administration
Department of Constitutional Law
Bracka Street 12, 31-005 Kraków
E-mail: <katarzyna.kos@student.uj.edu.pl>

The concept of chilling effect, formulated in the beginning of the second half of the 20th century by the Supreme Court of the United States of America, has been applicated both in common law and in continental law system. Lately, also the Polish Constitutional Tribunal more often has used it. Despite the U.S. Supreme Court bound the chilling effect with infringement of the freedom of speech, nowadays it seems to be useful to describe also interferences to other human rights. The European Court of Human Rights has developed that kind of interpretation. It has occurred that the notion of chilling effect perfectly describes any interference into right or freedom consisting of deterring of a person from undertaking by he or she an action. The Polish Constitutional Tribunal has drawn the concept of the chilling effect directly from adjudication of the ECHR. But without broad justification it also applicates this notion to constitutional issues connected with provisions concerning the system of government. This process of adaptation of the chilling effect concept provokes questions whether this notion was properly rooted in the Polish constitutional system. The Polish Constitutional Tribunal has not deeply explained how to understand the concept of chilling effect and in what occurrences it may be applied. Without clear statement of the Polish Constitutional Tribunal we can say that the chilling effect concept may not be applied only in the cases concerning rights and freedoms which imply act of deterrence, like prohibition of compelling to participate or not participate in religious practices. Moreover, we can only assume that identifying the chilling effect does not overjudge the result of constitutional review, it is just an argument for unconstitutionality.
Keywords: chilling effect, the Polish Constitutional Tribunal, the freedom of speech, human rights, the European Court of Human Rights.

Sąvokos *Chilling Effect* evoliucija ar entropija – perspektyva Lenkijoje

Sąvoką *chilling effect* suformulavo JAV Aukščiausiasis Teismas XX a. antrosios pusės pradžioje, pradėjęs vartoti kontinentinės ir *common law* teisės sistemoje. Pastaruoju metu ją vis dažniau vartoja Lenkijos Respublikos Konstitucijos Tribunolas. Nepaisant to, kad Amerikos Aukščiausiasis Teismas *chilling effect* siejo su kišimusi į žodžio laisvę, pažymėtina, kad sąvoka galima aprašyti kitų žmogaus teisių pažeidimus. Europos Žmogaus Teisių Teismas, išvystydamas jos interpretaciją, pareiškė, kad *chilling effect* puikiai aprašo kišimąsi į žmogaus teises kaip asmens sulaikymą nuo veiksmo priėmimo. Lenkijos Respublikos Konstitucijos Tribunolas rėmėsi koncepcija *chilling effect* iš Europos Žmogaus Teisių Teismo judikatūros. Be jokio platesnio paaiškinimo sąvoka taikoma liečiant problemas, susijusias su konstitucine santvarka. Toks jos prigijimo procesas kelia klausimą, ar *chilling effect* teisingai prisavintas Lenkijos konstitucinėje santvarkoje? Lenkijos Respublikos Konstitucijos Tribunolas nepaaiškina, kaip reikėtų suprasti sąvoką *chilling effect* ir kokiomis aplinkybėmis vartoti. Be vienareikšmiškos Konstitucijos Tribunolo nuomonės galima tik manyti, kad koncepcija *chilling effect* gali būti vartojama teisės arba laisvės reikalų srityje, kurie suponuoja veiksmo stabdymą, pavyzdžiui, draudimą versti dalyvauti arba nedalyvauti religinėje praktikoje. Taigi galima tik daryti prielaidą, kad *chilling effect* identifikavimas neturi įtakos konstitucingumo priežiūros rezultatui, tačiau tampa nekonstitucingumo sprendimo argumentu.
Pagrindiniai žodžiai: *chilling effect*, Lenkijos Respublikos Konstitucijos Tribunolas, žodžio laisvė, žmogaus teisės, Europos Žmogaus Teisių Teismas.

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Introduction

The concept of chilling effect, formulated in the beginning of the second half of the 20th century by the Supreme Court of the United States of America, has been applicated both in common law and in continental law system. However, nowadays it seems to be useful to describe more occurrences than it was initially thought. Primarily, it was applicated in constitutional review to analyse the scope of state's interference merely in freedom of speech. Next, also some other human rights were described by the term "chilling effect". These days the possible application of this term enhanced to some areas of system of government. In this context, it is worth indicating that one of the first articles concerning the problem of chilling effect has begun: "Lawyers are popularly known for their care in using words. The creation of a term of art in crucial area of constitutional law is therefore an event of presumptive significance"[1]. But nowadays, it seems that chilling effect may define many occurrences in internal differentiated area of constitutional system.

This article will concentrate on the method of rooting the concept of chilling effect in the Polish constitutional system by the Polish Constitutional Tribunal. It seems that sometimes it is quite chaotic. For this reason question, whether enhancement of applying the concept of chilling effect is evolution or entropy, is actual. The first aim of this article is to define the role of chilling effect in the constitutional review. We should take into account that the notion of chilling effect is mostly defined as an act of deterrence from participating in activity being a form of realization of rights and freedoms[2]. So this concept may be classified as a form of interference in human rights. The second aim of this article is to indicate whether the protection from the chilling effect is an element of every right or freedom or is it a component distinguishing only some human rights. Thirdly, it is worth examining if there is any possibility to apply analysed notion over human rights context.

1. International background of the notion of 'chilling effect'

As it was signalled, the genesis of the term "chilling effect" should be searched in the adjudication of the Supreme Court U.S. and connected with the freedom of speech. Firstly, the Supreme Court used the word "chill" in constitutional reference in 1952 in *Wieman v. Updegraff*[3]. The case concerned a "loyalty oath", which had been a condition of employment of state's officer, including teachers. This oath stated *inter alia*, that he is not, and has not been for the preceding five years, a member of any organization listed by the Attorney General of the United States as "communist front" or "subversive". The Supreme Court adjudicated that this oath violated Due Process Clause of Fourteenth Amendment[4]. One of the arguments raised in the judgment was that "It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers".

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[1] The Chilling Effect in Constitutional Law. *Columbia Law Review*, vol. 69 no. 5 (May, 1961), p. 808.

[2] Similarly: SCHAUER, F. Fear, Risk and the First Amendment: Unraveling the "Chilling Effect". *Boston University Law Review*, 58, 1976, p. 689.

[3] *Wieman v. Updegraff* , 344 U.S. 183, 195 (1952).

[4] According to the adjudication of the Supreme Court, Fourteenth Amendment statues due process clauses, which 1) incorporate specific protections defined in the Bill of Rights 2) guarantee that when the courts or the executive act deprive anyone of life, liberty, or property, they do so in accordance with established law (substantive due process), 3) state that judicial or executive deprivations follow fair procedures (procedural due process). See *Daniels v. Williams 474 U.S. 327* (1986). Search also for instance HARRISSON, J. Substantive Due Process and the Constitutional Text. *Virgina Law Review*, 83, 1997, p. 497–498.

Literally, the term "chilling effect" occurred in 1963 in *Gibson v. Florida Legislative Investigation Comm*[5]. The Supreme Court adjudged that request made by Florida legislature for membership list of National Association for the Advancement of Colored People violates First[6] and Fourteenth Amendment. The Court claimed that "While, of course, all legitimate organizations are the beneficiaries of these protections, they are all the more essential here, where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors, and the deterrent and 'chilling' effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substantial".

In the two aforementioned judgments of the U. S. Supreme Court the chilling effect concept was bound with the freedom of speech. Also American scholars stressed a link between analysed chilling effect concept and rights which are enshrined in the First Amendment, although they noticed the possibility to refer this concept to other human rights[7]. Subsequently, the U. S. Supreme Court applied the chilling effect to other constitutional rights and freedoms, for instance labour rights or the right to abortion[8]. In the American literature it was analysed the utility of the new construction lead by the U. S. Supreme Court. For instance, F. Schauer indicated that analysed term has three functions. Firstly, it justifies the invalidation of rules which interference the constitutional rights. Secondly, it may be the basis for the injunctive relief. Thirdly, it helps to designate the substantive immunity from governmental control[9]. On the other hand, it was emphasized that the role of distinguishing the chilling effect shows the great significance of stressing the act of deterrence[10].

In the American literature it was also formulated a general and broad definition of the chilling effect, according to which: "A chilling effect occurs where one is deterred from undertaking a certain action X as a result of some possible consequence Y. Additionally, a chilling effect is an indirect effect: it occurs when the deterrence does not stem from the direct restriction, but as an indirect consequence of the restriction's application"[11]. American understanding of the chilling effect, including the adjudication of the U. S. Supreme Court was a pattern for the European Court of Human Rights (ECHR), which incorporated the notion of "chilling effect", bounding it with rights and freedoms enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms (further: Convention). In the beginning the ECHR also restricted possibility of application analysed notion to freedom of speech, enshrined in Art. 10 of the Convention[12]. Firstly, this legal concept was used in *Goodwin v. the United*

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[5] *Gibson v. Florida Legislative Investigation Comm.*, 372 U. S. 556, 557 (1963).

[6] First Amendment to the United States Constitution states: „Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

[7] See SCHAUER, F. *op. cit.*, p. 685–687; SOLOVE, D. J. *The First Amendment as Criminal Procedure*, New York University Law Review Vol. 82, 2007 p. 142.

[8] See for example *Textile Workers Union v. Darlington Mfg. Co*., 380 U.S. 263 (1965). Hereby it was qualified under 8 (a) (3) of the National Labor Relations Act, closing part of a business as an unfair labor practice if the purpose is to discourage unionism in any of the employer's remaining plants and if the employer may reasonably have foreseen such effect closing the part of business. Nowadays chilling effect concept is also referred to the right to abortion, interpreted from the Fourteenth Amendment. See broader CANES-WRONE B.; DORF M. C. Measuring the Chilling Effect. *New York University Law Review*, No. 90, 2015, p. 1095–1114.

[9] *The Chilling Effect…*, s. 809

[10] SCHAUER, F. *op. cit.*, p. 689.

[11] YOUN, M. The Chilling Effect and the Problem of Private Action. *Vanderbilt Law Review*, Vol. 66, 2013, p. 1481.

[12] Art. 10 para. 1 states that everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. According to the para. 2, the exercise of these freedoms, since it carries with it duties and responsibilities, may be

Kingdom[13]. The case concerned an obligation to reveal sources of information by the journalist of the Engineer magazine. The ECHR, claiming infringement of Art. 10 para 2 of the Convention, marked that "Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be consistent with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest". Undoubtedly, the ECHR considered chilling effect as the allegation, which undergoes further examination by the principle of proportionality. In the context of freedom of press and freedom of speech this thesis was repeated by other judgments of the ECHR[14]. But there can be indicated judgments which refer the chilling effect concept to other human rights. For instance, in the case *A, B and C v. Ireland*[15] the European Court of Human Rights used the analysed term in the context of right to abortion, derived from the right to privacy. In turn, in the case *Kasparov v. Russia*[16] the ECHR applicated the chilling effect concept in the context of freedom of assembly and association, enshrined in Art. 11 ECHR. It is also worth mentioning that the chilling effect concept was bound by the ECHR with procedural right of individual petition, which is guaranteed by Art. 34 and Art. 38 of the Convention[17].

To conclude, in the scope of the chilling effect concept, the development of the adjudication of the ECHR is similar to the evolution which could be observed in the U.S. Supreme Court. Despite it was initially used to describe legal problems connected with the freedom enshrined in Art. 10 of the Convention, it was gradually diffused also to other human rights. But it should be underlined here that the ECHR has not formulated any boundary conditions for using the notion of chilling effect. However, the chilling effect concept was linked only with human rights.

2. The concept of the "chilling effect" in the adjudication of the Polish Constitutional Tribunal

Analysis of the potential role of the concept of chilling effect in Polish Constitution has not been carried out by Polish scholars[18], yet. Also in the adjudication of Polish Constitutional Tribunal it is not widespread. This suggests that process of implication of this known broadly in the world concept, in Polish legal system is still *novum*.

subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[13] ECHR Judgment of 27.03.1996, *Goodwin v. the United Kingdom*, Application no. 17488/90.

[14] See ECHR Judgment of 15.12.2009, *Financial Times Ltd. and others v. the United Kingdom,* Application no. 821/03, ECHR Judgment of 22.11.2007, *Voskuil v. the Netherlands*, Application no. 64752/01, ECHR Judgment of 22.11.2012, *Telegraaf Media Nederland Landelijke Media B.V and others v. the Netherlands*, Application no. 39315/06.

[15] ECHR Judgment of 16.12.2010, *A, B and C v. Ireland*, Application no. 25579/05. Similarly the right to abortion is understood in the context of chilling effect concept in the United States of America. See. CANES-WRONE, B.; DORF M. C. *Measuring*..., p. 1096–1114.

[16] ECHR Judgment of 3.10.2010, *Kasparov v. Russia*, Application no. 21613/07.

[17] ECHR Judgment of 28.05.2002, *McShane v. the United Kingdom,* Application no. 43290/98, ECHR Judgment of 21.10.2013, *Janowiec and others v. Russia*, Applications Nos. 55508/07 and 29520/09.

[18] One of a few articles about the notion of the chilling effect: ŁĘTOWSKA, E. *Legal harassement, contempt of court, chilling efect – jakby kto nie wiedział*..., publication date: 12.09.2017 [on:] <http://konstytucyjny.pl/legal-harassement-contempt-of-court-chilling-efect-jakby-kto-nie-wiedzial/>.

Taking into consideration rulings of the Constitutional Tribunal it could be noticed two tendencies to use the notion of chilling effect. Firstly, the Constitutional Tribunal linked analysed term mainly with the freedom of speech. So the understanding of the chilling effect was rooted in the original meaning of this notion. For instance, in the judgment Ref. No. P 10/06[19] "chilling effect" appeared in reference to the problem of criminal defamation in the following context. In this judgement the Tribunal repelled that criminalisation of this type of action may "chill" the public debate. It noticed that the prosecution could be commenced solely by the private offence, so the plausibility that the journalists would be harassed by the public prosecutors pushed by public persons was reduced. Similar problem was the subject of the case Ref. No. K 11/10[20], concerning the penalisation of possessing totalitarian symbols. Here, the Tribunal only mentioned the problem of chilling effect in the public debate. But in any of the aforementioned ruling the Tribunal did not explain what was the consequence of using the allegation of chilling effect. Moreover, the argument of the chilling effect was used only additionally, without clarification about its role in the constitutional review.

The chilling effect concept was – as in adjudication of the ECHR – also referred to other constitutional rights and freedoms. In the case Ref. No. P 15/08[21], which concerned the freedom of peaceful assembly, enshrined in Art. 57 of the Polish Constitution, the Tribunal considered permissibility of spontaneous assemblies in the context of the provision of the Code of Misdemeanours, which penalised organising and chairmanship the assembly which took place without a permission of an authority body. Here, the Tribunal coherently referenced to the risk of chilling effect emphasized in *Bączkowski and others v. Poland*[22]. The Constitutional Tribunal just quoted that the ECHR had claimed that refusal of consent to organize an assembly could induce chilling effect and could also discourage other people who had wanted to organize an assembly.

In turn, in the judgment Ref. No. K 14/13[23] in one of the dissenting opinions it was stated that resignation from limiting the right of access to public information (Art. 61 of the Polish Constitution) and enabling the citizens to access to all documents gathered or created during the audit will cause a chilling effect for the auditors. This example shows that the notion of chilling effect may be intuitively used to justify the limitation of rights and freedoms. Even more intriguing conclusion is that in the dissenting opinion it was claimed that citizen may "chill" the public authorities. These aspects were not occurred in the judgments of the ECHR referring to the issue of chilling effect and seems inconsistent with it.

The concept of chilling effect was more important in the judgment Ref. No K 12/14[24] concerning so called conscience clause. The Tribunal judged the infringement of Art. 53 para. 1 of the Polish Constitution (freedom of conscience and religion) by the provisions which regulated the scope and the procedure of doctor's refusal to provide medical treatment inconsistent with his conscience. In this case it was noticed that these regulations caused chilling effect, because they suggested to resign from guaranteed in the Constitution freedom of conscience and religion. Thus, the Tribunal decided that forejudging would be the principle of proportionality (Art. 31 para. 3 of the Polish Constitution) in this case. This is an only thesis in the adjudication of the Polish constitutional court, which suggests how an allegation of chilling effect would be considered. Despite it was not clarified thereinbefore, the Tribunal leaned towards more intuitive solution that chilling effect is not automatically the infringement

[19] Judgment of the Constitutional Tribunal of 30.10.2006, Ref. No. P 10/06.
[20] Judgment of the Constitutional Tribunal of 19.07.2011, Ref. No. K 11/10.
[21] Judgment of the Constitutional Tribunal of 10.07.2010, Ref. No. P 15/08.
[22] ECHR Judgment of 3.05.2007, *Bączkowski and others v. Poland*, Application no. 1543/06.
[23] Judgment of the Constitutional Tribunal of 9.04.2015, Ref. No K 14/13.
[24] Judgment of the Constitutional Tribunal of 7.10.2015, Ref. No. K 12/14.

of the principle of proportionality. That statement would be consistent with the understanding of the chilling effect by the ECHR.

On the other hand, in the judgment Ref. No. K 12/14 it was claimed that requiring giving reasons for refusal of providing medical treatment would not cause a chilling effect. It was considered that "Although it can be recognized the chilling effect in the case of a doctor's duty to prospective notifying the refusal his supervisor, an allegation of 'paralysing' doctors by requiring to note the refusal in the medical documentation is objectless". Hence, the Tribunal adjudged that this kind of duty is consistent with Art. 53 para. 1 of the Polish Constitution. The Polish constitutional court stated that revealing the refusal of medical treatment because of conscience clause may be adjudged as constitutional. The chilling effect appears only if the doctor has to report the refusal before stipulating a conscience clause. However, the Tribunal did not clarify why the notification of the conscience clause is this element, which makes chilling effect. This problem reveals some principle questions. Is it required to justify statement of chilling effect and eventually how to justify that a regulation makes chilling effect? Moreover, how to measure whether the chilling effect has occurred? The Polish Constitutional Tribunal has not considered these issues. So yet we have not disposed any "measurement" of the chilling effect and any method to recognize it.

Problems with method of applying the chilling effect concept in the constitutional review in cases concerned human rights are not the only ones. In the adjudication of the Constitutional Tribunal there has also appeared second tendency in applying the notion of chilling effect. The judgment Ref. No. K 39/07[25], where the Constitutional Tribunal first time wrote about chilling effect, concerned a proceedings and premises of arresting a judge and criminal responsibility of judges. The Tribunal claimed the violation of a few provisions of the Polish Constitution, indicating *inter alia* that controlled legal norms induce a risk of a chilling effect. These norms did not infringe solely constitutional rights and freedoms, but also the constitutional provisions concerning political system. The Tribunal noticed that weakening the guarantees ensuing from the formal immunity of judges was impermissible interference in Art 181 of the Polish Constitution[26]. It is worth underlining that in this case the chilling effect was one of the arguments forejudging abovementioned inconsistence. The Tribunal did not take into consideration other constitutional values which could eventually balance chilling effect. This is the reason why in this case we could not identify whether the concept of chilling effect used in the context of constitutional provisions concerning political system has the same meaning and features as the notion used in the reference to human rights. It is also not clear what is the role of analysing the concept of chilling effect in the adjudication of the ECHR.

Interference in the constitutional rights and freedoms was also not the main issue in the judgment Ref. No. K 10/08[27]. The case also pertained the problem of the criminal responsibility of judges and the dimensions of judges' immunity. It was adjudged the infringement of the principle of legal certainty (Art. 2 of the Polish Constitution)[28], because the reviewed by the Tribunal provision used the term "obvious groundlessness". The Constitutional Tribunal claimed that instead of being interpreted *ad casu*,

[25] Judgment of the Constitutional Tribunal of 28.11.2007, Ref. No. K 39/07.

[26] According to Art. 181 of the Constitution "A judge shall not, without prior consent granted by a court specified by statute, be held criminally responsible nor deprived of liberty. A judge shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The president of the competent local court shall be forthwith notified of any such detention and may order an immediate release of the person detained".

[27] Judgment of the Constitutional Tribunal of 27.10.2010, Ref. No. K 10/08.

[28] Art. 2 of the Constitution states that the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.

this term was generally defined by the Polish Supreme Court in the resolution Ref. No. I KZP 37/07[29]. The interpretation made by the Polish Supreme Court precluded a disciplinary action against a judge who had sentenced people on the basis of the Decree on Martial Law[30], which had included retroactive provisions. The resolution of the Polish Supreme Court defined the term "obvious groundlessness" as enabling not only the formal, but also the substantive control of the motion to permit the pressing of criminal charges against a judge. The Tribunal considered that the resolution Ref. No. I KZP 37/07 "<…> may effectively discourage law enforcement authorities to make any attempts to press of criminal charges against judges who adjudicated in accordance with the retroactive provisions of the Decree on Martial Law". This situation was claimed as the chilling effect. The Tribunal noticed that however, a root of the notion of chilling effect laid in human rights system, this concept can be also applicated in the political system context. It considered that also public authorities might be "chilled" by the provisions. The Tribunal did not reveal any other tips how to understood the chilling effect concept. There may occur some doubts, because provisions concerning political system are applicated differently in the comparison to the human rights. For instance, reviewed provision stating judges position, which makes chilling effect would not be the tested by the principle of proportionality. That is the reason why the chilling effect concept could not be strictly bound with the conception developed by the ECHR.

Two above described judgments of the Constitutional Tribunal were an attempt of creating the new way of reasoning from the notion of chilling effect. In spite of rather scant argumentation in these cases, we should not cross out the possibility of its further development. There is strong intuition to refer the notion of chilling effect to the provisions concerning system of government[31].

Summarizing, the Polish Constitutional Tribunal has not elaborated coherent theory which would include chilling effect concept. It is clear that the Constitutional Tribunal has not tried referring precisely to the mechanism known in the ECHR. But a terseness of Tribunal's statements about chilling effect makes application of this concept difficult. It was not formulated any boundary conditions for applicating this notion. Moreover, it has still not been settled whether chilling effect forejudges the unconstitutionality.

3. A scope of possible application of the chilling effect concept according to the Polish Constitution – a draft

As it was initially signalled, the notion of chilling effect is especially bound with the freedom of speech. In Poland many monographs and commentaries concerning this human right at least mention the problem of chilling effect[32]. It also seems that an important development of world-wide understanding the freedom of speech concentrates on analysing the chilling effect[33]. That actually automatically has

[29] Resolution of the Supreme Court of 20.12.2007, Ref No. I KZP 37/07.

[30] Decree on Martial Law of 12 December 1981.

[31] See also judgments of the Constitutional Tribunal of: 14.10.2015, Ref. No. Kp 1/15 and 25.06.2016, Ref. No. Kp 5/15. Although in the case Ref. No. Kp 5/15 the Tribunal bound the problem of chilling effect with the right to a fair trial (Art. 45 para. 1 of the Constitution), it was directly linked with the issue of judges' independence.

[32] See for example KAMIŃSKI, I. C. *Ograniczenia swobody wypowiedzi dopuszczalne w Europejskiej Konwencji Praw Człowieka. Analiza krytyczna*, Warszawa 2010, p. 525, 527, DEMANKO, A. *Granice wolności wypowiedzi adwokata (Limits on the advocate's freedom of expression)*. In: BIŁOGRAJSKI, E. (ed.) *Granice wolności wypowiedzi przedstawicieli zawodów prawniczych*, Warsaw, 2015., p. 133–134, ZAREMBA, M. komentarz do art. 1. In: ZAREMBA, M. (ed.). *Prawo prasowe. Komentarz*, Warsaw 2018.

[33] See for example: KENYON, A. T. Investigating Chilling Effects: News Media and Public Speech in Malaysia, Singapore and Australia. *International Journal of Communication*, 4 (2010), p. 1–28, PENNEY, J. W. Chilling Effects: Online Surveillance and Wikipedia Use. *Berkeley Technology Law Journal*, Volume 31, Issue 1, 2016, p. 119–173.

risen questions about chilling effect on the Internet and referred not only to the freedom of speech or freedom of expression[34] but also to the right to privacy[35]. Though, these analyses usually are reduced to indicating the scope of the chilling effect by pointing out proper examples. However, the general definition of the chilling effect, which was mentioned in the beginning of the article, seems to be very flexible. So, are there any boundaries for the application of this concept?

Probably unquestionable boundary seems to be a linguistic one. Any prohibitions, like ban on torture (Art. 40 of the Polish Constitution) or enshrined in Art. 53 para. 6 of the Polish Constitution prohibition of compelling to participate or not participate in religious practices should not be linked to the chilling effect. If the concept of chilling effect implies an act of deterrence, it is obvious that freedoms which essence is an act of deterrence should not be considered in the context of the chilling effect. Next intuition about applying the chilling effect concept is to link the notion of chilling effect with the rights and freedoms which shall not be limited. But still, on the linguistic point of view it is not impossible to apply analysed concept to rights and freedoms which shall not be limited. However, there could be indicated only a few proper examples on the ground of the Polish Constitution. According to Art. 30 of the Polish Constitution, dignity of the person shall be inviolable. The principle of dignity assumes also a right to taking action by the person. For instance, in the case Ref No. SK 18/17[36], the Constitutional Tribunal adjudged that setting a deadline of taking an action for denying the paternity of mother's husband independently of the date on which an adult child becomes aware of the fact he or she is a descendent of from the mother's husband is *inter alia* inconsistent with the principle of dignity. We could imagine actions of deterrence which might "chill" to take an action for denying the paternity.

So, generally speaking, we should assume that if a right or freedom implies activity of a person, it may be bound with the chilling effect concept. This assumption is coherent with the understanding of this notion as the mechanism useable strictly for the proportionality test. If we accept that chilling effect is only an allegation, not a result of constitutional review, the chilling effect concept have the same meaning and does not require different instruments to "measure" it – at least in the context of human rights. But what about the Polish constitutional court's tendency to use the analysed notion in the cases concerning the system of government? Definitely capacious definition of the chilling effect does not scratch using this concept out. Moreover, again, if we accept that chilling effect is only an allegation, argument, but not a result of the constitutional review, there is a space to consider other constitutional principles, values and norms in the context of chilling effect. On the other hand, the constitutional review concerning the constitutional system of government has some distinctiveness. Considering relations between public authorities, which has to exercise their competences, in the context of "chilling" (being afraid of) just seems inappropriate. If we allow using the term in this context, there will not be any obstacle to say that a citizen may "chill" a public authority. These are the reasons, why we should still have doubts to use the chilling effect concept to describe acts of deterrence of the public authorities. So, maybe for the conceptual purity we should resign from using the chilling effect concept in the context of political system. Any extraordinary situation which is an attempt of deterrence the authority, may be an argument in the process of constitutional review without using the notion of chilling effect. But this issue should be unambiguity decided by the Constitutional Tribunal.

[34] PENNEY, J. W. Internet surveillance, regulation and chilling effects online: a comparative study. *Internet Policy Review*, Volume 6 Issue 2, 2017, p. 1–39.

[35] MARDER, B.; JOINSON, A.; SHANKAR, A.; HOUGHTON, D. The extended 'chilling' effect on Facebook: The cold reality of ubiquitous social networking. *Computers in Human Behaviour*, 60 (2016), p. 582–592.

[36] Judgment of the Constitutional Tribunal of 18.05.2010, Ref. No. SK 18/17.

Conclusions

The chilling effect concept was created for describing an infringement of the freedom of speech. But it has occurred that this notion perfectly describes any act of deterrence from undertaking an action by the person. The analysed concept is not solely a phenomenon of naming known problem by the courts and tribunals. It is a confirmation that a person shall be able to use rights and freedoms without obstacles. The Polish Constitutional Tribunal transplanted the chilling effect concept, which influenced on the understanding of the constitutional rights and freedoms. This process of transplanting the chilling effect concept has provoked questions whether this notion was properly rooted in the Polish constitutional system. It is difficult to avoid questions about meaning of this concept. The Polish Constitutional Tribunal has given only some tips for that, but it has not deeply explained how to understand and in what occurrences the concept of chilling effect may be applied. The assumption that the chilling effect does not overjudge the result of constitutional review is clarifying the problem. But we cannot be sure that the Polish Constitutional Tribunal has used this notion in this meaning. The question about the role of this notion in the process of constitutional review connects with the above mentioned issue. And in the end there is the problem of applying the concept of chilling effect to the cases concerning political system. There are some arguments, which justifies it. But the Constitutional Tribunal has not ordered this issue, so we are allowed to have doubts even about the possibility to apply the chilling effect concept to the system of government. Finding new forms of application this notion is usually valuable, but without appropriate rooting it in the legal system there is a danger of progressive entropy, not an evolution which makes the legal system more coherent.

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3. *Textile Workers Union v. Darlington Mfg. Co*., 380 U.S. 263 (1965).
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5. Judgment of 27.03.1996, *Goodwin v. the United Kingdom*, Application no. 17488/90.
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